30 July 2021

Submission for the AJRC *Reimagining the Japan Relationship* project

Bilateral cooperation in consumer and competition law reforms

Barry Wang[1], University of Sydney

This submission provides a comparative analysis of competition and consumer law in Australia and Japan. By identifying where the law differs and where the law is similar, we can better propose a reform agenda that deepens the relationship between both countries.

The first part of this submission provides a historical overview of the legal developments necessary to contextualise the current regimes of both countries. The second section of this submission identifies a list of regulated conduct then maps and compares the substance of the relevant legal provisions in both Australia and Japan. Through this exercise the submission hopes to highlight that competition and consumer law provisions are similar in substance between Japan and Australia, and there is growing overlap between the two areas of law.

This submission suggests that there are valid reasons and benefits for Japan and Australia to undertake legal reforms to harmonise its respective consumer law and competition law framework.

Table of Contents

[1] Student/Research Assistant at The University of Sydney, Email: hwan4841@uni.sydney.edu.au

Part I: Historical Developments in Australia and Japan

1. Australian Development of Competition and Consumer Law

The origins of competition law in Australia can be attributed to the enactment of the *Australian Industries Preservation Act 1906*. The federal law dealt with restrictive trade practices, and was comparable with the US Sherman Act of 1890 in that it sought to prohibit monopolisation and unfair competition.[2] However, the law fell into general disuse due to the restrictive interpretations of commonwealth powers prior to the landmark decision in the *Engineer's Case*.[3] Competition law resembling its contemporary form can be traced to the implementation of the *Trade Practice Act 1974* (TPA) which marked a shift away from administrative investigations towards a prohibition based approach to competition policy.[4] The TPA was the primary legislation to ensure fair competition and consumer protection within the economy. However, it soon became apparent that the TPA was patchy and ineffective, largely due to historical and constitutional factors.[5] As a result, the National Competition Policy Review established in 1992 recommended a comprehensive set of policy reforms. These recommendations were eventually adopted and implemented through the *Competition Policy Reform Act 1995* (CPRA). The CPRA amended the competitive conduct rules of the TPA in distinct phases, and extended coverage of government businesses and unincorporated bodies.[6] In addition, the CPRA merged the Trade Practices Commission and Prices Surveillance Authority to create the Australian Competition and Consumer Commission (ACCC) with the primary function of enforcing the TPA.[7]

Around this time, Australia's consumer law regime consists of 13 Acts which cover the same broad subject matter.[8] This consisted of two national laws in the form of the consumer provisions of the TPA and the ASIC Act 2001, eight state and territory Fair Trading Acts all with slightly different objectives,[9] and three generic consumer protections laws in select

---

[2] Economics, Commerce and Industrial Relations Group, 'Australia's National Competition Policy: Its Evolution and Operation', Australia's National Competition Policy (E-Brief, June 2003)
<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/ncpebrief >.
[3] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.
[4] Economics, Commerce and Industrial Relations Group, 'Australia's National Competition Policy: Its Evolution and Operation', Australia's National Competition Policy (E-Brief, June 2003)
<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/ncpebrief >.
[5] Ibid.
[6] Ibid.
[7] *Competition Policy Reform Act* 1995 Schedule 3.
[8] Dr Steven Kennedy, 'An Introduction to the Australian Consumer Law' (Forum for Consumer and Business Stakeholders, Standing Committee of Officials of Consumer Affairs, 27 November 2009).
[9] The NSW *Fair Trading Act 1987*; the Victorian *Fair Trading Act 1999*; the Queensland *Fair Trading Act 1989*; the SA *Fair Trading Act 1987*; the WA *Fair Trading Act 1987*; the Tasmanian *Fair Trading Act 1990*; the ACT *Fair Trading Act 1987;* NT *Consumer Affairs and Fair Trading Act 1990*.

