

# PRESS REPORTS

## DYNAMIC COMPETITION IN DYNAMIC MARKETS:

### A PATH FORWARD

We would like to express our sincere thanks to each of you who participated in our *Dynamic Competition in Dynamic Markets: A Path Forward* Conference in Melbourne on April 30, 2019.

Here is what has been said about our conference by the press.

by CPI

## FINANCIAL REVIEW

### Facebook, Google are not publishers, says US anti-trust expert

Yolanda Redrup  
Apr 29, 2019

Renowned US competition lawyer Howard Shelanski has pushed back against moves by regulators to treat Facebook and Google as publishers, saying any laws dictating how the tech giants display content or refer users to news sites would be overreaching.

Mr Shelanski, who is in Melbourne this week for a Melbourne Law School conference on market competition laws, said some regulatory reform was necessary, particularly around data privacy and mergers and acquisitions, but he urged the competition regulator and

the federal government to take a slowly-but-surely approach to any changes.

"It [the Australian Competition and Consumer Commission] is treating the platforms, particularly Facebook, like a media outlet and refers to it having a news referral market ... but that conclusion needs some careful thought because a lot of what Facebook does is let news sources reach an audience and let individuals share content they themselves have taken action to find," he told *The Australian Financial Review*.

"A lot of news traffic Facebook has very little to do with - it's just the locus of exchange for people on the edge of the platform.

"We have to be very careful in saying that Facebook is taking action to affirmatively refer people to news sites. That needs a closer look."

Mr Shelanski, who is a partner at law firm Davis Polk and former regulatory tsar under the Obama administration, advises Facebook on competition law.

## Christchurch effect

His comments come in response to the ACCC's preliminary report from its digital platforms inquiry, which stated that Facebook and Google curate content served to consumers and in doing so make their own decisions regarding the trustworthiness of content.

While the ACCC's preliminary recommendations stopped short of suggesting any changes to Facebook or Google's algorithms, it raised concerns about the "risk of under-provision" for traditional media, while ACCC chairman Rod Sims said there were frustrations about the tech platforms promoting stories that had ripped off the work of other journalists.

But it was in the aftermath of the Christchurch massacre, which was live-streamed on Facebook, that the tech giants started to be called out as publishers, not just platforms.

Earlier this month the government legislated three-year prison sentences for social media company executives and hefty fines if the platforms do not expeditiously remove violent and extremist content, in the wake of the Christchurch mass shooting. While Mr Shelanski would not comment directly on whether he believed these laws were ill thought out, he cautioned against a "top-down" approach to reform.

**"There also needs to be greater recognition of the value of competition and innovation when thinking about mergers."**— Howard Shelanski

"We feel like we've been living with this technology for a long time, but a dozen years ago we weren't using it in the fundamental ways we do today," he said.

"These platforms have made some mistakes, but we want to maintain what's good about them. Strong top-down regulation at this point is premature.

"Regulators need to work with industry and the large platforms to understand what the best practices are and how to implement them. That's something that can't be done with top-down governance," he said.

While Australian politicians have been focused on how to manage the growing power of the tech giants, so, too, are their international counterparts.

In the United States, would-be Democratic presidential candidate Elizabeth Warren has proposed breaking up the likes of Google and Facebook, saying they have too much power over the economy, society and democracy.

Senator Warren would implement laws that make it illegal for the tech giants to own both a utility, or marketplace, and a business that operates on the utility. For example, Amazon would no longer be able to sell its Amazon Basics products on Amazon Marketplace.

Under Senator Warren's proposal, some big mergers would also be undone, including Facebook's purchase of WhatsApp and Instagram.

But Mr Shelanski said the break-up of AT&T and Bell Operating Companies in the early 1980s demonstrated that splitting up businesses was incredibly complex and impractical.

In the case of Facebook, he said Instagram's success may also not have occurred unless Facebook had taken control of the company, contesting the idea that the social network buying Instagram had stopped a competitor from emerging.

## Value of competition

However, Mr Shelanski acknowledged that competition watchdogs globally needed to stop being so risk-averse when it came to blocking M&A activity.

