

DYNAMIC COMPETITION IN DYNAMIC MARKETS: *A PATH FORWARD*

Melbourne Law School

April 30, 2019



8:30am - 9:00am **REGISTRATION & COFFEE**

9:00am - 9:10am **WELCOME / INTRODUCTORY REMARKS**

Caron BEATON-WELLS, Professor of Law, Melbourne Law School

9:10am - 9:40am **OPENING KEYNOTE SPEECH**

Philip MARSDEN, Professor of Law and Economics at the College of Europe; Deputy Chair of Enforcement Decision Making Committee, Bank of England

9:45am - 11:00am **DIGITAL INNOVATION AND COMPETITION POLICY: A SYNERGIC APPROACH**

Allan FELS AO, Professorial Fellow, Melbourne Law School

Geoffrey MANNE, President and Founder, International Center for Law and Economics

Beth WEBSTER, Director, Centre for Transformative Innovation, Swinburne University of Technology

Moderator: Luke WOODWARD, Partner, Gilbert + Tobin Lawyers

11:00am - 11:15am **MORNING TEA**

11:15am - 12:30pm **BIG DATA: UNDERSTANDING AND ANALYZING ITS COMPETITIVE EFFECTS**

Katharine KEMP, Lecturer, Law School, UNSW

Peter LEONARD, Professor of Practice, UNSW Business School; Principal, Data Synergies

D. Daniel SOKOL, University of Florida Research Foundation, Levin College of Law

Graeme WOODBRIDGE, Chief Economist, ACCC

Moderator: Caron BEATON-WELLS, Professor of Law, Melbourne Law School

12:30pm - 1:15pm **LUNCH**

1:30pm - 2:00pm **A FIRESIDE CHAT WITH...**

Rod SIMS, Chairman, ACCC

Howard SHELANSKI, Professor of Law, Georgetown Law School; Partner, Davis Polk

2:00pm - 3:15pm **DESIGNING ANTITRUST REGULATORY MODELS IN A GLOBALIZED SILICON VALLEY CULTURE**

Christopher BERG, Senior Research Fellow, RMIT Blockchain Innovation Hub

Morag BOND, Joint-General Manager, Digital Platform Service Inquiry, ACCC

Stephen KING, Commissioner, Productivity Commission

Howard SHELANSKI, Professor of Law, Georgetown Law School; Partner, Davis Polk

Moderator: George SIOLIS, Partner, RBB Economics

3:15pm - 3:30pm **WRAP-UP & CLOSING REMARKS**

Caron BEATON-WELLS, Professor of Law, Melbourne Law School

Philip MARSDEN, Professor of Law and Economics at the College of Europe; Deputy Chair of Enforcement Decision Making Committee, Bank of England



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LETTER FROM THE ORGANIZERS

Elisa Ramundo
CPI

Since its inception, CPI has always focused its efforts on being the most valuable platform for high-level debates and offering the antitrust community advanced opportunities to discuss the most current issues influencing our economies on a global scale.

This conference, in line with CPI's goals, addressed the dynamics of competition in today's dynamic markets. 16 leading antitrust experts delved into in-depth analysis of topics such as digital innovation and competition policy, understanding and analyzing the competitive effects of big data, and designing antitrust regulatory models in a globalized silicon valley culture, etc.

We are honored by, and grateful to, Melbourne Law School for their partnership—for coming together with us to put on this timely conference that allowed for the discussion of the relevant topics affecting the antitrust and competition world today.

We thank all of the great minds that came together to make this happen and all of our speakers and attendees who made these discussions extremely valuable sharing their experience, and knowledge.

While we continue working to make the antitrust community connected globally, we invite you to stay tuned and learn more about our upcoming initiatives in print and at events around the world.

Professor Caron Beaton-Wells
University of Melbourne

The Melbourne Law School was delighted to partner with Competition Policy International in convening this important conference.

Events such as these play a valuable role in facilitating a mutual understanding and constructive dialogue amongst the many stakeholders – from business, government, competition authorities, consumer groups and academia – in an area that is prone to polarized perspectives. Divergent views are inevitable on the critical questions we face in charting the best way forward to promote dynamic competition and consumer welfare in an era of unprecedented change and uncertainty. At the very least, a robust and respectful debate on the issues allows for assumptions and approaches to be tested and fosters a climate conducive to working together in the common interest of ensuring we maximize the benefits of the digital economy for all. The debate at this conference was conducted in that spirit.

An event such as this would not have been possible without the generous support of sponsors, the willing involvement of speakers and the active participation of audience members. I am grateful to them all and to CPI for its commitment and skill in making the event such a success. For those of you who were unable to join us on the day, I hope you will take advantage of the rich record of the event that has been captured on the conference webpage and that it encourages you to continue being part of this important and ongoing global conversation.

THINKING HARDER ABOUT DATA VALUE AND REGULATION OF DATA DRIVEN BUSINESS

Peter Leonard

Data Synergies; UNSW Business School

“Data value is derived not by what data is, but by the ability of an entity to create value using that data as an input.”

Much of the discussion as to reasons to regulate big data is misguided. Common errors include: over-estimation of value of raw data (as distinct from value in ability and capability to link diverse data sets and thereby derive actionable insights); generalisation of conclusions as to global consumer data platforms to other large data driven businesses and shared data eco-systems; and over-concentration upon current tools of competition policy, rather than possibilities for context specific rebalancing of data rights using a variety of incentives and regulator tools.

Raw data has little inherent value. Big quantities of data are often less valuable than small quantities of the right diversity of transformed and correlated data sets. Data value is derived not by what data is, but by the ability of an entity to create value using that data as an input; to then durably capture that value (not by ownership, but by practical control – that is, by denying others the ability to do those things); and to do these things in a way which does not excite regulatory intervention that may strip that value.

Exclusivity of an entity's practical control of data can be qualified through regulatory action in a variety of ways. Possible value depleting regulatory interventions include:

- Enforcement of data protection, consumer protection and competition (antitrust) laws,
- Addressing information asymmetries through new requirements as to transparency,
- Creating new 'consumer rights' over data, and



- Facilitating enforcement by individuals of rights of access to, or portability of, transactional data (whether or not personal information about them) as held by data custodians.

Sometimes data derives value not through direct application of that data, but through enabling testing and development of code for application on other data. AI didn't beat grand masters in chess and Go by being smarter, but through learning by 24x7x365 playing of games, generating 'training data' to inform machine learning. Data may thereby enable code that enables analysis of other data, making that other data more valuable. And often a large volume of data of uneven quality can yield algorithms of substantial value which may then make poor data or narrow data sets more valuable. In short, data (through the intermediary of code) can be transformative in value of other data.

