

# The Comparison of Securities Law and Competition Law among China, Australia and Japan

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**Abstract:** *The substantive laws chosen for comparison in this paper are Securities Law and Competition Law. The countries selected for comparison are China, Australia and Japan. These two substantive laws can have a direct impact on foreign investment. Therefore, the main content of this paper is to discuss, what are the differences in the specific provisions of the laws of these two entities in the three countries? What are the pros and cons of these rules for investors? What should foreign investment focus on when entering these countries?*

**Keywords:** *Securities Law; Competition Law; Comparison*

## 1. Introduction

As major members of the APEC, the three countries have frequent exchanges in trade and international investment. In order to have a more specific and intuitive understanding of the legal investment environment of these three countries, this paper chooses Securities Law and Competition Law as the main discussion content.

## 2. The Comparison of Competition Law among China, Australia and Japan—Anti-monopoly review of cross-border mergers and acquisitions

All member states carry out various economic activities on the basis of opening up the economy and promoting free trade. However, from the perspective of cross-border mergers and acquisitions review of competition law, there are some differences between countries in the review standards of cross-border mergers and acquisitions of anti-monopoly. When dealing with international investment disputes, we may encounter cross-border investment disputes caused by foreign investors violating domestic laws.<sup>[1]</sup> The review of monopolistic behavior in cross-border mergers and acquisitions is a very critical link.

### 2.1. Australia

Australia enacted the Business Conduct Act in 1974, and has made several amendments to the Business Conduct Act through amendments and other legislation, but its legal structure and content have not changed fundamentally, and it remains the backbone of the Australian competition law system. The Competition and Consumer Act is administered and enforced by the Australian Competition and Consumer Commission (ACCC). The ACCC has broad powers to investigate anti-competitive behaviour, including the power to require individuals to provide information, produce documents and submit to inspections.<sup>[2]</sup>

The ACCC Merger Guidelines provide that, although a proposed merger may result in a reduction in competition, the merger will not be prohibited if it will result in certain market benefits. Because mergers may reduce competition and harm consumers' interests, not all mergers that can produce market benefits can be allowed, and regulators should be cautious in applying the efficiency defense. According to the provisions of the Merger Guidelines, an efficiency defense must at least meet the following conditions:

Market efficiencies are created by mergers. It means that the efficiency is the unique market efficiency produced by the merger, which can only be produced by the merger. When conducting antitrust review, regulators should assess whether the market efficiency is generated by the merger itself. If the efficiency can also be generated without the merger or when other conditions other than the merger are established,

it should not be considered resulting from a merger, the efficiency defense cannot be applied.<sup>[3]</sup>

Market efficiency brings benefits to consumers. For regulators, the biggest concern is the impact of the merger on consumers. The fundamental reason why a merger is prohibited is that it harms the interests of consumers, and if the merging enterprise wants to claim the efficiency defense, it should focus on evaluating whether the market efficiency produced by the merger is beneficial to consumers. If the market efficiencies created by mergers can bring benefits to consumers, then mergers and acquisitions may be allowed.<sup>[4]</sup>

Market efficiency is more than enough to offset the damage from mergers. The premise of the efficiency defense is that the efficiency generated by the proposed merger can offset the damage to the market and consumers caused by the reduction of competition caused by the merger. Only when the overall welfare is greater than or at least equal to the overall damage can the merger be allowed. Otherwise, the grounds for the efficiency defense do not stand.<sup>[5]</sup>

Market efficiency can be demonstrated. It is not easy to prove something that has not happened in the future, but in the review process, it is necessary to formulate normative standards of proof and rules of proof to regulate the application of efficiency defenses. In practice, there are only a handful of cases where the efficiency defense can be adopted by regulatory agencies, mostly for reasons of proof. Merged companies may deliberately exaggerate benefits in their review submissions to gain the trust of regulators. This requires the regulatory agency to use the materials submitted by the enterprise as an auxiliary judgment factor in the review and conduct a quantitative analysis of the benefits of the merger.<sup>[6]</sup>

In the face of the special turmoil caused by the new crown epidemic, global antitrust regulators, including the ACCC, are taking corresponding measures according to the current situation. For example, the ACCC promotes conduct that would normally breach competition law while conducting antitrust review and enforcement as usual. Today's global market, including Australia, is experiencing a new wave of mergers and acquisitions. Along with the wave of mergers and acquisitions, regulators are reforming their antitrust review methods. Australia will implement new foreign investment rules on January 1, 2021. The new regulations require overseas transactions that do not require foreign investment review to also undergo Australian foreign investment review (ie FIRB review). FIRB will issue a "no objection" opinion only if the ACCC confirms that there are no competitive impact concerns about the proposed transaction. In practice, this means more transactions are being reviewed by the ACCC - all transactions reported to FIRB are reviewed by the ACCC.<sup>[7]</sup>