"If we were to take the tools we have in anti-trust enforcement and be less hesitant to make mistakes in terms of over-enforcement, then we'd have a more rigorous and careful merger enforcer that would preserve a more vibrant marketplace going forward," he said.

"There also needs to be greater recognition of the value of competition and innovation when thinking about mergers. That's reasonable."

As part of the digital platforms inquiry, the ACCC made the preliminary recommendation to change merger laws to take into account the removal of a potential competitor, as well as the amount and nature of data which the acquirer would likely gain.

But the local start-up sector is concerned these changes could prevent even young start-ups from being acquired by the tech giants - an exit that many founders aspire to.

"The problem with regulating this level of M&A is that it will create uncertainty as to whether any Australian start-up can achieve a liquidity event," the co-founder of online used car marketplace Carbar, Desmond Hang, said.

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Link:  
<http://online.isentialink.com/afr.com/2019/04/29/a49093fb-6fb5-4349-8f4d-3a02408caad4.html>

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## FINANCIAL REVIEW

# Facebook and Google have no excuse, warns ACCC

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Patrick Durkin  
Apr 30, 2019

Australian Competition and Consumer Commission chairman Rod Sims has doubled down on his concern that Facebook and Google are responsible for the content they publish.

Bank of England deputy governor Philip Marsden, who sat on the UK's recent digital platform review, also backed calls for a dedicated regulator to limit the power of the digital giants.

Rod Sims says Facebook and Google must take responsibility. Michael Clayton-Jones

Mr Sims is facing a backlash ahead of his final report on digital platforms after flagging increased penalties, changes to merger laws and a new regulatory body with power to examine editorial content.

"Facebook and Google aren't neutral players here – they own it, they make a truck-load of money from it and they have a responsibility for the impact they have on society," Mr Sims told a Melbourne Law School conference on Tuesday.

"They have created this machine ... I don't think you can absolve yourself of responsibility for what happens on the platforms ... I find that extraordinary and totally unacceptable."

The Australian government has already promised prison sentences and hefty fines if social media companies do not expeditiously remove violent and extremist content, in the wake of the Christchurch mass shooting.

### Claims of ACCC censorship

But there is a significant backlash from the tech sector over further proposed controls, with the ACCC's final report due by June 30.

"The most troubling recommendation by the ACCC is essentially a censorship board ... there are no standards," said Geoffrey Manne, whose International Centre for Law and Economics is partly funded by the tech giants.

"It highlights the problems of politicisation of this issue when we are giving up fundamental freedoms." Professor Allan Fels says he has heard the same excuses before. Alex Ellinghausen

US competition lawyer Howard Shelanski - who has advised Facebook - urged the ACCC and the federal government to take a slowly-but-surely approach.

However former regulator Allan Fels said he had heard all the same excuses before in the past from the banks.

"We didn't recognise the problems [with the banks] before the GFC or the problems which arose from the Hayne royal commission. We need to get on top of these issues now in the internet era," Professor Fels said.

Swinburne University's Beth Webster also pointed to the banks as an example where market power has been misused.

"Think of Australian banks in the 1980s, they all agreed not to introduce AGMs because it would be a zero sum game," she said.

### ACCC mirrors UK review

The UK review led by Jason Furman, former economic adviser to US President Barack Obama, also recommended last month the creation of a new digital unit, more power to block mergers and an industry code of conduct.

Jason Furman reached strikingly similar conclusions in the UK review. AFR

Mr Sims said the UK report produced remarkably similar recommendations, to the point that he felt like he was

"sitting in class and someone is going to accuse me of cheating".

Professor Marsden also urged competition experts to overcome their resistance to the creation of a bespoke regulatory regime for the tech giants.

"There is no way it is not going to happen; we are riding a wave of digital regulation," Professor Marsden told the conference.

He defended criticism over Facebook buying Instagram for \$US1 billion (\$1.4 billion) in 2012, saying that regulators still needed to rely on the evidence.

But he said more needed to be done to protect against further consolidation by the tech giants, despite critic Mr Manne claiming that "a presumption against any vertical integration is front and centre in the ACCC report".

"It is merger control, not merger clearance," Professor Marsden said.

"You may think calling for all tech mergers to be banned is ludicrous but those calls are being made, so it would be dangerous to ignore them – we can't just say there is nothing to see here," he said.