Valuation of so-called 'data rich' businesses is sometimes confused by failure to distinguish between the quantity and range of data sets that a business holds, and the capabilities (or lack thereof) of a business to transform those data sets into actionable insights or other sustainable business advantage. Transformational methods and code and algorithms are often fungible across business sectors, with the result that data rich businesses concentrated within particular industry sectors may not achieve economies of scope of data analysis that are available to cross-sector consultancies. Scarcity of human capital, and in particular experienced data scientists, means that much data that is captured today is not transformed and never achieves its potential value. Human capital remains the key investment in cleansing, transforming and linking data, in discovering useful correlations, and in creating and applying algorithms to data sets to derive actionable insights. Technology



enables, but humans (still) create. And humans are ambitious, fickle and moveable – so innovative people culture will continue to be a key differentiator of good data driven businesses.

In short, the common analogy of control of data as ownership of 'oil' undervalues the value-adding contribution of the processes required to 'refine' data to power actionable insights for businesses. Good insights as outputs require great labour to create quality data inputs and to derive robust algorithms that are used as the engines of transformation. Which is one reason why many of the more ambitious predictions as to roll-out of applications of artificial intelligence have proven incorrect.

Valuable business insights are often deployed in disrupted product or service sectors that are characterised by increasingly short product life cycles, where returns on investment are highly uncertain. Markets for outputs of data are volatile and unpredictable. Refined (real) oil can be stockpiled: much data is time sensitive and rapidly loses value. Actionable insights often have narrow application, a short shelf-life and require continuing innovation and reapplication. Oil is fungible across many industrial, transport and heating applications, and the movement from fossil fuels to alternative energy is still agonisingly slow. Oil markets may appear to be volatile, but the markets for outputs of data analysis are often substantially more unpredictable.

Increasingly, data sets must be shared to some degree to yield value. Data sharing within multi-party data ecosystems is required to deliver almost all online services, and particularly internet of things (IoT) applications and many offline supplied products and services. Many IoT services, and online platforms such as Amazon and Alibaba, require a complex supply-side data sharing eco-system of five or more data holding entities to enable delivery of a service to an end-user and billing for that service. A business to consumer IoT service may include a retail service provider, a data analytics service provider, a cloud data platform, a telecommunications network services provider, a billing services provider, a mobile app provider and an IoT device provider, all sharing data without settled industry standards as to data minimisation and data security. In other words, at least some sharing of data is required to deliver many services, while at the same time the service provider should protect service value through imposition of safeguards and controls to ensure that 'the service provider's data' (which it does not 'own' as 'property') remains defensibly trade secret and confidential.

To consider whether particular uses and applications of data needs to be regulated, we need to develop a more nuanced understanding of data and good data governance.

Data can be infinitely reproduced and shared at effectively zero replication and sharing cost. Data does not derive its value through scarcity. Value in data is usually created through investment in 'discoverability': in collecting and transforming raw data to enhance capability to link data to other data and then explore the linked data sets for correlations and insights. Often in data analytics projects about 70-80% of the cost is cleansing and transforming raw data to make it discoverable: the high-end work of then analysing the transformed data is the smaller part of a program budget.

Discoverability may be created within a privacy protected data analytics environment. In many cases, substantial data value can be created and commercialised without particular individuals being or becoming identifiable. With deployment of appropriate controls and safeguards, analysis of personal data need not be privacy invasive. Of course, it is easier to link disparate data sets by using personal identifiers than it is to deploy a properly isolated and safeguarded data analytics environment that uses only pseudonymised data linkage transactor keys. It is also easier to release outputs and insights without taking reliable steps to ensure that the outputs cannot be used to re-identify affected individuals. Good privacy management is exacting. The frameworks, tools and methodologies for good data governance are immature and therefore not well understood. And good data handling does not create good outputs. Senior management of businesses and government agencies often do not know how to evaluate data scientists and their outputs. The term 'data science' carries, as the term management science once did, the enticing ring of exactitude. However, algorithms may be painstakingly derived and applied, but based on poor data, or simply misapplied in particular contexts. Often poor data practices are implemented through inadvertence, or as a result of cutting corners, rather than bad intent.

Most importantly, we need to recognise that most data about what humans think or do is generated through transactions involving those humans in circumstances where humans no longer understand or control the data exhaust associated with those transactions. Most data is inherently transactional, but gathered from or about transactions in circumstances where many individuals that are transactors do not fully understand the transactional data – and sometimes, that there has been a transaction at all. In any event, relevant transactions are between transaction parties and accordingly, there is a bundle of rights and responsibilities of transactors that can be reallocated or repackaged by regulatory intervention. Where citizens and consumers are unwilling or unknowing transactors, there is particular vulnerability to data uses that may be adverse to their interests. I don't choose to be observed by my very smart rental car, but I am. When I drive it out of the parking slot, I don't reach for the vehicle manual to check in on the car's data analytics capabilities. Often, I have no real opportunity to think about whether or not they should give consent. Even when I am informed about particular data collections, life is too short for me to read and evaluate the terms: I do not knowingly and reflectively given consent to particular uses.

Should recalcitrant consumers who don't read all terms proffered to us (such as me) be punished for our failure to engage with the torrent of privacy disclosures by organisations with whom we deal? I don't expect, or need, regulators to force more responsibility on me. I don't need more notice or more click-through consents. But even if I don't care about privacy, I might wish to join ranks with many millennials and demand to know who is doing what, with what data about me. Many millennials do not care about privacy or transparency by right, but sense that value is being derived from data about them, that free services are great but no-cost may be less than fair value, and that they aren't given enough information to force a meaningful negotiation over fair allocation of data value. Many organisa-

tions are frightened to initiate the discussion as to what is fair, because they don't want to give away value. Some social media businesses captured the data high ground and then engaged in tactical retreats, giving away certain data value if and when required to mitigate particular crises in digital trust. Many other data driven organisations, such as some insurers and banks, are more willing to sacrifice short term data value in order to preserve longer term certainty and therefore sustainability for data value-adding investments, but fear that initiating a discussion with customers as to fair data exchange can lead to unpredictable and uncontrollable outcomes. And explanations of many data applications and data value chains are devilishly tricky. Explanations often sound self-serving, or just plain spooky. Try explaining to sceptical citizens and consumer advocates how real time programmatic advertising does not require any disclosure of the identify of ad recipients, and explaining how audience segmentation value is allocated through the advertising and media supply chain. And most data applications have unique, but similarly complex, multi-party supply and fulfilment value chains.

