Bathurst Lecture 2024

'Modern centrality of the *Competition and Consumer Act 2010* (Cth) in the regulation of commercial conduct'[1]

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In preparing this lecture I had the benefit of reviewing the enlightening papers presented by previous distinguished speakers in the series. I have been particularly aided by the Bannerman lecture of Justice Leeming in April 2021 titled 'The enduring qualities of commercial law'. He observed that there appeared to be a trend in oscillating between speakers with an advocacy background and speakers with a corporate background. Today I am presenting the lecture as the first regulator.

I also take licence from Justice Leeming's lecture to touch on my personal experiences in dealing with the Hon Thomas Frederick Bathurst, in whose honour this lecture series is named. They involve two cases that are bookmarks in my own career. I first encountered Bathurst QC in 1994 when I was the principal solicitor of the Public Interest Advocacy Centre (PIAC) and instructing in what became known as the Home Fund litigation. The proceedings involved claims of unconscionable and misleading and deceptive conduct against the State of New South Wales in the promotion of a scheme that involved selling loans to tenants of the New South Wales Housing Commission at a time of rapidly rising interest rates. PIAC represented the class of borrowers who brought the action. The proceedings progressed to the High Court on the question of Crown immunity under the *Trade Practices Act 1974* (Cth) *(TPA)* and were ultimately settled by the state with remedies to the borrowers.

I can vividly remember the first occasion I witnessed Bathurst rise to his feet to address the Federal Court. As instructing solicitor on the opposing side, it was an intimidating affair. My barrister, a Mr John Basten QC, was not so intimidated. Ten years later, as a partner at Gilbert + Tobin, I had the privilege (with my colleague Luke Woodward) of instructing Bathurst QC on behalf of AGL, in the first proceedings ever brought for a declaration that a merger did not contravene s 50 of the *TPA*. I was still intimidated. Fortunately for me, the junior to Bathurst was a young and approachable barrister named Anthony Payne and I worked with a brilliant and even younger solicitor named Dr Ruth Higgins. Perhaps it goes without saying we succeeded in our application.

Justice Leeming's lecture also gave me the thread of today's topic. He posed the question: 'What is commercial law? Does it extend to "public law" litigation, such as administrative law challenges to decisions of the Takeovers Panel or the Reserve Bank? Does it extend to competition law?'

Competition and consumer law generally attempts to control and influence business conduct by setting and enforcing standards of commercial behaviour. Its common-law antecedents are in the restraint of trade doctrine and doctrines of unconscionability, but today in Australia and most countries it is a creature of statute. In this lecture I aim to briefly comment on aspects of the intersection between the common law and statute in these two areas, and the dramatically increased scope and significance of competition and consumer regulation. This evolution has been in response to changes in community expectations, in Australia, Europe and the United States, as to the role of law in regulating commercial dealings.

Evolution of competition and consumer regulation – contentious and profound

This history, leading to the modern centrality of competition and consumer regulation in commercial practices, is not only one of legislative evolution and jurisprudence. It is also a history of debate and controversy in community and political expectations for the role of law in constraining perceived excesses in commercial behaviour.

Justice Jagot, in her 2018 Bannerman lecture, observed that that 'there is a more acute need for "acceptance as a foundation for legitimacy" for competition law compared to other laws' and suggested 'this may explain why the common law did not come close to developing coherent principles for ensuring effective competition'. I take Jagot to be reflecting on the fact that where you stand on the question of the role of law in competitive processes is a question of values. This question can be approached from two distinct perspectives: the first of confidence in the rationality of business decision-making and the self-correcting capacity of markets, and the second a precautionary perspective concerned with the capacity for profiteering, with a corresponding emphasis on the role of government as regulator. As Professor Kathryn McMahon has observed, debates about the role of competition law are often argued before the courts using competing legislative interpretations, with these interpretations masking undisclosed policy preferences 'concerning the role of the state and the market'.[2]

The Commonwealth Parliament first legislated to prohibit combinations in restraint of trade in the *Australian Industry Preservation Act 1906* (Cth) *(AIPA).* The legislation commenced in a period of active judicial consideration of tension between the common-law restraint of trade doctrine and notions of freedom of contract, and the limitations of that doctrine.[3]

The *AIPA* certainly had the virtue of simplicity and concision, totalling nine pages with only four operative provisions, including a prohibition of combinations in restraint of trade. Its brevity, however, did not win the day.

