

WHAT LESSONS CAN THE LUCKIN COFFEE SCANDAL OFFER TO  
AUSTRALIA–CHINA CROSS-BORDER LISTED COMPANIES’  
SUPERVISION?  
PROBLEMS AND REFORM SUGGESTIONS IN CHINA

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*The continuous disclosure compliance of Chinese cross-border companies listed in Australia has long been a concern, as Chinese companies are either frequently delisted or rejected by the Australian Securities Exchange. The particularity of cross-border listings generates information asymmetry between securities regulators based out of the host jurisdiction and the home jurisdiction. This then impacts the effectiveness of the host jurisdiction’s supervision of the cross-border listed companies and each company’s continuous disclosure compliance. The purpose of this article is to clarify the issues surrounding cross-border supervision by the securities regulators in China to shed light on current dilemmas and suggest possible reform proposals. Considering the similarities of the securities markets in the US and Australia, as a case study example, this article looks at Luckin Coffee, a US-listed Chinese company, which created a scandal in 2020 when it was accused of continuous disclosure fraud. The case points out relevant lessons for Australia–China securities cross-border supervision.*

**Keywords:** Securities cross-border supervision, Luckin Coffee scandal, Regulatory cooperation, Enforcement

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## I. INTRODUCTION

Although the cross-border listing of Chinese companies on the Australian Securities Exchange (ASX) is a current and increasing trend, the process has been rocky at best.<sup>1</sup> Not only are Chinese cross-border listed companies easily delisted from the ASX but many are rejected listings as well.<sup>2</sup> Both circumstances can be attributed to continuous disclosure compliance concerns regarding Chinese companies.<sup>3</sup> Apart from the characteristics of Chinese companies per se, securities supervision (or the lack thereof) also serves as an important factor in understanding the continuous disclosure performance of Chinese cross-border listed companies to date.<sup>4</sup>

The particularity of a cross-border listing is that the securities offering and the operations of the cross-border listed company are in two different jurisdictions: where the company is domiciled is its home jurisdiction and where the company is listed is the host jurisdiction.<sup>5</sup> In this situation, information asymmetry is unavoidable between the host jurisdiction and the home jurisdiction. This, consequently, affects critical aspects of the supervision of the cross-border listed company's continuous disclosure performance.<sup>6</sup> Meanwhile, cross-border enforcement of these companies is difficult to achieve under the efforts of only one jurisdiction.<sup>7</sup> Such difficulties have discouraged securities regulatory agencies that, in the end, prefer simply not to attempt enforcement.<sup>8</sup> This has highlighted the issue of securities cross-border supervision and the need to address such regulatory problems through

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<sup>1</sup> Belle Qi Guo, *A Review of the Theoretical Foundations for the Continuous Disclosure Regime between Australia and China: Contributing Factors for Chinese Cross-border Listed Companies' Continuous Disclosure Performance in Australia?* 38 COMPANY AND SECURITIES LAW JOURNAL 66, 66 (2021).

<sup>2</sup> *Id.*, at 67.

<sup>3</sup> *Id.*, at 68.

<sup>4</sup> Lu Bin (吕斌), Ye Lin: Kuajing Jianguan Hezuo Nanti Daijie (叶林: 跨境监管合作难题待解) [*Ye Lin: Cross-border Regulatory Cooperation Problems to be Solved*], Faren (法人) [FAREN MAGAZINE], 40, 40 (2013).

<sup>5</sup> Stephen J. Choi, *Assessing Regulatory Responses to Securities Market Globalization*, 2(2) THEORETICAL INQUIRIES IN LAW 613, 614 (2001). Chao Xi and Yurong Huang, *Are U.S.-Listed Chinese Firms a Minefield? A Broad Perspective*, 54(2) THE INTERNATIONAL LAWYER 201, 205 (2021).

<sup>6</sup> Geoffrey R. D. Underhill, *Keeping Governments out of Politics: Transnational Securities Markets, Regulatory Cooperation, and Political Legitimacy*, 21(3) REVIEW OF INTERNATIONAL STUDIES 251, 264 (1995).

<sup>7</sup> Flora Huang, Xinmin Liu and Horace Yeung, *Coordinated Efforts to Regulate Overseas Listed Chinese Companies: A Historical Perspective and Recent Developments*, 18(1) JOURNAL OF CORPORATE LAW STUDIES 43, 58 (2018).

<sup>8</sup> *Id.* Australian Securities & Investments Commission, *Report 368: Emerging Market Issuers* (August 2013) cl 28.

negotiations and cooperation between various jurisdictions.<sup>9</sup> To clarify this problem and other associated issues and suggest potential reform that can address these, this article examines the key elements of securities cross-border supervision on the Chinese side.

Dating back to the 1990s, when the trend of cross-border listings of Chinese companies began, China has been developing ways to supervise these Chinese companies listed overseas.<sup>10</sup> In 1994, China's State Council issued the *Special Provisions of the State Council Concerning the Floatation and Listing Abroad of Stocks by Limited Stock Companies* ('*Special Provision on Listing Abroad 1994*'),<sup>11</sup> providing a legal basis for the supervision of cross-border listed companies. Since then, China has established securities cross-border regulatory cooperation with many jurisdictions.<sup>12</sup> As of December 2020, the China Securities Regulatory Commission (CSRC) had established bilateral regulatory cooperation with overseas securities regulatory agencies in 66 countries/regions.<sup>13</sup> In addition to such bilateral cooperation, in 2007, the CSRC joined the *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* (MMoU) issued by the International Organization of Securities Commissions (IOSCO).<sup>14</sup> The

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<sup>9</sup> Luo Weilin and Liu Songtao (罗炜琳 and 刘松涛), *Xinshidai Beijing Xia Goujian Kuajing Zhengquan Jianguan Xiezuo Jizhi Yanjiu* (新时代背景下构建跨境证券监管协作机制研究) [*Research on the Construction of Cross-border Securities Regulatory Cooperation Mechanism under the Background of the New Era*], 3 *Fujian Jinrong* (福建金融) [FUJIAN FINANCE] 21, 21 (2020).

<sup>10</sup> Huang, Liu and Yeung, *supra* note 7, at 44.

<sup>11</sup> Guowuyuan Guanyu Gufen Youxian Gongsi Jingwai Muji Gufen Ji Shangshi De Tebie Guiding (国务院关于股份有限公司境外募集股份及上市的特别规定) [*Special Provisions of the State Council Concerning the Floatation and Listing Abroad of Stocks by Limited Stock Companies*] (promulgated by the St. Council of the People's Republic of China, August 4, 1994, effective August 4, 1994), St. Council, Order No 160.

<sup>12</sup> Liu Fengyuan and Qiu Ni (刘凤元, 邱妮), *Zhengquan Shichang Kuajing Jianguan Yanjiu—Yi EMMoU Wei Shijiao* (证券市场跨境监管研究——以EMMoU为视角) [*Research on Cross-border Supervision of Securities Market – From the Perspective of EMMoU*], 12 *Jinrong Jianguan Yanjiu* (金融监管研究) [FINANCIAL REGULATION RESEARCH] 100, 106 (2019).

<sup>13</sup> Zhongguo Zhengjianhui Yu Jingwai Zhengquan (Qihuo) Jianguan Jigou Qianshu De Beiwanglu Yilanbiao (中国证监会与境外证券(期货)监管机构签署的备忘录一览表(2020年12月)) [*List of Memorandums Signed by the China Securities Regulatory Commission and Overseas Securities (Futures) Regulatory Agencies (December 2020)*], 中国证券监督管理委员会 [China Securities Regulatory Commission] (February 25, 2021), [http://www.csrc.gov.cn/pub/newsite/gjbjghz/202102/t20210225\\_393092.html](http://www.csrc.gov.cn/pub/newsite/gjbjghz/202102/t20210225_393092.html).

<sup>14</sup> Liao Fan (廖凡), *Zhongmei Zhengquan Kuajing Jianguan Hezuo Milu* (中美证券跨境监管合作觅路) [*Find Way for Sino-US Securities Cross-border Regulatory Cooperation*], 11 *Zhongguo Waihui* (中国外汇) [CHINA FOREX] 64, 64 (2020).

most recent developments in its securities cross-border supervision is reflected in its newly revised *Securities Law of the People's Republic of China* ('*Securities Law 2019*'), which, for the first time, established China's jurisdiction over the non-compliance of cross-border listed companies.<sup>15</sup>

In spite of the foregoing efforts, the recent non-compliance scandals around Chinese companies listed overseas highlight the shortcomings in the current securities cross-border supervision regime in China, which calls for further research.<sup>16</sup> In the context of Chinese companies listed on the ASX, these shortcomings will unavoidably influence the continuous disclosure compliance of Chinese companies listed in Australia.<sup>17</sup>

To understand the problems facing China's securities cross-border supervision in practice, this article discusses the 'Luckin Coffee Scandal', as a case study, to shed light on the situation. The Luckin Coffee scandal refers to a US-listed Chinese company that was accused of fraud in its continuous disclosures.<sup>18</sup> The scandal has had far reaching repercussions in both regulatory and academic fields in China. As such, there is a considerable amount of publicly available information on it for examination. Moreover, as the scandal happened in 2020 under the latest *Securities Law 2019*, it falls under the most up-to-date securities cross-border supervision philosophies in China. Although the ultimate goal of this article is to diagnose the challenges facing Chinese listed companies' continuous disclosure in Australia, and propose suggestions, the case of a US-listed Chinese company can help us understand the general problems on the Chinese side.