Leaving aside the desire for demand side transparency to reduce information asymmetry and to enable negotiation as to data value exchange, why should a consumer need to engage with a data collector as to whether a particular collection of data is by way of fair exchange for benefits the data collector shares with the data subject, beneficial to the data subject, proportionate or reasonable? More transparency may help a consumer advocate or regulator to make relevant assessments, but regulators should not be forcing transparency on the pretext that citizens can then determine whether to change their behaviour. Regulators don't require consumers to take responsibility for determining whether a consumer product is fit for purpose and safe when used for its stated purpose and unsuitable or unsafe when used for other purposes. Why should data driven services be any different? And in any event, usually I don't even know when an algorithm is being used in a way that may affect how an entity deals with me, particularly where the algorithm is fuelled by data which is not personally identifying (and therefore unregulated by most existing data privacy laws). I don't want transparency and then responsibility for me to exercise a decision based upon evaluation of that transparency. I want accountability of the data controller, to responsibly and reliably do what is fair. And this may lead to a need to restrict data flows within a multi-entity data ecosystem or require opening up of data ecosystems to new data intermediaries. Of course, 'fairness' is a notoriously normative concept, which is why com-

petition law seeks exactitude of economic theory in evaluating effects on consumer welfare. Beneficence for most consumer means less than 'fair' treatment of a few, at least as those few perceive treatment by others of them. It all turns on the particular context.

Critics of data driven businesses often rightly say that too many data businesses are not self-reflective about balancing their own and societal interests: many businesses don't stop to ask: just because I can use data in a particular way, should I? There is a risk that regulators will fall to a similar temptation when considering regulation of business uses of data. Big data holdings of global data corporations look like clear candidates for competition regulation. Data driven businesses can't assert legal protection against deprivation of 'their property' in data, because the bundle of rights and responsibilities that characterises data are not property as such. Rebalancing is unusually enabled because most data is not legally 'owned' as legal ownership is conventionally analysed in most jurisdictions. Legally recognised 'property' may be tangible (chairs, dogs and pencils) or intangible (software, creative writing, trademarks and patents). Data is none of these things: I don't own personal data about what I think or do, and often I don't even know when it is collected or used. Often a large component of intangible value is trade secrets, or as we usually call it in Australia, confidential information. Trade secrets are not 'property' in most national legal systems and in most (if not all) national variants of generally accepted accounting principles. Rights of protection of trade secrets more readily yield to regulatory interventions.

Of course, the market capitalisation of both 'unicorns' and 'data giants' demonstrates that public financial markets and venture capitalists see value outside traditional classes of property. A single trade secret 'asset' can be worth millions, or billions, of dollars. Google emerged out of nowhere to dominate the search engine world using Google's trade secret algorithms. Google's success today depends upon protecting these trade secret assets collectively described as the Google brand. Many trade secrets derive their value through closely guarded central control: the recipe for Coke, the Google search ranking algorithm, and so on. These trade secret 'assets' may not appear in the balance sheet as assets, but derive value through being closely held, and through being so managed scarcity is created.

Regulators have a broad range of available regulatory tools that may be used to affect activities of data driven businesses. Available tools include enforcement of data protection, consumer protection and competition (antitrust) laws, the new 'consumer data right', and facilitation of enforcement by individuals of rights of access to, or portability of, transactional data (whether or not personal information about them) as held by data custodians. These tools should be selectively and surgically used to address particular contexts of data use by businesses that warrant regulatory intervention. But protection of consumers, of individual's rights of privacy, and of fair competition between entities that operate in a shared data ecosystem over a data platform controlled by one of the parties, are tightly intertwined. Rebalancing of rights and responsibilities of participants in this eco-system – affected individuals, other consumers, platform operators and entities that willingly or not contribute relevant data through use of the platform – can have profound implications. There is clearly a role, and a need, for good regulation. But context is critical in dynamic markets. Outcomes of regulatory interventions may be unpredictable and unintended. It is hard to be a good regulator.



DIGITAL INNOVATION AND COMPETITION POLICY: A SYNERGIC APPROACH

Luke Woodward

Gilbert + Tobin



The potential paradox underlying the promotion of innovation and competition has been well traversed in many contexts, most obviously in intellectual property and its intersection with competition law and regulation. The paradox is that the potential for above competitive returns that incentivises innovation; but providing protection from competition to incentivise innovation will also chill the impetus for innovation.

The panel with Prof. Allan Fells AO, Prof. Beth Webster and Geoffrey A. Manne opened with what it considered to be the synergic approach to innovation and competition policy:

- Competition can and does promote innovation;
- Competition policy, laws and their administration and enforcement should promote and certainly not impede innovation;
- Other policies which are designed to reward and incentivize innovation, should not eliminate or impede competition;

- Similarly, addressing policies targeted at addressing non-competition based concerns should do so without impeding competition.

To frame the discussion, it was recognised that competition policy has myriad applications and in its implementation there will be spectrums of potential outcomes that could be broadly said to be in line with a synergic approach. Within that spectrum, there is often strident debate about whether a particular decision is right or not, perhaps correlated more or less with the relevant interest of those perspectives.

Of course, the operative premise of the innovation/competition policy debate is that innovation is a good thing, should be promoted, and arguably is more important as an end goal than competition. Self-evidently digital innovation and more recently digital platform innovation has provided enormous consumer and business benefits (and of course successful investor returns).

So as a general proposition we can and will accept the benefits of innovation, but perhaps not everyone thinks that way and disruption can create winners and losers.

There is a current, at times heated, debate as to how well competition policy operates and is operating in the area of digital innovation. In addition to standard competition law concerns, these concerns include:

- More traditional consumer issues, including: open and informed consumer choice, through to the ability to exploit consumer's data against their interests or manipulate them through big data, algorithms, platforms with a lack of consumer control or transparency over these actions.
- Market disruption issues, for example: the impact on quality journalism (which is the actual origin of the ACCC's Digital Platforms Inquiry); and
- General data and privacy concerns, highlighted in the Facebook/Cambridge Analytica case, through to the use of big data and AI to infringe on individual freedoms or monitor citizens.

A recognition of the key digital issues facing competition policy was a subject of much discussion. The panel shared insights into the nature of competition in digital markets such as:

- Observations about competition in digital markets is characterised by innovation and often dominated by a couple of firms at each time which are subject to a continual process of challenge by innovation. The constant threat of new entry is a key part of how digital competition works. An over-fixation on market concentration to leap to a conclusion of market power may also lead to error.
- A sense that large corporations, monopolies, and access to markets is not a problem confined to digital markets and not necessarily a whole new issue. However, there was a recognition of the complexity of issues in digital markets that's challenging to penetrate.
- That further analysis and better understanding generally of digital markets and innovation will lead to better policy outcomes – and the ACCC's Digital Platform Inquiry goes some way to improving our understanding.

The question about what, if anything, should be done with Australian competition law was broadly summarised into three perspectives:

- The current laws are fit for purpose, and before changing it, we first need clear evidence or cases to test the law's limits.
- The current laws are fit for purpose, but require more or stronger enforcement and higher penalties.
- The current laws are outdated and we must re-write it from a first principles basis.