## **2.2. China**

On August 1, 2022, the newly revised Anti-Monopoly Law was officially implemented, which is undoubtedly a milestone progress in China's anti-monopoly law. China requires the following three points for the declaration of foreign capital mergers and acquisitions:

### **2.2.1. Requiring that mergers and acquisitions meet certain standards.**

According to the declared standard, it can be divided into unilateral standard and double standard. The unilateral standard means that as long as one party meets the declaration standard, it should submit a merger application to the competent authority. Double standards mean that every condition requires consideration of at least the turnover of the two parties to the merger or whether the two parties have reached the minimum standard. China adopts unilateral standards.

### **2.2.2. Report in accordance with the statutory content.**

In China, the content of the declaration includes:(1)The status of the business personnel participating in the M&A project. (2)Covering the name of the company, the goods produced, the number of employees, the number of properties and debts owed, last year's sales profit, and a series of questions about business conditions; Financial statements and business forms at the accounting meeting; (3) The business personnel who carry out the merger project together propose a series of information such as the production or sales cost, selling price, and total production volume of the merged goods; (4) The impact of the execution of the merger on the overall economy and The significance of the rights and interests of the people's society; (5) the reasons for mergers and acquisitions. (6) Materials related to the acquired company and the market. For example, the specifications of the relevant goods market and the regional market, and the market position of the companies involved in the merger and acquisition project.<sup>[8]</sup>

### **2.2.3. Obtain the result within the statutory time.**

According to the formulation and implementation of anti-monopoly laws in other countries and China,

reports on concentration of undertakings are usually divided into two types: prior notification and post-procedure notification. China adopts the pre-declaration system, which is a model of mergers and acquisitions after declaration.

The judgment conditions of monopoly review are divided into structuralism and behaviorism. Structuralism focuses on manipulating this state. No matter what the reason is, as long as it affects the normal operation of the market, mergers and acquisitions must be stopped. Behaviorism pays attention to manipulative behavior, which makes up for the shortcomings of the first form. It includes market share and market aggregation level as the key conditions for judging corporate mergers and monopoly, but it is not the only condition, and it also takes into account changes in the market environment. and many other reasons.

China's censorship system not only uses behaviorist manipulative behavior as a major part of the censorship conditions, but also incorporates structuralist conditions. Once the burden of competition brought by peers to companies with market share disappears, such companies can freely adjust the price and quality of products according to their own interests, or use their monopoly in the market, regardless of the external environment. The state restricts trading by driving down prices and undermining competition in the market. In addition, there are many international companies merged by foreign capital in China. Compared with ordinary Chinese companies, the assets, market influence, and technological foundation of these international companies are much better than those of Chinese domestic companies. , it is easy to monopolize the phenomenon, therefore, the behaviorism condition is the key criterion for China's governance of international enterprises.<sup>[9]</sup>

### 2.3. Japan

Japan's anti-monopoly legal regulations on corporate mergers and acquisitions started relatively late, with the "Prohibition of Monopoly Law" as the main law. The reasons for adopting this legislative model are roughly as follows: 1. The nature of monopoly and unfair competition is different, and the way the law adjusts it Different: In view of the duality of both advantages and disadvantages of monopoly, it is determined that the law adopts a parallel adjustment method of protection and prohibition of monopoly behavior; unfair competition behavior is harmful to economic development, and the law strictly prohibits it; 2. Separate Legislation is beneficial to the operation: the anti-monopoly law regulates monopoly behavior, which is higher than the recognition and regulation of unfair competition behavior in terms of law enforcement technology, operation, and flexibility; 3. The protection objects have different emphases: the anti-unfair competition law is mainly to protect the interests of operators, while the anti-monopoly law is mainly to protect the interests of consumers and operators.<sup>[10]</sup>

Japan has established an independent collegial body—the Fair Trade Commission—according to the 'Prohibition of Monopoly Law'. It exercises its functions independently, free from any other external interference, and enjoys quasi-legislative, quasi-judicial and executive powers in charge of implementing the Anti-Monopoly Law. The Fair Trade Commission can make designated unfair trading methods, etc., and announce the designated declaration, approval application, case handling procedures, etc.; through quasi-judicial procedures, taking measures against relevant behaviors that restrict competition; accepting and reviewing the application reports submitted by enterprises in accordance with the law, and coordinating other economic activities. Laws, regulations and administrative measures so that they do not conflict with anti-monopoly laws, etc.