jurisdictions.[10] Following the Productivity Commission Inquiry Report in 2008 and the global financial crisis, there was growing pressure to shift towards a national framework to reduce the complexity, duplication, and inconsistencies.[11] This ultimately led to the development of the Australian Consumer Law (ACL), which created a harmonised national consumer regime in substantive law. Although the ACL was implemented as a schedule to the TPA with enforcement responsibilities conferred to the ACCC, the enforcement of the substantive law was still largely decentralised.[12]

The TPA was renamed the *Competition and Consumer Act 2010 (CCA)* in 2011 marking the unification of competition law and consumer law regimes within Australia. The CCA is the current legislative vehicle for competition law and consumer protection in Australia, with the objective "*to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection*".[13]

2. Japanese Development of Competition and Consumer Law

Competition law

The origins of competition law in Japan can be traced to the enactment of the *Antimonopoly Act* (AMA) in 1947 following the end of World War II. The AMA was an integral part of the Allied Occupation Forces' Economic Democratisation Policy which aimed to promote market forces and ensure the dissolution of the *Zaibatsu*.[14] The AMA, similar to Australian competition law, was heavily influenced by the United States Sherman Act and sought to prohibit private monopolization, unreasonable restraints of trade, and unfair methods of competition. The Japan Fair Trade Commission (JFTC), created as the enforcement agency of the AMA, was also modelled directly on the United States Federal Trade Commission.

In the 1950s there was relaxation in the enforcement and provisions of the AMA because of the Korean War, which shifted priorities towards the creation of strong heavy industries as a

[10] WA Consumer Affairs Act 1971; SA Consumer Transactions Act 1972; ACT Fair Trading (Consumer Affairs) Act 1973.
[11] Productivity Commission, Review of Australia's Consumer Policy Framework (Productivity Commission Inquiry Report/No. 45, 30 April 2008).
[12] *Trade Practices Amendment (Australian Consumer Law) Bill (No. 1) 2010; Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010.*
[13] *Competition and Consumer Act 2010* s 2.
[14] Mitsuo Matsushita, 'The Antimonopoly Law of Japan' (1978) 11(57) *Law Japan,* 151.

bulwark to communism.[15] This is exemplified in 1953 when Japan enacted an amendment that deleted Article 4 which prohibited cartels, significantly weakening the Act. However, the amendment did also broaden the scope of the Act by changing prohibition on "unfair methods of competition" to prohibitions on "unfair trade practices".[16]

In the 1960s, a sharp increase in consumer prices and the liberalisation of financial and capital markets resulted in a revitalisation of the AMA.[17] In addition, the rising affluence and sophistication of Japanese consumers contributed to an increased emphasis on consumer protection. As a result, *the Act against Unjustifiable Premiums and Misleading Representations* (AUPMR) was enacted in 1961, which prohibited excessive premiums and misleading statements and was enforced by the JFTC.[18]

In the 1970s, the action of Japanese companies during the oil crisis of 1973 contributed to soaring commodity prices and reignited public criticism.[19] In response, the National Diet of Japan, amended the AMA in 1977 to incorporate three provisions which greatly increased enforcement powers by introducing administrative surcharge, structure control, and price-reporting system.[20] These provisions granted the JFTC powers to confiscate illegal profits, control how companies were structured, and require mandatory price reporting.[21] Before the amendment the JFTC could only issue orders prohibiting conduct, a weak enforcement mechanism in practice.

In 1993 the implementation of the Structural Impediment Initiative, a trade negotiation between the United States and Japan, resulted in an increased enforcement of the AMA to reduce structural barriers for foreign competition.[22] More recently, in 2019 a major amendment of the AMA was enacted which introduced variable fines, client-attorney privilege, and expanded scope of sales revenues as a basis to calculate fines.[23] These changes ultimately improve the flexibility of enforcement by the JFTC and incentives cooperation from corporations.

