

Bannerman Competition Lecture

22 February 2018

THE COMMON LAW AND COMPETITION LAW

JAYNE JAGOT*

I THE INVISIBLE HAND?

I would like to start with Ron Bannerman's 1982 article 'Competition as the Regulator'.¹

There is the title, 'Competition as the Regulator'. From the person who regulated Australian competition laws for the best part of two decades, from 1966 to 1974 as the Commissioner of Trade Practices and from 1974 until 1984 as the Chairman of the Trade Practices Commission, the title seems to embody an act beyond self-effacement towards self-abnegation. Was the regulator not Ron Bannerman, exercising powers under the laws of the Commonwealth Parliament, the *Trade Practices Act 1974* (Cth) and its predecessor, the 1965 Act of the same name? How is competition, either as a policy objective or as a description of the state of markets, the regulator? History shows that left to their own devices markets are not necessarily competitive and, where they are competitive, the social price is often too high (to take one example, child labour must have contributed to economic efficiency through competitive markets during the industrial revolution but in Western society at least other values have ultimately prevailed).

The article's substance is also notable not so much for the invisible hand, but for the invisible man, Ron Bannerman. The article characterises the thrust of the trade practices legislation as 'not at all regulatory but indeed ... deregulatory',² subject only to consumer protection provisions, and describes the role of competition law as increasing the opportunity for competition 'by removing fetters placed upon it that used to dampen or prevent competitive

* Judge of the Federal Court of Australia. This paper is based on a speech I gave for the Bannerman Competition Lecture 2018. I thank my Associate, James Barrett, for providing his feedback as well as technical and research assistance.

¹ R M Bannerman, 'Competition as the Regulator' (1982) 5(1) *University of New South Wales Law Journal* 61.

² *Ibid* 62.

initiatives ...'.³ The article then describes how 'far from regulating industry and commerce, [the *Trade Practices Act 1974* (Cth)] provides mechanisms to ensure that market forces have the opportunity to do the regulating.'⁴ But it is doubtful that anyone had a better grasp of what market forces had been up to in Australia since the end of the Second World War than Ron Bannerman – and effective competition was not a product of those forces.

Kerri Round and Martin Shanahan's fascinating overview of the history of trade practices in Australia, the 2015 book *From Protection to Competition*, gives Bannerman a justifiably prominent role,⁵ along with Sir Garfield Barwick. Two World Wars involving extensive government price controls had left many business-people thinking that their continued prosperity depended on self-interested self-regulation. So-called 'orderly marketing' was the order of the day.⁶ The forces of the market were themselves anti-competitive. And as Round and Shanahan's review exposes, it was Ron Bannerman, not market forces, that prompted, encouraged, cajoled, and only where all other attempts had failed, ultimately forced Australian businesses into accepting that their self-interest, which was widely seen as benefiting from anti-competitive practices, came at a price which was too high for Australia as a whole.

Why the self-abnegation? Those who knew Ron Bannerman might be in a position to say that such was his character. If so, there was a perfect alignment of character and context. Round and Shanahan describe the *Trade Practices Act 1965* (Cth) as 'one of the most controversial pieces of legislation to have come before Australia's parliament', involving eight days of 'stormy debate' in which every provision was challenged and what was ultimately passed was, as Round and Shanahan put it, 'considerably weakened'.⁷ The forces supporting orderly marketing in Australia were not going to give up because of a post-World War II resurgence of economic liberalism. Nor were the experiences in the UK, which had introduced the *Monopolies and Restrictive Practices (Inquiry and Control) Act 1948* (UK), or the US, which had the longstanding *Sherman Antitrust Act of 1890*, 15 USC §§ 1-7 (2013), considered relevant to Australia's circumstances.

³ Ibid 64.

⁴ Ibid.

⁵ Kerri Round and Martin Shanahan, *From Protection to Competition: The Politics of Trade Practices Reform in Australia* (Federation Press, 2015).

⁶ Ibid 9.

⁷ Ibid 161.