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<sup>15</sup> Zhonghua Renmin Gongheguo Zhengquanfa (2019 Xiuding) (中华人民共和国证券法 (2019 修订)) [*Securities Law of the People's Republic of China (2019 Revision)*], (promulgated by the Nat'l People's Cong., Order No 37, December 28, 2019, effective March 1, 2020), Art 2. Wang Ting (王婷), Qianlun Woguo Zhengquan Shichang Kuajing Jianguan Zhidu De Wanshan—Yi Xin Zhengquanfa De Yuwai Xiaoli Wei Shijiao (浅论我国证券市场跨境监管制度的完善——以新<证券法>的域外效力为视角) [*On the Perfection of the Securities Market Cross-border Supervision System of China—From the Perspective of the Extraterritorial Effect of the New Securities Law*], 12 Caijingjie (财经界) [MONEY CHINA] 111, 111 (2020).

<sup>16</sup> Jiang Liwen and Yang Kehui (姜立文, 杨克慧), Zhonggaigu Kuaguo Jianguan De Falv Chongtu Yu Xietiao (中概股跨国监管的法律冲突与协调) [*The Legal Conflict and Coordination of Transnational Regulation of 'China Concept Shares'*], 11 Nanfang Jinrong (南方金融) [SOUTH CHINA FINANCE] 38, 38 (2020).

<sup>17</sup> Lv, *supra* note 4.

<sup>18</sup> Selina Wang and Matthew Campbell, *Luckin Scandal is Bad Timing for U.S.-Listed Chinese Companies*, BLOOMBERG BUSINESSWEEK (July 30, 2020), <https://www.bloomberg.com/news/features/2020-07-29/luckin-coffee-fraud-behind-starbucks-competitor-s-scandal>.

The remainder of this article is structured as follows. Part II presents the case study of the ‘Luckin Coffee Scandal,’ highlighting existing problems with the securities cross-border supervision in China. Part III details the overall landscape of the securities cross-border supervision regime in China. Part IV analyses China’s securities cross-border supervision with the aim of diagnosing the underlying issues. Part V offers suggestions on improving securities cross-border supervision in China. Part VI concludes.

## II. CASE STUDY: ILLUMINATING SECURITIES CROSS-BORDER SUPERVISION OF LUCKIN COFFEE

This section examines the ‘Luckin Coffee Scandal,’ with the aim of shedding light on current problems with China’s securities cross-border supervision. We can foresee that such problems in supervising cross-border listed companies can exist regardless of their host jurisdiction.

### A. A Brief Overview of the Luckin Coffee Scandal

Luckin Coffee Inc. (‘Luckin Coffee’) was founded in China in November 2017.<sup>19</sup> The company then held its initial public offering (IPO) on the NASDAQ in the US in May 2019,<sup>20</sup> becoming the first company to initiate an IPO so quickly after its establishment.<sup>21</sup> As of the end of 2019, Luckin Coffee had become the largest coffeehouse chain brand in China.<sup>22</sup> Unfortunately, on 31 January 2020, Muddy Waters Research, a well-known due diligence based investment firm in the US,<sup>23</sup> shorted the shares of Luckin Coffee and released an anonymous report, alleging significant fraud in the company’s

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<sup>19</sup> *Id.*

<sup>20</sup> *Luckin Coffee*, WIKIPEDIA (September 1, 2021), [https://en.wikipedia.org/wiki/Luckin\\_Coffee](https://en.wikipedia.org/wiki/Luckin_Coffee).

<sup>21</sup> Qian Cao, *Empirical Study on Financial Fraud of Luckin Coffee 1*, (Conference Paper, International Conference on Economic Management and Model Engineering, 21 November 2020), *available at* <https://ieeexplore.ieee.org/stamp/stamp.jsp?tp=&arnumber=9434762&tag=1>.

<sup>22</sup> Han Hongling et al (韩洪灵 et al), Ruixing Shijian Yu Zhongmei Kuajing Zhengquan Jianguan Hezuo: Huigu Yu Zhanwang (瑞幸事件与中美跨境证券监管合作: 回顾与展望) [*The Luckin Incident and Sino-US Cross-border Securities Regulatory Cooperation: Review and Outlook*], 9 *Kuaiji Zhi You* (会计之友) [FRIENDS OF ACCOUNTING] 6, 6 (2020).

<sup>23</sup> The Muddy Waters Research is famous for its successful attacks on the weak governance of listed companies in the US. See Zhe Peng and Yahui Yang, *A Ripple in the Muddy Waters: The Luckin Coffee Scandal and Short Selling Attacks 2*, (Working Paper, School of Business & Economics, Wilfrid Laurier University, August 2020) 2, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3672971](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3672971).

continuous disclosures in 2019.<sup>24</sup> According to its short-selling report, the fraud ranged from inflated profits and related party transactions to board arrangements with potential losses among public investors.<sup>25</sup> Subsequently, the share price of the company dropped suddenly that same day.<sup>26</sup> Luckin Coffee did not confirm these corporate disclosure improprieties until 2 April 2020. At that time, it issued an announcement, admitting to false transactions of RMB 2.2 billion between the second and fourth quarters of 2019.<sup>27</sup> In the following months, it experienced several trading halts and received two delisting notices from NASDAQ.<sup>28</sup> The company was finally delisted from the NASDAQ on 29 June 2020.<sup>29</sup>

### *B. Host Jurisdiction: Limited Investigation Resources*

In conducting securities supervision of Luckin Coffee regarding the above-mentioned non-compliance, the securities regulatory agencies in the host jurisdiction (the US) faced obstacles in obtaining the necessary information for an investigation of the company's records.<sup>30</sup> Specifically, the US Securities and Exchange Commission (SEC) and the Public Company Accounting Oversight Board (PCAOB) were unable to gain timely access to the appropriate documents and information in China—the home jurisdiction of Luckin Coffee—to conduct company audits.<sup>31</sup> As these obstacles continue to

<sup>24</sup> @muddywatersre (MuddyWatersResearch), TWITTER, (February 1, 2020, 3:00am AEST), <https://twitter.com/muddywatersre/status/1223274746017722371>.

<sup>25</sup> Muddy Waters Research, *Luckin Coffee: Fraud + Fundamentally Broken Business*, (January 31, 2020) <https://drive.google.com/file/d/1LKOYMPXVo1ssbWQx8j4G3-strg6mpQ7F/view>.

<sup>26</sup> *RepRisk Case Study Luckin Coffee*, REPRISK AG (June 2020), <https://www.reprisk.com/media/pages/news-research/modules/case-studies/luckin-coffee/1898928569-1630564167/reprisk-case-study-luckin-coffee.pdf>.

<sup>27</sup> Gagan Kukreja, *The Spillover of the Coffee: Material Misstatements at (un)Luckin Coffee Inc.*, 5(2) INDIAN JOURNAL OF FINANCE AND BANKING 106, 109 (2021).

<sup>28</sup> 'RepRisk Case Study Luckin Coffee', *supra* note 26.

<sup>29</sup> Peng and Yang, *supra* note 23.

<sup>30</sup> Haodi Dong, *A Tug of War Over Record Books: How a Coffee Shop Scandal Could End a Decade-Long Deadlock Between the SEC and Chinese Regulators*, JOURNAL OF BUSINESS & INTELLECTUAL PROPERTY LAW (July 8, 2020), <http://ipjournal.law.wfu.edu/2020/07/a-tug-of-war-over-record-books-how-a-coffee-shop-scandal-could-end-a-decade-long-deadlock-between-the-sec-and-chinese-regulators/>.

<sup>31</sup> *China-Related Access Challenges*, PUBLIC COMPANY ACCOUNTING OVERSIGHT BOARD (September 7, 2020), <https://pcaobus.org/oversight/international/china-related-access-challenges>. Jing Yang, Juliet Chuang and Julie Steinberg, *Coffee's for Closers: How a Short Seller's Warning Helped Take Down Luckin Coffee*, THE WALL STREET JOURNAL (June 29, 2020), <https://www.wsj.com/articles/coffees-for-closers-how-a-short-sellers-warning-helped-take-down-luckin-coffee-11593423002>.

exist, the US regulators have issued notifications to raise investor awareness and protect investor interests.<sup>32</sup>

On 21 April 2020, the SEC and PCAOB jointly issued the following statement to the public: ‘Emerging Market Investments Entail Significant Disclosure, Financial Reporting and Other Risks; Remedies are Limited’.<sup>33</sup> The statement warned investors of the questionable quality and compliance level of US-listed Chinese companies’ information disclosures, considering the PCAOB’s limited ability to obtain the necessary documents to audit these Chinese based companies.<sup>34</sup> To address the problem of limited information on US-listed Chinese companies, the President’s Working Group on Financial Markets (PWG) published a report and recommendations on ‘Protecting Investors from Significant Risks from Chinese Companies’ on 24 July 2020.<sup>35</sup> In this report, the PWG evaluated the risks to investors derived from the failure, from the Chinese side, to allow the PCAOB access to US-listed Chinese companies’ auditing documents.<sup>36</sup> Additionally, it proposed corresponding recommendations for future standards that would require access for the PCAOB to audit company documents as a listing condition, or provide a co-audit from a firm determined by the PCAOB to have sufficient company access.<sup>37</sup> These recommendations were signed into law on 18 December 2020 in the Holding Foreign Companies Accountable Act (HFCAA).<sup>38</sup> The HFCAA requires companies listed in the US to allow

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<sup>32</sup> Xiaochen Zhang, *The Impact of Regulation: The US-China Relationship and Cross-Listings in the after Covid World*, Conference Paper, CIBEL Global Network Conference: Corporate Law and Practice in Turbulent Times, September 3, 2021.