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Link:<https://www.afr.com/technology/technology-companies/facebook-and-google-have-no-excuse-warns-acc-20190430-p51ihl>

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**THE AUSTRALIAN** 🇦🇺

## **Business being ignored in voter-focused campaigns**

John Durie  
Apr 30, 2019

As the election campaign moves into high gear the business community could be excused for asking what's in it for them because frankly, some isolated examples aside, the answer is not much.

The economy is crawling but neither side is talking up growth options and certainly neither is proposing major structural reform to boost productivity.

Business would prefer more talk about just where the growth is coming from. After taking a high profile last election, the lack of noise from the BCA and big business in general has been deafening, because it rightly perceives that its political standing is negative.

The Hawke-Keating era spruiked growth on the argument that a bigger pie meant more for everyone to eat.

This time, for Labor, it's more about a better division of the pie. That's a campaign strategy that can't be faulted for its intellectual honesty, but which is politically risky because it offers a big target. The ALP figures comparing household costs to pre-GFC days against income growth leaves the average household with a \$20,000 gap, which it is trying to bridge through a range of policies including its massive \$4 billion childcare package.

Business has some fears about the ALP industrial relations policies focusing on the same pay for the same work, which is aimed at offsetting the mass move from company-employed workers to labour hire contractors.

BCA boss Jennifer Westacott has endorsed the ALP investment guarantee, which offers immediate deductions of 20 per cent on the cost of new investments.

She wants the policy to be broader and to be backed by other initiatives, but the fact is the ALP policy offers the only new plan to boost investment, which at 12.1 per cent of GDP is stunningly just 0.1 per cent above 1994 levels.

Investment is needed to boost jobs, the economy and profits. Instead of a media campaign, the BCA is engaged in a series of community workshops talking up its "Plan for a Stronger Australia" report, with the next to be held in Bathurst on Thursday featuring Greencross's Simon Hickey, Charles Sturt's Professor Andrew Vann and Westacott.

Scott Morrison has proved successful on a simple campaign of "vote for me because I'm not him [Bill Shorten]" — and lower taxes.

The Prime Minister's record on structural reform while he was treasurer was at best weak, and the Coalition campaign has featured no new initiatives that go close to providing a structural boost to productivity.

The ALP message is clear — it wants to divide the pie better — and the reality for business from both sides is that structural reform to give the economy a restart is, so far, not on the agenda.

Coles closing the gap If all goes to plan, when Woolworths' sales numbers are released later this week they will show that Coles boss Steven Cain has narrowed the gap between the supermarket majors.

But that hides some problems.

Cain has made some big strategic calls on supply chain, petrol and Queensland pubs but all of this takes time to translate into better grocery sales — unless his competitors make dumb mistakes.

So far Brad Banducci has operated superbly, so Cain doesn't have the benefit of the debacle that was the old Woolworths leadership from 2008 onwards, with grocery margins kept too high to help finance the Masters hardware snafu.

Coles's third-quarter sales on a comparable basis were up 2.4 per cent, or 1.5 per cent adjusted for 0.9 per cent inflation. This time last year the 0.9 per cent gain came with deflation of 0.7 per cent, so in real terms was up 1.6 per cent.

You can play with the numbers to adjust for the placement of New Year sales, which would make the reduction more obvious, but the bottom line says transaction growth at Coles is slowing. In retailing, that is bad news.

The market seemed unperturbed, with Coles shares up slightly at \$12.65. Cain argues that in so-called big baskets Coles is growing transactions. But in convenience it is doing badly and needs more work.

His friends at fuel supplier Viva gave some hope by suggesting its margins were falling because it couldn't hold wholesale fuel price increases.

This suggests petrol prices are more competitive but, given Coles is charging the most of any retailer, it needs further falls.

The last quarter again saw a boost from a promotional campaign. Fresh Stikeez are plastic toys shoppers can get for their kids and all evidence suggests the punters love them.

On Thursday the market expects Woolworths to report a rise in same-store sales of 2.8 per cent and, if the consensus number is correct, Cain can feel pleased.

But judgment on this issue must wait.

Coles is fast-forwarding its home brand products, which now stand at more than 30 per cent of total sales — well on track to beat the 2023 target of 40 per cent.