In his role as Commissioner from 1966 Bannerman was working against the tide for many years. And, leaving aside the interests of businesses, it would not have been easy to identify the politics involved. Because it cuts across so many aspects of society, it would have been naïve (and still would be) to imagine that views about trade practices neatly reflect political ideologies. To some, a ‘free market’ meant a market in which established participants were free to agree how their market should be ordered in their best interests. To others, truly competitive markets risked too much, whether it be business profitability, the rights and conditions of workers, or just a preference for the values of co-operation over competition. To others again, all restraints on trade were an anathema.

How could a path be navigated through this? Here, I suspect, is another explanation for the approach apparent in Bannerman’s 1982 article. If one is beset on all sides and yet is to find a path through, which Bannerman did, what better way to do so than:

- present the regulations which forced competitive markets on Australia as deregulation;
- describe what, by 1982, must have been over 15 years of chipping away at anti-competitive practices as allowing market forces to do the regulating; and
- thereby, assume as a given what it had actually taken 15 years to achieve – the existence of a consensus that Australian markets should be competitive markets.

By 1982, knowing that his work and that of the Trade Practices Commission since 1966 had achieved that consensus, Bannerman could say, as he did in ‘Competition as the Regulator’, that ‘competition is an essential force in seeking and maintaining profitability’ and that the ‘community gains from the competition in terms of more and better goods and services, lower costs and prices, and better use of resources.’⁸

Five to 10 years ago, we might have thought it unimaginable that such a consensus did not always exist, but it did not and a large part of Ron Bannerman’s professional legacy must be that consensus was achieved. In more recent years, when the competitive global economy is seen as having benefited some but left others behind, this consensus may well be under threat.

⁸ Bannerman, above n 1, 64.

By 1985 Bannerman was able to be much more forthcoming. In his article ‘Development of Trade Practices Law and Administration’⁹ he could describe how the Commission’s work under the 1965 legislation had exposed ‘an astonishing web of restrictions covering a very great deal of Australian industry’,¹⁰ so extensive indeed that the need for more robust legislation in the form of the 1974 Act became widely (although not completely) accepted. And by 1985 he could say also that ‘the law appears by now to have reached reasonable maturity and to be accepted as a useful element within total economic policy.’¹¹

The fact that Bannerman was a lawyer, and a lawyer in the Anglo-Australian tradition, may explain what appears to be an acute awareness on his part that competition law is in an unenviable position. Its dependence on political ideology is obvious. In the conclusion to his 1985 article Bannerman said this:

The factors for change [in the law] are political, economic, legal and administrative. They interact all the time ... With change, the degree of change, and resistance to change all depending on politics, economics, and law, the contribution of administration may sometimes be unnoticed, but it goes on all the time. If it could not cope with change, or sometimes even indicate the potential direction for change to be effective, then the changes could not be digested and earn the necessary acceptance for their continuance.¹²

II THE DYNAMICS OF THE COMMON LAW

Is the need for acceptance as a foundation for legitimacy more acute for competition law than other laws? I think the answer to this question is yes. This may also explain why the common law did not come close to developing coherent principles for ensuring effective competition. And I suspect that knowing this and being himself a lawyer in the Anglo-Australian tradition, as much as personal inclination, may explain why Ron Bannerman preferred to present the law as anti-regulatory.

Looking at the US and the UK positions lends support to this thesis.

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, contrary to Bismarck’s adage about the making of law and sausages, expose the ideological underpinnings of the law. The

⁹ R M Bannerman, ‘Development of Trade Practices Law and Administration’ (1985) 18(3) *The Australian Economic Review* 83.

¹⁰ *Ibid* 85.

¹¹ *Ibid* 83.

¹² *Ibid* 95.