---

[15] Ibid, 152.
[16] Ibid, 153.
[17] Ibid.
[18] ICLG, 'Consumer Protection Laws and Regulation', Consumer Protection Laws and Regulation (Website, May 2021) <https://iclg.com/practice-areas/consumer-protection-laws-and-regulations/japan>
[19] Mitsuo Matsushita, 'The Antimonopoly Law of Japan' (1978) 11(57) *Law Japan,* 154.
[20] Ibid.
[21] Ibid.
[22] Ibid, 155.
[23] Morrison Forrester, 'Stick, Carrot, and Privilege: Parliament Passes Major Amendments to Japanese Anti-Monopoly Act' (Blog Post, Jul 2019) <https://www.mofo.com/resources/insights/190717-japanese-anti-monopoly-act.html#_ftn3>

Although the enforcement of the AMA has gradually increased in volume and complexity over time, its substantial provisions have remained quite consistent. The purpose of the Act is still "*to promote fair and free competition, stimulate the creative initiative of enterprise, encourage business activity, heighten the level of employment and actual national income, and thereby promote the democratic and wholesome development of the national economy as well as secure the interests of general consumers*"[24]

Consumer Law

The decades of the 1950s and 1960s were an era defined by rising consumer concerns for product safety.[25] Two visceral incidents that fueled these concerns were the Morinaga powdered-milk case in 1955 and the thalidomide case in 1961. In the Morinaga case, infants were poisoned by unsafe levels of arsenic in milk powder which resulted in over 130 deaths. In the thalidomide case, pregnant women who consumed over-the-counter drugs gave birth to children with severe disabilities.[26] As a result, the *Consumer Product Safety Law* (CPSL) was legislated in 1973 which required businesses to report whenever a serious consumer safety incident occurred. In the 1970s consumer concerns were characterised by unethical and deceptive sales practices, contracts, and price issues.[27] In response to the aggressive door-to-door sales tactics from the likes of Britannia Japan, a specific law was enacted in 1976 to address the issue. The law was expanded to include other specific transactions and eventually became the *Act on Specified Commercial Transactions.*

In the 1980s and 1990s Japan's economy could be characterised by deregulation and an economic bubble, a fertile environment for consumer issues to arise. These issues ranged from increasing predatory loans and forceful sales practices, to issues with the quality of imports and pricing cartels.[28] After this period, while consumer groups continued the tradition of organising grassroots movements they also engaged in proposing actual regulation.[29] From these proposals arose two key pieces of legislation still relevant to this day. The first was the *Product Liability Act* 1994 (PLA) which provided consumers more flexibility in compensation compared to

[24] *Antimonopoly Act* 1974 Article 1.
[25] Mariko Morimoto, 'Japanese consumer rights', *Routledge Handbook of Japanese Business and Management* (Taylor & Francis Group, 1st edition, 2016).
[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Ibid.

a tort claim traditionally brought under the Civil Code of Japan.[30] The second is the *Consumer Contracts Act 2000* which is applicable to every contract between consumers and business. The Act provides relief from contractual obligations under certain situations involving negligent misrepresentation, misleading material information,[31] or when negotiations take place in his or her residence and the business party refuses to leave.[32] In addition, the *Consumer Protection Fundamental Act*, first legislated in 1968, was amended to become the *Consumer Basic Act* (CBA) *in 2004.*[33] Although the CBA stipulates non-binding principles for business, it has found some success in regulating advertising claims when used in conjunction with the AUPMR. It has also contributed to local ordinances, especially local government budget request for Consumer Centres and formation of informal dispute resolution mechanisms.

As the chimera that is Japanese consumer law continues to grow, issues relating to complexity, inconsistency, jurisdiction become apparent. As ministries and agencies traditionally regulate specific industries, problems arose as some business conduct may fall under multiple jurisdictions and legislation white others did not fall under any at all.[34] This problem ultimately led to the formation of the Consumer Affairs Agency in 2009 which is an agency under the cabinet office which centralised powers to handle consumer issues and to plan consumer protection policies.