In fairly short order the High Court and the Privy Council delivered judgments that denuded the *Act* of any meaningful effect, in a series of cases involving combinations in restraint of trade between coalminers and shipping companies. The first of these was the 1909 case of *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, where the majority of the High Court declared ss 5 and 8 of the *AIPA* constitutionally invalid.[4]

In 1911 Justice Isaacs gave his judgment in the *Coal Vend* case, involving proceedings against two groups of collieries and shipping firms and heard in the original jurisdiction of the High Court.[5] The political and commercial context for these proceedings and their significance for the development of competition law in Australia are vividly described by Dr Kerrie Round in her book *From Protection to Competition, the Politics of Trade Practices Reform in Australia.*[6] The defendants argued that the *AIPA*'s s 4 restraint of trade prohibition should be read subject to the common law, with the effect that the section's requirement for 'detriment to the public' could only be satisfied where the restraint of trade was not reasonable as between the parties.

Justice Isaacs found for the Commonwealth and rejected this argument, finding that it failed to reflect both Parliament's intention and the position at common law. Referring to the 1894 House of Lords case *Nordenfelt*, he stated that 'the public have an interest in every person's carrying on his trade freely … all interference with individual liberty of action in trading, and all restraints of trade themselves, if there is nothing more, are contrary to public policy and therefore void'.[7]

> The Trade Practices Act 1974 *(Cth) was a watershed moment in the evolution of the regulation of competition and fair trading in Australia.*

On appeal, however, the majority of the High Court overturned this verdict, observing that 'cutthroat competition is not now regarded by a large portion of mankind as necessarily beneficial to the public', reading down the *AIPA* by importation of the common law.[8]

The Attorney-General appealed to the Privy Council, in *Attorney-General of the Commonwealth v The Adelaide Steamship Co Ltd*.[9] The Privy Council held that in order for an offence to be committed under the *Act* it was necessary to establish that a restraint of trade or commerce must have been 'calculated' to create a 'pernicious monopoly'.

The cumulative impact of these judgments on the effectiveness of the *AIPA* was such that the following decades were characterised by high tolerance of anti-competitive commercial practices in Australia. In the words of Dr Kerrie Round and her co-author: 'By 1933 collusion between firms was so widespread and so accepted that a respected business education society had no qualms about detailing the best way of establishing pooling schemes which were described as being "usually adopted between companies who would otherwise be keen competitors"'.

In 1976 the Swanson Committee report described the *AIPA* as having 'a relatively ineffectual lifespan of 60 years'.[10]

Another false start: The *Trade Practices Act 1965* (Cth)

As with their predecessor, both the *Trade Practices Act 1965* (Cth) and the *Restrictive Trade Practices Act 1971* (Cth) were, arguably, false starts. This likely reflected the lack of what Justice Jagot described as the 'acute need' for community acceptance as a basis of competition regulation.

Until the 1950s there was a lack of political and social momentum for regulating commercial practices from a competition and consumer protection perspective. Round states that

> for four decades from 1913, protection, nation-building and economic development took precedence over tackling concentrated market structures and anti-competitive behaviour. Not until the mid to late 1950s, with war economy problems being a thing of the past, did the interests of consumers emerge as a subject of concern for governments.[11]

Professor Maureen Brunt described the *Trade Practices Act 1965* (Cth) as 'tentative and experimental' and observed that there was an 'obvious lack of popular and business support to control, or even question, restrictive practices and monopolies until the mid-1960s'.[12]

The 1965 *Act* introduced prohibitions on collusive tendering and bidding, but its central effect was to make four types of potentially anti-competitive practices examinable. The *Act* required that agreements between competing businesses containing certain restrictive terms be registered and the Commissioner of Trade Practices had the power to determine whether such agreements and practices were contrary to the public interest.