<sup>33</sup> SEC Chairman Jay Clayton et al, *Emerging Market Investments Entail Significant Disclosure, Financial Reporting and Other Risks; Remedies are Limited*, U.S. SECURITIES AND EXCHANGE COMMISSION (April 21, 2020), <https://www.sec.gov/news/public-statement/emerging-market-investments-disclosure-reporting>.

<sup>34</sup> *Id.*

<sup>35</sup> *President’s Working Group on Financial Markets Releases Report and Recommendations on Protecting Investors from Significant Risks from Chinese Companies*, U.S. DEPARTMENT OF THE TREASURY (August 6, 2020) <https://home.treasury.gov/news/press-releases/sm1086>.

<sup>36</sup> *Email from Steven T. Mnuchin, Chairman, President’s Working Group on Financial Market to the Honorable Donald J. Trump, the White House* PRESIDENT’S WORKING GROUP ON FINANCIAL MARKETS: REPORT ON PROTECTING UNITED STATES INVESTORS FROM SIGNIFICANT RISKS FROM CHINESE COMPANIES (July 24, 2020), available at <https://home.treasury.gov/system/files/136/PWG-Report-on-Protecting-United-States-Investors-from-Significant-Risks-from-Chinese-Companies.pdf>.

<sup>37</sup> *Id.*

<sup>38</sup> Jay Clayton, *Statement after the Enactment of the Holding Foreign Companies Accountable Act*, U.S. SECURITIES AND EXCHANGE COMMISSION (December 18, 2020), <https://www.sec.gov/news/public-statement/clayton-hfcaa-2020-12>.



the PCAOB to inspect relevant company documents; any company that fails to comply for three consecutive years will be delisted.<sup>39</sup>

These US regulatory activities following the Luckin Coffee scandal highlight that currently, China's securities regulatory cooperation is weak.<sup>40</sup> The underlying causes of such problems are worthy of in-depth analysis to identify potential solutions. These will be discussed in a later section.

### *C. Host Jurisdiction: Lack of Securities Enforcement*

China, as the home jurisdiction, also investigated Luckin Coffee's fraud from a domestic perspective. As announced on 27 April 2020, the CSRC dispatched a team to Luckin Coffee to examine the company's false information disclosures.<sup>41</sup> In the following months, together with China's Ministry of Finance and its State Administration of Market Supervision, the CSRC investigated suspected non-compliant activities of the company and its domestic operating entities and domestically related parties.<sup>42</sup> However, among the various regulatory outcomes, there has been a lack of enforcement under the Securities Law, which should be the most authoritative law regulating listed companies' continuous disclosure in the hierarchy of Chinese legislation.<sup>43</sup> In other words, Luckin Coffee's domestic operating

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<sup>39</sup> *President Signs Kennedy's Bill to Protect Americans from Fraudulent Foreign Companies into Law*, JOHN KENNEDY U.S. SENATOR FOR LOUISIANA (December 18, 2020), <https://www.kennedy.senate.gov/public/press-releases?ID=6CBCBD77-97BD-41C1-A2FA-6D6CDA4A1B81>.

<sup>40</sup> Zhang, *supra* note 32.

<sup>41</sup> Zhongguo Zhengjianhui Youguan FuZeren Da Jizhe Wen (中国证监会有关负责人答记者问) [*Relevant Person in Charge of China Securities Regulatory Commission Meets the Press*], 中国证券监督管理委员会 [CHINA SECURITIES REGULATORY COMMISSION] (April 27, 2020), available at <http://www.csrc.gov.cn/csrc/c100028/c1000790/content.shtml>.

<sup>42</sup> Guanyu Ruixing Kafei Caiwu Zaojia Diaocha Chuzhi Gongzuo Qingkuang De Tongbao (关于瑞幸咖啡财务造假调查处置工作情况的通报) [*Announcement on the Investigation and Disposal of Luckin Coffee Financial Fraud*], 中国证券监督管理委员会 [CHINA SECURITIES REGULATORY COMMISSION] (July 31, 2020), <http://www.csrc.gov.cn/csrc/c100028/c1000725/content.shtml>.

<sup>43</sup> The hierarchy of legislation in China is as follows: "the Constitution shall have the supreme legal effect, and no laws, administrative regulations or departmental rules may contravene the Constitution. The effect of laws shall be higher than that of administrative regulations and departmental rules. The effect of administrative regulations shall be higher than that of departmental rules." See Zhonghua Renmin Gongheguo Lifa Fa (中华人民共和国立法法 (2015 修正)) [*Legislation Law of the People's Republic of China (2015 Amendment)*], (promulgated by the Nat'l People's Cong., March 15, 2015, effective March 15, 2015) arts 87-88, available at [http://www.gov.cn/xinwen/2015-03/15/content\\_2834595.htm](http://www.gov.cn/xinwen/2015-03/15/content_2834595.htm). See also Zhongguo

entities and domestically related parties were said to be violating the *Accounting Law of the People's Republic of China (2017 Amendment)* ('*Accounting Law 2017*') and the *Anti-Unfair Competition Law of the People's Republic of China (2019 Amendment)* ('*Anti-Unfair Competition Law 2019*'),<sup>44</sup> as the relevant companies' fictitious transactions, inflated revenues, costs, expenses and false propaganda.<sup>45</sup> However, more appropriately, these acts are supposed to be regulated according to non-compliant continuous disclosure under the Securities Law. Yet, the continuous disclosure provision of the Securities Law merely covered Luckin Coffee's domestically related listed companies in this case, instead of all Luckin Coffee entities and related parties.<sup>46</sup>

As a result, the securities enforcement of Luckin Coffee's continuous disclosure has been far from sufficient in China.<sup>47</sup> Such issues inevitably influence securities cross-border supervision quality and deserve further analysis.<sup>48</sup>

#### *D. Potential Implications of the Luckin Coffee Scandal*

The Luckin Coffee scandal can offer certain lessons for the supervision of Chinese securities listed in Australia, considering the similarities in the US and Australian securities markets. Specifically, both the US and the Australian securities markets are mature, with investor protection and market integrity their most fundamental considerations.<sup>49</sup> This is in contrast to the theoretical framework of the

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Zhengquanye Xiehui (中国证券业协会) [Securities Association of China], *Zhengquan Falv Fagui—Zhengquan Falv Fagui Gaishu* (证券法律法规—证券法律法规概述) [*Securities Laws and Regulations – An Overview of Securities Laws and Regulations*], 中国证券监督管理委员会 [China Securities Regulatory Commission] (April 23, 2012), available at <http://www.csrc.gov.cn/csrc/c100211/c1452106/content.shtml>.

<sup>44</sup> Guanyu Ruixing Kafei Caiwu Zaojia Diaocha Chuzhi Gongzuo Qingkuang De Tongbao 《关于瑞幸咖啡财务造假调查处置工作情况的通报》 [Announcement on the Investigation and Disposal of Luckin Coffee Financial Fraud], 中国证券监督管理委员会 [China Securities Regulatory Commission] (July 31, 2020), available at <http://www.csrc.gov.cn/csrc/c100028/c1000725/content.shtml>.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Zhang, *supra* note 32.

<sup>48</sup> Li Youxing and Pan Zheng (李有星 and 潘政), Lun Zhonggaigu Weiji Xia Zhongmei Kuajing Shenji Jianguan Hezuo (论中概股危机下中美跨境审计监管合作) [*On the Cooperation between China and the United States in Cross-border Audit Supervision during the China Concept Stock Crisis*], 10 证券市场导报 [SECURITIES MARKET HERALD], 72, 77 (2020).

<sup>49</sup> Robert P Austin and Ian M Ramsay, *Ford, Austin and Ramsay's Principles of Corporations Law* (LexisNexis Butterworths, 17th ed, 2018) 902. *SEC Highlights*

Chinese securities market, which is more politically driven, with investor protections and market integrity considered as sub-superior factors.<sup>50</sup> Moreover, both the US and Australian securities markets face similar problems with cross-border listed companies from emerging securities markets, such as China. Similar to the problems face by the US as the host jurisdiction with limited access to information resources in the Luckin Coffee scandal, the securities regulatory agency in Australia—the Australian Securities and Investments Commission (ASIC)—has identified challenges in accessing sufficient reliable information in emerging market listed companies' home jurisdictions, including China.<sup>51</sup> In this sense, it is fair to say that the Luckin Coffee scandal, as a Chinese cross-border listed company case in the US, has important implications for Australia-China securities cross-border supervision.

### III. REVIEW OF SECURITIES CROSS-BORDER SUPERVISION IN CHINA

This section provides a general review of the status quo of the securities cross-border supervision regimes in China. We examine Chinese domestic provisions as well as the securities cross-border regulatory cooperation framework that China has engaged in.

