



# Birdsville better for drinks than legislation

*Barnaby Joyce did not protect consumers from anti-competitive behaviour, he protected business from competition, argues **Craig Emerson***

**J**UST when you'd thought you'd seen everything, a free-market think tank has joined forces with Queensland Nationals senator Barnaby Joyce in supporting an anti-competitive business regulation.

Alan Moran, deregulation director of the Institute of Public Affairs, has described as pathetic the Rudd Government's decision to scrap the previous government's law, written by Joyce in the Birdsville Pub, that would have made illegal any sustained heavy discounting by businesses with a substantial share of the market.

The Government's amendments to the competition laws — the Trade Practices Act — will restore the original intent of the act in outlawing predatory pricing. This occurs where a business cuts its prices below its costs for a sustained period, absorbs the losses with the intention of driving rivals out of the market, and then increases prices under weakened competition.

The Birdsville amendment, enacted in the shadows of an election campaign, protected businesses from competition and would have forced consumers to pay higher prices. Joyce is entitled to propose such an amendment;

the previous Coalition government was cynically opportunistic in embracing it.

By legislating against businesses with a substantial market share, the Joyce-Peter Costello amendment had the potential to dampen legitimate competitive behaviour.

Joyce has been honest enough to acknowledge that his Birdsville amendment was designed to protect small businesses against bigger businesses.

But even by this criterion it fails. Consider a small business that holds a substantial share of the market in a small country town. If a big business entered the town and the small business cut its prices below cost in an attempt to see off its new big business rival, the small business could fall foul of the Birdsville amendment. The newly entering big business could retaliate with impunity, as it would not yet have a substantial share of the market.

More important, the Birdsville amendment does not protect competition and was never designed to do so. The courts would have spent a decade deciding what a substantial market share meant. What is the market in question? The near neighbourhood, a few square kilometres or, in the case of an internet-based business, the whole state or the entire nation? And what is a substantial share of that market? Is it 20, 30 or 40 per cent? Isn't it possible that two business rivals with a market between them could go at it hammer and tongs, while four in another market could collude?

Despite Labor's urgings during the parliamentary debate on the Birdsville amendment last August, the Coalition government refused to provide any guidance to the courts on these fundamental questions. Neither the then treasurer nor the small business minister fronted up for the debate, leaving it to a parliamentary secretary who had no idea.

Surely it's not the size of a business but its behaviour that determines whether or not it is acting competitively.

The Rudd Government is removing the reference to market share and replacing it with market power. In doing so, the Government is protecting competition in the tradition of previous Labor governments that first introduced the Trade Practices Act, strengthened it in the mid-1980s and introduced national competition policy in the early 1990s.

The Government is continuing Labor's

pro-competitive tradition by reforming 27 areas of business regulation that will take Australia towards a seamless, competitive national market.

Small businesses and consumers do best in genuinely competitive markets. In any event, it is not the job of governments to protect businesses — big or small — from genuine competition.

The Rudd Government's amendments do not require the courts to find that a business engaging in sustained below-cost pricing could have recovered all its losses after it had driven a rival out of the market. A hypothetical ability to recover all losses would be impossible to prove. The amendments repair a hole in the law that at present effectively requires such proof.

It is this repair work that has incensed the Institute of Public Affairs, which conveniently ignores that similar guidance to the courts was included in the explanatory memorandum to the Birdsville amendment. Given its druthers, the institute would rather there was no law against predatory pricing: no Birdsville amendment, no Labor amendment, nothing.

Competition laws are needed in a market economy. Anti-competitive behaviour is the enemy of keeping prices low for consumers. But poorly designed competition laws such as the Birdsville amendment are the enemy of competition. The Birdsville amendment was written at the urging of a group of businesses that wanted protection from competition.

The previous government should have heeded the advice of Adam Smith, who warned that "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 (examined) . . . with the most suspicious attention".

The Government's amendments to the Trade Practices Act are designed not to protect business from competition but to protect competition from anti-competitive business behaviour.

Consumers and competitive small businesses will be the winners. Perhaps the Institute of Public Affairs should hold its next meeting in the Birdsville Pub.

Craig Emerson is the federal Minister for Small Business and Minister Assisting the Finance Minister on Deregulation.