Parliamentary extracts from the debates on the introduction of the 1965 Bill demonstrate the political controversy, which led to the attenuation of legislative goals and the weakness of the legislation as passed. The business community's near-universal opposition to the 1965 Bill is reflected in Hansard, with one member of Parliament describing the Bill as 'an unjustifiable intrusion into the normal business affairs of secondary industry and intrusion by the government and its officers into the normal business affairs of free enterprise, about which they know very little'.[13] The Australian Council of Retailers criticised the Bill as 'objectionable to business and industry … opening them up to officials prying and interruption'.[14]

1974 *Act* watershed moment and the influence of Professor Maureen Brunt

Following this challenging legislative history, the *Trade Practices Act 1974* (Cth) was a watershed moment in the evolution of the regulation of competition and fair trading in Australia. The second reading speech is instructive as to legislative intent: 'the purpose of the Bill is to control restrictive trade practices and monopolisation and to protect consumers from unfair commercial practices. The Bill will replace the existing *Restrictive Trade Practices Act*, which has proved to be one of the most ineffectual pieces of legislation ever passed by this Parliament.'[15]

Part IV of the *TPA* in its original form prohibited arrangements in restraint of trade, monopolisation, exclusive dealing, price discrimination and resale price maintenance. Its provisions are the antecedents of the current provisions of pt IV of the *Competition & Consumer Act 2010* (Cth) *(CCA)*.

The TPA, through pt V, also introduced the first Commonwealth regime for economy-wide consumer protection through the regulation of dealings between business and consumers. This Act introduced a series of prohibitions including misleading or deceptive conduct, false representations, bait advertising and coercion at a place of residence, as well as a regime for product safety. The second reading speech described the consumer protection reforms as 'long overdue', noting 'the existing law is still founded on the principle known as caveat emptor … that principle may have been appropriate for transactions conducted in village markets. It has ceased to be appropriate as a general rule'.

The significance of the 1974 *Act* was given narrative and intellectual licence by the writings and work of Professor Maureen Brunt, both as Professor of Economics at Monash University and as a member of the Trade Practices Tribunal.

Brunt had been a long-term critic of what she saw as entrenched anti-competitive practices in the Australian economy. In 1963 Brunt remarked, 'It is said that in a nudist colony nakedness goes unnoticed. Similarly in Australia, structural monopoly and oligopoly, along with Big Business are so common as to be taken for granted.'

Brunt described the 1974 *Act* as constituting 'a distinct break with the Australian past by virtue of its unequivocal objective, its comprehensiveness and its character as economic law'.[16]

Its character as 'economic law' is distinctive, necessarily requiring the intersection of legal theory with the discipline of economics. Professor Imelda Maher reinforces this point, stating, 'One of the most distinctive characteristics of competition law is its dependence on the discourse of economics.'[17]

As Brunt predicted in 1975, 'We begin with a statute; it is to be interpreted and enforced by courts of law; necessarily we are in the hands of lawyers. Yet fundamentally the *Trade Practices Act* … is economic; the very terms used in drafting the statute … employ economic concepts.'[18] The economic framing of the *Act* was embraced by the High Court in *Queensland Wire* [*Industries v BHP*] (1989) 167 CLR 177, holding that

the *TPA* was an 'economic and not a moral statute'.

Section 45 of the 1974 *Act* introduced a statutory prohibition of restraints of trade. As had been the case with the *AIPA*, the scope of the provision was quickly read down by reference to the common law. In *Quadramain Pty Ltd v Sevastapol Investments Pty Ltd* (1976) 133 CLR 390, the High Court applied certain limitations of the common-law doctrine of restraint of trade, echoing the 1913 Privy Council in *Adelaide Steamship*.[19] Chief Justice Gibbs stated that

> It was submitted that s 45 of the *Act* applies to any covenant in restraint of trade, even to a reasonable restraint. If that is so, the section, if valid, would have the drastic result that a contract to which the section applies will be invalid even though it is demonstrably reasonable both in the interests of the parties and in the interests of the public.