These goods are more profitable for Coles, and cheaper, so are good for consumers.

Any interest rate cut (an unlikely and unneeded event) would obviously have more impact on discretionary sales.

But, at store level, progress is not evident.

How to govern anarchy Bank of England deputy governor Philip Marsden is the keynote speaker today in a Melbourne Law School conference looking at how to regulate digital platforms.

Marsden was on Professor Jason Furman's committee in the UK that recently reported on the vexed issue of digital platforms and largely backed ACCC draft recommendations saying the present law was adequate but needed better execution.

This would be done with a new authority governing a code of conduct that would be set by the platforms and their users and be implemented by the authority to enable speedy decisions.

Marsden will talk about this so-called participatory regulation and ACCC boss Rod Sims will also appear to explain his report in the Gilbert & Tobin-sponsored event.

The code is meant to avoid the lengthy delays in present administration by facilitating quick enforcement. Marsden will also urge more future-looking merger decisions, which is something Sims has championed.

Sims is likely to push for amendments to the law if the ALP wins power. Others would say the ACCC has this power already but arguably failed to enforce it.

The conference is part of the process leading up to the final ACCC report, which is due to be handed to the government on June 30.

Former ACCC boss Alan Fels will support the concept of a new authority but suggests the best home for enforcement is the ACCC, with an expanded mandate to cover privacy issues.

The ALP also wants the ACCC to monitor its \$4bn childcare package to ensure providers don't rip off the system.

On platforms, a global consensus is forming around the creation of a separate entity to regulator Google, Facebook et al, in part to ensure any regulation is pro-competitive and evidenced-based.

Will Seek never learn?

Seek's market value fell about \$130 million yesterday on news of \$142m in acquisitions of stakes in two online learning companies, Future Learn and Coursera.

Both are classic Seek investments — in early-stage growth companies with the potential to be huge earnings contributors.

However, when the stock is trading at 32 times the market has blinkers and is concerned that right now the newcomers are loss-making and likely to lose about \$12m next year. Separately, the company's inspired choice as the new chief operating officer, former CBA boss Ian Narev, reported for work for the first time yesterday.

Link:

[https://www.theaustralian.com.au/subscribe/news/1/?sourceCode=TAWEB\\_WRE170\\_a\\_GGL&dest=https%3A%2F%2Fwww.theaustralian.com.au%2Fbusiness%2Fbusiness-being-ignored-in-voter-focused-campaigns%2Fnews-story%2F615417ecc01f8e3eb125a7bcebc7970e&memtype=anonymous&mode=premium](https://www.theaustralian.com.au/subscribe/news/1/?sourceCode=TAWEB_WRE170_a_GGL&dest=https%3A%2F%2Fwww.theaustralian.com.au%2Fbusiness%2Fbusiness-being-ignored-in-voter-focused-campaigns%2Fnews-story%2F615417ecc01f8e3eb125a7bcebc7970e&memtype=anonymous&mode=premium)

The logo for Global Competition Review (GCR) consists of a red square with the letters 'GCR' in white, bold, sans-serif font.

## ACCC boss criticises US “hipster antitrust” movement

Charles McConnell  
Apr 30, 2019

The push by some in the US to broaden the purpose of the antitrust laws is surprising and misguided, the head of Australia's antitrust authority has said.

*To read the full article follow the link below.*

Link:

<https://globalcompetitionreview.com/article/1190729/accc-boss-criticises-us-%E2%80%9Dhipster-antitrust%E2%80%9D-movement>

## FINANCIAL REVIEW

### Facebook and Google sell big in Australia, taxed little

Michael Bailey and Patrick  
Apr 30, 2019

Australians paid Google \$4 billion and Facebook \$598 million for services in 2018, yet the search and social media giants paid corporate tax of only \$49 million and \$14 million respectively.

In financial statements lodged on Tuesday that are set to reignite the debate around multinational tax minimisation, both Google and Facebook booked large payments to offshore suppliers that reduced reported revenue to roughly one-quarter of customer receipts, with corporate tax liabilities slashed accordingly.