Japan's substantive standard for the control of corporate mergers and acquisitions is the "substantial reduction of competition" standard. The Fair Trade Commission pays special attention to the degree of industry monopoly when conducting merger review. If the degree of monopoly increases after the completion of the merger, it will conduct an in-depth analysis of whether there are substitute products and the possibility of entry of other competing companies. If it is judged that the market competition can continue to be maintained, the merger and acquisition will be agreed. For industries with fierce international competition, the focus is on the international market share, so even if the domestic market share is high, it may pass the M&A review.<sup>[11]</sup>

In terms of reporting system, Japan stipulates in the 'Prohibition of Monopoly Law' that it adopts a prior reporting system for business mergers and divisions. According to the provisions of the law, when foreign businessmen establish new enterprises in the liberalized industrial field, the approval system is no longer implemented, but the declaration system is implemented. Any foreign investor who complies with the law must file an application in accordance with legal procedures, and can obtain an automatic license to carry out actual investment activities after 30 days. The prescribed notification requirements

are: the domestic turnover of the acquiring company as a corporate group reaches 5 billion yen. In addition, when the domestic turnover of the transferee company exceeds 20 billion yen, and the domestic turnover of the company related to the transfer exceeds 3 billion yen, it is also required to report.<sup>[12]</sup>

#### **2.4. The Comparison**

In contrast, China's anti-monopoly review of cross-border mergers and acquisitions focuses on the company's own market share in the market and its ability to manipulate the market. However, Australia and Japan pay more attention to the substantial damage to the market caused by the monopolistic behavior of cross-border mergers and acquisitions. In comparison, China's anti-monopoly review pays more attention to formal fairness and the protection of domestic enterprises. The antitrust reviews in Australia and Japan pay more attention to substantive fairness. Under the influence of the epidemic, Australia's antitrust law enforcement agency has also begun to strengthen antitrust review of cross-border mergers and acquisitions. These trends deserve the attention of foreign investors.

### **3. The Comparison of Corporate Governance and Securities Law among China, Australia and Japan—Environment information disclosure**

#### **3.1. Australia**

The origins of corporate governance in Australia include a range of legislation, accounting standards, listing rules issued by the Australian Stock Exchange ("ASX"), corporate governance best practice codes and other rules. There are also separate provisions for information disclosure of listed companies.<sup>[13]</sup>

Australia has long developed an environmental information disclosure system and has built a relatively mature system. In particular, energy extraction companies such as oil and mining, which may cause serious pollution, have disclosed corporate environmental information through independent environmental reports as early as the 1980s. The Australian Accounting Standards Board's Emergency Committee published Briefing Note No. 4 in 1995, requiring adjudicatory corporations to disclose in their financial reports the amount spent on environmental remediation and to display that amount as a liability on the balance sheet.<sup>[14]</sup> In 1996, the Australian Mining Industry Environmental Management Standards established new standards for the mining industry such as environmental management system, environmental accounting information disclosure, risk management system, etc., and standardized the environmental information disclosure and environmental risk management system of listed companies in the mining industry in Australia.

The Public Environmental Reporting Framework: An Australian Approach was published by the Australian Department of Environment and Heritage in 2000. The Triple Bottom Line Report - Reporting Guidelines for Environmental Indicators from Australia was released in 2003. In addition to the active promotion of the government, most of Australia's mineral resources are near the aboriginal settlements. Under the conditions of the Australian Aboriginal culture's reverence for the land and the government's respect for the Aboriginal culture, mining companies will be more active in disclosing environmental information to win a better reputation among investors, the public, the media and other aspects.<sup>[15]</sup> At the same time, non-profit organizations dedicated to protecting the environment and indigenous culture will also put pressure on listed companies in the mining industry through online and offline publicity, so that companies pay more attention to environmental issues, participate more actively in environmental activities, and proactively disclose more environmental information.