Within this framework, the panellists made the following observations:

- The fundamental problem about difficulties in testing theories about competition policy and whether they are promoting or impeding innovation. We are cautioned about departing from an existing regime without testing whether a new regime would deliver better outcomes.
- While we may not know enough, some argued there are clear gaps in Australia's competition laws – for example, the clear absence of a divestiture power. Furthermore, some obvious steps could be taken to improve the process (not necessarily engineer outcomes) that would assist the anticipation of future issues – including establishing new (or inviting existing) institutions to look at the issues continuously and establishing codes of practice.
- Looking to competition policy for answers about "fairness" may be misguided as markets are not inherently fair. Furthermore, that these issues need to be given broader attention than through competition policy.

The panel closed with thoughts on Australia's place in the debate, and whether it could drive material outcomes and changes with respect to issues and businesses that are operating globally. Generally, the consensus is that any real hope of achieving policy outcomes in Australia must necessarily coordinate and be mindful of the global context and other jurisdictions.

“The consensus is that any real hope of achieving policy outcomes in Australia must necessarily coordinate and be mindful of the global context and other jurisdictions.”

BIG DATA COMPETITION ISSUES - DYNAMIC COMPETITION IN DYNAMIC MARKETS: A PATH FORWARD CONFERENCE



D. Daniel Sokol

Levin School of Law University of Florida
Wilson Sonsini Goodrich & Rosati

Digital markets are complex. They deserve attention and thought by academics and practitioners. As with other issues in competition law and policy, theories must match up with evidence. That is, the validity of theories are tested by the available evidence. Theories of consumer harm must match up to evidence of harm. Without such matching, there are due process concerns as to outcomes of cases as a lack of evidence should not allow for mistaken inferences of a competition law infringement.

One area of increasing fascination within competition law circles is the interface of big data related issues to competition law. A few years ago I authored a paper¹ that presented both theories of harm and the pro-competitive benefits of big data and competition law. Since that time, many more papers have been written on big data and competition law.

What have we learned from this debate? A few things come to mind:

1. Most practitioners (and lamentably, professors) look only to a narrow set of papers do not spend the time to work through important contributions in the literature in fields such as strategy, marketing, information systems, operations, finance, and computer science. This is too bad because gaps in knowledge/data lead to mistaken inferences. These literatures generally suggest great promise in the use of data to benefit consumers.

2. Whereas most data sources are ubiquitous, we have learned that some data may in fact be unique. This happens within a narrow band of situations, such as when there is a government monopoly on data or with regard to certain industrial sources of data such as heavy machinery. We can contrast this with consumer facing platforms that use data, where there are many sources of data and where data seems to be non-rivalrous and ubiquitous because of an increasingly better understood data ecosystem – data brokers, IoT, various apps, platforms, data resellers, data

storage, sensor data, as well as the types of data that are collected and used (and combined). This tends to suggest that data barriers to entry generally are more theoretical than real.

4. Data analytics are transforming many industries. Consumer facing platforms were perhaps among the first and most prominent. However, they are transforming a number of “non-sexy” sectors such as transport, supply chain management, agriculture, and finance. There are more data analysts working in financial services than all of the high profile consumer facing tech platforms combined!

5. If data is a “currency” as a number of commentators claim, then currency alone does not lead to successful business outcomes and neither do vast amounts of data unless data is used effectively. Just as with cash flush companies not necessarily being the most successful, the mere possession of data does not guarantee business success. Rather, it is what you do with the data that matters, much the way that it is how you use your cash that matters. If you don’t believe me, believe the lost decade of 1982-1993, when the NY Yankees spent more money than any team in baseball but could not buy a pennant. Similarly, credit card companies have not effectively utilized big data for competitive advantage given how much they know about their own customers’ spending habits.

6. Competition Authorities have the responsibility to focus on economic evidence in their decision-making. When reports on platforms and big data are done well, the reports show nuance and work through the economic steps of how to build legal cases. Perhaps the best big data report to date is the Canadian Competition Bureau Big Data and Innovation Report of 2017. The preliminary report by the ACCC into competition in media by platforms is long and helpful in places. However, its major failing is in the analytical shortcuts it takes, such that the preliminary report effectively makes the following leaps – Some companies are big. Because you are big you are a monopolist and therefore are bad. Each of these claims requires a showing of the economic evidence to prove such statements. Such claims are not supported by evidence in the preliminary report. The final report should build an effective case based on the actual evidence without taking such analytical shortcuts.

“Competition Authorities have the responsibility to focus on economic evidence in their decision-making. When reports on platforms and big data are done well, the reports show nuance and work through the economic steps of how to build legal cases.”

¹ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2834611

DIGITAL INNOVATION AND COMPETITION POLICY: A SYNERGIC APPROACH

Allan Fels AO

Melbourne Law School, University of Melbourne

1. The international debate

Currently there is a lively debate about the proper direction for antitrust.

The background is:

- A seeming rise in national concentration ratios;
- A seeming rise in profit margins;
- A fall in labour's share of national income and rising inequality;
- Claims that antitrust law is not being sufficiently enforced.

“... the state of economic knowledge and understanding of digital platforms is not highly advanced. It is easy to propose hypotheses that are either favourable or unfavourable to the digital platforms.”

One of the points being emphasised is the rise of innovative super star firms like Facebook, Amazon, Netflix and Google. These firms have high market shares and high profits.

2. Antitrust

Views about antitrust fall under three headings:

- The status quo is right;
- Antitrust legislation and its general principles are broadly acceptable but there is insufficient enforcement;
- The underlying principles of antitrust law are not fit for purpose in today's world and in any case are being weakly enforced.



In enforcement terms the following could be said:

- The USA is closest to the view that the status quo is an acceptable one. One landmark is that the Federal Trade Commission decided to take no action on Google some years ago.
- It would be fair to say that USA public enforcement of antitrust law is heavily affected by a conservative supreme court. Much of that conservatism stems from the rise of class actions, multiple damages and the like – which has led to caution in applying antitrust law.
- The European Union has been applying the law vigorously with multi-billion dollar fines for Google and others. There is a question as to how coherent and well argued the economic basis for the EU conclusions is.
- Germany has been especially active including its recent actions about privacy in relation to Facebook. Germany is probably somewhere between the second and third school of thought above.
- It is a little early to judge where Australia is. It often occupies a middle position between the USA and Europe.

3. The ACCC Digital Platforms Inquiry

The ACCC digital platforms inquiry stems from a Senate recommendation made during the debate about changes in media law. As a result, there is a big emphasis in the Terms of Reference and the ACCC report on the impact of digital platforms on the media and substantial discussion about what policy measures including various forms of financial support might be appropriate to deal with a perceived threat to the quality of media reporting – especially investigative reporting.

Generally over the years the ACCC has not been a leading world participant in issues about new technology and competition.

It has tended to wait for and to follow what happens overseas and this to a significant degree is sensible because many of the biggest problems arise at a global level and are dealt with in North America and Europe. However, the Senate reference has forced the ACCC's hand.