In another battlefield for big tech, Australian Competition and Consumer Commission (ACCC) chairman Rod Sims doubled down on his assertion that Facebook and Google are responsible for the content they publish, and should be policed by a new regulatory body with power to examine editorial content.

Google Australia reported \$129.5 million of total comprehensive income after tax in 2018, up from \$125.1 million in 2017.

Facebook Australia reported \$23.2 million, up from a \$9.6 million loss in 2017, which it incurred after a legally binding settlement with the Australian Tax Office saw it pay back \$31.3 million owed from the seven prior years.

Google Australia's explanation for it booking only \$1.07 billion revenue, after \$3.7 billion was paid to Google by Australian advertisers, was that the local arm merely

"facilitated" the sale of advertising between the advertiser and Google Asia-Pacific, a Singaporean entity.

A Google spokeswoman said the difference between the total receipts and taxable revenue complied with Australian tax law, which required Google Australia to operate at arm's length from its ultimate parent, US-based Alphabet.

Most of the activity in creating the advertising opportunities resold locally happened offshore, and Google Australia had to pay a "fair price" for it, she said.

The \$1.07 billion Australian revenue figure consisted of \$561 million in net advertising and reseller revenue, \$291 million from research and development services to offshore parts of Google, \$216 million from the hardware business, and \$2.5 million from other revenue streams.

Facebook Australia's financial report gives a similar explanation for why \$598.4 million of local customer receipts translated into only \$125.5 million revenue, although it does not reveal which offshore subsidiary it is reselling ads for.

A Facebook spokesperson told Nine that it "complied with applicable tax laws".

Presumably expecting controversy over its receipts-to-tax ratio, Google Australia sent out a statement to media in tandem with the accounts, pointing to Google's investment in its Australian business. This included \$371 million paid to its nearly 1500 employees, and \$240 million spent on plant, property and equipment in 2018.

Meanwhile Mr Sims is facing a backlash ahead of the ACCC's final report on digital platforms after flagging increased penalties, changes to merger laws and a new regulatory body with power to examine editorial content.

"Facebook and Google aren't neutral players here – they own it, they make a truck-load of money from it and they have a responsibility for the impact they have on society," Mr Sims told a Melbourne Law School conference on Tuesday.

"They have created this machine ... I don't think you can absolve yourself of responsibility for what happens on the platforms ... I find that extraordinary and totally unacceptable."

The Australian government has already promised prison sentences and hefty fines if social media companies do not expeditiously remove violent and extremist content, in the wake of the Christchurch mass shooting.

### **Claims of ACCC censorship**

But there is a significant backlash from the tech sector over further proposed controls, with the ACCC's final report due by June 30.

"The most troubling recommendation by the ACCC is essentially a censorship board ... there are no standards," said Geoffrey Manne, whose International Centre for Law and Economics is partly funded by the tech giants.

"It highlights the problems of politicisation of this issue when we are giving up fundamental freedoms."

US competition lawyer Howard Shelanski - who has advised Facebook - urged the ACCC and the federal government to take a slowly-but-surely approach.

However, former regulator Allan Fels said he had heard all the same excuses before in the past from the banks.

"We didn't recognise the problems [with the banks] before the GFC or the problems which arose from the Hayne royal commission. We need to get on top of these issues now in the internet era," Professor Fels said.

Swinburne University's Beth Webster also pointed to the banks as an example where market power has been misused.

"Think of Australian banks in the 1980s, they all agreed not to introduce AGMs because it would be a zero sum game," she said.

### **ACCC mirrors UK review**

The UK review led by Jason Furman, former economic adviser to US President Barack Obama, also recommended last month the creation of a new digital unit, more power to block mergers and an industry code of conduct.

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"sitting in class and someone is going to accuse me of cheating".

Professor Marsden also urged competition experts to overcome their resistance to the creation of a bespoke regulatory regime for the tech giants.

"There is no way it is not going to happen; we are riding a wave of digital regulation," Professor Marsden told the conference.

He defended criticism over Facebook buying Instagram for \$US1 billion (\$1.4 billion) in 2012, saying that regulators still needed to rely on the evidence.

But he said more needed to be done to protect against further consolidation by the tech giants, despite critic Mr Manne claiming that "a presumption against any vertical integration is front and centre in the ACCC report".