In 1976 the Swanson Committee, charged by the Commonwealth to review the *TPA*, described the *Quadramain* approach as unduly technical and inappropriate for economic regulation. The Committee recommended that the phrase 'restraint of trade' should be eliminated from the *Act* and be replaced by notions more closely related to the concept of competition itself, without the limiting common-law connotations.[20]

In 1977, s 45 was amended to frame the prohibition in economic terms, requiring a consideration of whether the impugned contract had the purpose or likely effect of substantially lessening competition.[21]

The current state of the *CCA* – a history of the introduction of positive obligations

We have come a long way since 1976. At 1970 pages, the *Competition and Consumer Act 2010* (Cth) is daunting, even for those who have spent their professional lives in its work. It certainly stands in stark contrast to the nine pages of the 1906 *Act* and its length speaks to its significance in the regulation of commercial dealings. The core competition provisions continue to be in pt IV of the *CCA*. Dr Ruth Higgins SC has characterised the substantive prohibitions within pt IV as having 'no moral orientation', rather they 'have a normative character, Part IV is predicated on a commitment to free market competition as being conducive to public welfare'.[22]

The scope of the *TPA* and its impact were fundamentally broadened by amendments following the 1993 *Report on National Competition Policy* (*'Hilmer Report'*), and again in 2010 by the incorporation of the *Australian Consumer Law* as sch 2 to the *Act* (*ACL*), coincident with its renaming as the *Competition and Consumer Act*.

The *Hilmer Report* marked a significant evolution in competition policy and law, contending that this should actively promote efficiency and economic growth. The 1995 Hilmer amendments, amongst other things, inserted pt IIIA, which provided a framework for imposing a 'duty to deal' on firms with market power who own or operate facilities of national significance.

The introduction of pt IIIA reflected a dramatic change in regulatory design. The framing of pt IIIA could be seen as an evolution of the High Court's decision in *Queensland Wire Industries v BHP* (1989) 167 CLR 177. In that case the High Court found a contravention of s 46's prohibition against misuse of market power, and effectively imposed a 'duty to deal' on BHP (by finding BHP had contravened the *Act* by refusing to supply a necessary input to a competitor). Part IIIA went further, establishing a framework for imposing positive *ex ante* obligations on commercial enterprises' interactions – a significant development in regulatory approach, compared to merely relying on prohibitions against anti-competitive conduct.

> *Debates about the future of competition law are often cast in the language of economics … the real battle concerns fundamentally different views on the role of law in society.*

This shift in regulatory design beyond sole reliance on adjudication of prohibitions to the imposition of *ex ante* obligations has developed over the last 30 years in a range of sector specific reforms. The 1995 introduction of pt IIIA was followed in 1997 by the *Trade Practices Amendment (Telecommunications) Act 1977* (Cth), which inserted pts XIB and XIC. Parts XIB and XIC contain a comprehensive framework including third-party access obligations and service-specific regulation in the telecommunications sector.

In 1998, the *Trade Practices Amendment (Fair Trading) Act 1998* (Cth) inserted pt IVB, making provision for mandatory industry codes of conduct. Part IVB does not limit or prescribe the content of these codes other than in s 51ACA, which defines an industry code as one that regulates 'the conduct of participants in an industry towards other participants in that industry or to consumers in that industry'. The second reading speech describes the objective of pt IVB as 'to ensure that small businesses can confidently deal with large firms in the knowledge that the rules under which they are operating are fair'.[23] A number of sector specific codes of conduct have been made under pt IVB, regulating commercial dealings in areas as diverse as franchising arrangements and milk processors in their dealings with dairy farmers.