#### A. *Special Provision on Listing Abroad 1994: Outdated But Still in Effect*

The first provision for securities cross-border supervision in China dates back to 1994, when the State Council issued the *Special Provision on Listing Abroad 1994*, to regulate Chinese companies listed on the Hong Kong and US exchanges.<sup>52</sup> According to Article 28 of the provision, first, the information in the disclosure documents compiled by the companies for domestic and overseas announcements must not contradict each other.<sup>53</sup> Second, the companies must disclose information in accordance with domestic and overseas laws,

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*Investor Protection for World Investor Week 2021*, U.S. SECURITIES AND EXCHANGE COMMISSION (October 4, 2021), available at <https://www.sec.gov/news/press-release/2021-207>.

<sup>50</sup> Guo, *supra* note 1, at 77-84.

<sup>51</sup> Australian Securities & Investments Commission, *Report 368: Emerging Market Issuers* (August 2013) cls 62-73.

<sup>52</sup> Jane Fu, *Corporate Disclosure and Corporate Governance in China*, KLUWER LAW INTERNATIONAL, 140 (2010).

<sup>53</sup> Guowuyuan Guanyu Gufen Youxian Gongsi Jingwai Muji Gufen Ji Shangshi De Tebie Guiding(国务院 关于股份有限公司境外募集股份及上市的特别规定) [*Special Provisions of the State Council Concerning the Floatation and Listing Abroad of Stocks by Limited Stock Companies*], (promulgated by the St. Council, Order No. 160, August 4, 1994, effective August 4, 1994), Art. 28.

regulations, and the rules in the licensed securities markets.<sup>54</sup> Third, if there are any differences in the disclosed information at home and abroad, such differences must be disclosed at the time.<sup>55</sup> In terms of the supervision of Chinese cross-border securities-related activities, Article 4 stipulates that Chinese securities regulatory agencies may reach an understanding or agreement with overseas securities regulatory agencies to conduct cooperative supervision and management of cross-border listed companies.<sup>56</sup>

The *Special Provision on Listing Abroad 1994* provided the legal basis for the supervision of continuous disclosure among cross-border listed companies for the first time in the history of the Chinese securities market.<sup>57</sup> However, no detailed guidance was included on how the supervision of these cross-border listed companies would be handled; in particular, how supervisory cooperation with overseas securities regulatory agencies would be managed. Moreover, at the time when the provision was enacted, Chinese cross-border listed companies were mainly large and medium-sized state-owned enterprises (SOEs).<sup>58</sup> As such, the provision inevitably put more emphasis on the government's demands.<sup>59</sup> It is hard to say whether the *Special Provision on Listing Abroad 1994* still has any current reference significance. Current revisions to it are being considered in light of more recent developments in the securities market in China.<sup>60</sup>

#### B. *The Latest Securities Law 2019: Torching a Small Step*

For the first time, in the latest revised *Securities Law 2019*, China's long-arm jurisdiction over Chinese cross-border companies was established in legal form.<sup>61</sup> According to Article 2, if overseas-listed Chinese companies disrupt the domestic market order and

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*, Art. 4.

<sup>57</sup> Huang, Liu and Yeung, *supra* note 7, at 44.

<sup>58</sup> *Id.*

<sup>59</sup> Guo, *supra* note 1, at 66.

<sup>60</sup> 新华社 [New China News Agency], Zhonggong Zhongyang Bangongting Guowuyuan Bangongting Yinfa Guanyu Yifa Congyan Daji Zhengquan Weifa Huodong De Yijian (中共中央办公厅 国务院办公厅印发<关于依法从严打击证券违法活动的意见> [The General Office of the Central Committee of the Communist Party of China and the General Office of the State Council Issued the "Opinions on Strictly Cracking Down on Illegal Securities Activities in Accordance with the Law"], 中央人民政府 [THE CENTRAL PEOPLE'S GOVERNMENT] (July 6, 2021), available at [http://www.gov.cn/zhengce/2021-07/06/content\\_5622763.htm](http://www.gov.cn/zhengce/2021-07/06/content_5622763.htm).

<sup>61</sup> Zhengquanfa (2019 Xiuding) (证券法 (2019 修订)) [*Securities Law (2019 Revision)*], (promulgated by the National People's Congress, Order No. 37, December 28, 2019), Art. 2.

infringe on the legitimate rights and interests of domestic investors in China, they shall also incur legal liabilities in accordance with this law.<sup>62</sup> Apart from this, the Securities Law 2019 further stipulates the law enforcement powers of overseas securities regulatory agencies in China. This explains how cross-border securities regulatory cooperation between the CSRC and overseas securities regulatory agencies will be handled. Specifically, Article 177 states:

The overseas securities regulatory authority shall not conduct investigation, evidence collection and other activities directly within the territory of the People's Republic of China. Without the consent of the CSRC and relevant competent departments of the State Council, no entity or individual may provide documents or materials relating to securities business activities to the overseas authority without approval.<sup>63</sup>

However, similar to the *Special Provision on Listing Abroad 1994*, there are no other specifics given regarding securities cross-border supervision in China.

### C. *Bilateral Memoranda of Understanding*

In terms of cross-border securities supervision, the CSRC has been active in seeking to establish regulatory cooperation with agencies in other jurisdictions in the form of bilateral memoranda of understanding ('BMoUs').<sup>64</sup> BMoUs, in this context, refer to agreements between securities regulatory agencies of two jurisdictions of their intent to cooperate in the supervision or enforcement of securities non-compliance.<sup>65</sup> The BMoUs generally represent high levels of information sharing between different securities regulatory agencies as well as their desire to coordinate.<sup>66</sup> At the same, entering

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<sup>62</sup> *Id.*

<sup>63</sup> *Id.*, Art. 177.

<sup>64</sup> 爱建证券课题组 [Aijian Securities Research Group], Lun Woguo Zhengquan Jianguan Jigou De Yuwai Guanxiaquan—Yi Kechuangban Kaifang Hongchou Qiye Shangshi Wei Shijiao (论我国证券监管机构的域外管辖权——以科创板开放红筹企业上市为视角) [*On the Extraterritorial Jurisdiction of China's Securities Regulatory Agency: From the Perspective of the Opening of Red Chip Companies on the Sci-tech Innovation Board*], 3 证券市场导报 [SECURITIES MARKET HERALD] 2, 9 (2020).

<sup>65</sup> Pamela Jimenez, 'International Securities Enforcement Cooperation Act and Memoranda of Understanding' (1990) 31(1) *Harvard International Law Journal* 295, 305.

<sup>66</sup> Jennifer G. Hill, 'Regulatory Cooperation in Securities Market Regulation: Perspectives from Australia' (2020) 17(1) *European Company and Financial Law Review* 11, 18.

into a BMoU does not generate any binding international legal obligation; rather, the BMoU provides significant flexibility for the two securities regulatory agencies.<sup>67</sup> As of December 2020, the CSRC had established BMoUs with overseas securities regulatory agencies in 66 jurisdictions.<sup>68</sup>

The CSRC and ASIC have also signed bilateral cooperative agreements regarding the regulation of securities activities.<sup>69</sup> As early as 1996, the *Memorandum of Understanding Regarding Securities and Futures Regulatory Cooperation* was signed between Australian Securities Commission and the CSRC in Canberra, Australia.<sup>70</sup> The scope of securities supervision cooperation under this MoU mainly covered information sharing between the two authorities:

To the extent permitted by its domestic laws and regulations, each Authority will use reasonable efforts to provide the other Authority with any relevant information that is discovered which gives rise to a breach, or anticipated breach, of the laws and regulations in relation to the securities and futures markets of the other Authority.<sup>71</sup>

Other content in this MoU related to information request procedures and the principle of information confidentiality.<sup>72</sup>

#### D. Multilateral Memoranda of Understanding

In addition to bilateral securities regulatory cooperation, securities cross-border supervision can be achieved through multilateral channels.<sup>73</sup> The IOSCO is an international body that brings together global securities regulators and develops and promotes

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<sup>67</sup> Jimenez, *supra* note 65, at 306.

<sup>68</sup> 《中国证监会与境外证券（期货）监管机构签署的备忘录一览表（2020年12月）》 [List of Memorandums Signed by the China Securities Regulatory Commission and Overseas Securities (Futures) Regulatory Agencies (December 2020)], 中国证券监督管理委员会 [China Securities Regulatory Commission] (Web Page, 25 February 2021) <[http://www.csrc.gov.cn/pub/newsite/gjb/jghz/202102/t20210225\\_393092.html](http://www.csrc.gov.cn/pub/newsite/gjb/jghz/202102/t20210225_393092.html)>.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Memorandum of Understanding between Australian Securities Commission and China Securities Regulatory Commission, Regarding Securities and Futures Regulatory Cooperation*, signed 23 May 1996.

<sup>71</sup> *Ibid.*, cl II.3.