"It is merger control, not merger clearance," Professor Marsden said.

"You may think calling for all tech mergers to be banned is ludicrous but those calls are being made, so it would be dangerous to ignore them – we can't just say there is nothing to see here," he said.

Facebook has banned foreign-bought political ads during the federal election campaign.

The decision came after a series of privacy scandals, including the Cambridge Analytica data breach, that forced the social media giant to set aside at least US\$3 billion for a record fine from the US Federal Trade Commission.

But is fining big tech companies the most effective way to protect users?

**Guest:** Howard Shelanski, Professor of law, Georgetown University

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Link: <https://www.afr.com/business/media-and-marketing/facebook-and-google-rake-in-billions-but-pay-little-tax-20190430-p51i0l>

## Digital giants look for clues in Australian wrangle over future-focused regulation

James Panichi  
May 01, 2019

There's a growing consensus among Australian legal practitioners on why the country's competition regulator is calling for law changes to help it assess mergers of technology companies based not on what the parties look like today, but what they're likely to become tomorrow.

The Australian Competition & Consumer Commission's call for competition legislation to be reworded to include a reference of the risk that a "potential competitor" — rather than a mere "competitor" — may be removed from a market is an ambit claim, lawyers say, that it isn't something the ACCC needs.

In fact, what's becoming clear is that the first recommendation of the watchdog's much-discussed interim report on the impact of digital platforms on news and advertising industries is directed neither at the regulated companies nor at Australia's lawmakers, but at the country's judiciary.

To use an Italian proverb, the ACCC was speaking to the wife so that the mother-in-law may hear what it had to say.

### 'Ex ante' assessments

There's no ambiguity that under existing laws the ACCC can already make predictive assessments — that is, the regulator is authorized to employ an "ex ante" approach to mergers. But by asking for a tweak to the wording of section 50(3)(h) of the 2010 Competition and Consumer Act, the regulator wants to spell it out for the judges.



Speaking at a conference in Melbourne this week, the ACCC's chief economist conceded that convincing the courts that a digital giant's acquisition of a relatively small startup could lead to serious competition problems further down the track remained a stumbling block.

"You have to convince the judge that [the deal] is likely to have the effect of a substantial lessening of competition. You have to convince the judge that [the acquired company] is likely to become the next big thing," Graeme Woodbridge told a panel of competition experts. "A judge ... is going to look at that and say 'well, I just can't predict that future, so I'm going to just let the acquisition go ahead.'"

The issue of "ex ante" merger assessments is fast becoming one of the most controversial parts of the ACCC's sprawling review of digital platforms, which has so far focused on Facebook and Google but has implications for other US technology companies as well.

The ACCC, in line with other regulators around the world, sees problems in the removal by acquisition of online companies and startups before they develop into competitors. It fears the practice has become a means of preemptively eliminating competitive restraints.

Importantly, the watchdog has identified Australia's cautious judiciary as the weakest link in any move to rein in the practice. The ACCC may already have the powers to deploy "ex ante" criteria in its merger assessments, but it believes that such a muscular approach could unravel in court.

The technology companies know this too. They're dismissive of the ACCC's first two recommendations that deal with mergers and fear that predictive considerations would simply lead the regulator to pick winners and make wild, uninformed guesses about what the future landscape may look like.

"In general, competition laws work OK," Woodbridge said. "It's more about whether the courts would have the appetite to interfere with a merger ... It's an open question."

## **Regulatory timidity**

The first recommendation of the ACCC's preliminary report into the operation of digital platforms calls for competition laws to include a reference to potential competitors, as well as the need to define the competition regulator's role in assessing the impact of data on the proposed deal.

In the detail of the interim report, the ACCC appears to acknowledge that the demand for legislative changes is a piece of regulatory theatre, designed to woo skeptical judges who may be reluctant to embrace considerations about the future competitive implications of a deal.

"The ACCC notes that it is currently not prevented from taking [the removal of a potential competitor] into account in reaching a view as to whether a merger or acquisition is likely to substantially lessen competition," the interim report says.

The draft document goes on to say that the recommendation is "intended to signal the significance of these factors in relevant cases and remove any ambiguity as to their relevance." In particular, the changes would signal "the importance of these factors to the courts."

