Consumer law redress and administration, product safety regulation and contracts: Comparing Japan and Australia

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This article explores developments in consumer law and practice in Japan as an important area that has not seen much comparative scholarship in Western languages despite significant developments over the last 10–20 years. The article connects developments to broader debates about the nature of contemporary Japanese law and society, as well as the trajectory of consumer law more generally, by mainly comparing Australia although other jurisdictions are also discussed. The comparative analysis first explains the persistent problems around consumer redress. It then focuses on issues and reforms in consumer affairs administration, including the functions of reforming and enforcing consumer laws, the relationship with competition law concepts and regulators, and the relationship between consumer affairs regulators and other government agencies or stakeholders. The article then examines developments in consumer product safety law and contracts, including new challenges from e-commerce and digital technologies, before drawing conclusions reiterating the usefulness of socio-legal comparisons of consumer law.

I Introduction

Consumer protection law is always evolving, but faces particular challenges from e-commerce and other new digital technologies, especially since the COVID-19 pandemic.[1] This is also true in Japan, but there is relatively little written in Western languages on Japanese consumer law,[2] especially in recent years and incorporating comparative analysis of how that law is actually

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1 See, eg, G Howells, 'Protecting Consumer Protection Values in the Fourth Industrial Revolution' (2020) 43 *Journal of Consumer Policy* 145.

2 Cf generally, H Baum et al, *Japanese Business Law in Western Languages: An Annotated Selective Bibliography* (2nd ed, William S Hein, 2013) pp 208–13.

administered and enforced.[3] Yet a study of this topic reveals connections to broader developments in Japanese law, as well as lessons for consumer law and policy in general.

First, the evolution of Japanese consumer law and practice can be located within wider transformations to the justice system, accelerating since a 2001 Report to make both civil and criminal justice systems more accessible to the general public.[4] New measures included improvements to civil and criminal procedures in court proceedings, but also the promotion of alternative dispute resolution (ADR) mechanisms and increases in those allowed to qualify as practising attorneys (*bengoshi*). One overarching aim was to move Japan away from a focus on ex ante regulation of corporate activity by public authorities towards more indirect socio-economic ordering by providing more credible ex post relief through the civil justice system for any harm caused by firms. Although not a focus of the 2001 Report, consumer law reforms adding private law protections can be seen as consistent with this strategy. (However, protections through public laws and regulations remain important as well,[5] and indeed may be making or due for a resurgence in response for example to developments in the digital economy). Already in 1994, eg, Japan enacted a Product Liability Act (PL Act) based on strict liability rather than liability for negligence by manufacturers, modelled on the 1993 European Community Directive.[6] However, as our analysis below shows, there has been a renewed focus on product safety regulation in recent years. This may indicate growing awareness of the limits to private law and redress mechanisms to support consumers, especially in digital marketplaces.

Secondly, developments in Japanese consumer law over the last few decades provide a further example of 'gradual transformation', meaning ultimately significant discontinuities with the past but through a process of incremental rather than abrupt change, as observed for example in the field of corporate governance.[7] One of the mechanisms underpinning such changes is also prominent here, namely 'layering' — superimposing new elements without doing away with old ones.[8] Examples include the PL Act co-existing

3 But see, eg, combining aspects of consumer law 'in books' and 'in action': A Karaiskos, 'Consumer Disputes and Consumer Dispute Resolution in Japan' (2017) 21 *Jurnal Undang-Undang dan Masyarakat* 1; H Hirose, K Lenz and T Shiraishi, 'Japan' in *Consumer Protection in Asia*, G Howells et al (Eds) (Bloomsbury Publishing, 2022) p 105.

4 T Kitagawa and L Nottage, 'Globalization of Japanese Corporations and the Development of Corporate Legal Departments: Problems and Prospects' in *Raising the Bar: The Emerging Legal Profession in East Asia*, W Alford (Ed) (Harvard University Press, 2007) pp 201, 201–85.

5 On the complexity resulting from this combination, see, eg, Hirose, Lenz and Shiraishi (n 3) at pp 105, 110–11; and generally M Dernauer, *Verbraucherschutz und Vertragsfreiheit im japanischen Recht* (Mohr Siebeck, 2006).

6 L Nottage, *Product Safety and Liability Law in Japan: From Minamata to Mad Cows* (Routledge, 2004) pp 61–8.

7 L Nottage, 'Perspectives and Approaches: A Framework for Comparing Japanese Corporate Governance' in *Corporate Governance in the 21st Century: Japan's Gradual Transformation*, L Nottage, L Wolff and K Anderson (Eds) (Edward Elgar Publishing, 2008) p 3 (drawing on wider comparative research by Streeck and Thelen).

8 Above, at p 40. For further examples of 'gradual transformation' in other fields of Japanese law despite some significant reforms, see also, eg, S Kosuka, 'Introducing Sustainability

with Civil Code provisions, and especially the layering of new private law protections for consumers on top of the public law protections.

Thirdly, a close analysis of Japanese consumer law allows us to track the influence of foreign law in Japan as well as the current or potential influence of Japan on consumer law regimes abroad.[9] Major inbound impact still comes from Europe, including German and French law although filtered increasingly through European law, but influences can also be found recently, eg, from Australia, Brazil and the Organisation for Economic Cooperation and Development (OECD).[10] For example, reports were commissioned from one of the present authors (Nottage) via the Kyoto Comparative Law Centre to Japan's Cabinet Office for its project considering reforms to Japanese law concerning Representative Actions for Monetary Remedies (2007) and Consumer ADR (2008). Outbound influence from Japan is also evident in OECD deliberations, eg, and in some parts of Asia. For example, albeit not in standalone legislation, strict liability of manufacturers for unsafe products modelled on Japan's PL Act can be found in Art 751 of Cambodia's Civil Code, enacted in 2007 with extensive 'legal technical assistance' from the Japanese government and its consultants.[11] Japan's new public law regulations around product safety, or consumer contracts or administration, may also start to influence countries especially in the Asian region.

Given such connections with wider developments in Japanese law, in an evolving field addressing many challenges with other legal systems, this article undertakes a comparative survey of significant developments in Japanese consumer law and practice. After sketching the backdrop of the significant challenges for consumers seeking redress (see Part II below), it highlights significant transformations in the field of consumer affairs administration and enforcement (Part III), before honing in on consumer product safety regulation (Part IV) and consumer contracts (Part V) and drawing some general conclusions (Part VI). We compare Japan primarily with Australia, as both have similarly developed economies and legal systems, including longstanding legal regimes for protecting consumers in various ways, and actual or potential impact on other countries especially in the Asia-Pacific region.[12] However, the article also mentions developments

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into Japanese Corporate Governance' (2022) 27 *Zeitschrift fuer Japanisches Recht (Journal of Japanese Law)* 63.

9 For patterns of cross-border influence historically across various fields of law, see generally L Nottage, 'The Development of Comparative Law in Japan' in *The Oxford Handbook of Comparative Law*, M Reimann and R Zimmermann (Eds) (2nd ed, Oxford University Press, 2019) pp 201, 201–27.

10 OECD, *The Report on OECD Member Countries' Approaches to Consumer Contracts* (Final Report, July 2007) <https://www.oecd.org/sti/consumer/38991787.pdf> (accessed 1 February 2024). On consumer law developments in Brazil, also influenced by EU law, see CL Marques and RAC Pfeiffer, 'Dissemination of Consumer Law and Policy in Brazil: The Impact of EU Law' (2022) 45 *Journal of Consumer Law Policy* 27.

11 L Nottage and S Thanitcul, 'Consumer Product Liability and Safety Regulation: ASEAN in Asia' in *Consumer Protection in Asia*, Geraint Howells et al (Eds) (Bloomsbury Publishing, 2022) pp 437, 443–5.

12 Australia has been more active in funding consumer law harmonisation throughout Southeast Asia, especially through the ASEAN-Australia Development Cooperation Program (AADCP); see 'Consumer Protection', *AADCP* (Webpage) <http://aadcp2.org/streams/#consumer-protection> (accessed 1 February 2024). However, as a major donor

particularly in Europe, influencing both Australia and Japan, as well as some other comparatively interesting reference points (including New Zealand, Singapore and other parts of Asia) that have also been updating consumer protection law and practice recently.

II The consumer redress backdrop

Consumer law is a field where the 'law in action', not just the black-letter 'law in books', is particularly important. This is mainly because many disputes are low-value for an individual consumer, making it not worth the expense (including wasted time and energy) to pursue claims, even though collectively the loss to consumers may be large. For example, the 2016 Australian Consumer Survey found that 65% would pursue a consumer complaint if the product or service involved a significant amount, assessed on average as $275 (although 59% cumulatively did consider up to $100 to be significant). The estimated (direct and indirect) cost to Australian consumers of dealing with consumer problems was estimated at A$16.3 billion (almost unchanged from the 2011 survey).[13]

Such acute issues around access to justice have been long recognised, prompting various reforms worldwide.[14] One early measure was to develop legal aid schemes, but limited government budgetary support has understandably always tended to prioritise impecunious parties to criminal rather than civil proceedings. Japan enacted its first legal aid statute providing government support only in 2000, with expanded legislation in 2004 creating *ho-terasu* centres (operational from 2006 in major cities) in collaboration with the Japan Federation of Bar Associations,[15] as part of the wider justice system reforms mentioned above in the Introduction. However, the scope of civil legal aid remains quite narrow compared to, say, Australia.[16] Anyway, such

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generally, Japan may develop more influence especially now that it has established a dedicated Consumer Affairs Agency (CAA).

13 Australian Government The Treasury, 'Australian Consumer Survey' (Online Published Survey, 2016) 34 <https://consumer.gov.au/consultations-and-reviews/australian-consumer-survey> (accessed 5 February 2024).

14 See, eg, P Spiller and K Tokeley, 'Individual Consumer Redress' in *Handbook of Research on International Consumer Law*, G Howells, I Ramsay and T Wilhelmsson (Eds) (Edward Elgar, 2018); L Nottage, 'Consumer ADR and the Proposed "Consumer Law" in Australia: Room for Improvement' (2010) 9 *Queensland University of Technology Law and Justice Journal* 176; M Gamito, 'Access to Justice' in *Consumer Protection in Asia* G Howells et al (Eds) (Bloomsbury Publishing, 2022) p 407.

