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****CHECK AGAINST DELIVERY****

Labor is the party of competition

Sound policy beats game playing

Picture the scenario. An industry association proposes new laws to protect businesses from unfair competition. The small business minister privately thinks it's a bad idea that will hurt small business and consumers but, keen to stay on side with the industry association, says it's a good idea. The minister undertakes to raise it with ministerial colleagues in Canberra.

The minister returns to Canberra and says to colleagues 'I know this is a silly idea but I need to be seen to be championing it with the industry association. You just tell me we're looking at it, but we agree we won't do anything about it'.

The minister reports back to the industry association that the idea has been raised at the highest levels of the government and they are looking at it. The industry association reports to members that the highest levels of government are looking at the idea. Nothing ever happens. But at least the minister and the industry association chief look like they are on the side of small business.

This is no fairytale.

It describes a succession of small business ministers in the previous government. That government instigated a review of the nation's competition laws. The Dawson review reported in 2003.

The Coalition government sat on its hands for 11 years, refusing to strengthen the competition laws in anything other than a tokenistic way, including refusing to make serious cartel behaviour a criminal offence despite a clear recommendation by the Dawson report to do so. But Coalition small business ministers could report to industry associations how they were on the side of small business but that they just couldn't get the necessary changes through Cabinet.

Now in opposition, Coalition politicians are again saying they are on the side of small business, calling for new laws that they refused to introduce while in government, such as laws obliging businesses to charge consumers in poor suburbs the same prices they charge consumers in wealthy suburbs – the so-called Blacktown Amendment.

A small business minister can and should do better than that. Playing political games is no substitute for sound policy work to create an environment in which small business can flourish and consumers can benefit from lower prices and better service. My interest is in policy not in political game playing.

Why compassion and competition go hand in hand

Labor is the party of compassion and competition. At first blush, competition and compassion might appear to be competing ambitions. How could the soft-hearted support for the poor and vulnerable be compatible with the hard-hearted support for competition in open markets?

It is in the interests of working people, the poor and the vulnerable that business is under strong, competitive pressure. Competition exerts downward pressure on consumer prices. Competition makes businesses tough and resilient, better enabling them to employ people through the good times and the bad. Competition drives innovation which in turn drives productivity growth.

Today's productivity growth is tomorrow's prosperity. Business managers will have strong incentives to innovate – boosting productivity growth and future prosperity – when they are under competitive pressure from rivals who adopt and adapt the latest technologies and who develop and apply their own best ideas.

Just as competition lowers prices, creates jobs and generates prosperity, anti-competitive behaviour leads to higher prices, precarious employment and less prosperity, all to the detriment of the poor, the vulnerable and everyday consumers.

Labor has promoted competition dating back to the Whitlam era when the first national competition law – the Trade Practices Act – was introduced and tariffs were cut by 25 per cent.

The Hawke and Keating governments fashioned Australia's open, competitive economy. They opened the economy to competition from abroad and at home through tariff reductions, liberalised financial markets, labour market reform and national competition policy.

And the Rudd government is proceeding with the most ambitious program of reforming business regulation in the nation's history, moving Australia towards a

seamless national economy, while pursuing further competition reforms in vital infrastructure sectors such as energy, transport and communications.

These regulatory and competition policy reforms are one of five policy reforms areas identified by the Prime Minister to re-start productivity growth that stalled under the previous Coalition government.

To achieve global competitiveness for Australia in what he describes as ‘the building decade’, Kevin Rudd embraces a reform program comprising regulatory and competition reform, wise investment in infrastructure, support for innovation, investment in skills through the education revolution, and tax reform.

Regulatory and competition policy reforms are therefore a foundation stone in the Rudd Labor government’s reform program designed to prepare Australian business for recovery from the global recession and lock in its competitiveness as a basis for sustained prosperity in a tough post-recession global economic environment.

Anti-competitive behaviour can be comfortable for business

Way back in 1776 Adam Smith warned of the proclivity of businesses to engage in anti-competitive behaviour:

'People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices' (The Wealth of Nations, vol 1, book 1, chapter 10, 1776).

Life is easier for business managers if they reach understandings with other businesses to fix prices, rig bids and generally refrain from competing against each other.

But Smith also warned that governments can make matters worse, especially when they listen to protectionist business owners when enacting legislation:

'The proposal of any new law or regulation of commerce which comes from this order, ought always to be listened to with great precaution, and ought never to be adopted till after having been long and carefully examined, not only with the most scrupulous, but with the most suspicious attention' (The Wealth Of Nations, vol 1, book 1, chapter 11, 1776).

Smith was saying that businesses seeking new government regulation were typically motivated by a desire not for competition but for protection against it.