Part II: Legal Frameworks in Japan and Australia

1. Comparison between Japan and Australia

There are significant similarities in the type of conduct regulated by existing competition and consumer regimes in both Japan and Australia. However, in some cases the same type of conduct may be regulated under competition law in Japan but consumer law in Australia or vice versa. As such, a comparative analysis structure by distinct types of conducts regulated by both competition and consumer law was appropriate. It must also be acknowledged that each of these prohibited conducts contain enough legal nuance to warrant individual essays. However,

[30] ICLG, 'Product Liability Laws and Regulation, Japan (Website, May 2021) <https://iclg.com/practice-areas/product-liability-laws-and-regulations/japan>.
[31] Masahiko Takizawa, 'Consumer Protection in Japanese Contract Law' (2009) 37 *Hitotsubashi Journal of Law and Politics*, 31.
[32] Ibid, 35.
[33] Midori Tani, 'Japan's Consumer Policy' (Policy Update, REITI, Dec 2008) <https://www.rieti.go.jp/en/special/policy-update/031.html>
[34] Consumer Affairs Agency, 'White Paper on Consumer Affairs 2019 (Summary)'(White Paper, 2019) <https://www.caa.go.jp/en/publication/annual_report/2019/white_paper_summary_08.html>.

the purpose of this comparative analysis is to map the substantive provisions and highlight any fundamental differences between Australia and Japan.

Overview of Competition and Consumer Law in Japan and Australia.

Conduct & Issue	**Japan**	**Australia**
Traditionally Competition Law		
Collusive Conduct / Cartels	AMA Article 3	CCA Pt IV Div 1
Misuse of Market Power / private monopolisation	AMA Article 3	CCA s46
Mergers and Acquisitions	AMA Chapter 4	CCA s50
Exclusive Dealings / UTP Discriminatory Practices	AMA Art 2(9) (iv)(a)	CCA s47
Resale Price Maintenance	AMA art 2(9)(iv)	CCA s48
Traditionally Consumer Law		
Misleading and deceptive Conduct	AUPMR & CBA & AMA	ACL Part 2-1
Unconscionable conduct	-	ACL Part 2-2
Unfair Contract Terms	CCA	ACL Part 2-3
Product Safety and Liability	CPSL & PLA & CSA	ACL Part 3-2
Specific Unfair Practices	ASTP	ACL Part 3-1
General Unfair Practices	-	-

2. Collusive Conduct and Cartels

Both Australia and Japan have very similar provisions and principles to prohibit cartels. In the AMA a cartel is referred to by the concept of an "unreasonable restraint of trade".[35] This concept is defined under Article 2(6) to mean any agreements, understandings, or communications among enterprises which substantially restrain competition in a market and is contrary to the public interest.[36] In Australia, this type of conduct is referred to as collusive conduct but is essentially regulated under the same principles as Japan. The provisions under CCA Part IV Div I also prohibits contract, arrangement or understanding that contains a cartel provision which substantially lessens competition in the market.[37] Other legal issues arising from the prohibition of cartels such as proof of cartel, role of circumstantial evidence and parallelism, and the scope of remedies, are not fundamentally different across jurisdiction.[38]

The Japanese provision explicitly includes the phrase "contrary to the public interest". In *Oil Cartel (Criminal Case)*, the Court interpreted public interest in the context of the AMA as "free competitive economic order", and acknowledged the existence of exceptional circumstances where cartels are consistent with the ultimate purpose of the Act.[39] Although the Australian provisions does not explicitly include a public interest style test, the ACCC has the broad power to authorise continuation of conduct that contravenes Part IV of the CCA on public benefit grounds.[40]

3. Misuse of Market Power and Private Monopolisation

In Japan, AMA Article 3 prohibits private monopolisation and is defined under Article 2(5) as an "exclusion" or "control" exerted by an enterprise over business activities of other enterprises to restrain competition in a market.[41] In Australia private monopolisation is reframed as a misuse of market power with CCA Section 46 stating that a corporation, which has a substantial degree of power in a market, must not engage in conduct which substantially lessens competition in that