15 See 'The Japanese Judicial System', *Japan Federation of Bar Association* (Webpage) <https://www.nichibenren.or.jp/en/about/judicial_system/legal_aid_and_jlsc.html> (accessed 5 February 2024); 'Civil Legal Aid', *Japan Legal Support Centre* (Webpage) <https://www.houterasu.or.jp/en/about_jlsc/operations/operation2.html> (accessed 5 February 2024).

16 Cf, eg, 'Legal Advice', *Legal Aid NSW* (Webpage) <https://www.legalaid.nsw.gov.au/ways-to-get-help/apply-for-legal-aid> (accessed 5 February 2024) (short initial consultation funded by the state government); 'Apply for Legal Aid', *Legal Aid NSW* (Webpage) <https://www.legalaid.nsw.gov.au/ways-to-get-help/apply-for-legal-aid> (accessed 5 February 2024) (means-tested government grants). See also Australian Government Productivity Commission, *Access to Justice Arrangements* (Inquiry Report, 3 December 2014) 26–31 <https://www.pc.gov.au/inquiries/completed/access-justice/report> (accessed 5 February 2024) (*Access to Justice Arrangements Report*); T Ikenaga and K Abe,

schemes typically only help with larger and/or more complex cases impacting on a small subset of consumers.

Accordingly, a second mechanism to expand access to justice for consumers has involved creating specialist courts or tribunals for consumer affairs. Their format varies significantly even within countries. For example, some Australian jurisdictions have consumer courts, but most create specialist tribunals linked to consumer affairs agencies subject to (limited) scope of appeal to regular courts, and there remain significant differences concerning what disputes they can deal with (types of claims and monetary value caps), fees and procedures.[17]

Japan still does not have a specialist court or tribunal giving rulings on consumer law matters. There is a fast-track procedure in Summary Courts for any civil dispute up to 600,000 yen under Art 368 of the Code of Civil Procedure.[18] This could be useful especially because the civil justice reforms allowed judicial scriveners (*shihoshoshi*) to represent clients in such Courts if they pass extra certification.[19] Again, however, such procedures are mainly for larger or more complex consumer claims. In addition, while there was an initial jump in judicial scriveners certified to represent clients in Summary Courts in 2004 (by around 6000, adding to around 19,000 *bengoshi* lawyers), the proportion they constitute among legal professionals able to help with Summary Court lawsuits has declined as the numbers of *bengoshi* have grown faster than judicial scriveners admitted each year. This pattern is likely to continue after a major area of litigation work for certified judicial scriveners, helping consumers reclaim overpaid ('grey zone') interest on loans following a Supreme Court judgment in 2006, abated from 2009. They have been left mainly representing clients in minor real property related disputes, arguably because judicial scriveners are perceived as knowledgeable in such fields due to their traditional practice of registering property rights. Such disputes constitute a very small proportion of total lawsuits, and anyway can involve commercial as well as consumer disputes.[20]

A third avenue to improve access to justice for consumers has focused on ADR outside courts, especially mediation schemes. From the 1970s, Japan developed a network of local government supported Consumer Lifestyle Centres (*shohi seikatsu senta*), coordinated by the National Consumer Affairs Centre (NCAC). Informal mediation (through 'shuttle diplomacy') as well as information for consumers is provided by consultants (often working

'Country Report — Japan' in *Access to Justice and the Challenge of COVID-19* (International Legal Aid Group Conference Proceedings, 2021) 154.

17 Commonwealth of Australia, *Consumer Law Enforcement and Administration* (Research Report, 2017) 39–64.

18 M Yoshida, 'Japanese Small Claims Procedure: How Does It Work?' (2004) 11 *Murdoch University Electronic Journal of Law* 1.

19 L Nottage, 'Civil Procedure Reforms in Japan: The Latest Round' (2005) 22 *Ritsumeikan University Law Review* 81.

20 K Chan and I Takayuki, 'Empowering Judicial Scriveners as Litigators in Japan: Is It Justifiable and of Value?' (2022) 29 *International Journal of the Legal Profession* 181. On the background and impact of the Supreme Court judgment, see also S Kozuka and L Nottage, 'Re-Regulating Unsecured Consumer Credit in Japan: Over-Indebted Borrowers, the Supreme Court, and New Legislation' in *The Yearbook of Consumer Law*, C Twigg-Flesner et al (Eds) (Aldershot, 2009) p 197.

part-time and without law degrees).[21] In the wake of the wider justice system reforms and alongside the establishment of the Consumer Affairs Agency (CAA) in 2009, the National Centre created an ADR Committee that can conduct formal mediation or arbitration of disputes. However, the focus is on serious issues emerging nationwide, aiming to prevent further escalation.[22] In recent years, cases resolved by formal ADR Committee procedures have varied between around 120 and 200 annually. About two-thirds of the cases have resulted in successful mediation settlements.[23]

Similarly, product-specific Product Liability (PL) ADR Centres established around enactment of the PL Act 1994 in the shadow of some (loose) government guidelines, have resolved only a few cases through formal mediation. However, they have dealt with many more cases through informal mediation and especially by providing information that consumers may then use to resolve disputes directly with suppliers or through other procedures.[24]

Much larger volumes of cases are mediated through a financial services ADR scheme established in 2008, with many cases settled based on recommendations by mediators with legal training. By contrast, many more cases are dealt with by a counterpart in Australia (dating back to the Banking Ombudsman scheme established in the 1990s) and other Ombudsman schemes (also for telecommunications, water and electricity supplies).[25] Moreover, those add an extra step of allowing these industry-based (but

21 The report of a CAA Study Group on consumer policy in local governments states that there were 3393 consultants as of 2016: available at <https://www.caa.go.jp/policies/policy/local_cooperation/local_consumer_administration/support_meeting/pdf/support_meeting_170725_0001.pdf> (accessed 5 February 2024).

22 Article 19(3) of Japan's National Consumer Affairs Center Act 2002 provides that the Alternative Dispute Resolution (ADR) Committee shall dismiss the application if the case does not amount to a 'serious consumer dispute'.

23 Cases filed grew over 2017 (172), 2018 (177) and 2019 (204). However, they dropped during pandemic years (paralleling trends, eg, in Australia), namely in 2020 (166 filings), 2021 (136) and 2022 (122). See '国民生活センター紛争解決委員会によるADRの概要', *National Consumer Affairs Center of Japan* (Webpage) <https://www.kokusen.go.jp/adr/hunsou/hunsou.html> (accessed 5 February 2024) (only in Japanese).

24 The Automotive Dispute Resolution Centre reports successfully mediating 20–30 cases every year, while receiving 2000–3000 inquiries, most of which are resolved through informal procedures. See its annual reports at <https://www.adr.or.jp/outline/report.html> (accessed 5 February 2024) (only in Japanese). The Product Liability (PL) Centre of the Consumer Safety Products Association reports yearly records of more than 400 inquiries in the past few years but makes no official reports of the number of formal mediations, which fact may imply that almost all cases have been resolved informally. See reports of the Centre available from the News section at <https://www.sg-mark.org/pl/> (accessed 5 February 2024) (only in Japanese). This is consistent with patterns since the establishment of PL Centres from the mid-1990s: see L Nottage and Y Wada, 'Japan's New Product Liability ADR Centers: Bureaucratic, Industry, or Consumer Informalism' (1999) 65 *Zeitschrift fuer Japanisches Recht (Journal of Japanese Law)* 295.

25 See, eg, Australian Government Productivity Commission, *Access to Justice Arrangements Report* (n 16) at 311–43; 'Data Snapshot 2022', *Australian Financial Complaints Authority* (Webpage) <https://www.afca.org.au/news/statistics/data-snapshot-2022> (accessed 5 February 2024); I Ramsay and M Webster, 'The Evolution and Consolidation of External Dispute Resolution Schemes in the Financial Sector: From the Banking Ombudsman to the Australian Financial Complaints Authority' (2019) 30 *Journal of Banking and Finance Law and Practice* 182.

independent) or statutory Ombudsman schemes, if mediation fails, to enforce a decision that is binding only on the supplier (which must join such an external dispute resolution scheme to be licensed) but not the consumer. Such an enhancement for consumers was not politically palatable when Japan's scheme was set up, only for financial services, around the time of the Global Financial Crisis of 2007–8.[26] The compromise in Japan was that securities dealers and other financial services providers must enter into a 'Basic Contract' with a designated ADR body that requires them (but not consumers) to agree to mediation and accept any special settlement offer proposed by the mediator (thus creating a type of unilateral arbitration clause).[27]

Japan has also struggled to promote commercially-supplied mediation services, despite enactment of legislation in 2004 that allows governmental certification of ADR bodies meeting minimum standards. Such certification gives bodies advantages such as suspension of limitation periods during mediations they facilitate.[28] Although many have obtained certification under the 2004 Act, including the Nippon Association of Consumer Specialists (NACS), established in 1998), most are small-scale and/or only attract limited numbers of cases annually.[29] Consumers and suppliers alike still seem to prefer the well-trusted and taxpayer-subsidised court-annexed ADR scheme provided under the Civil Conciliation Act 1950.[30] By contrast, perhaps because of higher costs for lawyers and entrepreneurship from them and others (including former judges), Australia since the 1990s has developed a big market for commercially provided mediation services alongside some more court-annexed mediation schemes.[31] Again, such services may assist consumers, albeit still especially for larger or more complex disputes given the costs of mediators and (quite often) lawyer representation.

A fourth phase in improving consumer redress has come from initiatives to provide collective redress especially for small-value damages claims.[32] Australia, like Canada, adopted a US-style class action mechanism starting in the federal (Commonwealth) jurisdiction in 1992, then for claims under Victorian state law from 2000, and more recently also across further

26 For wider comparisons including across the Asia-Pacific, see S Ali, *Consumer Financial Dispute Resolution in a Comparative Context* (Cambridge University Press, 2013).

27 T Maeda, 'How Are Disputes Settled in Japan's Financial ADR? Statistical Analysis of the Determinative Factors in the Facilitation and Conclusion of Settlements in FINMAC Mediation' (2022) 3 *Japan Commercial Arbitration Journal* 91.