<sup>72</sup> *Ibid.*

<sup>73</sup> Joel P. Trachtman, *Unilateralism, Bilateralism, Regionalism, Multilateralism, and Functionalism: A Comparison with Reference to Securities Regulation* (1994) 4(1) *Transnational Law & Contemporary Problems* 68, 98.

international securities supervision standards.<sup>74</sup> The multilateral channel for securities regulatory cooperation is based mainly on the cooperation framework of the IOSCO.<sup>75</sup> In 2007, the CSRC joined the *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* ('IOSCO MMoU') established by the IOSCO in 2002.<sup>76</sup> The IOSCO MMoU sets out specific provisions for general principles of mutual assistance and information sharing between signatories, the scope of assistance, elements and the execution of requests for assistance, permissible uses of information, and the confidentiality of information, among other aspects.<sup>77</sup> In 2017, IOSCO further adopted the *Enhanced Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* ('IOSCO EMMoU'), adding new enforcement powers that signatories could use to maintain market integrity and stability, protect investors, and deter market misconduct and fraud.<sup>78</sup> The CSRC has not yet signed this EMMoU, whereas ASIC was one of its first signatories.<sup>79</sup>

#### IV. SECURITIES CROSS-BORDER SUPERVISION IN CHINA AND AUSTRALIA: A COMPARATIVE PERSPECTIVE

This section delves into the existing issues surrounding the securities cross-border supervision regime in China from the perspective of securities cross-border supervision between Australia and China. A comparison of such supervision in these countries can help us better understand the causes underpinning the problems in regulating the Chinese cross-border listed companies in Australia.

##### *A. A Conflicting Central Theoretical Primacy: Investor Protection versus National Security*

The conflict between investor protection primacy and national security primacy serves as the most prominent cause of many problems

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<sup>74</sup> *About IOSCO*, OICV-IOSCO (Web Page, Aug. 26, 2021), [https://www.iosco.org/about/?subsection=about\\_iosco](https://www.iosco.org/about/?subsection=about_iosco).

<sup>75</sup> Liao (n 14) 64.

<sup>76</sup> Huang, Liu and Yeung (n 7) 60.

<sup>77</sup> *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information*, International Organisation of Securities Commissions, opened for signature in May 2002.

<sup>78</sup> *Enhanced Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (EMMoU)*, OICV-IOSCO (Web Page, Aug. 26, 2021), <https://www.iosco.org/about/?subsection=emmou>.

<sup>79</sup> *18-182MR ASIC enhances its enforcement toolkit beyond Australia's borders*, Australian Securities & Investments Commission (Web Page, June 22, 2018), <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2018-releases/18-182mr-asic-enhances-its-enforcement-toolkit-beyond-australia-s-borders/>.

facing China's securities cross-border supervision.<sup>80</sup> In fact, the history of China's approach to continuous disclosure has been driven by political factors, namely, the government's desire for macro-control of economic reform.<sup>81</sup> This contrasts with the underlying theoretical framework in developed securities markets, such as Australia, where investor protection is accepted widely as the core pillar of continuous disclosure management.<sup>82</sup> Thus, this divergence in theoretical primacy is at the heart of the issue in securities cross-border supervision between China and other jurisdictions.

In securities cross-border supervision in China, national security is its primary concern, as evidenced in several laws and regulations.<sup>83</sup> First, according to the *Law of the People's Republic of China on Guarding State Secrets (2010 Revision)* ('*Guarding State Secrets Law 2010*'), where any entity needs to provide information involving state secrets in foreign cooperation, the entity shall report to national or provincial authorities seeking approval and enter into a secrecy agreement with the other party.<sup>84</sup> Second, in the *Regulations on Strengthening the Confidentiality and File Management Related to the Issuance and Listing of Securities Overseas*, jointly issued by the CSRC, the State Secrecy Bureau, and the State Archives Bureau, it clearly requires that in the process of the securities cross-border listing, the disclosure of relevant information involving state secrets shall be reported to the relevant competent authority for approval.<sup>85</sup> Meanwhile, company papers and other files created by domestic professional advisers shall be kept within China.<sup>86</sup> Third, as noted in Part III, the newly revised *Securities Law 2019* stipulates that the providing of documents or materials relating to securities business

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<sup>80</sup> 李晟 [Li Sheng], 中美跨境审计监管僵局的形成、内在矛盾与可能的合作模式 [The Formation, Internal Contradictions and Possible Cooperation Models of the Cross-border Audit Supervision Deadlock between China and the United States] (2015) 36(1) 河北经贸大学学报 *Journal of Hebei University of Economics and Business* 113, 115.

<sup>81</sup> Guo (n 1) 77-84.

<sup>82</sup> *Ibid.* 70-77.

<sup>83</sup> Liao (n 14) 66.

<sup>84</sup> 中华人民共和国保守国家秘密法 (2010 修订) [Law of the People's Republic of China on Guarding State Secrets (2010 Revision)] (People's Republic of China) National People's Congress, Order No 28, April 29, 2010, Art 30.

<sup>85</sup> 关于加强在境外发行证券与上市相关保密和档案管理工作的规定 [Provisions on Strengthening the Confidentiality and File Management Related to the Issuance and Listing of Securities Overseas] (People's Republic of China) China Securities Regulatory Commission, State Secrecy Bureau and State Archives Bureau, Announcement No [2009]29, Oct. 20, 2009, cl 3.

<sup>86</sup> *Ibid.*, cl 6.



activities to overseas entities is subject to the consent of the CSRC and relevant competent departments of the State Council.<sup>87</sup>

As a result, national security primacy in China has been creating obstacles to information access needed by host jurisdictions in investigating cross-border listed companies. Yet, being able to get timely information access to ensure continuous disclosure compliance by cross-border listed companies is vital for host jurisdictions to protect investors.<sup>88</sup> In this respect, further reform proposals that can overcome the problem with China's securities cross-border supervision should account for the conflict between national security and investor protection.

### *B. Insufficient Cooperation Awareness Weakens Developing Regulatory Cooperation*

Securities regulatory agencies from different jurisdictions can request from each other investigation assistance under both multilateral and bilateral MoUs.<sup>89</sup> Although the securities cross-border supervision in China has been in place since the 1990s, and a series of securities regulatory cooperative relationships have been established,<sup>90</sup> China's cooperation awareness is still in its infancy.<sup>91</sup> This is evident from the statistics surrounding China's international securities cooperation, measured by the relative low number of proactively coordinated international responses. Thus, higher cooperation awareness and closer relationships between securities regulatory agencies are necessary to facilitate full regulatory cooperation.<sup>92</sup>

Comparing the number of international securities cooperation requests between Australia and China in the past 10 years, it is not difficult to see that in terms of requests received and requests sent, the

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<sup>87</sup> 中华人民共和国证券法（2019 修订） [Securities Law of the People's Republic of China (2019 Revision)] (People's Republic of China) National People's Congress, Order No 37, Dec. 28, 2019, Art 177.

<sup>88</sup> 文一墨 [Wen Yimo], 中国概念股风波与跨境监管提速 [China's Concept Stock Turmoil and Speeding Up Cross-border Supervision] (2011) 8 财会学习 Accounting Learning 14, 14.

<sup>89</sup> *International regulatory and enforcement cooperation*, Australian Securities & Investments Commission (Web Page, Sept. 15, 2020), <https://asic.gov.au/about-asic/what-we-do/international-activities/international-regulatory-and-enforcement-cooperation/>.

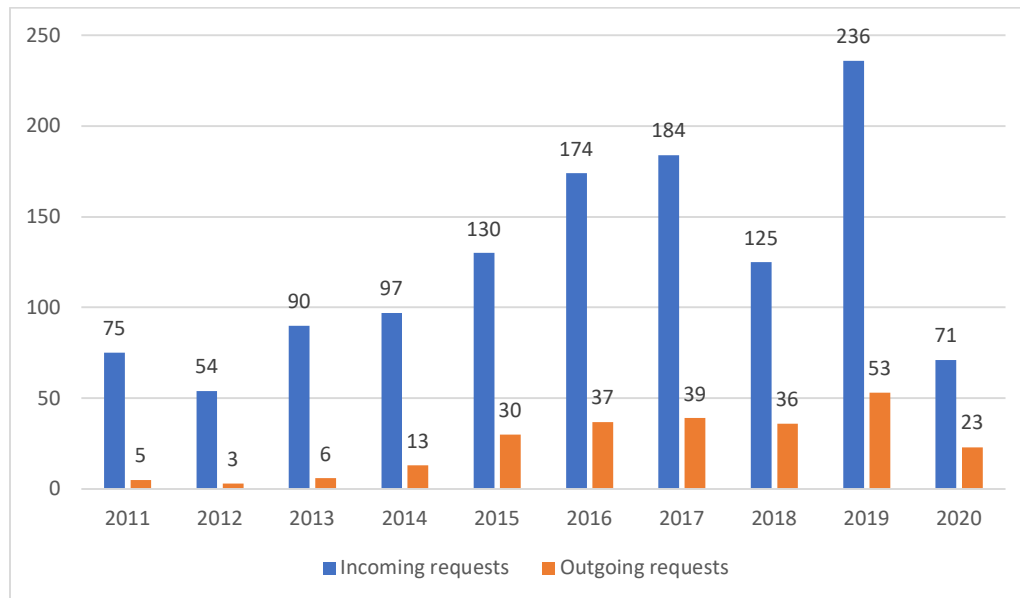
<sup>90</sup> Huang, Liu and Yeung (n 7) 44.

<sup>91</sup> Aijian Securities Research Group (n 64) 9.