---

[35] Mitsuo Matsushita, 'The Antimonopoly Law of Japan' (1978) 11(57) *Law Japan,* 171.
[36] *Antimonopoly Act* 1947 Article 2(6).
[37] *Competition and Consumer Act 2010* Part IV Div I.
[38] Mitsuo Matsushita, 'The Antimonopoly Law of Japan' (1978) 11(57) *Law Japan,* 171.
[39] Ibid; Citing Supreme Court, 24 February 1984, 38-IV *Keishu* 1287 *(Oil Cartel [Criminal])*. English translation is as in JFTC, *Guidelines for Exclusionary Private Monopolisation under the Antimonopoly Act*, 28 October 2009 (emphasis added).
[40] *Queensland Co-op Milling Assn Ltd — Proposed Merger(1976) 8 ALR 481.*

[41] *Antimonopoly Act* Article 2(5).

market. Both provisions are plagued by the difficult evidentiary issues of market definition, position within that market, and indirect and direct forms of control.

A recent Japanese case worth highlighting involved the Japanese Society for Rights of Authors, Composers, and Publishers (JASRAC). JASRAC was the dominant music copyright management service provider in the market and engaged in the business of permitting broadcasting companies to use music entrusted to it by the copyright holders.[42] It was difficult for broadcasters to refuse a license agreement with JASRAC as it owned the vast majority of music copyrights.[43] JASRAC essentially violated the AMA as its agreements resulted in high fees and prevented broadcasters from engaging with other copyright management companies.[44] However, the original administrative proceedings were withdrawn by the JFTC and an appeal was made by JASRAC's sole competitor. This case is unique as it marked the first instance, where a third party brought a case to an appellate court as a proper plaintiff to continue a legal proceeding initiated at the administrative level.[45] It is unclear if a third party in Australia would have similar standings to initiate legal proceedings.

4. Mergers and Acquisitions

In Japan, Chapter 4 of the AMA regulates mergers and acquisitions, and prohibits business combinations that are '*likely to substantially restrain competition in a particular field of trade*'.[46] A business combination of this kind is one that results in an "*excessive concentration of economic power*".[47] In Australia, a similar principle is applied under CCA Section 50 which also prohibits mergers and acquisitions that substantially lessen competition in any markets. However, the CCA arguably provides better guidance as Section 50(3) outlines a non-exhaustive list of considerations that must be taken into account. Similar legal issues arise when assessing mergers, such as the different market effects of established categories of mergers whether horizontal, vertical, or conglomerate. These issues are particularly complex in Japan due to the rampant cross shareholding that occurs between corporations and banks and the growing rise

[42] Kazuhiko Fuchikawa, 'Regulations of Digital Platform Markets Under the Japanese Antimonopoly Act: Does the Regulation of Unfair Trade Practices Solve the Gordian Knot of Digital Markets?' (2020) 65(1) *The Antitrust Bulletin,* 102.
[43] Ibid, 108.
[44] Ibid.
[45] Yutaka Ishida, 'The Evolution of Antimonopoly Proceedings in Japan: Observations of Third Party Standing to Sue in the Case Involving JASRAC' (2017) 26(3) *Washington International Law Journal*, 588.
[46] Masako Wakui, *Antimonopoly Law Competition Law and Policy in Japan* (2nd Edition, 2018) 48.
[47] *Antimonopoly Act* Article 9(3).

of digital platforms which offer multi-sided markets. Recent cases that highlight these issues include the merger of Yahoo Japan and E-book Initiative Japan, the merger of video streaming services Kadokawa and Dwango, and informal consultation on the sharing of search capabilities between Google and Yahoo Japan.[48] Australia, likely due to its significantly smaller economy and lack of success digital platform companies, have not seen major cases relating to mergers under the CCA.