28 L Nottage, 'Will Privately-Supplied Legal Dispute Resolution Keep Growing In Japan?', *East Asia Forum* (Blog Post, 10 April 2010) <https://www.eastasiaforum.org/2010/04/10/will-privately-supplied-legal-dispute-resolution-keep-growing-in-japan/> (accessed 5 February 2024).

29 For example, NACS received annually from 800 to 1300 requests for consultations between 2018–22, but the number of disputes referred to formal mediation is zero or one for each year. See their annual reports available (in Japanese only) at <https://nacs.or.jp/about/>.

30 See generally A Yamada, 'ADR in Japan: Does the New Law Liberalize ADR from Historical Shackles or Legalize It' (2009) 2 *Contemporary Asia Arbitration Journal* 1.

31 See G Rooney, 'The Rise of Commercial Mediation in Australia — Reflections and the Challenges Ahead' (2017) 4 *Journal of Mediation and Applied Conflict Analysis* 439.

32 D Hensler, 'Using Class Actions to Enforce Consumer Protection Law' in *Handbook of Research on International Consumer Law*, G Howells, I Ramsay and T Wilhelmsson (Eds) (Edward Elgar Publishing, 2018) p 445.

Australian states.[33] The basic model is that at least seven representative plaintiffs with shared issues of law or fact create a class bound by court decisions (or court-approved settlements) unless individual class members actively opt-out, which happens rarely as class members can free ride on the efforts of the representative plaintiffs and their lawyers. Class actions in Australia have been reinforced by the growth of large plaintiff law firms, the apex High Court of Australia ruling in 2006 that third-party litigation funding was permissible, and Victoria going the next step of allowing lawyers themselves to fund class actions by charging pure US-style 'contingency fees' (whereby lawyer negotiate a percentage of all damages received by their clients bringing class action claims).[34] Nonetheless, for many reasons including more pervasive public health care system, the numbers of class actions initiated in Australia remain far fewer than the US. Furthermore, PL cases focused on damages caused by unsafe products have been eclipsed in recent years by shareholder class actions against directors etc, for misleading or other conduct resulting in losses, which are easier for plaintiff law firms to aggregate and prove in class actions.[35]

By contrast, Japan decided against introducing a US- or Australian-style class action mechanism. Instead, the 2013 Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Property Damage Incurred by Consumers (in force from October 2016) introduced an interesting two-stage hybrid procedure, partly inspired by Brazilian (and French) law. Government-certified consumer non-governmental organisations (NGOs) (not a group of representative plaintiffs) can seek a court decision on liability. If successful, the NGO can then try to get individual claimants in the class to opt-in to a second stage, where it seeks damages to be awarded by the court.[36] Japan's scheme is also mostly focused on consumer contract disputes, excluding claims for personal injury and/or consequential property losses (as with PL Act claims against manufacturers).[37] These limitations remain even

33 L Nottage, 'The New Australian Consumer Law: What About Consumer ADR?' (2009) 9 *Law and Justice Journal* 176; M Legg and S J Hickey, 'Class Actions in Australia' in *The Cambridge Handbook of Class Actions: An International Survey*, B Fitzpatrick and R Thomas (Eds) (Cambridge University Press, 2021) p 366.

34 K Walsh, 'Class Actions and Litigation Funding: The New State of Play in Australia' (2020) 69 *Law Society Journal* 34.

35 Such investor class actions have maintained momentum, despite 2021 reforms to limit liability to where companies or directors acted with knowledge, recklessness or negligence, although almost all claims still settle rather than reaching final judgment. See, eg, S Patten, 'Shareholder class actions rise despite more stringent disclosure laws', *Australian Financial Review* (online, 5 December 2022) <https://www.afr.com/companies/financial-services/shareholder-class-actions-rise-despite-more-stringent-disclosure-laws-20221202-p5c3a7#:~:text=The%20number%20of%20class%20actions,disgruntled%20shareholders%20to%20sue%20directors> (accessed 5 February 2024).

36 The EU's 2020 Directive on Representative Actions also adopts an opt-in system involving certified consumer groups. For a critique, see L Visscher and M Faure, 'A Law and Economics Perspective on the EU Directive on Representative Actions' (2021) 44 *Journal of Consumer Policy* 455.

37 Concerning the choice of possible approaches as compared with the models overseas, see *Kin'yu Homu Jijo*, '集団的消費者被害救済制度研究会報告書の概要' (Summary of the Report of the Study Group on Collective Redress for Consumer Damages) (Report No 1907, 2010) 62–7. See generally, eg, M Madderra, 'The New Class Actions in Japan' (2014) 23 *Pacific Rim Law and Policy Journal* 795.

after amendments in 2022, prompted by only a few Japan-style class actions being initiated under this scheme.[38]

Overall, this outline of developments and realities concerning redress options shows the continuing challenges faced by consumers harmed by supplier misconduct. The challenges are comparatively more acute in Japan, but the underlying numbers of problems and/or directly negotiated outcomes may be more favourable than for consumers in Australia. After all, eg, the 2016 Australian Consumer Survey found that only 44% of respondent consumers know of dispute resolution services provided by consumer protection agencies (down from 47% in 2011). Only 31% (36% in 2011) would definitely participate in any dispute resolution scheme if their complaint could not be resolved. Main barriers indicated against participating were perceptions that it was not worth the hassle or effort (28% of responses), dislike of confrontations (21%), low familiarity with the process (17%), an expectation that nothing good will come from it (12%) and lack of time (11%).[39] Accordingly, the persistent and largely shared problems for consumers themselves seeking redress for harm caused, evident in Australia and perhaps especially Japan, provide an important backdrop to the efforts to enhance the capacity of consumer affairs agencies to develop new laws and enforce them more effectively, including before problems escalate into large-scale damages claims.

III Consumer affairs administration and enforcement

A recent partly empirical and comparative study found that fair and effective consumer authorities significantly enhance generalized trust in markets.[40] Yet there is little sustained analysis, especially in Western languages, about important changes in consumer law administration in Japan — let alone in comparison to other countries. This Part therefore introduces these changes under three broad sub-topics, compared mainly to Australia.

A Consumer law and policy development 'versus' implementation

After some severe products incidents in Japan, including carbon monoxide poisoning due to remodelled gas water heaters, elevators suddenly starting to move with the doors open resulting in deaths, and children fatally choking on konjac jelly snacks, consumer issues became a salient agenda item in the early 2000s.[41] Prime Minister Fukuda of the longstanding coalition government,

38 There have been only three cases identified by NCAC since the law entered into force: see '消費者団体訴訟制度（団体訴権）の紹介', *National Consumer Affairs Center of Japan* (Webpage) <https://www.kokusen.go.jp/danso/index.html> (accessed 5 February 2024) (only in Japanese). Summarising the recent amendments, see A Hironaka and T Morita, 'The 2022 Bill to Amend the Japanese Quasi Class Action System', *Lexology* (Blog Post, 15 April 2022) <https://www.lexology.com/library/detail.aspx?g=a210e935-faeb-4c8f-882b-896f9b3cc462> (accessed 5 February 2024).

39 Australian Government The Treasury (n 13) at 36–7.

40 L Berg, 'The Importance of Consumer Authorities for the Production and Maintenance of Trust and Social Capital in Consumer Markets' (2022) 45 *Journal of Consumer Policy* 537.

41 See, eg, L Nottage, 'The ABCs of Product Safety Re-Regulation in Japan: Asbestos,

comprising the Liberal Democratic Party (LDP) and New Komeito, took the initiative to establish a new government agency.[42] It aimed to depart from traditional consumer policy that had existed in a piecemeal manner as an element of the industrial policy of the relevant manufacturing or service industry. PM Fukuda stated that there should be consumer policy for the consumers' sake, administered by the Consumer Affairs Agency (CAA). The new agency was expected to fill the gaps from bureaucratic sectionalism and realise consumer protection by comprehensively covering every aspect of consumer lifestyle.

The government bill to establish the CAA was submitted to parliament by the succeeding Aso government. However, the Democratic Party of Japan (DPJ) as the largest opposition party claimed that the government bill was insufficient, submitting its own bill to establish the Institute of Consumer Rights as an independent organ. The Commissioner of Consumer Rights as the head of the Institute should not be a bureaucrat but be a political appointee and to have the power to urge the central and local governments to take actions about every type of a consumer problem. In an emergency case, the Commissioner should be entitled to apply for injunction orders from the courts.

As the LDP-Komeito coalition did not have the majority in the Upper House, they negotiated with DPJ to merge the two bills into one. The compromise arranged by the LDP member Fumio Kishida, who later became Prime Minister, resulted in amendments to the government bill to create the Consumer Commission (CC) as an independent organ to monitor consumer policy, including that of the CAA, instead of an ordinary Council (*shingikai*) within the CAA. The Resolution of the Lower House approving the amended bill further recommended that the CC members be all private citizens, with due regard to age and gender. Apparently, therefore, the focus was on having private citizens participate in the policy making.[43] It may not be a coincidence that one of the big issues in the Judicial System Reform concluded a few years earlier was lay participation in the criminal justice. At that time, furthermore, the DPJ also argued for the increase of political appointees in the government, which they achieved later when they won the general election and came to the power (2009–12). The distrust in bureaucracy and demand for more civic participation in policy-making was a common agenda across various fields in the early 2000s, when Japan was going through radical changes in its socio-economic system.[44]

Buildings, Consumer Electrical Goods, and Schindler's Lifts' (2006) 15 *Griffith Law Review* 242.

42 On the background to establishing the CAA and Consumer Commission elaborated in this section, see Y Ishidoya, '消費者庁と消費者委員会の誕生 (上) (The Birth of the Consumer Affairs Agency and the Consumer Commission, Part 1)' (2009) 49 *Kokumin Seikatsu Kenkyu* 1.

43 See K Yoshioka, '動き出す「消費者庁」と「消費者委員会」 (The "Consumer Affairs Agency" and the "Consumer Commission" Being Launched)' (2009) 1382 *Jurisuto* 37.