<sup>92</sup> Australian Securities & Investments Commission, *Annual Report 2016-2017* (Report, 2017) 77. 张阳 [Zhang Yang], 证券监管的扩张与制衡：中澳比较视域的论析 [Securities Regulation: An Analysis of the Comparative Perspective between China and Australia] (2020) 6 金融市场研究 *Financial Market Research* 111, 118.

numbers from Australia are far greater than those from China (see Figures 1 and 2). Additionally, most international securities cooperation requests in China are incoming from securities regulatory agencies in other jurisdictions (see Figure 1). However, there are cases of proactive outgoing international cooperation requests from China and these have been increasing (see Figure 1).

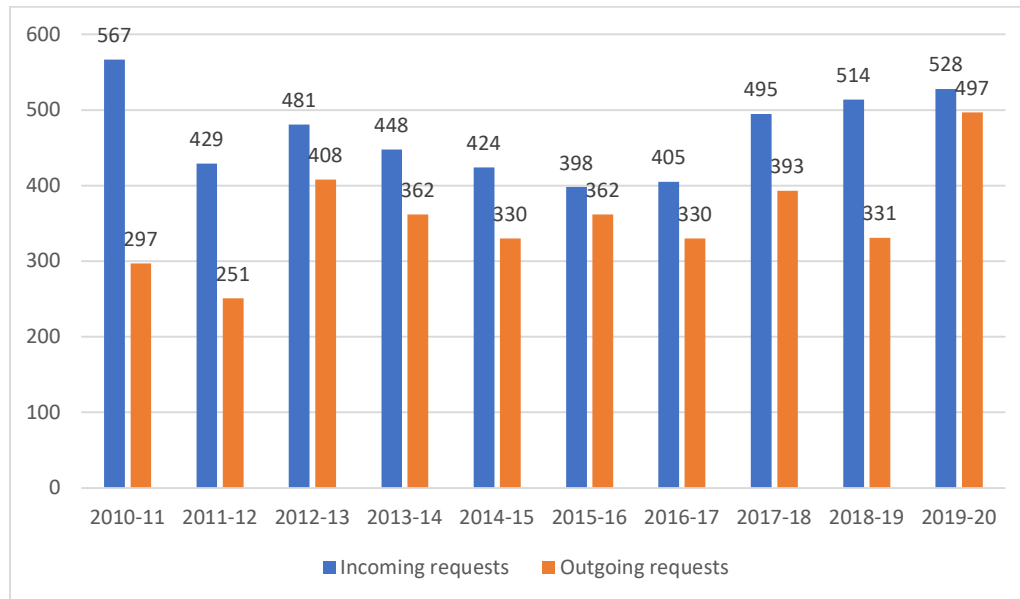
**Figure 1: Number of international cooperation securities requests to/from the CSRC**<sup>93</sup>



**Figure 2: Number of international securities cooperation requests to/from ASIC**<sup>94</sup>

<sup>93</sup> This Figure is compiled by the author. The data comes from the annual reports of CSRC. See, 证监会年报 [CSRC Annual Reports], 中国证券监督管理委员会 [China Securities Regulatory Commission] (Web Page, 15 September 2020), <http://www.csrc.gov.cn/pub/newsite/zjhjs/zjhnb/>.

<sup>94</sup> This Figure is compiled by the author. The data comes from the annual reports of ASIC. See, 'ASIC annual reports', *Australian Securities & Investments Commission* (Web Page, 15 September 2020), <https://asic.gov.au/about-asic/corporate-publications/asic-annual-reports/>.



To some extent, these figures demonstrate that China is not taking full advantage of existing bilateral and multilateral securities cross-border regulatory cooperation mechanisms.<sup>95</sup> Further, the implication is that China's awareness of such securities regulatory cooperation opportunities is below that of developed capital markets, such as Australia.<sup>96</sup> Thus, the need for improved cooperation awareness in China helps explain some of the foregoing practical problems plaguing securities cross-border supervision in China. However, as mentioned, the number of outgoing securities international cooperation requests from the CSRC has been increasing from an overall perspective (see Figure 1). Therefore, it is foreseeable that reform proposals in this area could be feasible in the future.

### *C. Limited Enforcement Powers of the CSRC Hinder Equable Cooperative Support*

Precise and robust enforcement of regulatory agency policies are necessary conditions for effective securities supervision.<sup>97</sup>

<sup>95</sup> Liu and Qiu (n 12) 107.

<sup>96</sup> 徐玉德 and 智广洁 [Xu Yude and Zhi Guangjie], 从瑞幸咖啡事件看我国跨境会计监管的改进 [Looking at the Improvement of China's Cross-border Accounting Supervision from the Luckin Coffee Incident] (2020) 10 中国注册会计师 *Chinese Institute of Certified Public Accountants* 93, 96.

<sup>97</sup> An-you Liu et al, 'The Dilemma of Cross-border Financial Supervision – Based on the Operational Analysis of China's New Securities Law' (Conference Paper, International Conference on Education, Economics and Information Management,

Similarly, based on this philosophy, comparable enforcement powers between various regulatory agencies are an important prerequisite for effective securities cross-border supervision, especially regulatory cooperation between different jurisdictions.<sup>98</sup> In reality, however, the enforcement powers of the CSRC are relatively limited compared with those of securities regulatory agencies in developed securities markets, such as Australia.<sup>99</sup>

As Table 1 shows, ASIC has a wide range of enforcement powers, from criminal remedies, civil remedies, and administrative remedies, to negotiated measures.<sup>100</sup> This range of enforcement powers provides ASIC with a toolbox of civil, criminal, and administrative means, along with negotiable solutions, to combat non-compliant activities from a multi-faceted perspective.<sup>101</sup> Whereas the enforcement powers of the CSRC are limited to administrative actions.<sup>102</sup> Additionally, these administrative actions have been presented as an enumerated, exhaustive list (see Table 1).<sup>103</sup> Although enumerating these actions helps build a detailed framework of enforcement powers for the CSRC, these powers remain relatively scattered, with no clear type of classification.<sup>104</sup>

**Table 1: A comparison of enforcement powers between ASIC and CSRC<sup>105</sup>**

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19-20 December 2020), 554. 洪艳蓉 [Hong Yanrong], 我国证券监管独立性的检讨与制度完善 [Review and System Perfection of the Independence of China's Securities Regulation] (2018) 3 法律适用 *National Judges College Law Journal* 82, 85.

<sup>98</sup> Han et al (n 22) 9.

<sup>99</sup> Liu et al (n 97) 552.

<sup>100</sup> *Australian Securities and Investments Commission Act 2001* (Cth) arts 12GA-12GO.

<sup>101</sup> Zhang (n 92) 118.

<sup>102</sup> 中华人民共和国证券法（2019 修订） [Securities Law of the People's Republic of China (2019 Revision)] (People's Republic of China) National People's Congress, Order No 37, 28 December 2019, art 170.

<sup>103</sup> Zhang (n 92) 118.

<sup>104</sup> 张红 [Zhang Hong], 证券监管措施：挑战与应对 [Securities Regulatory Measures: Challenges and Responses] (2015) 4 政法论坛 *Tribune of Political Science and Law* 129, 129.

<sup>105</sup> This table is compiled by the author. 'Information Sheet 151: ASIC's Approach to Enforcement', *Australian Securities & Investments Commission* (Web Page, September 2013)

<[https://download.asic.gov.au/media/1339118/INFO\\_151\\_ASIC\\_approach\\_to\\_enforcement\\_20130916.pdf](https://download.asic.gov.au/media/1339118/INFO_151_ASIC_approach_to_enforcement_20130916.pdf)>. 中华人民共和国证券法（2019 修订） [Securities Law of the People's Republic of China (2019 Revision)] (People's Republic of China) National People's Congress, Order No 37, 28 December 2019, art 170. Fu (n 52) 214-215.

ASIC		CSRC
Enforcement powers	Non-exhaustive examples	Enforcement powers (exhaustive list)
Punitive action	Criminal prosecutions	—
	Civil penalties	
Protective action	Disqualification from managing a corporation	Disqualification from serving as the director, supervisor or senior executive of a securities issuer
	Ban on providing financial services/engaging in credit activities	Securities trading restriction Ban on providing securities services/engaging in securities business
	Revocation, suspension, or variation of conditions of a license	—
	Public warning notice	Warning letters
Preservative action	Protecting assets	Freezing/detaining documents
		Freezing/sealing assets
	Compelling someone to comply with law	—
Corrective action	Corrective disclosure	Correction orders
Compensation action	Representative action to recover damages or property for a person who has suffered loss	—
Negotiated resolution	Enforcement undertaking	—
Infringement notices	Infringement notices	Administrative fines
—	—	Confiscation

As the CSRC's enforcement powers are limited by type and scope, unavoidably, it is unable to provide equable assistance as required by overseas securities regulatory agencies. Moreover, its limited powers constitute further obstacles to the CSRC joining the IOSCO EMMoU.<sup>106</sup> This status quo weakens the effectiveness and functioning of China's cross-border cooperation and coordination in securities supervision, leading to cross-border supervision problems.

#### *D. Unclear Criteria for Long-Arm Jurisdiction*

<sup>106</sup> Liu and Qiu (n 12) 106.