5. Exclusive Dealings / UTP Discriminatory Practices

The regulation of unfair trade practices marks a divergence between the structure of competition and consumer law between Australia and Japan. Unfair trade practices are prohibited under Article 19 of the AMA and a list of prohibited practices defined under Article 2(9). This provision is important, as Article 2(9)(vi) authorises the JFTC to designate additional prohibited practices which enjoy the same legal status as practices prohibited by statute. This effectively broadens the scope of business conduct the JFTC can regulate as the only qualification is an impediment of fair competition.[49] As a result, certain practices designated by the JFTC would be considered in Australia to be better regulated under the consumer law framework.

In Australia, CCA Section 47 prohibits exclusive dealings, which is a prohibition in respect to conduct between businesses at different levels on the same vertical supply chain. Section 47(2) provides a list of conduct which constitutes exclusive dealings, these include among others, the refusal to deal and the supply of goods and services on a proscribed condition. In Japan, the provisions that deal with vertical conduct can be found under Article 2(9)(vi)(a) which relates to discrimination practices, a type of unfair trade practice. The prohibited practices are mainly designated by the JFTC and include refusal to be supplied, discriminatory treatment, and discriminatory pricing.

The prohibition on discriminatory pricing is worth highlighting as it is an AMA provision which arguably creeps into consumer issues and is a concept that does not exist in the Australian frameworks. Under the JFTC designation, price discrimiation may not occur among final consumers or enterprises if the goods or services are essentially the same. Japanese courts

[48] Kazuhiko Fuchikawa, 'Regulations of Digital Platform Markets Under the Japanese Antimonopoly Act: Does the Regulation of Unfair Trade Practices Solve the Gordian Knot of Digital Markets?' (2020) 65(1) *The Antitrust Bulletin,* 109.
[49] Masako Wakui, *Antimonopoly Law Competition Law and Policy in Japan* (2nd Edition, 2018) 139.

have found that trivial differences do not matter,[50] and the only exception is if the cost of providing the goods and services are different.[51] This may be a relevant concept in Australia as Australian consumer law is currently inadequate at regulating certain data driven and algorithmic practices, one of which is personalised pricing. This practice involves using data and algorithms to provide tailored prices to individuals, thereby maximising business profits and minimising consumer surplus.[52]

6. Resale Price Maintenance

Resale price maintenance is a vertical practice, where suppliers influence thoses in the supply chain closer to the consumers to maintain a minimum price for goods or services. In Australia, this conduct is prohibited under CCA Section 48 and is presumed to intrinsically lessen competition. In Japan this practice is prohibited under Article 2(9)(iv) of the AMA as a subcategory of unfair trade practices. Similar to Australia the practice is presumed to lessen competition and surrounding conduct such as inducing a supplier or entering into an agreement are also prohibited.

7. Misleading and Deceptive Conduct

In Australia businesses must not engage in 'misleading or deceptive conduct'[53]or make 'false or misleading representations'[54]. Section 18 of the ACL applies generally, while Section 29 prohibits a set of specific false and misleading representations. These provisions are well supported by case law and regularly used as the core of major ACCC enforcement actions within Australia. In ACCC v Google, it was found that Google misled consumers as its privacy settings did not reflect the actual data collection that was occurring. In ACCC v Trivago, it was found that Trivago misled consumers as it did not surface the cheapest hotel prices despite making representations that it did offer the cheapest prices.

[50] Ibid; Citing Tokyo High Court Order, 18 March 1957, 8-III Gyosei Jiken Saibanrei-shu 443 (Hokkoku Newspaper [2nd]).
[51] Ibid; Citing Tokyo High Court, 31 May 2005, 52 Shinketsu-shu 818 (Tokai Gas).
[52] Pascale Chapdelaine, 'Algorithmic Personalized Pricing' (2020) 17 *NYU Journal of Law & Business*, 5.
[53] *Competition and Consumer Law Act 2010* (Cth) sch 2 ('*Australian Consumer Law*') s 18.
[54] Ibid, s 29.