One of the problems in conducting this type of review is that the state of economic knowledge and understanding of digital platforms is not highly advanced. It is easy to propose hypothesis that are either favourable or unfavourable to the digital platforms. But in most cases there is insufficient depth of analysis to reach firm conclusions about policy actions if any. In addition some of the possible steps go beyond the traditional scope of Competition law and involve such matters as privacy and "censorship" of materials on platforms.

In this situation the ACCC digital platforms inquiry draft report raises a very large number of important questions. For example about the market power of the digital platforms. It concludes that Facebook and Google both have a high degree of market power and it expresses concern that this may be expressed in preferencing their own businesses and other businesses with whom they have close links.

The conclusions, however, are not followed through – after all it was an interim report intended to raise questions, not give answers. The final report is not so far off and we will have to wait to see if the ACCC is going to reach firm conclusions.

It does float a number of detailed proposals for reform. Probably the single most important recommendation is to establish a new institution which will monitor and scrutinize the behaviour of the digital platforms and be able to investigate them in depth.

There is an interesting question as to whether a new separate body should be set up as the ACCC recommends or whether these tasks should be left in the hands of the ACCC thereby keeping a close link between competition and the analysis of issues about privacy, censorship and so on.

ARE THE DATA PRACTICES OF DIGITAL PLATFORMS A COMPETITION CONCERN?

Katharine Kemp
UNSW Sydney

How should competition authorities act in the face of uncertainty regarding the competitive significance of data? This question currently divides antitrust scholars, practitioners and regulators, particularly in the context of digital platforms. Finding an answer will require new analytical tools and an understanding of how the constraining power of consumers is currently undermined.

Some have pointed to the significant value that digital platforms – Google, Facebook and Amazon most prominent among them – provide to consumers. They have emphasised the need to take account of positive feedback loops in the context of multi-sided platforms, arguing that high prices extracted from advertising customers often fund highly beneficial, “free” services for users, allowing the platform to harvest more consumer data and in turn more advertising revenue. It is also said that these firms face fierce competition from actual and potential rivals: they are liable to be overtaken by “the next Google” and must fight for custom accordingly. They have argued data is ubiquitous, cheap, non-rivalrous and non-exclusive and should not be treated as a barrier to entry. According to these views, antitrust regulators should wait for robust evidence of actual consumer harm before taking any action on the basis of some theory of anticompetitive data effects. Such action, the argument goes, may do greater harm to consumers by impeding innovative conduct by dominant firms.

But there is a great deal of scepticism about the “innate goodness” of digital platform conduct and the allegedly innocuous role of the data practices of digital platforms. Many question the wisdom of relying on markets to self-correct while the strength of some digital platforms appears to become more enduring. They point out that it may be impossible to prevent or undo anticompetitive effects after the fact, particularly once the market tips to a winner. If regulators prioritise innovation by dominant firms – on the basis that a greater number of consumers enjoy these innovations than the innovations of small, fringe rivals – innovation by “the next Google” may be quashed before it has a chance to take hold. Scholars, politicians and regulators making these warnings have variously recommended changes to merger laws or merger analysis to take account of data effects; divestiture remedies to “break up the tech giants”; taking account of data effects in the analysis of market power; and intervening where dominant firms exploit consumers through their data practices even in the absence of exclusionary conduct.

On both sides, our understanding of the competitive effects of data is nascent, as are our analytical tools for assessing these effects. Regulators are experimenting in their reactions to the



data practices of digital platforms, whether they choose intervention or inaction. To be clear, regulatory inaction is an experiment just as regulatory intervention is an experiment. It should also be acknowledged that structured intervention will sometimes produce significantly more information than inaction, since it is likely to require parties to disclose what they know as part of an information-gathering process; involve a disinterested decision-maker operating under threat of review; while requiring the recognition of limits to our knowledge.

The weakened position of consumers – in information and bargaining power – also matters. Some commentators claim there is a “privacy paradox.” That is, while consumers claim to care about the privacy of their personal information, they cannot truly care about their privacy while they continue to use on-line services that offer little in the way of privacy protections. This makes no sense. Saying consumers like poor privacy terms because they keep using online services is like saying my dog likes worming tablets because I stuck one in a meatball and fed it to him. But while a worming tablet is ultimately beneficial, reduced privacy protection is more like an experimental drug.

We should not rely on “revealed preferences” while consumers are prevented from meaningfully observing, understanding or bargaining about the manner in which their personal information is treated. We should be concerned that the data practices of dominant firms in the digital environment are unlikely to be constrained by consumer power while gross asymmetries in information and bargaining power persist.

Competition policy must be supported by robust consumer protection and privacy regulation, but that is not all. The competitive process may be degraded and dominant market positions may be reinforced by the data practices of digital platforms, particularly where those practices are deliberately obscured from consumers and used to attract funds from advertisers. These are competition concerns that should be addressed. The challenge is to adapt and develop analytical methods and regulatory tools which take account of the competitive significance of data practices in these markets.

“We should not rely on ‘revealed preferences’ while consumers are prevented from meaningfully observing, understanding or bargaining about the manner in which their personal information is treated.”



In this section we have included the transcripts from the CPI Talks... video interviews which were conducted during the conference.

Caron Beaton-Wells

Melbourne Law School, University of Melbourne

For competition authorities, we need to be taking steps to ensure that the uncertainty that pervades the digital economy catalyzes, it doesn't paralyze. By which I mean, authorities need to keep asking the hard questions. They need to be testing new theories of harm, and taking more cases, being prepared to fail. At the same time, in doing so, competition authorities need to adhere to their long-standing principles of rigorous, evidence-based decision making, of transparency in their analysis and their decisions, and of their accountability to governments, legislatures and, ultimately, to consumers.

For governments, in terms of the steps they should be taking to drive innovation through the digital economy, of course they need to be investing in the infrastructure, assets and skills that are new to this economy. But there is a role, also for government, to be steering and there of course I am referring to regulation. To ensure that we drive competition and spur innovation. At the same time, the sometimes political impotence to regulate, needs to be checked. It needs to be checked against well-embedded regulatory principles, such as ensuring that the need for government action is clear, that the public interest that is to be served by that action and its objectives are co-

Our speakers respond to the question: "What do you think are some steps towards a path forward for dynamic competition in dynamic markets?"

gently defined, and perhaps most importantly, that the impact of any such action is thoroughly weighed. Both in terms of its costs and its benefits, and weighed against non-regulatory options.

In addition, any such regulation needs to be fit for purpose in the context of the digital economy. That means that more than ever, regulation needs to be adaptive. We need to switch from a regulate-and-forget to an iterative, responsive approach to regulation. Regulation needs to be outcomes-focused. We need to be thinking about what we're setting out to achieve rather than the form by which we do it. And it needs to be accommodating of experimentalism. Using, as has been seen in the fintech area, regulatory sandboxes and accelerators, environments in which innovators can prototype new approaches.