The lack of securities enforcement of the supervision of Chinese cross-border listed companies can be analysed by examining China's long-arm jurisdiction over these cross-border companies as a starting point. Specifically, Article 2 of the latest revised *Securities Law 2019* stipulates China's long-arm jurisdiction over Chinese cross-border companies as follows:

Where the offering and trading of securities outside the People's Republic of China disrupt the order of the domestic market of the People's Republic of China and infringe upon the lawful rights and interests of domestic investors, the violator shall be punished in accordance with the relevant provisions of this Law and shall be subject to legal liability.<sup>107</sup>

However, this clause provides only general principles; thus, such clauses need to be more detailed and specific to be put into practice.<sup>108</sup> Considering the specialties of the companies listed overseas, the lack of quantitative standards on what constitutes infringement in China's domestic securities market and the investors therein, without any doubt, increases the difficulty of enforcement.<sup>109</sup> In the case of the Luckin Coffee scandal, even scholars in this area have opposing observations as to whether the CSRC can implement long-arm jurisdiction over companies like Luckin Coffee.<sup>110</sup> This highlights the ongoing problem surrounding the lack of enforcement in securities cross-border supervision in China.

<sup>107</sup> 中华人民共和国证券法（2019 修订） [Securities Law of the People's Republic of China (2019 Revision)] (People's Republic of China) National People's Congress, Order No 37, 28 December 2019, art 2.

<sup>108</sup> Xu and Zhi (n 96) 95.

<sup>109</sup> Liu et al (n 97) 551.

<sup>110</sup> Han et al (n 22) 10. 缪因知 [Miu Yinzhi], 瑞幸案不会成为新<证券法>长臂管辖第一案 [The Luckin Coffee Case will not Become the First Case under the Long-arm Jurisdiction of the New Securities Law], 经济观察报 [The Economic Observer] (Web Page, 16 April 2020) <<https://mp.weixin.qq.com/s?src=11&timestamp=1632212996&ver=3327&signature=vkKEpNizeGopF9UtPhl7MFAIhFCEIGOAJPo1fx6VjIVgBd5SUacMRdnOo3vxFEHpN0aXrflzCecrR7VTbUVa8cR9npByi94zTcDwddS88jY=&new=1>>. 朱婷 [Zhu Ting], 新<证券法>“长臂管辖”发力, 调查组突袭瑞幸 [New Securities Law 'Long Arm Jurisdiction' Launches Force, Investigation Team Raids Luckin], 知律 [Zhilv.net] (Web Page, 28 April 2020) <[https://mp.weixin.qq.com/s?src=11&timestamp=1632212996&ver=3327&signature=1cONVwiU2vMSDc7U7yKUcDfpeSeIlzqVWR\\*4PWfCTVR8xJd9VVEGLHsnNa1fzjlsP604XhsqzcMORhGDhtggSigF0G-L2NXqfdyYCVO2tAM9YYTGsIMCWkptBkKAc-A&new=1](https://mp.weixin.qq.com/s?src=11&timestamp=1632212996&ver=3327&signature=1cONVwiU2vMSDc7U7yKUcDfpeSeIlzqVWR*4PWfCTVR8xJd9VVEGLHsnNa1fzjlsP604XhsqzcMORhGDhtggSigF0G-L2NXqfdyYCVO2tAM9YYTGsIMCWkptBkKAc-A&new=1)>.

## V. FUTURE PROSPECTS FOR IMPROVED SECURITIES CROSS-BORDER SUPERVISION IN CHINA

This section discusses potential improvements in securities cross-border supervision in China from a general perspective. These recommendations bring the prospect of securities regulatory cooperation between Australia and China to the forefront.

### *A. Increasing Mutual Trust: A Basic Guarantee*

It is widely acknowledged that an international solution to securities supervision on cross-border listed companies can be achieved through better cross-border regulatory cooperation.<sup>111</sup> Cross-border securities supervision regimes in different jurisdictions can assist in achieving equal cooperative positions and meeting the needs of each jurisdiction in the context of securities regulatory cooperation.<sup>112</sup>

From the perspective of ASIC, sufficiently equivalent supervision regimes between Australia and other jurisdictions have been regarded as the very first principle of cross-border regulation.<sup>113</sup> Yet, the low level of cooperation awareness and limited CSRC enforcement powers have remained as a gap between the CSRC and its Australian counterpart. To overcome such limitations, China will need to embrace certain reforms that can create mutual trust with other jurisdictions in the sphere of securities cross-border supervision. Subsequently, based on such mutual trust, further measures can be proposed more feasibly. These will be discussed in more detail later on.

Future reform should consider increasing cooperative awareness as well as investor protection. As has been acknowledged, the difference in the primary focus of the continuous disclosure regimes in Australia and China in terms of investor protection has been affecting directly Chinese listed companies' non-compliance problems overseas.<sup>114</sup> This same difference exists in corresponding

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<sup>111</sup> Huang, Liu and Yeung (n 7) 74. Roger Silvers, *Cross-border Cooperation between Securities Regulators* (2020) 69(2-3) *Journal of Accounting and Economics* 1, 1.

<sup>112</sup> Australian Securities & Investments Commission, *Regulatory Guide 54: Principles for Cross-border Financial Regulation* (June 2012) [RG54.38]. 刘强安 [Liu Qiang'an], 《中美审计跨境监管面临的挑战》 [The Challenges Faced by Cross-border Audit Supervision Between China and the United States] (2019) 10 *中小企业管理与科技 Management & Technology of SME* 65, 66.

<sup>113</sup> *Ibid.*

<sup>114</sup> Guo (n 1) 90.

supplementary regimes that support continuous disclosure in China, thereby indirectly impacting Chinese cross-border listed companies' continuous disclosure struggles as well.<sup>115</sup> Thus, the suggestion in this article is that securities cross-border supervision in China should strengthen investor protection while maintaining national security. By placing greater emphasis on investor protection, the CSRC will be able to increase positive cooperative awareness while relying on existing securities cross-border regulatory cooperation.

Some specific suggestions are as follows. First, the bridging role of the BMoUs should be better utilised, and the IOSCO MMoU should be put into wider practice to ensure greater cooperation. Second, the enforcement powers of the CSRC should be expanded at least to meet the joint thresholds of the IOSCO EMMoU.<sup>116</sup> Only in this way can the CSRC provide comparable regulatory assistance to its counterparts in securities cross-border regulatory cooperation and gain mutual trust in this international context. The IOSCO EMMoU identifies additional powers, known as the 'ACFIT' powers, that provide extra guarantees for the IOSCO MMoU in the pursuit of market integrity and investor protection (see Table 2).

**Table 2: ACFIT powers under the IOSCO EMMoU<sup>117</sup>**

<b>'ACFIT'</b>	<b>Meaning</b>	<b>Content</b>
<b>A</b>	Audit	To obtain and share audit documents, communications, and other Information relating to the audit or review of financial statements
<b>C</b>	Compel	To compel physical attendance for testimony (by being able to apply sanctions in the event of non-compliance)
<b>F</b>	Freeze	To freeze or confiscate assets or advise and provide information on how to freeze/confiscate assets at the request of a court order
<b>I</b>	Internet	To obtain and share existing Internet service provider (ISP) records (not including the content of the communications) with the assistance of a prosecutor, court, or other authority, and to obtain the content of such communications from authorised entities
<b>T</b>	Telephone	To obtain and share existing telephone records (not including the content of communications) with the assistance of a court, prosecutor, or other authority, and to

<sup>115</sup> *Ibid.*

<sup>116</sup> Liu and Qiu (n 12) 106.

<sup>117</sup> This table is compiled by the author. *EMMoU Flyer*, OICV-IOSCO (Web Page, Sept. 24, 2021), <https://www.iosco.org/about/pdf/Enhanced%20MMoU%20Flyer.pdf>.



		obtain the content of such communications from authorised entities
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Under its current powers, the CSRC does not have the ability to compel physical attendance for testimony or access to internet and telephone records.<sup>118</sup> In this respect, potential reform proposals can target these aspects, which would enable China to subsequently sign the IOSCO EMMoU.

### *B. Conducting Joint Inspections*

To overcome the problem of limited access to investigation resources for host jurisdictions in the home jurisdictions of cross-border listed companies, this section demonstrates the conciliatory approach of conducting joint inspections by both jurisdictions. This approach can take into account the theoretical underpinning of investor protection without violating China's national security primacy in its securities cross-border supervision. Moreover, based on creating improved mutual trust between the CSRC and overseas securities regulatory agencies, such joint inspections are more feasible.

Based on greater trust, such joint inspections by the ASIC and CSRC will be achievable from both the Australian and Chinese perspectives. ASIC has entered into joint inspection agreements with several overseas securities regulatory agencies already, including the PCAOB of the US, the European Commission, the Canadian Public Accountability Board (CPAB), and the Commission de Surveillance du Secteur Financier of Luxembourg (CSSF).<sup>119</sup> ASIC has recognised these arrangements as more effective measures for cross-border listed companies' supervision, which also minimise the regulatory burdens from the Australian perspective.<sup>120</sup> These cooperative agreements, together with the open-mindedness of ASIC in seeking joint inspection arrangements with more securities regulatory bodies, highlight the

<sup>118</sup> 夯实跨境监管合作法律基础 切实防范系统性风险——方星海副主席近日在金融监管研讨会上的致辞 [Consolidate the Legal Basis for Cross-border Regulatory Cooperation and Effectively Prevent Systemic Risks – Vice Chairman Fang Xinghai's Speech at the Recent Financial Supervision Seminar], 中国证券监督管理委员会 [China Securities Regulatory Commission] (Web Page, June 13, 2018), [http://www.csrc.gov.cn/pub/newsite/zjhxwfb/xwdd/201806/t20180613\\_339807.html](http://www.csrc.gov.cn/pub/newsite/zjhxwfb/xwdd/201806/t20180613_339807.html).

