

The Real Problem is Competition Destruction

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The historical approach of the HR Nicholls Society in calling for industrial relations reform has been to focus on industrial relations legislation along with industrial relations practices and behaviours. In this presentation I propose that, although that focus is valid and correct, it has now become a focus that misses and diverts attention away from what industrial relations practices in the private sector have actually become.

Australian private sector engaged unions no longer conduct worker-bosses 'war.' They pretend to engage in this 'war' but that is primarily a masquerade from their real activities. Australian private sector engaged unions are no longer genuine employee representative collectives.

These unions are now in fact self-sustaining non-taxable businesses that provide a service to (primarily) select large businesses in Australia. That service is the delivery of anti-competitive processes to protect their large business 'partners' from the businesses competitors.

The unions' anti-competition big business partners pay for this service either through defacto or actual enforced union membership of employees, or payments to a myriad of union 'funds' or through corrupt means.

Toll-TWU

The evidence of this starkly emerged in the Hayden Royal Commission. For example the giant transport company Toll admitted making payments to the Transport Workers Union on a contractual arrangement that the TWU would harass specified Toll competitors. Many other examples came out.

Coles-SDA

Subsequent to Hayden, Coles has been 'caught out' being in bed with the shoppies union, the SDA securing a deal to underpay workers. This standard deal was done by the SDA also with Woolworths for example. But the SDA opposed deals with Aldi and opposed adjusting the relevant retail award. The outcome was that the SDA-Coles deal put Coles, Woolworths and other big retailers at a competitive advantage to small retailers and other competitors.

CFMEU-Construction contractors

In the construction sector the thuggery, violence and intimidation of the CFMEU that grabs so much attention is a symptom of the problem, not the problem. The intimidation is rather an anti-competitive tool used to ensure that businesses that are in 'partnership' with the CFMEU are able to supply into the construction sector at higher prices than competitors. For example I have documentary evidence that where the CFMEU 'requires' the use of a particular concrete supplier that that concrete supplier charges an additional \$10-50 per cubic cm for the supply of concrete. Shower screens cost 22% more. The list goes on.

Not cartel

I am told by specialist competition lawyers that such arrangements do not fit the definition of 'cartel' under the competition laws. There is therefore difficulty launching prosecutions for 'cartel' behaviour. A 'cartel' requires two or more competitors to get together and agree on a price or market carve-up between them. In this instance the CFMEU organizes who gets what jobs acting as an anti-competitive organizational 'hub.' The best definition I've been able to invent for the specialist competition lawyers is 'anti-competitive collective'.

What is clear is that competition is being suppressed, markets are being manipulated and prices are artificially increased for the purposes of increasing company profits. For this service, businesses pay unions. It's a wonderful set up!

CFMEU delivers 'profits'

The CFMEU willingly admit this and in fact openly advertise the service. On the 8th September this year the WA CFMEU sent a 2 page letter to WA construction firms inviting them become involved to achieve an outcome similar where 'the east coast have higher profits'. The letter says that Probuild, Brookfield Multiplex and Lend Lease have already joined.

ACCC

It is now obvious that private sector union, industrial relations processes are now primarily about select businesses in select industries colluding with relevant unions to achieve anti-competitive outcomes. The head of the Australian competition watchdog Rod Sims recognized this in a speech to the Law Council of Australia in August last year and said the ACCC would act. The ACCC is currently conducting litigation against the CFMEU over the Boral saga.

However the ACCC is constrained. First, private sector unions have devised devilishly successful processes to protect their big business partners from evidence of 'cartel' activity. Quite brilliant really!

Competition Act flaws

The most significant problem is in flawed design elements of the competition laws. There are a few but the most important is the so called 'employment exclusion.'

Section 51(2)(a) of the Competition and Consumer Act 2010, says:

(2) In determining whether a contravention of a provision of this Part other than section 45D, 45DA, 45DB, 45E, 45EA or 48 has been committed, regard shall not be had:

(a) to any act done in relation to, or to the making of a contract or arrangement or the entering into of an understanding, or to any provision of a contract, arrangement or understanding, to the extent that the contract, arrangement or understanding, or the provision, relates to, the remuneration, conditions of employment, hours of work or working conditions of employees;

We can accept that employee 'remuneration' or 'hours of work' should not be subject to competition laws. But, the 'conditions of employment' and 'conditions of employees' are so broadly applied under law as to arguably and do exclude the

ACCCs reach into moving against this anti-competitive business scam. This has and is being used to enable an anti-competitive business model to flourish in which private sector unions are in partnership with select businesses maximize profits and to harm consumers, ordinary workers, taxpayers and the economy. It looks like the ACCC has woken up. Congratulations to them.

Reform

But I note that acceptance of this anti-competitive collect reality is not on this Coalition governments radar screen or agenda. The ACCC needs legislative reform to enable it to do its job. I note also that One Nation, lead by Senator Malcolm Roberts has recognized and is leading on the issue. Congratulations One Nation. How do we help?