The mining industry in Australia is dominated by private enterprises, and listed companies must comply with the Listed Company Governance Code and fulfill the obligation to disclose environmental information. As shareholders participate in shareholder meetings, have the right to speak and have a certain influence on the company, the management and board of directors will therefore disclose more environmental information, fulfill additional corporate social responsibilities, have a strong environmental awareness, and participate more actively in environmental protection activities.<sup>[16]</sup> In addition, non-governmental organizations (third-party organizations) concerned with environmental issues will also exert pressure on listed companies in the Australian mining industry (through online and offline environmental publicity campaigns, etc.), enhance the environmental awareness of relevant enterprises, participate more actively in environmental protection activities, and disclose more environmental information.

The basic environmental information disclosed by Australian mining listed companies in their

independent environmental reports includes: corporate environmental philosophy, sustainable development strategy, sewage discharge, environmental protection projects that the companies participate in. On top of this, it also incorporates information about the health and safety of employees and the impact on the environment in their communities. These include: the physical and mental health of employees, the safety of the working environment, the impact on the community and related environmental protection projects, the respect for indigenous culture and investment projects, the protection of land resources, water resources and ecological diversity, and the efforts made in climate change and greenhouse gas reduction, so that the Sustainable Development Goals and 17 Sustainable Development Goals are integrated.<sup>[17]</sup>

The environmental information disclosure form of Australian mining companies has significant advantages as follows : (1) The environmental information disclosure content of enterprises is more timeliness. Enterprises can disclose the latest environmental information at any time through websites, media conferences and other forms rather than according to the financial year; (2) The radiation of information users is wider, and it is more convenient for users who do not pay attention to the annual report; (3) The amount of information disclosed by enterprises is larger, and enterprises may not be able to disclose all environmental information due to the limitation of the length of the annual report of the board of directors and the notes; (4) It is more convenient to communicate with information users, and enterprises can quickly receive feedback from users by disclosing in the form of press conferences or networks; (5) Through new ways of disclosure other than annual reports, enterprises can disclose relevant information in a way that better meets their needs.<sup>[18]</sup>

### 3.2. China

As for the current legal supervision system of information disclosure in China, the securities market has formed a well-defined system with the Securities Law as the main body and other normative documents such as administrative regulations and departmental rules as supplements, covering two stages of initial information disclosure and continuous information disclosure after listing.

In 2015, the Environmental Protection Law was promulgated, which not only strengthened the supervision and punishment of the regulatory bodies on the environment, but also made mandatory provisions on the information such as the government's release of environmental bulletins and the release of pollution announcements by key polluters from the legislative level, greatly improving the openness and transparency of environmental information disclosure. In 2016, China began to implement environmental inspection work led by the central government to achieve comprehensive supervision of local governments, environmental protection departments and enterprises. In 2018, China established the Ministry of Ecology and Environment, which unified environmental law enforcement and supervision, and promoted the disclosure of environmental information on water pollution, air quality and corporate environmental violations in various regions.<sup>[19]</sup>

Since the reform and opening up, the State Council, the State Environmental Protection Administration (MEP), the Ministry of Finance, the Securities Regulatory Commission, and other institutions have developed and promulgated pertinent laws, regulations, rules, and standards in order to better regulate and supervise the disclosure of environmental information by enterprises. Environmental regulatory departments, through the formulation of relevant environmental laws and regulations, use legal means to compel enterprises to disclose environmental information that should be disclosed. Securities regulatory departments shall make relevant provisions on the specific ways and contents of environmental information disclosure by listed companies.<sup>[20]</sup>

Current rules for corporate environmental information disclosure are outlined in the Guidelines for Environmental Information Disclosure of Listed Companies (Draft for Comments), and the overall trend is that the requirements for disclosure are becoming higher and clearer. However, there are still some problems: First, from the perspective of disclosure rules, the flexibility of information disclosure willingness is too large, except for mandatory disclosure rules adopted by heavy pollutant discharge units, the mandatory requirements for other industries are relatively low, mainly voluntary disclosure; Second, from the perspective of disclosure content and disclosure method, the disclosure content is not systematic, scattered and fragmented, and no clear provisions are made on the disclosure method. Websites and related reports (including corporate annual reports, social responsibility reports, environmental reports, etc.) enterprises can choose their own disclosure methods, and generally lack a unified disclosure method. Third, from the perspective of the disclosure subject, heavy polluting enterprises are the main body, and this type of enterprises are mainly divided by environmental protection regulatory authorities, and the basis for division is more vague and the possibility of artificial operation is greater. The above problems

show that China's environmental information disclosure system still needs to be improved.