Perhaps most importantly though, new regulatory design in the digital economy needs to be collaborative. We need to have regulators not only working with each other, but working with the firms both incumbents and innovators to set the new rules of the game in the digital economy.



“...competition authorities need to adhere to their long-standing principles of rigorous, evidence-based decision making, of transparency in their analysis and their decisions, and of their accountability to governments, legislatures and, ultimately, to consumers.”

Christopher Berg

RMIT Blockchain Innovation Hub

We're going through a really sustained social negotiation about the role of data, about the role of privacy, about the role of platforms in the Australian economy and in the global economy. This is an entrepreneurial question. What do consumers want out of these platforms? What can be provided by the market? What can be provided by entrepreneurs?

I think it would be a really serious mistake to take the market as it is and regulate on that market, the sort of traditional, industrial era competition policy, consumer regulation that was designed for a world of large factories and natural monopolies onto this incredibly fast-paced, digital landscape. Where we're talking about totally different questions, we're talking about totally different products, new markets, very rapid change.

I look at blockchain professionally, that's my area of academic expertise. I can see while it looks like some of these digital platforms have a dominant position right now in the market, we are very close to entering a world where those large platforms, there's a large amount of competition against them. As centralized organizations have to contest with decentralized digital ledger, blockchain style competitors.

I think it would be a mistake for regulators to try to intervene in that ongoing entrepreneurial social negotiation.



“...This is an entrepreneurial question... it would be a mistake for regulators to try to intervene in that ongoing entrepreneurial social negotiation.”

Morag Bond

ACCC

I think the question is obviously about dynamic markets, but I'm going to focus in terms of the steps, probably focus on those digital platform markets which have been the subject of our inquiry. They obviously display features of very highly dynamic markets, but obviously, there are a range of other markets which could be considered highly dynamic. So in relation to those markets, the digital platform type market, they do display particular characteristics. These are high barriers to entry, network effects, both cross side and same side network effects and they also display economies of scale. In terms of there's these very high fixed costs and low marginal costs in reaching and serving additional consumers and economies of scale, particularly through the amount of data that is collected across a range of markets. Now because of all of these various characteristics, we think that these markets are more prone to have companies which have a substantial degree of market power and some commentators have talked about them tipping so that is one of the key concerns of those markets.

And there are other concerns with these sorts of markets as well, like the opacity of those markets and the information



asymmetry between the various sets of users and the platforms themselves. When perhaps looking forward and thinking about the steps and the way forward, I think there's a couple of goals which we as a regulator should be allowed to and the sort of factors I think to which, which we should be sort of looking at is first of all, ensuring that dynamic competition can take

place. They may have market power at the moment and it certainly looks like that will persist, but making sure that we're not removing that potential for dynamic competition in the future because that will provide an important, competitive constraint. We also want to make sure that the substantial market power that is held is not extended into our ad adjacent markets and that can happen a couple of ways.

Obviously, leveraging and self preferencing and also through acquisitions of potential competitors and rival markets and ad adjacent markets. We also want to make sure that within the core markets where substantial market power or dominance, I'm using the terms interchangeably, is held. We want to make sure that those markets work as well as they can for the customers in those markets. And that's making sure they're not acting anti-competitively but also making sure that they're not exploiting their market power in dealing with the different sets of users. So we've got those, I guess, three goals to making sure that those markets work well and if those markets are working well, I think that will encourage trust in those platforms and encourage users to use those platforms on a more comfortable basis and encourage further use and innovation in those markets.

So from the ACCC's point of view, and of course my views here are very much my views... but the ACCC has released a preliminary report in December and we focus on a couple of ways in which we think we can ensure competition is best achieved in these markets and one of our core ideas is basically there needs to be increased scrutiny. We need to look at these markets much more closely to ensure that they are working effectively for the different users. We need to make sure that there is no anticompetitive conduct taking and also ensure that consumers aren't being harmed as well. Now this is important because of the opacity of these markets. We think there is a market failure in relation to the amount... in relation to the information asymmetry between consumers on the one hand and the platforms in between advertisers and the platforms.

We don't think it's necessary to change the fundamentals of competition misuse of market power, which is the Australian equivalent to abuse of dominance, was relatively recently reformed and the standard itself does not need to reform. However though, we do need to look much more closely, I think, at what is going on given the capacity of those markets. In the case of mergers, the ACCC made two recommendations in the preliminary report. One is to specifically identify the acquisition of data as a factor that should be considered in relation to merger control. That's been a lesson, I think, which has been learned from the experience of both ourselves and other regulators internationally. The second recommendation in relation to merger control focuses on acquisitions of potential competitors.

These are extremely hard areas for a regulator to assess and with the benefit of hindsight, it's easy to say that perhaps some of the mergers that had been cleared in the past maybe shouldn't have gone ahead. But what we think needs to be done is that perhaps the competition authority needs to be less concerned about so called false positives, so blocking acquisitions of small businesses which don't in fact expand, providing a competitive constraint, and more concerned about false negatives.

So approving acquisitions of firms that may in fact grow to provide an effective constraint on the target firm. So it's getting that sort of balance right. It's a really tricky question, but it's something where we think regulators could do more. We also think we need to look at the imbalance of bargaining power and whether the platforms may be using that to exploit their relationship, either with consumers or with the other set of users on these platforms, business users, advertisers, or potentially media companies as well.

It's also important to look at the bigger picture. The impact of digital platforms is very broad and they play a critical role as gateways and a range of different areas and one of the issues that's been highlighted in our digital platforms inquiries, the impact of the platforms on media businesses and using journalism. We do think effective competition policy is part of the answer in that it's important to see how these issues intersect and interrelate. I haven't addressed data portability.

In an ideal world, I think data portability would be a tool that could be used effectively to enhance competition and ensure dynamism in these markets going forward. However, what I would say is that there are potentially some real practical concerns about how that may work in practice regarding digital platforms. The ACCC is the lead regulator for the consumer data right in Australia. And that's been rolled out to banking and, then after that, to a number of utilities. If that is extended to digital platforms in the future and that is obviously a possibility, there will be a number of practical issues that will need to be worked through, including, for example, exactly what data would be provided to be passed on.

“The impact of digital platforms is very broad and they play a critical role as gateways and a range of different areas...”

Stephen King Productivity Commission

What we're seeing in terms of competition now is amazingly interesting. But we shouldn't think of it as anything particularly new from a competition perspective. So at the moment you've got the Googles, the Facebooks, the giant firms that have market power, viewed as being some sort of problem for competition. You go back over previous generations, you had General Motors, you had GE. Go back further, Standard Oil, the railway companies in the US where antitrust started.

We've always had large companies. The important thing is to understand that market power, and being large by itself, is not a problem. There is a reason why, for example, Google, despite it being a late entrant into the search market became the dominant player that it is. It had a better product, people wanted to use Google. So, to now say, "Oh, there's something wrong with Google offering a better product and becoming the dominant search player," just seems, just from an economic perspective, to make no sense.