US ‘*Sherman Act*’ of 1890¹³ resulted from and has continued to cause vigorous debate in the US about the interests which the Act is intended to protect. The Act has been described by one commentator as a compromise between two competing visions of the market, the so-called evolutionary and intentional, which may be paraphrased as follows. One vision, the evolutionary, is that market processes are best left alone as the conditions which will emerge from those processes are legitimate, being beyond the control of any individual participant. On this theory, government regulation can only hinder, not help, overall consumer welfare. The other vision, the intentional, is that left to their own devices powerful participants in markets will tend to self-interest through anti-competitive means and unfair exploitation. On this theory, government regulation is necessary to provide the conditions within which truly competitive markets, and associated benefits, can flourish.¹⁴

While her thesis is that anti-trust law in the US has been seen as evolving towards some apparent ‘technocratic and apolitical’ apotheosis, Professor Marina Lao of Seton Hall University School of Law has identified the existence of ongoing substantial debate in the US about the role of ideology in anti-trust law.¹⁵ Lao’s point is that debates about the choice of one mode of economic analysis or another can mask the fact that there are social and political values at play. While cautioning against the risks of generalisation, Lao described these values in terms of ‘antitrust conservatives’ and ‘antitrust liberals’.¹⁶

Antitrust conservatives, Lao proposed, are generally:

- confident in the robustness of markets and dubious about the capacity for effective government intervention to enhance overall welfare; and
- permissive or non-interventionist as a result.¹⁷

Antitrust liberals, Lao proposed, are generally:

- dubious about the robustness of markets and confident about the capacity for effective government intervention to enhance overall welfare; and
- restrictive or interventionist as a result.¹⁸

¹³ *Sherman Antitrust Act of 1890*, 15 USC §§ 1-7 (2013).

¹⁴ William H Page, ‘The Ideological Origins and Evolution of US Antitrust Law’, (2008) 1(1) *Issues in Competition Law and Policy* 1.

¹⁵ Marina Lao, ‘Ideology Matters in the Antitrust Debate’ (2014) 79(2) *Antitrust Law Journal* (2014) 649, 651 n 12.

¹⁶ *Ibid* 652.

¹⁷ *Ibid* 652-3, 657.

In Lao's words:

While these differing ideologies may be irrelevant where the economics of a practice is unambiguous, they do matter where economic theories and empirical evidence are indeterminate...It is, after all, only natural that people tend to find theories that are in tune with their predispositions more persuasive, and interpret ambiguous facts in ways that are in accord with their worldviews.¹⁹

Compare this to the UK and Australia. In the UK, the 1948 legislation and subsequent development of competition law has been described as emerging 'incrementally and piecemeal as a result of consensus building by a powerful civil service, heavily influenced by business lobbying',²⁰ and lacking a 'consistent and coherent underpinning'.²¹

In Australia, as Bannerman put it in his 1985 article, the approach he took was 'intensely practical'.²²

It is hard to escape the conclusion that the reality of Australian markets up to and beyond the 1960s was irreconcilable with the evolutionary theory of markets and that government regulation was required to ensure competitive market conditions. But the preferred appearance, as we have seen, was anti-regulatory and pro-market forces as supposedly natural progenitors of effective competition. This, of course, reflected an unstated acceptance of the prevailing wisdom of political liberalism.

Professor Lao concluded her article with a comment on the debate about antitrust policy in the US, saying that:

It would be helpful in this discourse to bring to the fore the ideological underpinnings of the conservative and liberal divide, and to have a normative conversation based on these value differences rather than rely on economic theories as a proxy for discussion. What is needed is an honest conversation on what values should matter and why they should matter...and whose interests are important and how those interests should be reconciled if they conflict ...²³

¹⁸ Ibid 652-3, 657.

¹⁹ Ibid 668-9.

²⁰ Stephen Wilks, *In the Public Interest: Competition Policy and the Monopolies and Mergers Commission* (Manchester University Press, 1999) 25, quoted in Andrew Scott, 'The Evolution of Competition Law and Policy in the United Kingdom', LSE Law, Society and Economy Working Papers 9/2009, 4.

²¹ Andrew Scott, 'The Evolution of Competition Law and Policy in the United Kingdom', LSE Law, Society and Economy Working Papers 9/2009, 4.

²² Bannerman, above n 9, 85.

²³ Lao, above n 15, 685.