Further amendments to the *CCA* in the last five years have continued to introduce parts which regulate specific sectors of industrial activity, namely pt IVBA, the News Media and Digital Platform Mandatory Bargaining Code; pt IVD, Consumer Data Rights; pt IVE, the Motor Vehicle Service and Repair Information Sharing Regime; pt XICA, Prohibited Energy Market Misconduct; and pt XICB, Access to Cash Settlement Services.

Each of these parts impose positive obligations on how larger businesses deal with smaller businesses or competitors.[24] This trend towards what is described as *'ex ante'* regulation is likely to continue as Parliament responds to changes in community expectations and tolerances for what are perceived to be 'unfair' or 'anti-competitive' commercial practices. Some authoritative commentators, such as the current chair of the US Federal Trade Commission Lina Khan, see this move towards *'ex ante'* regulation as reflecting a loss of confidence in the development of the law exclusively through adjudication.[25]

The future for competition law

The 1974 *Act* reflected the change in community expectations and tolerance for anti-competitive practices. As Brunt observed in 1994, 'These days it is not restrictive practices but competition that is regarded as the norm.'[26]

In looking to the likely future of competition and consumer law, the past proves instructive. In Australia, we have historically looked to the United States for policy formulation and legislative development.[27] Australia is not alone in this, with Maher observing that 'the influence of American antitrust law is pervasive and, in effect, it acts as a benchmark for other competition laws'.[28] In the United States, debates about the role of competition and consumer law in regulating commercial conduct are cast more overtly in terms of values and ideology than we are accustomed to in Australia. Again, an observation of Justice Jagot's Bannerman lecture is instructive: 'The US may be a common-law country but its legal tradition is different from that of the UK and Australia. One difference is a willingness to recognise and … expose the ideological underpinnings of the law'.

Era of contest in competition policy and economics

As seen throughout, these developments are contextualised by ongoing debates about the legitimacy of competition and consumer regulation. In her 2021 paper to the Competition and Economics Law Workshop, Justice Jagot reflected on the role of competition law in regulating commercial activity, stating that in the 'language of economists, this involves a policy preference for false positives (that is, regulation where no regulation is necessary) over false negatives (that is, no regulation where regulation is necessary).'[29]

Maher casts the choice as between a libertarian lens, under which 'competition law should intervene to a minimal degree in contractual arrangements', as against a concern to prevent the concentration of undue economic power.[30] She describes the choice of theoretical paradigm as the first issue to be addressed by enforcers. This choice is itself political, with decisions about which economic paradigms to use involving important value judgements as to the appropriate role of competition regulation.

Professor Eleanor Fox, the acclaimed antitrust academic, has written extensively on what she casts as 'the battle for the soul of antitrust'.[31] Fox dissects opposing largely US schools of thought: 'On one side is the Chicago school, which asserts that the law should be derived from and explained by economics. Chicagoans believe that business has a strong tendency to produce efficiencies when unconstrained by positive law'. On the other side is what she calls the 'New Coalition', which believes that law is essentially different from economics, and economics is just 'one of the tools used to carry out the spirit of the law.'[32]

Debates about the future of competition law are often cast in the language of economics and its own internal debates. Fox, however, views this as a mischaracterisation, stating the real battle concerns fundamentally different views on the role of law in society.[33]

Lina Khan asks the foundational question of whether competition law is directed at the process of competition itself or at consumer welfare.[34] Khan also sees this significant question as overtly ideological, stating 'Open, competitive markets are a foundation of economic liberty.'[35]

The future of Australian competition law and policy is and will continue to be influenced by debates in the US and increasingly in Europe. As Fox observes: 'The rest of the world has moved ahead of the USA. European controls may fill the US void'.[36]

Regulating for fairness

In consumer protection regulation the 2010 insertion of the *Australian Consumer Law* into the *CCA* has been the most significant development since Federation.[37] The *ACL* is broad, including business-to-business dealings, misleading or deceptive conduct, unconscionability, unfair contract terms and various consumer guarantees for goods and services. Central to so much of the jurisprudence under the *ACL* and policy considerations for future reform is the question of the role of 'fairness' in regulating commercial dealings.