Outlawing conspiracies against the public

Competition laws are designed to outlaw anti-competitive contrivances such as cartels. Strong barriers to entry can enable a business operating in an industry to behave as a monopoly, limiting supply and charging higher prices than would prevail in open, competitive markets.

Often the barriers to entry will have been erected by governments themselves through laws and regulations. Where this is the case, the best policy solution is to remove the entry barriers, making the market contestable and making monopoly pricing impractical.

Yet circumstances of natural monopoly can arise, especially where private infrastructure networks like telecommunications, rail and natural gas systems are involved and markets are small. If access to these networks by third parties is denied by a private owner, it can be uneconomic for duplicate networks to be built, enabling the original network owner to charge monopoly prices to users.

Australia's competition laws provide for third-party access to common-user infrastructure to deal with the problem of natural monopolies. Third-party access laws need, nevertheless, to ensure that private infrastructure providers have sufficient incentive to invest in, upgrade and replace the infrastructure assets. The Rudd government is currently preparing legislation that will improve the timeliness and effectiveness of decision-making process under the national access regime and provide additional certainty for infrastructure investors.

Several businesses in an industry can become involved in collusive behaviour. Colluding businesses may form a cartel that fixes prices and divides up a market such that the businesses do not compete with each other. Or the collusion may be less formal, involving an understanding that falls short of a strict agreement but which nevertheless restricts competition and causes higher prices.

Recognising the extreme detriment to consumers caused by serious cartel conduct, the Rudd government has amended the Trade Practices Act to introduce criminal sanctions against such behaviour, involving jail terms of up to 10 years. The message is clear: without fear or favour, those who engage in serious cartel behaviour risk extended jail terms – and they will not be able to buy their way out of a jail term by negotiating the payment of a hefty fine.

While collusion is commonly associated with big businesses operating in big markets, such as in the recent case of cardboard packaging, it can also be practised by small businesses operating in small markets, such as small petrol retailers in country towns.

When it comes to collusion, you don't need to be big to be bad.

Businesses with a substantial degree of market power can be in a position to engage in anti-competitive, sustained below-cost pricing strategies to drive smaller rivals or potential rivals from the market. Having seen off the competition, the business is then able to raise prices to recover temporary losses. The Rudd government has strengthened the predatory pricing provisions of the Trade Practices Act while still enabling businesses to engage in sales and other forms of price discounting.

Markets are at their most efficient when the parties to a proposed transaction have access to relevant information about the goods or services for sale and the terms and conditions of the proposed sale. Businesses that engage in false, misleading or deceptive conduct are engaged in a conspiracy against the public.

At present, only civil remedies (like injunctions and damages) or criminal sanctions apply for breaches of these laws, which leaves a gap in the range of powers available to tackle such practices most effectively.

Under the Australian Consumer Law reforms now before the Parliament, new powers will be introduced to enable the Australian Competition and Consumer Commission (ACCC) and the Australian Securities and Investments Commission (ASIC) to seek civil penalties.

The Australian Consumer Law reforms provide that if a business breaches the existing consumer protection provisions of the Trade Practices Act and the ASIC Act – for example by making a false or misleading representation or engaging in unconscionable conduct – it will be subject to monetary penalties of up to \$1.1 million for corporations and \$220,000 for individuals. In addition, the directors and officers of that business could be subject to disqualification or banning orders.

Some have suggested that these new penalties will present new compliance burdens for business. But the conduct covered by these reforms is already illegal. If businesses already comply with the law, they face no extra compliance burden. It's a bit like speeding motorists complaining that increased speeding fines impose an extra compliance burden on them. If they don't break the law there is no compliance burden.

Listening with great precaution to proposals for new regulation

Some proposals for new regulation are cast as proposals to strengthen competition while, in truth, being anti-competitive in design and effect. Advocates of anti-competitive regulation purport to be in favour of competition but competition that is fair.

Business claims of unfair competition can include complaints that labour costs are lower in Asian countries, as if in all fairness there should be a single, global wage rate.

Sometimes, owing to economies of scale in production, distribution or retailing, big businesses can sell products on a sustained basis at prices below the cost of those products faced by small businesses. This is not necessarily anti-competitive behaviour and treating it as such in government legislation would result in higher prices to consumers. Only a few years ago, in the name of promoting fair competition, an industry organisation in Australia was arguing for a guaranteed share of the market, which would have enabled its members to charge higher prices without fearing competition.

A very recent proposal for government regulation to protect against unfair competition is the so-called Blacktown Amendment, a private member's bill co-sponsored by Senators Barnaby Joyce and Nick Xenophon.