In Japan, misleading and deceptive conduct is regulated through various legal frameworks. Through the unfair trading practices provision in the AMA, the JFTC has designated deceptive customer inducement as a prohibited practice.[55] This form of deceptive conduct regulated representations between businesses and consumers but the representation must have some effect on competition. The AUPMR regulates misleading representations in connection with a transaction, and covers misrepresentations relating to the content of goods and services or the terms of the transaction. Traditionally the AUPMR only applied to business to business transactions, however following the transfer of legal authority from the JFTC to the CAA the provisions now apply to business to consumer transactions.[56] The CBA, although non-binding, is often used in conjunction with the AUPMR to regulate shady advertising practices. There may be a valid argument for the consolidation of different prohibitions on misleading and deceptive conduct into one provision similar to Australia.

8. Unconscionable conduct

In Australia, businesses must not engage in unconscionable conduct in connection with the supply or acquisition of goods or services under the ACL.[57] Unconscionable conduct is conduct that is 'against good conscience',[58] and must go beyond 'mere unfairness'[59]. The idea on unconscionability is one unique to common law jurisdictions as it developed as the foundational equitable doctrine. There is no real equivalent in Japan, although some select practices under the AMA, may in circumstances, constitute unconscionable conduct. However, in Australia this provision has not been useful in addressing competition and consumer issues due to judicial disagreements on the correct standard to assess the statutory prohibition on unconscionable conduct, despite legislative amendments which provided clear guidelines in statutory interpretation. By a bare majority, the High Court in *Kobelt* took a restrictive approach by defining unconscionable conduct with reference to its specific meaning in equity.[60] There is no basis for Japan to adopt this concept into any consumer law frameworks.

---

[55] Masako Wakui, *Antimonopoly Law Competition Law and Policy in Japan* (2nd Edition, 2018) 144.
[56] Midori Tani, 'Japan's Consumer Policy' (Policy Update, REITI, Dec 2008) <https://www.rieti.go.jp/en/special/policy-update/031.html>.
[57] *Competition and Consumer Law Act 2010* (Cth) sch 2 ('*Australian Consumer Law*') ss 20, 21 and 22.
[58] *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90.
[59] *Australian Competition and Consumer Commission v 4WD Systems Pty Ltd* (2003) 200 ALR 491 at [185] per Selway J.
[60] *ASIC v Kobelt* [2019] HCA 18.

9. Consumer Contracts

In Australia consumer contracts are regulated through the unfair contract terms regime contained within Section 23 of the ACL. The regime applies to standard form consumer contracts between businesses and individuals. A term is unfair, if it causes a significant imbalance in the parties' rights and obligations, is not reasonably necessary to protect legitimate interest, and causes detriment if relied upon.[61] If a contract contains an unfair term the contract may be void. A comparable consumer contract regime is implemented in Japan through the Consumer Contract Act 2000. The Japan regime is much more comprehensive and extended beyond the terms of the contract itself. The scope of the Act covers conduct including misrepresentations made about "important matters" in contract or even refusing to leave the consumer's place of residence.[62] The Act also allows the nullification of unfair contract terms similar to the Australia regime. One major point of difference following an amendment in 2006, is that consumer organisations now have standing to file injunctions against companies issuing contracts that disadvantage multiple consumers.[63]

10. Product liability and Safety

As a result of Japan's sensitivities to food safety issues, it has developed a strong framework for product liability and safety over the years. The CPSL serves to improve the monitoring and reporting of serious safety issues. The PLA aims to provide flexibility in remedies and compensation consumers can seek from manufacturers. In addition, government ministries and agencies create and enforce various industry specific laws to regulate and set standards for sectors such as finance,[64] real estate,[65] telecommunications,[66] and pharmaceuticals.[67] Finally, as the cherry on top, the introduction of the Consumer Safety Law aims to address any jurisdictional gaps that may exist by targeting" niche areas cases".[68] In Australia, product safety is regulated under Part 3-3 of the ACL. Although the regime is not as comprehensive as