The case law and literature on the topic of unfairness in contract terms and unconscionability in commercial dealings is extensive and I cannot do it justice here.[38] However, cases generally recognise the distinction between procedural and substantive unfairness. At least since the 1983 decision of the High Court in *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, it has been clear that the common law will not provide redress in commercial dealings on the grounds of substantive 'unfairness' alone. Relief must be found within the narrow doctrine of unconscionability: 'the unconscientious use of his superior position or bargaining power to the detriment of a party who suffers a special disability'.[39]

Professor Jeannie Paterson has observed that common-law courts are reluctant to invalidate contract terms purely for substantive unfairness.[40] The common-law need for more than substantive unfairness has carried over into the courts' application of legislative attempts to regulate for fairness in commercial dealings.

New South Wales was the first Australian jurisdiction to introduce unfair consumer contract legislation. The New South Wales *Contracts Review Act 1980* used the language of 'unjust', rather than 'unfair', defining this to include 'unconscionable, harsh or oppressive'. The early cases under the New South Wales *Act* struggled with the application of the statutory language, including one Court of Appeal case in which Justice Samuel described the term 'unjust' as 'a slippery word of uncertain content'[41] and another in which Justice McHugh observed that 'I do not see how that contract can be considered unjust simply because it was not in the interest of the claimant to make the contract'.[42]

Unfair contract terms

The *ACL* regulates unfair contract terms in standard form contracts under ss 23 and 24. Section 24(1)(a) provides that a term is unfair if it would cause a significant imbalance in the parties' rights and obligations arising under the contract, it is not reasonably necessary in order to protect a party's legitimate interests, and it would cause detriment to a party if relied upon. This test focuses on the substance of the terms, not the process under which they were formed and therefore extends beyond any common-law conception of unconscionability.[43]

Justice Beach in *AHG WA (2015) Pty Ltd v Mercedes-Benz Australia/Pacific Pty Ltd* (2023) 303 FCR 479; [2023] FCA 1022: at [3323] described the policy intent of these provisions in these terms: 'It has also been said that the sanctity of freedom of contract, which usually presupposes individual negotiations, must be respected … but where standard form contracts have been used and abused by one of the parties, closer scrutiny may be required'. In *Karpik v Carnival PLC* [2023] HCA 39: at [40], the High Court observed that 'Parliament is prescribing that a corporation that does business in Australia should be required, if it uses standard terms in a consumer or small business contract, to meet Australian norms of fairness, irrespective of whether the standard terms are in a contract made in Australia or one made overseas'.

In 2022, the *ACL* was amended to introduce penalties (from 9 November 2023) for unfair contract terms in standard form contracts. The amendments prohibit a person from making, applying or relying on a UCT in a consumer contract or small business contract. The court has power to impose penalties of up to $50 million per contravention.

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Unconscionability and unfairness

In 1986 the former s 52A was inserted into the *TPA*, introducing a narrow prohibition of unconscionable conduct in consumer dealings within the 'meaning of the unwritten law'. Between 1992 and 1999 further amendments were made including to extend the prohibition to business transactions.[44]

In 1999, in *Hurley v McDonald's Australia Ltd* [1999] FCA 1392: at [22], the Full Federal Court observed 'Whatever "unconscionable" means in sections 51AB and 51AC, the term carries the meaning given by the *Shorter Oxford English Dictionary*, namely, actions showing no regard for conscience … The various synonyms used in relation to the term "unconscionable" import a pejorative moral judgement.'

Dr Michelle Sharpe and Christine Parker evaluated the success of ACCC enforcement of the *TPA*'s unconscionable conduct prohibitions between 1998 and 2005, commenting on the difficulties in developing legal precedent to clarify what conduct is captured.[45] In 2008, the Senate Standing Committee on Economics released an inquiry report which called for an amendment to clarify that unconscionability under the *TPA* applied to parties' behaviour, as well as the process of formation – reflecting the common-law difficulty in establishing purely substantive unfairness.[46]

The *Competition and Consumer Legislation Amendment Act 2011* (Cth) inserted the contemporary prohibition against unconscionable conduct, contained in ss 21 and 22 of the *Australian Consumer Law*. Section 21(4)(a) of the *ACL* explicitly states that 'It is the intention of the Parliament that this section is not limited by the unwritten law relating to unconscionable conduct'.