I should say that the multiplicity of ways in which competition laws intersect with different aspects of society, lead me to query the existence of a competition law ‘conservative and liberal divide’. Perhaps more accurately, I should say that if there is a divide, then many of us may be on both or different sides depending on the issue. Take the range of social issues covered by the recommendations of the Harper Competition Policy Review and see if you can affix to yourself one label or another – antitrust conservative or antitrust liberal.²⁴ How about recommendation 2 relating to government provided human services? Regulation 6 relating to intellectual property? Recommendation 9 relating to planning and zoning? Recommendation 12 about retail hours? Recommendation 13 about parallel imports? Recommendation 14 about pharmacies? Recommendation 19 about electricity and gas, and 20 about water? Recommendation 37 about industrial agreements? Recommendation 54 about collective bargaining?

I cannot help but think that in the current climate, where the effects of the global market are under increasing scrutiny, the honest conversation for which Lao has called may be forced upon us. But these are not the kind of conversations by which the common law develops, at least not in the Anglo-Australian tradition. The common law not only permits, but perhaps even demands, the suppression of its own ideological underpinnings. The ideological realm is characterised by division, opposition, and conflict; but the legitimacy of the common law depends on a substantial degree of pre-existing consensus, continuity and incremental change. And this is my thesis, that the essence and dynamics of the common law effectively prevented the common law developing coherent laws about competition.

The common law has developed over centuries. It develops on a case-by-case basis between parties to an actual, not hypothetical, dispute about their rights and interests. Courts do not issue statements of principle or legal guidelines; they resolve actual disputes. Each case must also be resolved in the context of the doctrine of precedent by which judges are bound to apply the law as determined by those higher in the judicial hierarchy. These characteristics enhance the common law’s legitimacy. They facilitate continuity, predictability, and incremental rather than radical change. By the time the common law is ready for change, social consensus about the interests which should be protected and the values which inform these choices has usually already been achieved, and the change is thus seen as merely

²⁴ Commonwealth, *Competition Policy Review: Final Report* (2015).

another increment in the necessary development of the law. But these processes of the common law worked against it developing competition laws.

We can see this by looking at the how various common law causes of action which might have evolved into some form of competition law did not in fact do so.

III THE EVOLUTION OF SOME COMMON LAW DOCTRINES

A *Restraints Of Trade – From Void to Valid if Reasonable*

The doctrine of restraint of trade has been identified as having its roots in disputes involving mediaeval guilds and grants of royal monopolies from the 15th century.²⁵ Despite these early beginnings, the doctrine emerged in a coherent form only in the 1890s. In *Nordenfelt v The Maxim Nordenfelt Guns and Ammunition Company, Limited*,²⁶ Lord MacNaghten’s synthesis of the strands of authority resulted in this statement of principle:

The true view at the present time I think, is this: The public have an interest in every person's carrying on his trade freely: so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities. But it is not to be supposed that that result was reached all at once.²⁷

For present purposes, it is the last sentence which is of most interest. It is something of an understatement because the result reached in *Nordenfelt*, that the restraint on trade was valid, would have been anathema to the courts of mediaeval England where notions of the common weal dictated that all people not only should be free to work, but must work, so that any and all restraints on trade would be void.

Dyson Heydon refers to Pollock’s observation that the history of the restraint of trade doctrine is ‘a singular example of the common law, without aid from legislation and without any manifest discontinuity, having practically reversed its older doctrine in deference to the

²⁵ See, eg, J D Heydon, *The Restraint of Trade Doctrine* (Lexis Nexis Butterworths, 3rd ed, 2008) 1-10.

²⁶ [1894] AC 535 (*Nordenfelt*).