What you've got to say is, has the firm got market power? And then, is there evidence that they're misusing that market power? They're behaving in a way that hurts the competitive process, and by doing that they're hurting consumers. If there's no evidence in that direction, then there's no problem. What if there is evidence in that direction? Well, then we have our competition, or our antitrust laws.

And there's a view out there that, well, because these big firms are different to previous generation's big firms, somehow those laws are no longer fit for purpose. And I think that's just wrong-headed. We've seen the laws develop and evolve over time, and the existing broad competition laws are able to deal with the big firms of today, such as the Googles and the Facebooks. Let's pick one. Merger law.

Standard merger law around the world, I'll do the version from Australia, is a merger, an acquisition of assets, is illegal if it would lead to, or is likely to lead to a substantial lessening of competition. That covers pretty much everything in ... That you'd be worried about today. What's then the problem with it? Well, over time, how we understand those words, what the precedent's done, has changed over time and between countries. So, go back to the brown shoe decision in the 1960's in the US. That was an acquisition where, I think, the merged entity would have 15%.

It was viewed as anti-competitive, likely to substantially lessen competition. A competition regulator wouldn't even take that to court today. Where have we got to in Australia? In Australia, that likely, that word "likely," has now become synonymous with "more likely than not." In other words, more than a 50% chance. That's not the case in other jurisdictions. If we take New Zealand, for example, the current precedent coming from New Zealand, coming from the Warehouse case, is that, well, anything over 30% is likely.



So, if there's a third chance that this'll substantially lessen competition, then that's a problem. Anything under 15% is not likely and in-between it's a gray area and the court needs to decide. So you've got these two different approaches developed out of a law. But it's the same law, same wording. So you don't need to change the wording, what you do need to do is give more guidance to the courts, and potentially to the competition regulators themselves. Because the competition regulators, some, around the world, have sort of said, "This is all too hard. Let's just change the law. But until the law has changed, we're just going to sit on our hands and not do very much."

In contrast with saying particular in the European Union, some real activity by the regulators, some innovation by the regulators. And the regulators pushing the law and saying, "No, we're going to take this on. We're going to take it to court. If the courts knock it back, so be it. Maybe then the law will need to be changed. But let's test the law, let's see if there's a problem with the law before we start running after legislature and saying, "Oh, we need the laws changed." And I think that's the right approach. We're not seeing it, really, outside the EU.

“ We've always had large companies. The important thing is to understand that market power, and being large by itself, is not a problem. ”

Geoffrey Manne

International Center for Law and Economics

So caution. I think we definitely need a dynamic regulation to match the dynamic markets that are being regulated. I think regulation is inherently conservative. It's inherently backward looking. The government is far from typically the most dynamic of entities out there and there's an inherent mismatch then between the institution that is doing the regulation and the institutions that are being regulated.

I think it's a real problem if we start from a precautionary principle sort of approach. Now that's not always the case, but certainly when it comes to new technologies. And often even when it comes to implementation of our old traditional regulatory regimes. I'm thinking in particular of antitrust. The moves that we see are moves that are rooted in an assumption of harm, an assumption as often unstated that the harm would be greater than the benefit, and that we need to thwart the new innovation or often the new institutional design before it causes the inevitable problems.

I think a regime in which innovators are required to ask permission before innovating, and most importantly before commercializing their innovations, is a static and impoverished sort of regime. That is not always what happens, but I think there's a sense that right now, like we have been many times throughout history before, we're in a moment of a sort of panic about where technology is taking us as a society. And there is an understandable sort of urge to shape it so that our worst fears don't come true.

There is also an understandable urge for politicians to claim that they can shape it in ways that they electorate will approve of and get their votes, and then of course when they fail to do so it doesn't matter, they're long since out of office.

The problem with this of course is the inherent impediment to innovation. That we lose out on the innovations, and even potentially more problematically, the experimentation that leads to innovation, and it doesn't usually accomplish the purposes that the regulators state that it does. In part because they're actually making political claims and in part because when you're talking about future effects of new technology, the one thing we can say with any certainty is that we don't know what

the future effects are going to be. We have a long history of being wrong about predicting the consequences of new technologies and new models of commercializing technology.

So we have this double problem of deterring the beneficial innovations in the first place, and not even achieving the kind of moral, ethical, ideological objectives in the second place. This is because it's really hard to have evidence based precautionary principle. The precautionary principle has sort of inherently an alternative to an evidence based regime.

Now in a world in which evidence is impossible to come by, you have to have some decision rule. Now I understand that. It's not the precautionary principle and it's less strict variance the imposition of ex anti-rules, say in the antitrust context. It's not that there can be no defense of that approach to regulation. It is, as I said, very hard to come by evidence here so it's very hard to have a very evidence based rule.

I think we have to be really cautious though about a couple of things. About again, deterring the innovation in the first place. It's great if there's no harm from some new technology, but for all of known human history, new technology has provided more benefits than harm. It would be a shame to lose that. Then when it comes to sort of the flip side, when it comes to anti-trust, there's an almost myopic focus on, kind of ironically, on facilitating entry by new innovators, potential innovators, in order to ensure that we're not enshrining incumbents, especially in technology markets where you often have oligopoly markets, and scale economies, and network effects and these various things that lead to large firms and concentrated markets.

The problem here is the flip side of what I was just suggesting with respect to sort of direct technological regulation, and that is the assumption that we need as much new entry as possible in order to facilitate innovation and ensure that the incumbents are subject to competition. Forgets that the incumbents themselves are always competing with the prospective new entrants, that we have a sequential competition rather than a contemporaneous competition, and that when an incumbent innovates in order to stave off a new competitor, at the very least it has immediate and sort of by definition if we're talking about a scale economy here, large wide reaching effects benefits everyone. All of the billions of current users of a platform. That may or may not be greater than the perspective new innovation and extent of competition from the new entrants, but we pretend like it doesn't exist. And we pretend like platforms and incumbents don't innovate. That the only source of innovation is new entrants.

These kind of myopia's, the sort of twin myopia's of a precautionary principle approach to new technologies, the drones and autonomous vehicles and the like, and a myopic focus on new entry, new innovation when it comes to competition, are both incompatible with each other. Neither is very well grounded in economic theory and as I said, it's impossible to ground them in evidence. So we're sort of flying by the seat of our pants. We're operating on politics and moral beliefs, and there's a real danger when those kinds of dynamics take over.



So the answer to your question is a bit list of things we should not do. I have to say I don't have a great solution. I don't have a great idea about what we should do, precisely because we know so little. My inclination is to say let 1000 flowers bloom. We know so little, we understand so little, that any time we make an assumption of prospective harm or that some novel industry structure, or novel business arrangement is harmful because it's unfamiliar, we're almost always wrong. So the best I can say is, sit back, don't act, ex-ante, don't act on the basis of fear and if you have to act, wait until the harm occurs. Wait until we know what the consequence likely is and then we can try to correct it after it's happened. That's less than perfect, but it's better than the less than perfect alternative of acting in anticipation of harms that may never materialize.