Regulating for fairness in commercial dealings presents both policy makers and the courts with the challenge of navigating competing objectives. On the one hand, in a market economy we want vigorous competition which necessarily involves parties seeking terms favourable to themselves and of potential disadvantage to other parties. On the other hand, we want clear indicia which identify the line in commercial bargains beyond which the law will provide relief.

The High Court has continued to discern this line by reference to conscience and morality, rather than using objective criteria indicating substantive unfairness. Something more than 'unfairness' is required to establish unconscionable conduct. In *ASIC v Kobelt* [2019] HCA 18, [48], Chief Justice Kiefel and Justice Bell rather dryly observed 'if the legislative intention were to fix a standard lower than conduct that answers the description of being against conscience it is to be expected that the draftsperson would have employed another term'.

In the same case, as part of the majority, Justice Gageler observed that the statutory conception of unconscionable conduct is unconfined by the equitable doctrine: 'For a court to pronounce conduct unconscionable is for the court to denounce that conduct as offensive to conscience informed by a sense of what is right and proper according to values that can be recognised by the courts to prevail with contemporary Australian society. Those values are not entirely confined to, or entirely removed from, the values which historically informed courts administering equity in the development of the unwritten law'. However, the High Court's recent decision in *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* [2024] HCA 27 indicates that the proposition that the statutory conception of unconscionability is not confined to the values in equity remains contested.

For several years, the ACCC has proposed that there should be a general prohibition against unfair trading practices. In August 2023 the Commonwealth Treasury released a Consultation Regulation Impact Statement (RIS) on proposals for law reform to address unfair trading practices. The RIS states: 'Effective action against oppressive, exploitative or otherwise unfair business behaviour could better protect consumers and small business, remove distortions to competition … and bring Australia into line with other Organisation for Economic Co-operation and Development countries.'

Other jurisdictions including the US, EU and the UK have legislated to prohibit 'unfair' trading practices. The EU Unfair Commercial Practices Directive contains a general prohibition against unfair commercial practices if such a practice is contrary to the requirements of professional diligence, and materially distorts the economic behaviour of the average consumer.[47]

The US has had a prohibition on 'unfair practices … affecting commerce' since 1914, in s 5 of the US *Federal Trade Commission Act* (*'FTC Act'*). An act or practice will be considered by the FTC to be unfair under its 1980 policy statement if it causes or is likely to cause substantial injury to consumers, and that injury is not outweighed by countervailing benefits to consumers or to competition, and cannot be reasonably avoided by consumers.[48]

In 1992 the FTC observed that the uncertainty in the concept of 'unfairness' has been 'honestly troublesome for some businesses and some members of the legal profession'.[49] Over the last four years the FTC has been very active taking enforcement action under s 5 of the *FTC Act*, including against Epic Games, creator of the video game Fortnite. In March 2023 the FTC made an executive order requiring Epic to pay $245 million to consumers for the deployment of 'dark patterns' in charging consumers without their affirmative consent.[50]

The FTC has also recently sought to reconcile the apparent conflict between the policy objectives of vigorous competition and prohibiting commercial practices based on 'fairness'. In its November 2022 policy statement, the FTC provides guidance on the scope of unfair methods of competition under s 5:

> There are two key criteria to consider when evaluating whether conduct goes beyond competition on the merits. First the conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory or involve use of economic power of a similar nature … Second, the conduct must tend to negatively affect competition conditions. This may include, for example, conduct that tends to foreclose or impair the opportunities of market participants, reduce competition between rivals, limit choice or otherwise harm consumers.[51]

The guidelines draw on US Supreme Court cases stating that the concept of unfairness reflects 'public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws'.[52]