²⁷ *Ibid* 865.

changed conditions of society and the requirements of modern commerce.²⁸ In the same vein, in his *A History of English Law*, Sir William Holdsworth noted that ‘the law as to contracts in restraint of trade has, more than any other class of contracts, been moulded by changing ideas of public policy.’²⁹

The fact that the common law responds to public policy should hardly be controversial. The key concept for present purposes is as Pollock identified – that the common law of restraint of trade before and after the industrial revolution was effectively reversed without any apparent discontinuity. How? For one thing, because the doctrine of precedent is a powerful brake on sudden change so that the common law changes by accretion. For another, the common law develops through the resolution of disputes between parties, and not by free-standing statements of principle. And because this process takes time, centuries in the case of restraints of trade, by the time a common law doctrine is ready to emerge in a coherent form, as in *Nordenfelt* in 1894, consensus as to any underlying public policy has already been achieved; what might once have been labelled ‘ideology’ has largely become orthodoxy, which the common law can then reflect. By such means, the common law is able to be seen as largely free from ideological taint. This freedom may be a myth,³⁰ but some myths are necessary and it is one that has served the common law well.

The common law grappled with the potential conflict between contract and trade over centuries. It ultimately came down in favour of the principle that people are free to contract away their freedom to work as they see fit, provided the restraint is reasonable as between the parties and having regard to the public interest. In so doing the common law could not escape responding to the prevailing political and economic ideologies of the times. This response explains the shift from the mediaeval law that as every person must work and thus be free to work for the common good all restraints on trade must be void, to the post industrial revolution law that every individual must be free to contract so that only restraints on trade which are unreasonable in terms of the interests of the parties and of the public are void.

²⁸ F Pollock, *Principles of Contract* (Stevens & Sons Ltd, 10th ed, 1936) 391-2, quoted in Heydon, above n 25, 2.

²⁹ Sir William Holdsworth, *A History of English Law*, Vol VIII (Street & Maxwell, 1966) 56.

³⁰ I am indebted to Marcus Bezzi for the concept that the common law’s freedom from ideological taint involves a myth.

When it came to other kinds of anti-competitive restrictions, however, the common law was stumped. Dyson Heydon's review resulted in the conclusion that 'it seemed clear by the end of the First World War that English law would rarely invalidate a cartel.'³¹ He identifies six themes from the cases worked against the evolution of any general doctrine of law of anti-competitive conduct:

1. the common law's adherence to the sanctity of contract;
2. the state, of which the courts form part, should not interfere in the economy;
3. courts should not adjudicate on competing theories of political economy;
4. competition might have adverse consequences;
5. local issues might make anti-competitive conduct proper; and
6. restraints between parties might not affect the public if others were competing outside of the restraints.³²

The first two propositions reflect the ideological dominance of political liberalism, a dominance perhaps so profound that it was not recognised in the cases as ideology at all (itself a consequence of the way in which the common law develops).³³ This dominance necessarily worked against the evolution of a coherent body of competition law. The other propositions disclose a lack of consensus about preferred values and the reasons for preference, and thus an inability to identify the interests which warrant protection. In an area where considerations of public policy are at the forefront, the absence of social and political consensus about the relative importance of the interests affected by competition and anti-competitive practices also worked against the development of a body of common law competition law.

Now it is true that consensus about public policy is not a necessary condition of the development of the common law, even in areas where public policy is at the forefront. Native title law in Australia as a result of the High Court's 1992 *Mabo* judgment is one example of this.³⁴ But the history, traditions and essential dynamics of the common law mean that this is a well rarely drawn upon.

³¹ Heydon, above n 25, 25.

³² Ibid 26-7.

³³ See especially *A-G (Commonwealth) v Adelaide Steamship Co Ltd* (1913) 18 CLR 30. See also Justice Stephen Gageler, 'Chapter IV: The Inter-State Commission and the Regulation of Trade and Commerce under the Australian Constitution' (2017) 28 *Public Law Review* 205, 212-23. I thank Marcus Bezzi for bringing these sources to my attention.

³⁴ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

The limits otherwise imposed by the common law on trade were few and far between.