44 On the justice system reforms, see Kitagawa and Nottage (n 4). On the political pressures to introduce more civic participation into criminal justice in Japan (and elsewhere around that era), see R Kage, *Who Judges? Designing Jury Systems in Japan, East Asia and Europe* (Cambridge University Press, 2017) (reviewed by Nottage at <https://japaneselaw.sydney.

However, administrative law professor Sakurai, who served as one of the initial Commission members, observes that the political compromise was emotional and partisan, rather than institutional.[45] The political and pragmatic nature of the reform outcome resulted in an unusual episode. The CC's President-elect resigned on the eve of the launch of the Commission, in the face of consumer groups' criticism that she lacked sufficient expertise.

In addition, Sakurai remarks that the institutional role and power of the CC was not elaborated in the text of the compromise bill. When the CC was established, there was some optimism that the CC and CAA would work together with 'proper distance', partly collaborating with and partly checking each other. In fact, the CC has not merely reviewed the CAA's activities, but has made many proposals for consumer law and policy by itself, in competition with the CAA. For example, the deliberations for the amendments to the Consumer Contracts Act of 2018 (Japan) were made by the Expert Group of CC, while the 2022 amendments to the same Consumer Contract Act were prepared by CAA's Study Group. It is not clear why such a difference emerged. Yet there is no surprise about CC's engagement in law reform by itself, given that the focus of the reform was on enhancing citizen participation in policy-making.

By contrast, Australia has applied in this field the public management theory that developed from the 1980s aiming at separating the development of law and policy from implementation or enforcement.[46] This is complicated by the responsibility for consumer law being shared constitutionally between the federal government (Commonwealth) and the States and Territories. Thus, enforcement of the Australian Consumer Law (ACL) is carried out by the federal Australian Competition and Consumer Commission (ACCC) with jurisdiction, eg, over corporations or inter-state commerce, as well as State or Territory consumer affairs regulators with jurisdiction over sole traders or partnerships as well as corporations transacting within their borders).[47]

Law and policy reform is ultimately the responsibility of the ministers from each State and Territory, as well as from the federal government (namely an Assistant Treasurer). These ministers coordinated activities through the Ministerial Council on Consumer Affairs (1992–2010) and then the Legislative and Governance Forum on Consumer Affairs (2011–20, adding New Zealand's minister for consumer affairs given the tight economic, geopolitical and legal system connections between the two nations). These meetings of ministers now take place under the 'National Cabinet' system established in 2020 to enhance law and policy coordination across Australia due to the COVID-19 pandemic.

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edu.au/2018/12/review-rieko-kage-who-judges-designing-jury-systems-in-japan-east-asia-and-europe/> (accessed 5 February 2024)).

45 K Sakurai, 行政法講座 *(Lectures on Administrative Law)* (Daiichi Hoki, 2010) pp 267–78.

46 See, eg, C Hood et al, *Regulation Inside Government: Waste-Watchers, Quality Police, and Sleazebusters* (Oxford University Press, 1999).

47 These regulators have signed a Memorandum of Understanding to help coordinate their (sometimes overlapping) enforcement efforts: 'Enforcement', *Australian Consumer Law* (Webpage) <https://consumer.gov.au/index.php/australian-consumer-law/enforcement> (accessed 5 February 2024).

However, senior officials from the respective consumer affairs agencies support the Ministers in developing the law, especially through a body called Consumer Affairs Australia and New Zealand (CAANZ), established in the context of an Inter-Governmental Agreement (IGA) first agreed among the Commonwealth, State and Territory governments in 2009 to help promote harmonisation of substantive consumer law nationwide.[48]

The federal Treasury has a small consumer affairs unit that often takes the lead in opening for public consultation legislative reforms agreed by the Ministers on the advice of CAANZ officials. In addition, this unit sometimes lets state consumer affairs officials and their ministers take the lead in developing reform in particular areas, before opening up public consultation, such the vexed issue of whether Australia needs to add to the ACL a general prohibition against unfair trading along European or North American lines.[49] It even sometimes has staff seconded from enforcement agencies such as the ACCC, thus blurring the distinction between implementation and enactment of consumer law. Further blurring occurs outside the field of primary legislation. Consumer affairs officials must coordinate public consultations and advise their respective ministers about introducing regulations or bans and safety standards for specific types of consumer products.[50]

A further complexity is the role of the federal government's Productivity Commission (PC), an independent body that undertakes inquiries into law and policy reforms at the request of the federal Treasurer (who of course coordinates with the Assistant Treasurer on matters with consumer protection implications). For example, the PC completed reports on consumer product safety law reform in 2006,[51] and crucially in 2008 on re-harmonising substantive consumer law nationwide.[52] The latter recommended that the federal Trade Practices Act be renamed with a schedule entitled the ACL, which the States and Territories would then replicate by enacting 'application legislation' under what became the IGA. These enactments occurred in 2010, meaning that substantive consumer law was re-harmonised across Australia. The federal, State and Territory governments also followed the PC's 2008

48 See 'Consumer Affairs Forum', *Australian Consumer Law* (Webpage) <https://consumer.gov.au/index.php/consumer-affairs-forum> (accessed 5 February 2024).

49 See generally J Paterson and E Bant, 'Should Australia Introduce a Prohibition on Unfair Trading? Responding to Exploitative Business Systems in Person and Online' (2021) 44 *Journal of Consumer Policy* 1. New South Wales has taken the lead on developing various options, and the federal Treasury initiated a public consultation over 31 August–29 November 2023: see 'Unfair Trading Practices — Consultation Regulation Impact Statement', *Australian Government The Treasury* (Webpage) <https://treasury.gov.au/consultation/c2023-430458> (accessed 5 February 2024).

50 For example, the Commonwealth minister (the federal Assistant Treasurer) can set product safety standards for specific goods or services (s 104 of the Australian Consumer Law) or permanent bans of goods found to be unsafe (s 114), although State and Territory ministers can introduce interim bans (s 109).

51 Australian Government Productivity Commission, *Review of the Australian Consumer Product Safety System* (Research Report, 2006) <https://www.pc.gov.au/inquiries/completed/consumer-product-safety/report> (accessed 5 February 2024) (*Review of the Australian Consumer Product Safety System*).

52 Australian Government Productivity Commission, *Review of Australia's Consumer Policy Framework* (Inquiry Report, 2008) <https://www.pc.gov.au/inquiries/completed/consumer-policy/report> (accepted 5 February 2024).

report's recommendation that implementation of this new harmonised ACL regime should remain shared among their respective regulators, rather than for example agreeing to have a single regulator enforcing the ACL nation-wide (as with competition or corporate and securities law).

When a review was undertaken over 2016–17 into the operation of the new ACL regime and possible further legislative or other improvements, as required by the 2009 IGA, the PC was also charged with examining issues around consumer law enforcement and administration.[53] It was clearly thought inappropriate for the consumer affairs regulators themselves to review their own enforcement record. Instead, those officials through CAANZ focused on assessing the operation of the substantive consumer law provisions in the ACL enacted nationwide in 2010. This coordinating body of officials produced a report in 2017 recommending a range of specific legislative reforms (mostly now enacted) and further studies into more controversial topics (such as an unfair trading prohibition, or a General Safety Provision (GSP), requiring all consumer goods put on the market to be safe).[54]

B Consumer and competition regulators

CAA subsumed enforcement of Unjustified Premiums and Misrepresentations Act (UPMA) from the Japan Fair Trade Commission (JFTC) competition regulator, but not, eg, the enforcement of the Anti-Monopoly Law's unfair trade practices 'abuse of superior bargaining position' provision. Furthermore, as with the Designated Commercial Transactions Act and Ministry of Economy, Trade and Industry (METI), the CAA relies on the local offices of the JFTC for UPMA enforcement.

This may reflect the assumption that the Antimonopoly Act is a statute regulating business-to-business (B2B) transactions, as distinguished from the law on business-to-consumer (B2C) transactions. The definition of 'consumer' in Japan's Consumer Contracts Act or Consumer Safety Act, which reads as an individual except when engaged in a business, reflects this assumption. The emphasis on the 'independence' of the JFTC might also have impeded the CAA's co-sponsoring the Antimonopoly Act. If the scope of consumer law is too narrowly defined in Japan, albeit along largely European law lines, there is a risk that the law becomes inflexible. This can be a problem particularly in the digital economy, where the significance of peer-to-peer transactions is gaining greater importance in society.

Under the predecessor of the ACL, the Trade Practices Act dating back to 1974 and subsequent State or Territory legislation that adopted or adapted that original legislation, Australia has instead always had a prohibition against misleading or deceptive conduct in trade, which consumers, but also other businesses as well as consumer regulators have been able to invoke in court.

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53 Australian Government Productivity Commission, *Consumer Law Enforcement and Administration* (Research Report, 2017) <https://www.pc.gov.au/inquiries/completed/consumer-law/report> (accessed 5 February 2024).

54 Consumer Affairs Australia and New Zealand, *Australian Consumer Law Review* (Final Report, 2017) <https://consumer.gov.au/consultations-and-reviews/australian-consumer-law-review/final-report> (accessed 5 February 2024); 'Changes to the Australian Consumer Law', *Australian Consumer Law* (Webpage) <https://consumer.gov.au/index.php/resources-and-guides/changes-to-acl> (accessed 5 February 2024).

Since 1986, various amendments to that Act and then the ACL (s 21) have added prohibitions against unconscionable conduct in trade that they can invoke. However, some recent court decisions and new e-commerce practices (including various 'dark patterns') have generated calls for a potentially wider prohibition against unfair practices or trading to be added to the ACL, resulting in a public consultation from 31 August 2023.[55] Unconscionable conduct claims generally involve a party locked into a relationship, even potentially in a commercial setting, such as small suppliers to a large supermarket chain. They therefore have some conceptual and practical parallels with the prohibition against abuse of a superior bargaining position under Japan's Anti-Monopoly Law.[56]

The idea in Australia from the outset in the 1970s, influenced by the US, was that misleading and then unconscionable conduct prohibitions were complementary or related to competition law and policy, as well as consumer protection. This is why they are not limited under the ACL to claims by consumers in a narrow sense, such as individuals transacting for a non-business purpose (the usual definition in European and most Asian consumer laws). Instead, these prohibitions also can be and often are in practice be asserted by businesses against other businesses. This idea also explains why the ACCC and its predecessor have had responsibility over both consumer protection and competition law (including other typical topics such as cartel and merger controls). It may also be the reason why the ACCC has been more active than State or Territory regulators in bringing claims of misleading or unconscionable conduct.