The 2005 EU Directive on unfair business-to-consumer commercial practices similarly links the unfairness standard to the outworkings of 'legitimate' competitive behaviour 'which directly harm(s) consumers' economic interests and thereby indirectly harm(s) the economic interests of legitimate competitors'.[53]

Looking to the US, UK and EU, we can see that the unfairness standard remains highly context dependent. Nevertheless, these now well-established prohibitions reflect both consumer and small business expectations of protection from unfair trading practices. The ACCC has strongly supported the introduction of unfair practices legislation and if adopted the reforms will further centralise the *CCA*'s significant impact on commercial norms and behaviour.

Conclusion

The changing role of competition and consumer law in controlling and influencing commercial behaviour has been driven by changes in community values and expectations for over a century. While this is true for all areas of law it is particularly the case in this field.

It is also a field where women lawyers, economists and academics have particularly significant voices. I am the first woman to give the Bathurst Lecture and I am privileged to say I serve as a Commissioner of the Australian Competition and Consumer Commission led by its first female chair, Gina Cass-Gottlieb. And, for those of you who have been paying attention, you will have noticed all the academics I quote are women (including the current chair of the FTC, Lina Khan, who, prior to her appointment, was a professor of law at Columbia Law School). I could not have prepared this lecture without the very able assistance of two officers of the ACCC, Hannah Osborne, Senior Policy Officer and Kate Howe, Graduate.

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ENDNOTES

1 This version of the lecture has been edited for print. The full version, including extended references, is available on the ACCC website at <www.accc.gov.au/about-us/news/speeches/bathurst-lecture-2024>.
2 Kathryn McMahon, 'Competition Law, Adjudication and the High Court' (2006) *Melbourne University Law Review* 801.
3 See *Nordenfelt v Maxim Guns and Ammunition Company* (1894) AC 535 (Lord Macnaghten) and *R and A-G of the Commonwealth v Associated Northern Collieries* (1911) 14 CLR 387, 462–70.
4 In the same year, the *AIPA* was amended and the invalid ss 5 and 8 were repealed: *Australian Industries Preservation Act 1909* (Cth) ss 3, 6.
5 *R and A-G of the Commonwealth v Associated Northern Collieries* (1911) 14 CLR 387.
6 Kerrie Round and Martin Shanahan, *From Protection to Competition: The Politics of Trade Practices Reform in Australia* (Federation Press, 2015) chapter 3.
7 *Nordenfelt v Maxim Guns and Ammunition Company* (1894) AC 535 .
8 *Adelaide Steamship Co Ltd v The King and the A-G of the Commonwealth* (1912) 15 CLR 65.
9 *A-G of the Commonwealth v The Adelaide Steamship Co Ltd* (1913) 18 CLR 30.
10 Trade Practices Act Review Committee, *Swanson Report* (Parliamentary Paper No 228, 20 August 1976) 3.6.
11 Kerrie Round and Martin Shanahan, *From Protection to Competition: The Politics of Trade Practices Reform in Australia* (Federation Press, 2015) 87.
12 Maureen Brunt, 'The Australian Antitrust Law after 20 Years: A Stocktake' (1994) 9 *Review of Industrial Organisations* 483, 493.
13 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 1965, 3269 (Ray Whittorn).
14 Kerrie Round and Martin Shanahan, *From Protection to Competition: The Politics of Trade Practices Reform in Australia* (Federation Press, 2015) 135.
15 Commonwealth, *Parliamentary Debates*, Senate, 30 July 1974, 540 (Lionel Murphy).
16 Maureen Brunt, 'The Australian Antitrust Law after 20 Years: A Stocktake' (1994) 9 *Review of Industrial Organisations* 483: at 491.
17 Imelda Maher, 'Regulating Competition' in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 187, 197.
18 Maureen Brunt, 'Economic Overview' (Speech, The Monash Trade Practices Lectures, 1975) 2-3.
19 *A-G of the Commonwealth v The Adelaide Steamship Co Ltd* (1913) 18 CLR 30.
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