### 3.3. Japan

Prior to 2006, Japan's Commercial Code and Securities Exchange Law undertook the task of establishing rules related to information disclosure. The Commercial Code provides accounting rules to facilitate the preparation of financial reports of listed companies, while the Securities Exchange Act is a product of borrowing from the Securities Exchange Act of 1934 of the United States, because the enactment of the Act was formulated in combination with the actual situation of Japan during the period of American control of Japan in order to innovate the supervision of the Japanese securities market.<sup>[21]</sup> At first, the Japanese Securities Exchange Law only required the initial information disclosure of listed companies, and the disclosure content only stipulated the main business and financial status.

However, with the continuous development of the Japanese financial industry, especially after 2000, the internationalization of the financial industry increasingly showed the drawbacks of the Japanese information disclosure system, and the Japanese government gradually realized that the information disclosure system should be improved to cope with the new market pattern.<sup>[22]</sup> As a result, the Financial Commodity Exchange Law (hereinafter referred to as the "Gold Commercial Law") was promulgated in 2006, supplementing the previously incomplete information disclosure causes and establishing the continuous disclosure obligation of disclosure obligors. Since then, the "Gold Commercial Law" has completely replaced the "Securities Exchange Law."

Japan, with its small land area and lack of resources, has a huge population, which makes it necessary to consider the environmental bearing capacity when developing economy, and can not sacrifice the environment in exchange for excessive economic development. Therefore, Japan pays more attention to the development of environmental protection, and the construction of environmental laws and regulations is relatively mature and perfect.

In 1977 and 1986, the Japanese government successively formulated the Long-Term Concept of Environmental Protection and the Long-term Plan for Environmental Protection, which provided a complete code of conduct for the government's environmental governance. In 1993, the Environmental Basic Law was promulgated, which became the first laws and regulations concerning basic environmental protection policies formulated by the government. Subsequently, based on the Environmental Basic Law, the Japanese government formulated three guiding strategic plans successively in 1994, 2000 and 2006, laying the foundation for the smooth development of environmental protection work in the next stage.

The Japanese government has also set up special administrative regulations to promote enterprises to carry out environmental assessment. For example, when approving large construction projects, the government requires companies to conduct environmental assessments of their projects and disclose the results to the public in accordance with relevant regulations in order to listen to stakeholders' opinions and develop more effective project plans. To ensure that measures are taken, the Ministry of the Environment will strictly review the environmental assessment procedures of enterprises.

With regard to the preparation and disclosure of environmental reports, the Japanese Government has gradually established detailed and systematic rules. In 2003, the Japanese government issued the "Environmental Reporting Guidelines 2003", which explains and specifies the structure, content and relevant environmental information that must be covered in environmental reporting. In 2005, the Japanese government promulgated the Law on the Promotion of Environmentally Friendly Acts to clarify in legal form the mandatory disclosure and compliance of environmental information by relevant government agencies.

In 2000, the Japanese government formulated the Guidelines for Environmental Performance Indicators and revised them in 2002 to more accurately assess the damage and impact of environmental behaviors and related activities on the environment in the course of business operations, that is, to measure environmental performance. The first and second editions of the guidelines have established a systematic framework for enterprises' environmental performance assessment, greatly promoted their environmental protection activities, and laid an institutional foundation for the formulation of performance assessment indicators in the environmental reporting guidelines issued later. The guidelines include not only relevant provisions for the disclosure of environmental reporting information, but also relevant provisions for accounting information.

### 3.4. The Comparison

In comparison, among the three countries, Australia's environmental information disclosure system is the most complete, which has a great relationship with the development of local economy and mining industry. For investors, a sound information disclosure system can provide a clear standard for enterprise compliance construction. Be able to respond adequately before entering the market. Of course, high standards mean high requirements for enterprises. Investors need to take environmental indicators into account when making relevant investments. China's environmental information disclosure system is relatively backward and only provides environmental information disclosure system for key enterprises. For investors, it means that there is no need to have high environmental requirements. However, once faced with relevant litigation disputes, there may be uncertainty in the application of law, which will bring certain risks to the compliance of enterprises.

### 4. Conclusion

For investors, there are vast investment markets in Asia. However, before making overseas investments, it is necessary to fully understand the legal systems of different Asian countries. In terms of the content of competition law, corporate governance and securities law compared in Australia, Japan and China, there are great differences. Because competition law, corporate governance and securities law contain relatively rich content, this paper selects a representative system for investors to discuss. In general, countries with better legal development have higher compliance requirements for foreign investors. For countries with less detailed legal provisions for the time being, although investors do not need to face higher investment thresholds at present, they will face greater location risk.

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