As well as such potential overlaps in competition and consumer law, having a regulator with responsibility for at least some aspects of both can also give it more political and media impact. After all, competition law reforms and enforcement are usually easier to 'sell' to the voters because they promise better outcomes directly for (numerous) smaller businesses vis-à-vis (fewer) larger firms. (This political reality may also explain why Australian consumer law is comparatively quite unusual in having extended 'consumer' protections, also in contracts as mentioned below, to small and even sometimes larger businesses). Having obtained more powers and budget on the competition law side, the combined regulator becomes a more formidable presence in the business world, and can cross-subsidise its efforts on the (purely) consumer protection side. Of course, the business sector and other parts of the government may not appreciate such a development, which could explain why a combined competition and consumer regulator has not yet become the norm internationally.[57] Nonetheless, it is interesting that the power

55 Paterson and Bant (n 49); 'Duped by design — Manipulative online design: Dark patterns in Australia', *Consumer Policy Research Centre* (Webpage, 8 June 2022) <https://cprc.org.au/dupedbydesign/> (accessed 5 February 2024); 'Unfair Trading Practices — Consultation Regulation Impact Statement' (n 49).

56 There may be fewer parallels with European competition law as that requires abuse of a 'dominant position' in the market, but Vandewalle and Shiraishi (2015) argue that in fact, the Japan Fair Trade Commission guidelines suggest that such a position may be usually implied under the Japanese regime. See S Vande Walle and T Shiraishi, 'Competition Law in Japan' in *Comparative Competition Law*, John Duns et al (Eds) (Edward Elgar Publishing, 2015) p 415.

57 See generally L Nottage et al (Eds), *ASEAN Consumer Law Harmonisation and*

to issue injunctions against unfair (including misleading) practices was transferred from 2018 to Singapore's competition regulator, renamed accordingly as the Singapore Competition and Consumer Commission (SCCC).[58] New Zealand's Commerce Commission also enforces the prohibitions on misleading conduct in trade introduced by the Fair Trading Act 1986 and (by amendment in force from 22 August 2022) unconscionable conduct, eg, in both B2C and B2B contexts.

By contrast, as mentioned above, the JFTC lost rather than gained powers after the CAA was established, as did other parts of government including 'line ministries' such as METI and Ministry of Land, Infrastructure, Transport and Tourism (MLIT). The JFTC is likely to resist losing further powers (and budget) associated with any proposal say to allow the CAA to take over enforcement (fully or in collaboration) of prohibitions against abuse of a superior negotiating position. The CAA would also resist returning to the JFTC its new power against misleading premiums under the UPMA. A merger of both agencies in Japan might significantly improve both competition and consumer law enforcement — and indeed law reform quality. Yet that seems highly improbable, given the persistent dogmatic assumption that the B2B law and B2C law are separate.

C Consumer regulators and other departments or stakeholders

When the CAA was enacted in 2009, it gained jurisdiction over 29 consumer-related statutes that had been administered by various ministries, including the UPMA discussed above. It was a radical change from the previous regulatory scheme under which the consumer policy section of the Cabinet Administration Office (the Economic Planning Agency, before 2001) had only some coordinating power, with administration or implementation left to other ministries. For several of the 29 statutes, the CAA became the co-sponsor together with the ministry that had previously in charge. For example, for the Designated Commercial Transactions Act regulating door-stop selling, distance selling and other types of transactions causing many consumer problems, the CAA is now the lead agency in charge and administers the legislation — with METI as the subsidiary agency. When the Act or its implementing ordinances are amended, the CAA takes the lead, while METI and its Council on Consumer Economics usually just ratify the proposed amendments.

However, the CAA lacks local agencies for implementation of the Act. When it comes to investigating the suspected non-compliance and imposing any needed sanctions, the CAA relies on the local Economy and Industry Bureaus, being local METI branches. Similarly, the CAA lacks jurisdiction

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Cooperation (Cambridge University Press, 2019) pp 365–414.

58 It took over the power given from 2016 to Singapore's commerce ministry, SPRING, but the Singapore Competition and Consumer Commission (SCCC) has not yet issued many injunctions. See, eg, 'CCCS Cracks Down on Misleading Advertisements — Second Consumer Protection Enforcement Case', *Ashurst* (online, 30 September 2019) <https://www.ashurst.com/en/news-and-insights/legal-updates/cccs-cracks-down-on-misleading-advertisements/> (accessed 5 February 2024).

over mandatory safety standards for categories of risky consumer products and, even in the face of serious incidents, can only require intervention from other ministries in charge of the relevant regulation as long as there is a directly applicable law or regulation. Thus, CAA's claim for comprehensive responsibility has been compromised regarding implementation, in contrast to law making and policy formulation.

By contrast, Australian consumer affairs ministers and regulators have sole jurisdiction over specified unfair trade practices (Pt 3-1 of the ACL) as well as for setting minimum safety standards for specific products or services and ordering bans or mandatory recalls (Pt 3-3). This is useful as allows action for products, like konjac jelly snacks causing choking hazards for children and the elderly, which had fallen between the gaps in Japan and thus prompted new legislation in 2009 (as mentioned above).[59] However, eg, the ACCC has formal and informal arrangements with sectoral regulators and usually give them considerable deference, even though some problems have arisen. One example involves recalls of dangerous electrical wiring in homes, currently led by the state consumer affairs regulator in New South Wales, which involved delays and the insolvency of the supplier.[60]

Another serious problem concerned the belated mandatory recall of unsafe Takata airbags across millions of Japanese and other vehicles sold in Australia (and world-wide). Part of the delay seems to be that the ACCC, although it alone had the power to take the unusual step of forcing suppliers to recall vehicles, perhaps lacked technical capacity or political power and deferred extensively to the Transport Department. In 2018, after the first death in Australia from an unreplaced Takata airbag and a consequent coronial inquest,[61] a new Road Vehicle Standards Act was enacted that assigned the power to issue mandatory recalls instead to the Minister of Transport.[62] There is a risk that the specialist or sectoral regulator may be more likely to be

59 Those less than 45mm in size are banned: 'Mini jelly cups containing konjac', *ACCC Product Safety Australia* (Webpage) <https://www.productsafety.gov.au/product-safety-laws/safety-standards-bans/product-bans/mini-jelly-cups-containing-konjac> (accessed 5 February 2024). This is like setting a mandatory safety standard requiring such snacks to be bigger. By contrast, they are fully banned in Europe. They also caused serious problems for consumers and regulators in Japan: See N Kawawa, 'Jelly Mini-Cups Containing Konjac: Is a Warning Enough to Protect Vulnerable Consumers?' (2013) 13 *The Australian Journal of Asian Law* 135.

60 Cf Australian Government Productivity Commission, *Review of the Australian Consumer Product Safety System* (n 51) at 171–2 with 'Infinity Cables Frequently Asked Questions', *ACCC* (Media Release, 4 June 2021) <https://www.accc.gov.au/update/infinity-cables-frequently-asked-questions> (accessed 5 February 2024).

61 L Nottage, 'The Interface of Inquests and Consumer Law and Policy: 2021 NSW Coronial Inquest Findings into the 2017 Death of a Honda Driver from a Takata Airbag', *Japanese Law and the Asia Pacific* (Blog Post, 9 May 2022) <https://japaneselaw.sydney.edu.au/2022/05/the-interface-of-inquests-and-consumer-law-and-policy/> (accessed 5 February 2024).

62 However, the Australian Competition and Consumer Commission (ACCC) remains in charge of the Takata airbag recalls that its Minister had eventually ordered. See 'Vehicle Recalls', *Australian Government Department of Infrastructure, Transport, Regional Development, Communications and the Arts* (Webpage) <https://www.infrastructure.gov.au/infrastructure-transport-vehicles/vehicles/vehicle-recalls> (accessed 5 February 2024); 'Car manufacturers complete 99.9 per cent of Takata airbag recall', *ACCC* (Media Release, 5 March 2021) <https://www.accc.gov.au/media-release/car-manufacturers-complete-999-per-cent-of-takata-airbag-recall> (accessed 5 February 2024).

'captured' by the business sector it knows well, but this is arguably outweighed by the need to act more efficiently if large-scale safety issues arise with vehicles, and a detailed arrangement is in place between the Department and the ACCC since 2021.[63] In other countries, such as many in Southeast Asia with newer and less powerful consumer agencies, leaving sole or primary jurisdiction to other government departments is likely to be a riskier strategy.[64]

Similar issues arise concerning financial (and investment) services for consumers. While the CAA administers the Financial Products Sales Act with the Financial Service Agency (FSA), it has no power over the Financial Instruments and Exchanges Act, the primary statute for investor protection. Consumer ADR for financial services (mentioned in above Part II) is similarly under the jurisdiction of the FSA, not the CAA.

This distinction is also formally true in Australia: for financial services (including consumer credit) there is one federal regulator distinct from the ACCC, namely the Australian Securities and Investment Commission (ASIC). Yet there is significant lateral movement of staff between ASIC and the ACCC as well as State and Territory consumer affairs agencies. Key substantive protections, such as those against misleading or unconscionable conduct as well as unfair contract terms, are basically worded the same under both the ASIC Act and the ACL.

Another important interface arises between consumer regulators and bodies other than government departments. In Japan, the CAA does not have the capacity to bring injunction suits under the Consumer Contracts Act or collective damages claims under the 2013 Collective Redress Act. As mentioned above, such an idea was included in the initial DPJ bill of 2008 but was not adopted in the legislative compromise. Such pursuit of 'private' interests seems to be regarded as not the role of a government agency and so is left to certified consumer groups. The CAA has been negative about even giving financial assistance (subsidies) to such certified consumer groups, despite such groups being poorly funded.[65]

This was also a feature in Singapore too, with injunctions against unfair commercial practices being issued by the (quasi) NGO Consumers Association of Singapore (CASE), perhaps inspired by the German consumer

63 'Memorandum of understanding (Road vehicle safety)', *ACCC Product Safety Australia* (Webpage) <https://www.productsafety.gov.au/about-us/publications/memorandum-of-understanding-road-vehicle-safety> (accessed 5 February 2024).