At least one observer speaking at this week's Melbourne conference saw the wording of this proposal as an act of cowardice. If the ACCC already has the power to assess technology-company mergers preemptively, why wouldn't this already be happening?

Stephen King, a senior official with Australia's top economic advisory agency, the Productivity Commission, said there were plenty of examples in Australian history of regulators moving preemptively to avoid future competitive shortcomings and there was no reason why the ACCC shouldn't be doing this.

"Maybe the ACCC should be saying 'hang on, we don't need to accept the current jurisprudence,'" King told the panel. "Maybe we can push these matters before the courts; we can take the appeals and try to get that precedent changed in Australia."

"We don't need new antitrust laws, we don't need new competition laws. Maybe what we need is regulators more willing to take on actionable abuse," King added.

As an example of the ACCC's timidity, King pointed to the European Commission's legal pursuit of Google over the conduct of its AdSense shopping advertising business, which saw the EU watchdog impose a fine of 1.49 billion euros (\$1.67 billion today) on the Silicon Valley giant six weeks ago.

If Google had violated European laws with a service that it also offered in Australia, then it's likely to have violated Australian competition law as well, King said. "Why aren't we seeing the same kind of case in Australia?" he asked.

Those comments prompted a response from the joint general manager of the ACCC's digital inquiry, Morag Bond, who pointed out that the extended timeframe of the Google investigation just wasn't an option for the ACCC.

"We're not talking about fundamentally rewriting the misuse of market power law or the abuse of dominance law, or introducing something separate," Bond said. "What we are talking about is more proactive enforcement."

"We recognize that there are very complex cases, and Google Shopping took nine years," she said. "The chances of the ACCC being able to bring a case like that ... I just think nine years is an unrealistic timeframe to get resolution."

### **'Informed bets'**

The ACCC's interim report has also attracted the attention of regulators in other jurisdictions, many of whom are also grappling with notions of "ex ante" regulation, with particular reference to the assessment of acquisitions involving large technology companies.

Philip Marsden, deputy chair of the Bank of England's Enforcement Decision-Making Committee, said both the ACCC's interim digital-platforms report and the UK's Furman report on unlocking digital competition identified the need to look forward when assessing technology deals.

Marsden, who was one of the co-authors of the UK report with US economist Jason Furman, told MLex that most regulators around the world acknowledged the need for solid information and research before

launching into "ex ante" assessments, and many authorities were struggling with how far into the future they could look.

But that didn't mean regulators would be put in the position of picking industry winners, as the technology companies had suggested. It merely suggested that regulators needed to take a "more dynamic picture" of the market and to look more closely at potential competition.

Howard Shelanski, a partner with US law firm Davis Polk, told the conference that the reluctance of American competition regulators to embrace any kind of forward-looking regulatory norms amounted to a "systematic bias towards under-enforcement in US merger law and US anti-monopoly law."

However, Shelanski suggested that the regulatory bias may be coming to an end, with an increased recognition that "we have the tools and knowledge and techniques whereby we can actually make informed decisions about the future."

"Let's make informed bets, informed not just by the evidence of what might happen in those markets but informed about the risk involved and see how that works out for us," he said.

Geoffrey Manne, from the International Center for Law and Economics, a US free-market think tank, said that any push towards "ex ante" decision making would be regrettable because, in legal terms, it suffered from an "evidentiary problem."

Referring to Facebook's 2012 acquisition of Instagram, which is often held up as an example of regulators' inability to prevent mergers that may lead to subsequent competition concerns, Manne said that to say that the deal could have been stopped pre-emptively was "really problematic."

"That is basically saying: 'ex ante evidence that we admit is not enough to get us to the outcome that we think we should have means we should rejig the regime so that we get to the outcome that we want to have,'" he said. "It strikes me as recipe for false positives."

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Link: <https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/oceania/digital-giants-look-for-clues-in-australian-wrangle-over-future-focused-regulation>

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## Is fining big tech companies the most effective way to protect users?

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Justine Parker  
Apr 30, 2019

Facebook has banned foreign-bought political ads during the federal election campaign.

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Guest: Howard Shelanski, Professor of law, Georgetown University

Producer: Justine Parker

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