B *From Runaway Servants to the Tort of Inducing Breach of Contract*

Given the sanctity of contracts to the common law it is unsurprising that there was developed a cause of action in tort for maliciously inducing a breach of contract. We return again to the 1800s. The primary source of the tort was the law of masters and servants. The master's interest in retaining the servant meant that inducing a servant to run away for a better option elsewhere was actionable. But, in its usual way, the common law could develop to deal with the realities of life as they emerged. *Lumley v Gye* involved a contractual relationship of a singer to a theatre,³⁵ and not a traditional master-servant relationship. The tort was nevertheless found to have been committed by the defendant who had maliciously procured the singer to break her contract with the plaintiff's theatre. It was not a large step from there for the tort to further evolve by the traditional methods of the common law into one by which any intentional interference with any contract, without sufficient justification, which causes loss is actionable. The interest protected, that of a contracting party, was not foreign to the case-by-case development of the common law.

C *From the Tort of Deceit to Negligent Misrepresentation*

A coherent doctrine for the tort of deceit was articulated in *Derry v Peek*.³⁶ A tramway company stated in a prospectus that it held certain rights, but they were actually contingent rights. The House of Lords overturned the decision of the Court of Appeal, which had found the tort made out because the directors responsible for issuing the company prospectus had no reasonable grounds for the impugned assertion about the company's rights. The House of Lords' judgment was excoriating. The tort requires dishonesty.

It would be another eight decades before the Court of Appeal obtained some kind of vindication, albeit through the development of the tort of negligent misstatement. In *Hedley Byrne & Co Ltd v Heller & Partners Ltd* the limits imposed by *Derry v Peek* were redressed.³⁷ Lord Reid put it this way:

Much of the difficulty in this field has been caused by *Derry v Peek* [(1889) 14 App Cas 337; 5 TLR 625 HL]. The action was brought against the directors of a company in respect of false statements in a

³⁵ (1853) 118 ER 749.

³⁶ (1889) 14 App Cas 337.

³⁷ [1964] AC 465.

prospectus. It was an action of deceit based on fraud and nothing else. But it was held that the directors had believed that their statements were true although they had no reasonable grounds for their belief. The Court of Appeal held that this amounted to fraud in law, but naturally enough this House held that there can be no fraud without dishonesty and that credulity is not dishonesty. The question was never really considered whether the facts had imposed on the directors a duty to exercise care. It must be implied that on the facts of that case there was no such duty. But that was immediately remedied by the Directors' Liability Act, 1890, which provided that a director is liable for untrue statements in a prospectus unless he proves that he had reasonable ground to believe and did believe that they were true.

It must now be taken that *Derry v Peek* did not establish any universal rule that in the absence of contract an innocent but negligent misrepresentation cannot give rise to an action. It is true Lord Bramwell said [14 App Cas 337, 347]: 'To found an action for damages there must be a contract and breach, or fraud.' and for the next 20 years it was generally assumed that *Derry v Peek* decided that. But it was shown in this House in *Nocton v Lord Ashburton* [[1914] AC 932, 947] that that is much too widely stated. We cannot, therefore, now accept as accurate the numerous statements to that effect in cases between 1889 and 1914, and we must now determine the extent of the exceptions to that rule.³⁸

Nocton v Lord Ashburton involved a solicitor-client and thus a fiduciary relationship. *Hedley Byrne* was important because it contemplated liability in any case where the relationship or the circumstances were such that the defendant became bound to take reasonable care not to make a misrepresentation.

Innocent misrepresentations remained without remedy at common law, other than to the extent that the law of contract permitted rescission if the whole bargain had miscarried.³⁹

Again, the interest protected, that of a person suffering economic loss, was comparable to the other kinds of interests which the common law had developed to protect.

D *From Conspiracy to ... Not Competition Law*

The tort of conspiracy is another thread in the evolution of the common law which might have proved a source for the development of a doctrine about competitive markets ... but it did not.

Allen v Flood involved a waterfront dispute.⁴⁰ Ironworkers wanted to make sure that shipwrights weren't taking their work by doing ironwork, so their union delegate told the

³⁸ Ibid 484.