64 L Nottage, 'ASEAN Consumer Product Safety Law: Fragmented Regulation and Emergent Product Liability Regimes in Southeast Asia' (Sydney Law School Research Paper 20/13, 2020).

65 Compare the Consumer Law Action Centre, which assists consumers in resolving disputes including via lawsuits (linked to wider consumer protection lobbying and research), which is part funded by the Victorian state government: 'About', *Consumer Action Law Centre* (Webpage) <https://consumeraction.org.au/about/> (accessed 6 February 2024). Cf also, in Thailand, the Establishment of the Council of the Consumer Organization Act (2019). After at least 150 consumer NGOs were registered (achieved in October 2020), the Council was established (including powers to coordinate proceedings for individual NGOs or consumers) with an initial government endowment and can apply for annual funding through the Prime Minister's office. See United Nations Conference on Trade and Development, *Voluntary Peer Review of Consumer Protection Law and Policy: Thailand* (Report, 2022) 18 <https://unctad.org/system/files/official-document/ditccplp2022d1_en.pdf> (accessed 6 February 2024).

law tradition. However, as mentioned above, that power has been shifted to the government itself in recent years.[66] Even now, 'CASE and the Singapore Tourism Board remain the first points of contact for local consumers and tourists respectively to handle complaints' about unfair practices under the Consumer Protection (Fair Trading) Act 2003 (Singapore).[67]

By contrast, under the ACL regime. the ACCC and state or territory regulators have full jurisdiction to directly approach courts to issue injunctions (s 232) and have related powers to have courts make compensation orders (s 237). They also can initiate opt-in representative actions for damages, whereby individual consumers consent to regulators bringing suits damages (s 149 since 1992 for product liability, s 277 since 2010 for mandatory guarantees or minimum performance standards in consumer contract minimums). However, such representative actions have been very rare, especially as US-style opt-out class actions coordinated instead by private law firms have emerged (as outlined in above Part II). New Zealand still lacks such a regime altogether, and the country's regulators also do not have ACL-like powers to have consumers opt-in to representative actions. Japan brought into force — only in 2016 — a more restrictive two-stage class action regime centred on certified consumer NGOs, which has hardly ever been used.

IV Product safety regulation

Despite the aspiration to make the CAA the lead agency for consumer policy, its power is limited regarding product safety. First, as mentioned above, the CAA defers to other government agencies if there exists a statute on product safety for which another part of government remains in charge. For example, Japan's Road Traffic Vehicles Act 1951, for which the MLIT is responsible, sets standards for automobiles. Thus, the CAA does not have power to introduce new regulations concerning automobiles, but may only request the MLIT to amend the law or regulation, or to collaborate with the industry to introduce voluntary standards, if the CAA finds such measures necessary in the face of a consumer incident. Similarly, as the Building Standards Act provides for the standard applicable to elevators and the MLIT is in charge of Japan's Building Standards Act 1950, the CAA's power is limited to demanding the MLIT to take necessary measures to prevent an elevator from moving with the doors open.

Secondly, even when there is no existing statute providing for safety standards for the product, the CAA does not have the power to introduce a

66 Before shifting the injunction power to the SCCC from 2018, it was moved from Consumers Association of Singapore to SPRING in 2016: see 'Public Consultation on Proposed Amendments to the Consumer Protection (Fair Trading) Act ('CPFTA')', *Ministry of Trade and Industry Singapore* (Webpage) <https://www.mti.gov.sg/Newsroom/Public-Consultations/Past-Consultations/Public-Consultation-on-Proposed-Amendments-to-the-Consumer-Protection-Fair-Trading-Act-CPFTA> (accessed 6 February 2024). Part of the background was a very high-profile case of a Vietnamese tourist being misled into purchasing an expensive warranty for a new mobile phone: see J Paterson and V Wong, 'Consumer Protection, Statute and the Ongoing Influence of the General Law in Singapore' (2016) 28 *Singapore Academy Law Journal* 1079.

67 'Consumer Protection (Fair Trading) Act', *CASE* (Webpage) <https://www.case.org.sg/cpfta-lemon-law/> (accessed 6 February 2024).

standard on its own. The Consumer Safety Act, enacted at the same time as CAA's establishment, does authorise the CAA to order recall of products — which have caused a serious incident due to lack of safety — when there is no other statute applicable to the product. Still, if the CAA find it necessary to introduce a safety regulation to prevent further accidents, it may only request METI to add the product to the list of products regulated by Japan's Consumer Products Safety Act 1973 (CPSA).[68] Most recently in 2023, magnet toys and water inflatable balls were added to the list due to reports of small children harmed by swallowing them.[69]

Still, the CAA at least has the central power to collect reports of consumer incidents. The CPSA requires that the manufacturers and importers report to the CAA any serious product related incidents (defined as incidents resulting in serious harm to the life or body of a consumer (death, injury causing hospitalisation for 30 days or more or residual disability, or carbon monoxide poisoning or fire). When this reporting duty was introduced in 2006 — curiously with little, if any, reference to the even wider reporting duty since 2001 under revisions to the EU's General Product Safety Directive — the report from the Japanese supplier was to be made to the ministries in charge. However, since its establishment in 2009, the reports are channelled to the CAA. Prefectural governors, mayors of cities and villages, as well as the NCAC, must report to the CAA any such serious consumer safety incidents. The rationale is that sharing of incident reports is of utmost importance in preventing further occurrence of consumer accidents. It also improves the evidentiary base to develop new product safety standards.

Japan also retains a comparatively unique third-party insurance scheme. This originated from the 1970s when there was similarly growing pressure on the government and firms to improve consumer product safety. Manufacturers get specific products reviewed to be labelled with a quality mark, and bundled with insurance that covers claims made by consumers nonetheless injured by such products. Yet this is a voluntary scheme and its operation has been limited and somewhat controversial.[70]

By contrast, in Australia as mentioned above, the ACCC and/or State or Territory ministers advised by their respective consumer affairs officials can directly set mandatory safety performance or information or warning standards, as well as banning unsafe goods and (albeit very rarely) ordering mandatory recalls. This greater jurisdiction for consumer affairs authorities for

68 Japan's Consumer Products Safety Act 1973 (CPSA) not only provides for safety standards for the listed consumer products, but also imposes on the manufacturer the duty to carry out periodical checks upon request of the consumer for certain products used for a long period of time (currently, oil water heater and oil bath boiler).

69 The CPSA not only provides for safety standards for listed consumer products. Since amendments in 2006, it also imposes on manufacturers the duty to carry out periodical checks upon request of the consumer for certain products used for long periods (currently, oil water heaters and bath boilers).

70 Cf the optimistic assessment of this scheme by John Mark Ramseyer with the doubts raised in C Freedman and L Nottage, 'Revisiting Ramseyer: The Chicago School of Law and Economics Comes to Japan' (2022) 39 *Arizona Journal of International and Comparative Law* 225 with further references.

pre-market controls may help explain why Australian has set mandatory safety standards for more types of products than Japan (but also, eg, New Zealand).[71]

That expertise and familiarity with product safety issues may also have made it easier for the Australian government to initiate a consultation on adding an European-style GSP to the ACL regime. (Similar requirements that consumer products should be safe before being put on the market are also already found in the UK, Malaysia, Hong Kong, Macau, Canada since 2010, partially in Singapore since 2011, and Thailand since 2019).[72] Adding such a GSP should be less of a step if regulators already have considerable experience in setting standards for many types of risky products, as in Australia, especially if in setting such standards they are required to consult with affected businesses and other stakeholders. By contrast, a lack of jurisdiction for the CAA to set product safety standards under the CPSA but only indirectly to consult with METI, and fewer mandatory standards even for specific products, may explain why there has been no formal consultation in Japan about adding such a GSP. However, it could also be that suppliers in Japan are more cautious and diligent about safety issues, which would be consistent with lower voluntary recall rates per capita there compared to Australia.[73]

Furthermore, there has been no government report on its consultation about introducing a GSP, presumably due to opposition from some business sectors as Australian consumer groups have kept pressing for this reform,[74] so an amendment to the ACL seems unlikely at least over the next few years. Instead, in December 2021, the federal Treasury initiated a public consultation about amendments to the ACL to make it easier for the Australian government to recognise overseas safety standards, and more efficiently capture or allow compliance with voluntary Australian and overseas standards recognised under Australian law.[75] Reforms along these lines could lead to even more types of consumer products being covered by mandatory safety standards, further increasing the contrast with Japan (with comparatively few products covered under the CPSA) or countries like New Zealand. If so, over the years it may become easier to go the next step and add a GSP to the ACL.

In this aspect of post-market product safety regulations, Australia instead maintains a less pro-consumer regime than Japan. Suppliers were only

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71 Australia had 46 as of 7 March 2023: 'Mandatory standards', *ACCC Product Safety Australia* (Webpage) <https://www.productsafety.gov.au/product-safety-laws/safety-standards-bans/mandatory-standards> (accessed 6 February 2024). New Zealand has only six mandatory standards set under the Fair Trading Act 1986 (NZ) (Fair Trading Act): K Tokeley, 'Pre-Sale Product Safety Rules' in *Consumer Law in New Zealand*, K Tokeley (ed) (3rd ed, LexisNexis, 2022) p 53.

72 Nottage and Thanitcul (n 11) at pp 438–40.

73 L Nottage, 'Improving the Effectiveness of the Consumer Product Safety System: Australian Law Reform in Asia-Pacific Context' (2020) 43 *Journal of Consumer Policy* 829.

74 See, eg, R Ciaramidaro, 'Australia's weak product safety laws', *Choice* (online, 19 December 2023) <https://www.choice.com.au/shopping/consumer-rights-and-advice/your-rights/articles/weak-product-safety-laws-in-australia> (accessed 6 February 2024).