<sup>119</sup> 'Audit Inspection and Surveillance Programs, *Australian Securities & Investments Commission* (Sep. 26, 2021), <https://asic.gov.au/regulatory-resources/financial-reporting-and-audit/auditors/audit-inspection-and-surveillance-programs/>.

<sup>120</sup> *Ibid.*

possibility of such an arrangement being put in place between the ASIC and CSRC.<sup>121</sup>

From the Chinese perspective, although national security continues to be its priority when providing information access to overseas securities regulatory agencies, the CSRC has remained open to securities regulatory cooperation.<sup>122</sup> The chairman of the CSRC, in an exclusive media interview, references the importance of joint investigations of cross-border listed companies' continuous disclosure non-compliance as an important part of securities regulatory cooperation.<sup>123</sup> The next step is to promote the flow of relevant regulatory documents providing cross-border information to better facilitate joint inspections with overseas securities regulatory agencies.<sup>124</sup>

The CSRC and ASIC have both acknowledged the benefits of joint inspection in securities cross-border regulatory cooperation and are working towards establishing such arrangements. Ideally, these joint inspection arrangements will create win-win solutions for the supervision of Chinese cross-border listed companies' continuous disclosure in Australia. However, under the current political climate, whether these will take place needs further analysis, which is beyond the scope of this article.

### *C. Continuous Domestic Supervision of Cross-Border Listed Companies*

The *Opinions on Strictly Cracking Down on Illegal Securities Activities in Accordance with the Law*, issued by the Central Committee of the Communist Party of China and the General Office of the State Council in 2021, proposed the concept of 'zero-tolerance'

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<sup>121</sup> *Ibid.*

<sup>122</sup> Youxing Li et al, Submission to SEC Roundtable on Emerging Markets Risks, *Suggestions on Advancing Cross-border Regulatory Cooperation between the United States and China* (July 6, 2020).

<sup>123</sup> CSRC Chairman Yi Huiman Taking an Interview with Caixin (Transcript), *China Securities Regulatory Commission* (June 24, 2020), [http://www.csrc.gov.cn/pub/csrc\\_en/newsfacts/release/202006/t20200624\\_378786.html](http://www.csrc.gov.cn/pub/csrc_en/newsfacts/release/202006/t20200624_378786.html).

<sup>124</sup> 新华社 [New China News Agency], 《中共中央办公厅 国务院办公厅印发<关于依法从严打击证券违法活动的意见>》 [The General Office of the Central Committee of the Communist Party of China and the General Office of the State Council Issued the "Opinions on Strictly Cracking Down on Illegal Securities Activities in Accordance with the Law"], 中华人民共和国中央人民政府 [The Central People's Government of the People's Republic of China] (July 6, 2021), [http://www.gov.cn/zhengce/2021-07/06/content\\_5622763.htm](http://www.gov.cn/zhengce/2021-07/06/content_5622763.htm).

of listed companies' non-compliant activities.<sup>125</sup> In terms of cross-border listed companies, there should be no loopholes in the regulation on non-compliance to achieve this zero-tolerance goal.<sup>126</sup> The argument here is that legislative interpretations of the long-arm jurisdiction of the securities law should be designed in the near future for ex post supervision. Ex ante supervision of cross-border listed companies is also needed to establish continuous domestic supervision to ensure better regulatory cooperation in responding to the requests of overseas securities regulatory agencies.

Concerning the long-arm jurisdiction of the securities law, qualitative standards for cross-border listed company conduct that disregard either domestic securities market policies or investor should be clarified. As such standards confer extraterritorial jurisdiction over securities law, it is also important to be alert to the excessive expansion of such extraterritorial jurisdiction.<sup>127</sup> Existing international standards can be used as the basis for such standards in China. Moreover, as the operation and business activities of cross-border listed Chinese companies are mainly within China, it would be more effective if Chinese regulatory authorities investigate company information related to non-compliant performance. Establishing continuous ex ante supervision, at least in a minimal form, could facilitate securities cross-border regulatory cooperation, especially based on improved mutual trust between different jurisdictions.

In this way, cross-border listed companies will not be able to escape from domestic securities enforcement even after they have been delisted in overseas exchanges. Subsequently, the improved compliance of these companies can be guaranteed through zero-tolerance deterrence.

## VI. CONCLUSION

The case study of the 'Luckin Coffee Scandal' highlights the problems plaguing securities cross-border supervision in China. First, the host jurisdiction of these Chinese cross-border listed companies is unable to gain access to sufficient information and documents in China to conduct appropriate investigations of a company's continuous disclosure non-compliance. This then generates concerns in the host jurisdiction regarding market integrity and investor protection. Second, although the securities regulatory agency in China—the CSRC—has put in place regulatory measures for cross-border listed

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<sup>125</sup> *Ibid.*

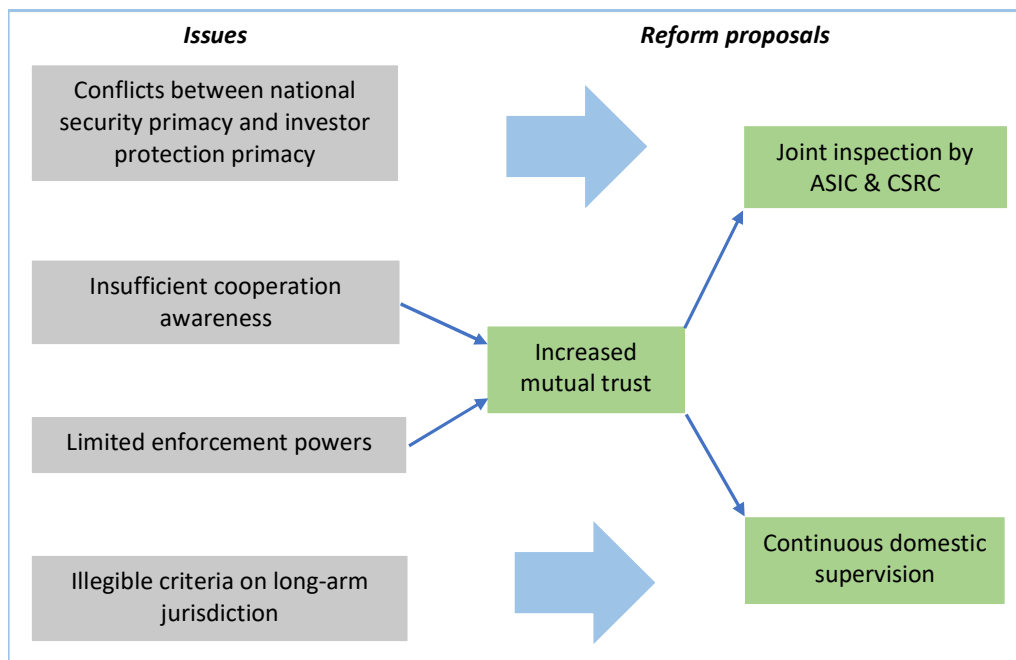
<sup>126</sup> *Ibid.*

<sup>127</sup> Xu and Zhi (n 96) 95.

company's non-compliant conduct, there is limited enforcement of this in the country.

The comparison of securities cross-border supervision between Australia and China revealed the main causes for the above problems in securities cross-border supervision in China. As indicated in Figure 3, these issues cover four aspects. First, the divergent theoretical frameworks between the continuous disclosure regimes in Australia and China are casting a shadow in securities cross-border supervision. As stated, a conflict exists between national security as the primary concern in the Chinese approach and investor protection as the primary concern in the Australian approach. Second, although the CSRC has entered into bilateral and multilateral securities cross-border regulatory cooperation arrangements since the 1990s, cooperation awareness in China is still weak. Third, the CSRC has limited enforcement powers compared with ASIC, which hinders it from providing equivalent securities supervision assistance. Fourth, a lack of clarity around the criteria for the newly added long-arm jurisdiction of the securities law has generated debates regarding whether it can be applied to certain non-compliant continuous disclosure conduct.

**Figure 3: Proposals for addressing existing securities cross-border supervision issues in China<sup>128</sup>**



<sup>128</sup> This Figure is compiled by the author.

In this article, we proposed corresponding potential improvements to these issues in China. Most importantly, improving China's cooperation awareness is necessary to ensure investor protection is considered properly along with the expansion of the enforcement powers of the CSRC, which can increase mutual trust with other jurisdictions. Subsequently, the improved mutual trust can facilitate the realisation of the following two reform measures. The first is the conciliatory approach of conducting joint inspections by the ASIC and CSRC to overcome limitations in accessing the information necessary to investigate cross-border securities, without running counter to the national security interests of China. Although in ideal circumstances, this is expected to happen, under the current political climate, whether it will happen needs further analysis, which is beyond the scope of this article. The second is reform that clarifies the standards of long-arm jurisdiction along with ex ante supervision of cross-border listed companies. Together, these reforms can establish an effective domestic supervision regime and improve overseas regulatory cooperation.