³⁹ In other words, there had been a total failure of consideration. See especially *Kennedy v Panama New Zealand and Australian Royal Mail Co Ltd* (1866-7) LR 2 QB 580, 587 (Blackburn J, on behalf of the Court). See also J W Carter, *Contract Law In Australia*, (LexisNexis Butterworths, 6th ed, 2013) [18-23], [18-37].

employer the ironworkers would cease work if the shipwrights were not sacked, which they were. The House of Lords refused to find a cause of action. You could see which way the wind was blowing, I suspect, when in the course of argument Lord Herschell asked ‘Is competition the only permissible form of interference? Is a temperance crusade unlawful?’⁴¹

The tort of conspiracy permitted a different conclusion to be reached in *Quinn v Leathem*.⁴² The case concerned the market for meat. The plaintiff employed non-union labour and refused to dismiss those employees. Union representatives took action to prevent their members from dealing with the plaintiff’s beef which he supplied to a third party. The third party to whom the plaintiff supplied beef refused to accept the supply as a result. Lord Halsbury got straight to the point at 505-6, saying:

My Lords, in this case the plaintiff has by a properly framed statement of claim complained of the defendants, and proved to the satisfaction of a jury that the defendants have wrongfully and maliciously induced customers and servants to cease to deal with the plaintiff, that the defendants did this in pursuance of a conspiracy framed among them, that in pursuance of the same conspiracy they induced servants of the plaintiff not to continue in the plaintiff’s employment, and that all this was done with malice in order to injure the plaintiff, and that it did injure the plaintiff. If upon these facts so found the plaintiff could have no remedy against those who had thus injured him, it could hardly be said that our jurisprudence was that of a civilized community, nor indeed do I understand that any one has doubted that, before the decision in *Allen v Flood* in this House, such fact would have established a cause of action against the defendants.

Lord Shand, at 514, observed that:

As to the vital distinction between *Allen v Flood* and the present case, it may be stated in a single sentence. In *Allen v Flood* the purpose of the defendant was by the acts complained of to promote his own trade interest, which it was held he was entitled to do, although injurious to his competitors, whereas in the present case, while it is clear there was combination, the purpose of the defendants was ‘to injure the plaintiff in his trade as distinguished from the intention of legitimately advancing their own interests.’

Allen v Flood was thus explained as a ‘case of legitimate competition in the labour market’,⁴³ whereas *Quinn v Leathem* was not. I do not find the distinction particularly persuasive. The defendants in *Quinn v Leathem* were also advancing their own interests to ensure a unionised workforce in the meat industry. For present purposes, however, the relevant point is that the

⁴⁰ [1898] AC 1.

⁴¹ *Ibid* 9.

⁴² [1901] AC 495.

⁴³ *Ibid* 515 (Lord Shand).

touchstone for liability had nothing to do with anti-competitive effects but was concerned with individual intention or purpose. Nor was the focus on markets, let alone the fostering of competitive markets. The focus was on the impact of the conduct on the plaintiff, the issue being only whether the conduct harmed the plaintiff's trade or business.

E *Other Intentional Torts*

The same can be said of other intentional torts including intimidation and injurious falsehood. The tort of intimidation requires compliance by a person (the plaintiff or otherwise) with an unlawful demand which causes a person to suffer loss.⁴⁴ Injurious falsehood protects from loss caused by the making of knowingly false statements about a person's proprietary rights and interests.⁴⁵ Similarly, while the tort of passing off developed from one which required the dishonest passing off of one trader's goods for those of another to any false suggestion that one person's goods or business are connected with those of another, the interest protected by the law of passing off was that of the trader or business suffering loss as a result of the conduct.⁴⁶

F *A Tort of Unfair Competition?*

In *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* a claim was made for the tort of 'unfair competition'.⁴⁷ Deane J, at 439-40 said:

The phrase 'unfair competition' has been used in judgments and learned writings in at least three distinct ways, namely, (i) as a synonym of the doctrine of passing off; (ii) as a generic name to cover the range of legal and equitable causes of action available to protect a trader against the unlawful trading activities of a competitor; and (iii) to describe what is claimed to be a new and general cause of action which protects a trader against damage caused either by "unfair competition" generally or, more particularly, by the "misappropriation" of knowledge or information in which he has a "quasi-proprietary" right. The first and second of the above uses of the phrase are liable to be misleading in that they may wrongly imply that the relevant action or actions are restricted to proceedings against a competitor. The second use is also liable to imply that there exists a unity of underlying principle between different actions when, in truth, there is none. The third use of the phrase is, in an Australian context, simply mistaken in that

⁴⁴*Sid Ross Agency Pty Ltd v Actors and Announcers Equity Association of Australia* [1971] 1 NSWLR 760, 766 (Mason JA, Jacobs and Holmes JJA agreeing); *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2014) 45 VR 571.