75 'Supporting Business Through Improvements to Mandatory Standards Regulation under the Australian Consumer Law', *Australian Government The Treasury* (Webpage) <https://treasury.gov.au/consultation/c2021-223344> (accessed 6 February 2024).

required from 2010 under the ACL to inform consumer regulators about product-related deaths or serious injuries and rapid-onset illnesses (not 'near-misses' or other such serious risks of harm). In addition, the reports from suppliers must be kept confidential to the consumer regulators, requiring consent from suppliers to share information from reports even with other sectoral regulators.[76]

Related to product safety, Japan has further introduced a unique organisation for investigation of the cause of serious consumer incidents, the Consumer Safety Investigation Committee (CSIC). It was only established in 2012, 3 years after the establishment of the CC and CAA. Yet it should be regarded as part of the same reform package, not least because such an organisation was recommended in a Resolution of the Upper House when approving the bill establishing the CC and CAA. The aim of CSIC is to identify the cause of a consumer accident and propose measures to prevent further occurrence of incidents, as opposed to pursuing civil or criminal liability of the manufacturer or service provider.

The emphasis on preventive measures arose from the family of an incident's victim. As mentioned, in the background of the reform was several consumer accidents, one of which was the incident when an elevator erroneously started to move. The family member related to that incident spoke in parliament about how the investigation by the police was focused on the criminal liability of the relevant people and not helpful to the victim's family. Nakagawa, an administrative law professor who has been a CSIC member from its inauguration, elaborates the difference.[77] While in pursuing criminal and other liability reference is made to the relevant rules, and the cause of the incident is identified to the extent useful for that purpose, the prevention of similar incidents requires review of all the possibly relevant elements without limitation. This wide scope includes an examination of the reason why a certain law or regulation was not complied with.

As useful for ultimate consumer safety as it may, such a focus on prevention, rather than attributing liability, might reflect the emotional aspect of the consumer law reform in the early 2000s. In fact, the Report of the Study Group for CSIC establishment includes phrases along the lines that findings from the investigation of an incident are 'common assets' for future members of the society and that the investigation shall be made by 'seriously facing' the victim, as such valuable findings could not have been discovered in the absence of the victim. As in the case of the CC, the motivation seems to be the participation of citizens in responses to consumer incidents. Unlike the CC, however, CSIC is a kind of governmental law reform council (*shingikai*) and is placed within the CAA. Nonetheless, it must exercise its powers independently from the CAA. In fact, the CSIC has often made requests to the Director of CAA, as well as the ministries in charge of the relevant products and industry groups, in its investigation reports.

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76 L Nottage, 'Suppliers' Duties to Report Product-Related Accidents under the New Australian Consumer Law: A Comparative Critique' (2011) 25 *Commercial Law Quarterly* 3.

77 T Nakagawa, '消費者事故原因の究明と課題 (The Investigation of the Cause of Consumer Incidents and its Challenges)' (2013) 1461 *Jurisuto* 34.

The latter Commission is an interesting innovation with no obvious parallel in Australia. Consumer problems generally, not limited to product safety, can be investigated by officials under CAANZ if required by one or more consumer affairs ministers.[78] Another avenue for identifying and investigating emerging issues is the Consumer Policy Research Centre, established in 2016 as an independent non-profit think tank but receiving funding from the Victorian state government.[79]

Specifically for product safety issues, however, an interesting partial analogue to the CAA's Consumer Product Safety Commission could be coronial inquests. Even though those are initiated on an ad hoc basis — to investigate the causes of deaths — they sometimes consider consumer services or products (such as Takata airbags) and make recommendations for law and policy improvements aimed at avoiding further deaths or injuries.[80] Coronial inquests proceed in a semi-judicial way but they are not aimed directly at prosecuting illegal behaviour, although evidence and findings from the inquests may lead to separate criminal investigations and lawsuits. The same may occur in larger-scale Commissions of Inquiry, requested by the government and usually chaired by former judges. They have more extensive powers, usually addressing larger scale problems (such as Australia's detailed inquiry into misconduct by banks and other financial institutions),[81] and less rarely implicate unsafe consumer products.

In Australia, and to a lesser extent in Japan, law reformers and commentators are becoming aware of recent European developments. The most influential is likely to be its new General Product Safety Regulation.[82] The European Commission's proposed revisions to the Product Liability Directive, although interestingly, eg, making manufacturers liable for not including or updating adequate cyber-security features resulting in harm to consumers, still have longer to go before being enacted.[83] The trend in Japan

78 For examples of focus areas generating public consultations, see 'Public Consultations', *Australian Consumer Law* (Webpage) <https://consumer.gov.au/consultations-and-reviews/public-consultations/> (accessed 6 February 2024).

79 See 'About CPRC', *Consumer Policy Research Centre* (Webpage) <https://cprc.org.au/about-us/> (accessed 6 February 2024). See also reports on topics at 'Our Work', *Consumer Policy Research Centre* (Webpage) <https://cprc.org.au/our-work/> (accessed 6 February 2024). Nottage serves on the Centre's Consultative Expert Panel established in 2022.

80 See above n 61.

81 See 'Misconduct in the Banking, Superannuation and Financial Services Industry', *Australian Government Royal Commission* (Webpage) <https://www.royalcommission.gov.au/banking> (accessed 6 February 2024).

82 See L Bertuzzi, 'EU finalises new product safety requirements: Here is what changes', *Euractiv* (online, 29 November 2022) <https://www.euractiv.com/section/digital-single-market/news/eu-finalises-new-product-safety-requirements-here-is-what-changes/> (accessed 6 February 2024).

83 See 'New Product Liability Directive', *Policy Podcast* (European Parliamentary Research Service, 13 February 2023) <https://epthinktank.eu/2023/02/13/new-product-liability-directive-eu-legislation-in-progress/> (accessed 6 February 2024). See also, eg, 'New Product Liability Directive', *European Parliament Think Tank* (Webpage) <https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2023)739341> (accessed 6 February 2024); E Turtle and T Bischofberger, 'New Product Liability Laws One Step Closer in Europe' (online, 21 December 2023) <https://products.cooley.com/2023/12/21/new-product-liability-laws-one-step-closer-in-europe/> (accessed 26 February 2024).

and especially in Australia is anyway to bolster public regulation around unsafe products, despite both countries having added strict European-style PL legislation in the 1990s.

V Consumer contracts

Japan's Consumer Contracts Act 2000 was originally inspired by European consumer law. One part deals with pre-contractual dealings, giving consumers (individuals transacting for non-business purposes) broader termination rights than under the Civil Code, partly influenced by what became the EU Unfair Commercial Practices Directive 2005/29. The Act did not include this Directive's extensive 'black list' of specifically prohibited practices. However, successive amendments promoted by the CAA in recent years have added termination rights for consumers impacted by sometimes very specific problems, that have emerged through complaints filed or discussed in the media. Examples include salespersons creating and exploiting romantic infatuations or creating anxiety about body image or religion to induce consumers into contracts (Art 4).[84]

A second part of the Act voids substantively unfair terms, inspired by the EU Unfair Contract Terms Directive 93/13/EEC. Voided terms include certain exclusion clauses, clauses preventing termination rights or requiring excessive liquidated damages, and a catch-all provision voiding other one-sided clauses contrary to the good faith principle (Arts 8–9). The substantive scope of these protections has not been expanded by legislative reform, although the Act was amended from 2006 to allow certified NGOs to bring injunction proceedings against unfair terms, and case law has been mixed.[85] Proposals to introduce a grey list as found in the 1993 EU Directive, which academics have repeatedly made in Japan, have never been accepted, with business interests urging the need for predictable rules.

From this pattern, it seems that procedural unfairness concerns, in Japan but also Australia and beyond (eg, across Southeast Asia and New Zealand),[86] more readily allow for legislative intervention. This could be because there is more philosophical agreement about the law ensuring fair procedures compared to substantively fair outcomes. It could also be due to pre-contractual problems being higher profile and obvious, or bigger in scope (infecting entire contracts), thus making it easier for consumers, NGOs and the CAA to mobilise. As for businesses, especially the majority who do not

84 See, eg, H Sono et al, *Contract Law in Japan* (Kluwer Law International, 2019) pp 66–7.

85 Cf, eg, S Kozuka, 'Judicial Activism of the Japanese Supreme Court in Consumer Law: Juridification of Society through Case Law?' (2009) 27 *Journal of Japanese Law* 81 (language school and university fee cases); Karaiskos (n 3) at 6–7 (apartment lease cases).

86 L Nottage and J Paterson, 'Consumer Contracts and Product Safety Law in Southeast Asia' in *ASEAN Law in the New Regional Order*, P Hsieh and B Mercurio (Eds) (Cambridge University Press, 2019) p 392. Also consistently with this pattern, New Zealand adopted an Australian-style prohibition on misleading conduct through its Fair Trading Act, followed by mandatory minimum performance standards in consumer contracts only in the Consumer Guarantees Act 1993 (NZ) and the European-style wider prohibition of unfair terms only from 2013. However, there was also much resistance to enacting a general prohibition against unconscionable conduct; this only came into effect from 22 August 2022, by amending the Fair Trading Act.

engage in such pre-contractual misbehaviour, they may find such targeted termination rights to be relatively predictable compared to courts ultimately assessing the substantive unfairness of contract terms.