---

[61] Australian Competition and Consumer Commission v CLA Trading Pty Ltd [2016] FCA 377; (2016) ATPR 42-517 at [54], Gilmour J
[62] Midori Tani, 'Japan's Consumer Policy' (Policy Update, REITI, Dec 2008) <https://www.rieti.go.jp/en/special/policy-update/031.html>.
[63] Ibid.
[64] *Installment Sales Act.*
[65] *Real Estate Brokerage Act.*
[66] *Act on Regulation of Transmission of Specified Electronic Mail (*which regulates spam mail and direct marketing).
[67] *Act on Securing Quality, Efficacy and Safety of Products Including Pharmaceuticals and Medical* Devices.
[68] Consumer Affairs Agency, 'White Paper on Consumer Affairs 2019 (Summary)'(White Paper, 2019) <https://www.caa.go.jp/en/publication/annual_report/2019/white_paper_summary_08.html>.

Japan's, the basic features of minimum safety standards, monitor and reporting, and remedies such as notices, recalls, and bans are all present.

11. Specific Unfair practices

In Japan the ASCT has been amended overtime in response to consumer complaints to cover a growing list of specific unfair practices. These practices currently include door-to-door sales, mail order sales, telemarketing, pyramid schemes, subscription services, and business opportunity related services.[69] An interesting feature of the ASCT is that certain prohibitions in the Act are classified as administrative regulation, meaning that ministers or a prefectural governor have the authority to issue orders against business that contravene those provisions. This has resulted in a situation where local governments are increasingly trained and encouraged to enforce several provisions. In Australia, a comparable list of specified unfair practices can be found under Part 3-1 of the ACL. These practices include among others, unsolicited supply of goods, pyramid schemes, and referral selling.

Part III: Recommendations for Law Reform

Japan should implement similar consumer law reforms undertaken in Australian during the 2000s to harmonise its various consumer law regimes. This is not legally infeasible as the current Japanese consumer law framework regulates the same types of conduct as the ACL and CCA. There is great economic value that arises from removing complexity, duplication, inconsistencies in consumer law. The Productivity Commission estimated the economic benefits from a national approach to consumer policy could amount to $1.5 billion to $4.5 billion per annum.[70] This figure would undoubtedly be higher for Japan given its larger economy.

A more radical recommendation would be to create a combined competition and consumer law framework similar to Australia's. Although radical, this is likely legally feasible as the substantive provisions on competition and consumer law already exist in Japan. In my view, this approach could the future proof approach as it reflects the convergence of competition and consumer law

[69] Midori Tani, 'Japan's Consumer Policy' (Policy Update, REITI, Dec 2008) <https://www.rieti.go.jp/en/special/policy-update/031.html>.
[70] Productivity Commission, Review of Australia's Consumer Policy Framework (Productivity Commission Inquiry Report/No. 45, 30 April 2008).

under the option-oriented notion of consumer sovereignty posited by Averitt and Lande.[71] However, the practical benefit of the merger comes in the form of enforcement flexibility, by conferring enforcement of consumer law to the JFTC, the possible consumer remedies greatly expand. A less radical reform for Japanese consumer law could be to simply consolidate the laws relating to misleading and deceptive conduct as a first step. “Don’t lie” is a simple legal concept that is easy to understand. A provision of this kind could greatly reduce duplication in the Japanese framework. Australia has shown, through consistent litigation, that it is effective at regulating the different types of conduct that may arise.

Australia could reform its unfair contracts regime by taking inspiration from Japan’s CCA. An amendment which allows consumer organisations to have standing to file injunctions against companies issuing contracts that disadvantage multiple consumers would greatly improve the consumer welfare in Australia. However, an important distinction that must be noted is that the culture of grassroots style consumer activism present throughout Japan history is not reflected in the Australian culture.

Finally, both countries may benefit by implementing a general unfair conduct prohibition. This avoids the constant need to amend legislation as new business practice emerges while also bring Australian and Japanese consumer law more inline with EU and US laws.

[71] Neil W. Averitt, Robert H. Lande, ‘Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law’ (1997) 67 *Antitrust Law Journal.*