⁴⁵See *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388, 404 (Gummow J), citing *Ratcliffe v Evans* [1982] 2 QB 524, 527-8 (Bowen LJ).

⁴⁶Compare the five elements, including 'calculated' injury in *Erven Warnink B V v J Townend & Sons (Hull) Ltd* [1979] AC 731, 742 (Lord Diplock) with the reformulated three elements including 'misrepresentation ... (whether or not intentional)' in *Reckitt & Colman Ltd v Borden Inc* [1990] 1 WLR 491, 499 (Lord Oliver).

⁴⁷(1984) 156 CLR 414.

“unfair competition” does not, in itself, provide a sufficient basis for relief under the law of this country. It is in that third and mistaken sense that “unfair competition” was called in aid of *Moorgate's* case in the present appeal.

So much for the proposed tort of unfair competition – but even that claim, it is apparent, concerned competition alleged to be unfair only to a specific competitor.

IV CONCLUSIONS

Where does this overview leave us?

It is fair to say the common law operated at the margins of anti-competitive conduct. In particular, the causes of action which regulated conduct in trade and business were not founded on view about markets, how they should function, or the harm that might be caused if markets did not function efficiently. They were founded on the protection of the rights and interests of individual traders and businesses – in other words, they were laws about competitors, not competition. Even where, as in the law of restraints of trade, the law ultimately ended up the opposite of what it started out as, the case-by-case development of the law gave the appearance of continuity and the founding of the law upon a pre-existing consensus about the importance of the interests the laws were protecting.

It is not that the common law operated on the basis that ‘there is no such thing as society’ (attributed to Margaret Thatcher’s in an interview by the *Women’s Own* magazine in 1987). It is that the very essence of the common law made it incapable of developing doctrines which sought to protect the general interest of consumers in efficient markets.

Equity, of course, had developed numerous doctrines which impacted upon businesses could be conducted, but these were founded on conceptions about the inability of the common law to fully reflect the requirements of good conscience. The dynamic underlying the development of equitable principles was far removed from any conception of the interests which might be affected by restricted markets.

In the period after World War II, some three hundred years after the industrial revolution, the common law had developed no theory to underpin any cause of action the object of which was to protect markets from anti-competitive practices. As we have seen, in Australia by the mid-1960s there was not a consensus that markets should be protected from anti-competitive practices. Parliament had to take the initiative. The 1965 statute may have been ‘toe in the

water legislation' (as Bannerman described it in his 1985 article),⁴⁸ but it enabled the kind and extent of anti-competitive conduct which was common place in Australia at the time to be exposed. It was this exposure which enabled Bannerman to achieve consensus that these practices were antithetical to overall consumer welfare, and it was this that enabled the more robust laws of the 1974 legislation to be enacted.

As Bannerman put it in his 1985 article, once the 'astonishing web of restrictions covering a very great deal of Australian industry' had been exposed,⁴⁹ it was not again asserted that there was no need for the legislation. The issue became whether the legislation would work. The 1965 Act did not work of course, which was why it did not last very long. But once the reality had been revealed, there was no going back. One way or another, the issue had to be tackled and ultimately it was in the 1974 Act.

History supports the wisdom of Bannerman's approach. The common law may have been incapable of developing a doctrine of competition law, but Bannerman's approach of building consensus over the life of the 1965 Act shows that Bannerman was very much a man of the common law. The challenge for the future, as the effects of global markets continue to be experienced, is whether the consensus that did exist, that efficient competitive markets increase total consumer welfare, will be able to be maintained.

⁴⁸ Bannerman, above n 9, 85.

⁴⁹ Ibid.