The bill would make it illegal for the same business owner to charge different prices for the same product sold within a 35 kilometre radius (apparently because Blacktown is 35 kilometres from Sydney's CBD). It would oblige supermarkets to charge

Vaucluse prices for groceries sold in Marrickville, Toorak prices for goods sold in Footscray and Ascot prices for sales in Inala – or at least prices somewhere between those in wealthy and poorer suburbs.

It should be renamed the Vaucluse Amendment, since its true beneficiaries would be the residents of Vaucluse.

Adam Smith would have described the Blacktown Amendment as a conspiracy against the poor. He wouldn't be too far from the mark.

Evaluating competition policy proposals

Businesses do best in open, competitive markets. Some business owners might feel that doing business in a protected market is more comfortable for them and more predictable. And indeed it may well be true for a time. But protection leads to lethargy, inefficiencies and ultimately to wealth destruction.

However they are dressed up, proposals for protection against open competition ought not be listened to with great sympathy. But proposals to curb anti-competitive behaviour by businesses with market power are consistent with maintaining an open, competitive economy – as long as they are well designed and do not have the unintended consequence of making matters worse through the imposition of excessive compliance costs and new risks that deter investment in the industry and raise prices to consumers.

As a general presumption, proposals for new regulations should be set aside in favour of competitive markets, unless the regulations are clearly pro-competitive in design and effect.

A program of deregulation – cutting red tape – is in the best interests of Australian businesses, small and large, and of the economy as a whole. Small businesses bear a disproportionately heavy red-tape burden.

It is an irony to this day that, while businesses rail against the cost of complying with red tape, most of the demands for new regulation come from businesses and their representative organisations in the hope of achieving protection from competition.

The previous Coalition government promised to cut business red tape by 50 per cent in its first term. Instead, it presided over a period described by the Business Council of Australia as one of the 'creeping re-regulation of business'. The Rudd government is well advanced with the states and territories in removing overlapping red tape in 27 areas of business regulation, moving Australia towards a seamless national economy.

Competition works best when both parties have access to all relevant information. Nowhere is the imbalance in information and bargaining power more contentious than in the dealings between small and large businesses. Circumstances can arise where a large corporation with sufficient funds to engage expensive lawyers can draw up standard-form contracts with small businesses on a take-it-or-leave-it basis. Small business owners may lack the resources to be able to understand the contract they are being asked to sign and the bargaining power to do anything about it.

This may have the result that small businesses are subject to contract conditions that impose unfair or onerous obligations, such as terms which might allow the larger business to continue charging for a service that it has ceased supplying, or that enable it to impose onerous additional charges for minor breaches of contract conditions by the small business.

Over time, governments have introduced laws and regulations to deal with this imbalance of knowledge and power, such as the unconscionable conduct provisions of the *Trade Practices Act* and the mandatory codes of conduct which apply in relation to franchising, supermarket suppliers and petrol retailers.

Legislating to create an unfair business-to-business contract law has been suggested to deal with this imbalance. As new Minister for Competition Policy and Consumer Affairs, I decided to remove these draft provisions from the Trade Practices Amendment (Australian Consumer Law) Bill before it was introduced into Parliament in June 2009.

In the context of business-to-business contracts, a general notion of unfairness, subject to interpretation by the courts, may have the effect of increasing risk, raising business costs and potentially jeopardising small business financing. Small business financiers will be more reluctant to lend if they believe that key contract terms could be overturned.

Small business organisations are reporting that it is more difficult during the severe global recession for their members to obtain finance. Small business finance will not be as readily available in the post-recession era as it was during the financial boom times of the mid-2000s. Making it even more difficult to obtain finance would not assist small business.

It may be possible to deal with specific instances of blatant unfairness through amendments to industry codes of conduct, such as the Franchising Code, and the unconscionable conduct provisions of the Trade Practices Act. The robustness or otherwise of the unconscionable conduct provisions is being tested in the courts at present. The outcome of those cases will provide valuable information in assessing the effectiveness of the unconscionable conduct provisions in dealing with unfair contracts.

The Government is reviewing the unconscionable conduct provisions of the Trade Practices Act as well as the Franchising Code of Conduct. Information imbalances in business-to-business transactions may therefore best be dealt with through reforms to and more effective enforcement of the false and misleading and unconscionable conduct provisions of the Trade Practices Act and the Franchising Code of Conduct. And the Australian Consumer Law Bill will give the ACCC greater powers to take effective action against such behaviour.

The Government will continue to pursue competition policy reforms as an integral part of its overall economic reform program. Policy proposals that are pro-competitive will get a sympathetic hearing while those that are anti-competitive will be listened to with great precaution and examined with the most suspicious attention.