By contrast, in Australia as mentioned above, the ACL has broadly worded prohibitions against misleading or unconscionable conduct in trade, and there are calls to add an even wider prohibition against 'unfair' trading. The ACL (Pt 3-1) and its predecessor has also long prohibited specific unfair practices, allowing sanctions from regulators as well as consumers getting out of related transactions. But these prohibitions target the supplier misconduct or schemes (bait advertising, unsolicited supplies, pyramid schemes, pricing practices, harassment and coercion, etc) rather than situations of vulnerability that consumers commonly find themselves in. Interestingly, speaking at a book launch in 2019, the then Chief Justice of New South Wales was quite sympathetic to the approach under Japan's Consumer Contracts Act because amendments identifying particular types of situations can help courts target problems identified by the legislature, rather than having to rely on general prohibitions under the ACL (eg, against unconscionability).[87] However, it seems more consistent with the historical evolution of the ACL (including its integration with competition law aspects) that it will add an even wider prohibition against unfair commercial practices generally. Even the ACCC, although formally involved in enforcing rather than developing consumer law, has been pushing for this new prohibition particularly due to the growth of e-commerce and digital 'dark patterns'.[88]

Turning from such procedural fairness measures to regulation directly of the substantive fairness of consumer contracts, in contrast to Japan, the ACL (Pt 3-2 Div 1) and its predecessor statute have long set mandatory minimum performance standards (eg, safety, fitness for pre-disclosed purpose, reasonable durability), voiding suppliers' attempts to exclude liability — indeed even in some business-to-business contexts (s 3 of the ACL). The predecessor Trade Practices Act had relied on common law remedies for breach, but the ACL from 2010 largely adopted the mandatory standards and statutory remedies set out in New Zealand's Consumer Guarantees Act 1993. Also from 2010, building on early NSW and especially Victorian state legislation, the ACL (Pt 2-3) added further controls over unfair contract terms generally, such as those requiring unreasonable actions on the part of consumers. Inspired by the 1993 EU Directive, and unlike Japan's Consumer Contract Act, the ACL (s 25) provides a grey list of possibly unfair terms. From 2016, successive amendments have extended these protections also to 'small businesses' (now defined quite widely in s 23(4)) as well as consumers contracting for non-business purposes. This has in turn influenced

87 T Bathurst, 'Guest Blog: Chief Justice Bathurst's Launch of Asian Law Books', *Japanese Law and the Asia Pacific* (Blog Post, 28 November 2019) <https://japaneselaw.sydney.edu.au/2019/11/guest-blog-launch-by-bathurst-cj-of-asian-law-books/> (accessed 6 February 2024).

88 See ACCC, *Digital Platform Services Inquiry* (Interim Report, September 2022) <https://www.accc.gov.au/publications/serial-publications/digital-platform-services-inquiry-2020-2025/digital-platform-services-inquiry-september-2022-interim-report-regulatory-reform> (accessed 6 February 2024) (*Digital Platform Services Inquiry*). See also the public inquiring (including a Consultation Regulatory Impact Assessment) led by the federal Treasury from 31 August 2023: 'Unfair Trading Practices — Consultation Regulation Impact Statement' (n 49).

New Zealand, which amended its Fair Trading Act with effect from 22 August 2022 to void unfair terms in 'small trade contracts'. However, in that country, as in the Act's original 2013 formulation, only the regulator (Commerce Commission) can apply to the courts to have terms declared void. This has happened rarely, and New Zealand therefore has fewer judgments on unfair terms even compared to Australia.[89]

Despite these initiatives in Australia, concerns have been building that unfair terms are still often included and invoked in contracts with consumers, and they find it hard to claim against suppliers (ultimately, eg, through tribunals or courts) their ACL rights to minimum performance standards. Again, focusing on e-commerce and digital platforms, the ACCC started pressing for an amendment so that the ACL would not only allow voiding of unfair terms, but also trigger new powers for regulators to issue civil pecuniary penalties (fines) if they found terms to be unfair. These amendments were passed through the Treasury Laws Amendment (More Competition, Better Prices) Act 2022 (Cth), in force from 9 November 2023.[90] Building on recommendations from a PC report into 'Rights to Repair' finalised in late 2021,[91] the Treasury also started a consultation on adding similar new regulatory sanctions against suppliers found to be not awarding remedies owed to purchasers under the ACL's mandatory minimum performance standards (at least for 'major failures', and possibly only for some types of goods or services).[92] Adding public sanctions in this way, rather than relying on contract parties asserting their statutory rights or voidness of unfair terms, is a comparatively unusual approach not envisaged under European consumer contract instruments, and rarely found world-wide.[93]

Adding such new powers to sanction and therefore encourage suppliers to improve the substantive fairness of contracts with consumers (and some other businesses), under the ACL, will be even more impactful when a new 'super-complaints' mechanism is enacted. This reform was a pre-election commitment by the Labor Party that formed government in 2022, and previously in 2019. A UK-style procedure would allow certified consumer NGOs to present preliminary evidence of widespread consumer problems to regulators (such as the ACCC and State or Territory consumer affairs regulators, and possibly others such as ASIC), requiring the regulators within a specified period to investigate and report back publicly on next steps

89 A Sims, 'Unfair Contract Terms' in *Consumer Law in New Zealand*, K Tokeley (Ed) (3rd ed, LexisNexis, 2022) p 290.

90 ACCC, 'ACCC welcomes new penalties and expansion of the unfair contract terms laws' (Media Release, 1 November 2022) <https://www.accc.gov.au/media-release/accc-welcomes-new-penalties-and-expansion-of-the-unfair-contract-terms-laws> (accessed 6 February 2024).

91 Australian Government Productivity Commission, *Right to Repair* (Inquiry Report, 2021) <https://www.pc.gov.au/inquiries/completed/repair#report> (accessed 6 February 2024).

92 'Improving consumer guarantees and supplier indemnification provisions under the australian consumer law', *Australian Government The Treasury* (Webpage) <https://treasury.gov.au/consultation/c2021-224294> (accessed 6 February 2024).

93 Linking this novel enforcement mechanism to Australia's further expansion of unfair terms regulation to more B2B contracts, see J Paterson and H Bolitho, 'Unfair Terms and Legitimate Business Interests in Standard Form Small Business Contracts' (2023) 30 *Competition and Consumer Law Journal* 19.

(including not proceeding further).[94] The May 2023 federal government budget duly announced funding to develop the scheme, which some commentary welcomed as allowing certified advocates for small business (not just consumer NGOs) to raise complaints against other bigger businesses.[95]

Although the LDP mentioned the UK super-complaints system in its proposal on consumer policy as far back as 2008 before the CAA was established, it was not implemented and is hardly ever discussed. Such an innovation seems likely to face difficulties in Japan, as its consumer groups are mostly less expert and/or are not well-resourced (in financial as well as human resources). In addition, Japan's regulators (even the CAA) may be stronger even than in Australia in retaining control over exercise of their discretion, including over where to direct their budget and other resources.

The initiatives sketched above are focused on bolstering regulatory enforcement. However, there also some moves to improve redress options for consumers in Australia. In particular, the ACCC's latest report on digital platforms recommends they be required to have an external Ombudsman scheme.[96] This would be free to consumers and with determinations only binding on the seller and platform, as with Australia's well-established Ombudsman schemes for financial and other services (outlined above in Part II). The expectation is that this innovation could also improve internal dispute resolution directly between consumers and sellers or the digital platforms.

This, too, seems unlikely in Japan, given its weaker system for consumer financial services dispute resolution and lack of comparable Ombudsman schemes in other fields. However, Japan has enacted new laws regulating some aspects of the relationship between platforms and retailers, and requiring big platforms to take down products considered unsafe. While METI administers the former regulation, CAA administers the latter consumer-related law, both in collaboration with JFTC. These enactments are inspired by laws on liability of platforms for defamation etc, and EU consumer law initiatives.[97]

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94 P Cullum, 'Up, up and away! What Australia can learn from two decades of UK "super-complaints"', *Medium* (online, 2 September 2022) <https://medium.com/@PhilipCullum/up-up-and-away-what-australia-can-learn-from-two-decades-of-uk-super-complaints-848e4469a748> (accessed 6 February 2024).

95 E Keating, 'Budget 2023: ACCC to Begin work on "super complaints" pathway to fast-track small business grievances', *Smart Company* (online, 11 May 2023) <https://www.smartcompany.com.au/federal-budget-2023/budget-2023-accc-super-complaints-pathway-small-business/> (accessed 6 February 2024).

96 ACCC, *Digital Platform Services Inquiry* (n 88).

97 See, eg, J Amato, 'Japanese Legislature Passes Act to Regulate Big Tech Platforms', *Winston & Strawn* (Blog Post, 18 December 2020) <https://www.winston.com/en/competition-corner/japanese-legislature-passes-act-to-regulate-big-tech-platforms.html> (accessed 6 February 2024). For legislative and policy-making history for the mainly METI-administered platform liability regime in effect from 2021, including comparisons with the Korean approach, see also S Kozuka, 'Japan's Regulatory Response to Digital Platforms: Comparisons with European and Asian Approaches' (2019) 48 *Journal of Japanese Law* 95.

VI Conclusions

Comparing consumer law and implementation predominantly in Japan and Australia generates many insights into a rapidly evolving field. Both are mature economies and democracies, influenced by Europe and sometimes other jurisdictions in the formulation of their consumer law. Facing also similar problems, including the expansion of the digital economy, there should be little surprise that the two jurisdictions have achieved rather similar substantive consumer law frameworks and protections.

Variations nonetheless exist, partly because of the different underlying approaches to law-making or implementation. The lesser role played by remedies through the judicial process or consumer ADR in Japan, and the impact of the single regulator (ACCC) holding responsibility for both competition and consumer laws in Australia, are salient examples of such differences. Another cause behind the development of unique regulations is the political process, including lobbying by consumer and business groups. Japan retains a narrower focus on B2B transactions (as in European law, many Asian jurisdictions and to a lesser degree, New Zealand), whereas there has been largely bipartisan agreement by successive Australian governments to expand protection to many B2B transactions. Whether this is good or bad given quite specific legislative and institutional contexts, and the causes behind the somewhat greater pace of consumer law reform in Australia, emerge as topics deserving further inquiry.[98]

This article has already shown how academic inquiries based on a broad view of comparative legal analysis can play a significant role. They not only can use fields like consumer law to generate wider insights into foundational aspects of an entire legal system.[99] Comparative socio-legal analysis can also help make consumer law and administration truly useful for the interests of consumers and society as a whole.

98 For preliminary views also on the slower and less expansive development of consumer law in New Zealand compared to Australia, see also the review by L Nottage of K Tokeley (Ed), *Consumer Law in New Zealand* (3rd ed, LexisNexis, 2022) in (2023) 30 *Competition and Consumer Law Journal* 228, also found at 'Comparing "Consumer Law in New Zealand"', *Japanese Law and the Asia-Pacific* (Webpage) <https://japaneselaw.sydney.edu.au/2023/06/comparing-consumer-law-in-new-zealand/> (accessed 6 February 2024).

99 Partly inspired by 'legal formants' theory, see also, eg, L Nottage and S Kozuka, 'Policy and Politics in Contract Law Reform in Japan' in *The Method and Culture of Comparative Law*, M Adams and D Heirbaut (Eds) (Oxford University Press, 2015) p 235.