“...a regime in which innovators are required to ask permission before innovating, and most importantly before commercializing their innovations, is a static and impoverished sort of regime.”

Philip Marsden

College of Europe; Bank of England



What I find with these debates about digital platforms and dynamic markets is the debate right now is extremely polarized, which means that there's a lot of heat but no light. So you've got one side of the argument arguing to essentially leave the anti-trust environment, leave evidence-based inquiries, leave expert-led and independent decision making, and leave the consumer welfare standard. And you've got another side of the debate that says there's nothing to look at here, let's remain solidly in ex-post law enforcement and just do our cases a bit faster, be a bit braver.

The problem with these two approaches is they're never going to meet in the middle. They're two completely different directions, and they're going essentially further and further apart, and the debates are getting hotter and hotter but with no real guidance for industry. What we were trying to produce in our

Furman report was not necessarily a middle ground, but a way of taking the values from each side, and say let's do some pragmatic steps towards a more professional-competitive regulation, try to get ahead of some of the problems that people are already citing.

And instead of litigating these cases around the world in multiple jurisdictions, we try to have a code of conduct that everybody can agree on that some of these platforms should not discriminate in certain ways, should not self-preference in certain ways, should be more transparent and more open, and thereby take some of the heat out of this debate, some of the heat out of the cases, and actually apply a principled approach towards just moving on ahead so that the actual dynamic competition and dynamic innovation of these platforms can be ensured, and also spurred on through entry.

Not saying that entrants are necessarily the most innovative, but without that entry and that spur, there is really no incentive for the incumbents to actually do any innovation. So keeping on that competitive pressure on the incumbents is what we're trying to ensure through entry and through more competitive regulation.

“...instead of litigating these cases around the world in multiple jurisdictions, we try to have a code of conduct that everybody can agree on...”

Howard Shelanski

Georgetown Law School; Davis Polk & Wardwell



“ We should not have an antitrust law for a particular industry. We should have antitrust law that as applied to a particular industry would, through rigorous application of the principles, lead to certain outcomes. ”

Well I think that, for the most part, we need to allow industries and firms the space to innovate. We need to allow them the space to make mistakes. We need to allow them the space to bring together the complementary assets that they need in order to innovate and achieve new and novel products and services for consumers. But I also think at the same time we have to preserve openness to those markets for new innovators, for new ideas, for new firms that are coming in.

So I think that we need to find a balance in our competition enforcement, in our consumer protection enforcement that does the two of them, that does not inhibit legitimate innovation efforts and legitimate bringing together of complementary assets that can be beneficial. But then at the same time do not create an atmosphere in which venture capital is biased only towards innovation that is likely to be inquired by incumbents, where new ideas feel like they have a chance of gaining traction and advancing in the marketplace, without an acquisition exit strategy.

So I think there's a case to be made that our competition enforcement has been a bit out of balance and a lot of the challenges that we're seeing now with digital platforms, and digital innovation should be viewed as an opportunity to go back and rethink how we do competition enforcement, how we do consumer protection enforcement.

But one thing that I think is very important, there's a tendency to tailor the policy of a moment to the problem of a moment and large digital platforms pose some interesting challenges for society and for policy makers. But we should keep in mind, particularly with competition policy, as we go ahead and reform those policies in response to some of these challenges, that we do two things. Keep those policies rigorously based on evidence and sound economic thinking, and also that we realize that those policy changes need to be broadly applicable.

We should not have an antitrust law for a particular industry. We should have antitrust law that as applied to a particular industry would, through rigorous application of the principles, lead to certain outcomes. So that's a way of saying I think that the antitrust or competition policy changes that people are thinking about should be broadly and generally applicable.

I think if we do the two of those things, if we rethink our tools going forward, if we think about rebalancing them and taking a more forward looking view in the application of those tools, while at the same time keeping them generally applicable, we can achieve the goals of giving existing firms the space they need to acquire and advance and develop new products, but also keep the market open to the new innovators of the future.



“...a lot of firms are below the efficiency frontier because they haven't fully embraced industry 4.0 or what is on offer from digital innovation, so there's a lot of benefits to be added by encouraging further digital innovation.”

Innovation is one of the main ways firms compete with each other and digital innovation's part of that, a subset of that. Digital innovations have brought tremendous improvements in the standard of living across the world that's been affected by innovation in terms of lowering costs of production.

It's come in to replace a lot of very routine repetitious service-type functions. It's opened up markets. It's increased the geographic scope of a lot of markets for a lot of businesses, which has increased competition. It's also delivered products that one would not have imagined to have existed several years ago, so there's a lot of fantastic things about digital innovation we want to encourage.

We know one of the reasons a lot of firms are below the efficiency frontier is because they haven't fully embraced industry

4.0 or what is on offer from digital innovation, so there's a lot of benefits to be added by encouraging further digital innovation. That said, there sometimes can be negative feedback from digital innovation back into competition or some types of digital products can be used to lockout would-be competitors. People might call that unfair competition, and they're the sorts of things that probably a regulator or some sort of pro-competition body might be wanting to look at, so for example, platforms that are only open to certain products.

Also there are instances where sometimes the intellectual property system is used to keep others out. These are the sorts of things that a regulator probably should be looking at if it wants to encourage further the spread of innovative products or technologies across the economy.



Professor Philip Marsden

Professor of Law and Economics, College of Europe

Deputy Chair of Enforcement Decision Making Committee, Bank of England



“...we’re noticing is a kind of a competition among competition policies and legislators to try to address these issues. But what I think we have to do, first of all, is work out whether there’s any real harm indeed...”

April 17, 2019

CPI's Editor in Chief Sam Sadden has interviewed Professor of Competition Law at the College of Europe and former regulator at the UK's Competition and Markets Authority, Philip Marsden.

Sadden: CPI has the pleasure to sit down today with Philip Marsden, Professor Competition Law at the College of Europe and former regulator at the UK's Competition and Markets Authority. Professor Marsden will be giving his keynote address at CPI's upcoming conference at Melbourne Law School on Tuesday, April 30th entitled "Dynamic Competition in Dynamic Markets: A Path Forward."

So Professor Marsden, as a member of the UK Furman Inquiry Panel, please give us the elevator pitch or some top bullet points for the recently released report entitled "Unlocking Digital Competition."

Marsden: Sure Sam, thanks, and good to talk to you. So in a bit of a summary, we feel that competition policy and law enforcement needs a reset. We think there are certain aspects of markets that tip, especially digital markets, that require more than antitrust law enforcement in terms of an ex-post approach to ensure that real consumer harms don't occur. We, therefore, recommended an ex-ante pro-competitive regulatory approach in addition to some changes to antitrust law enforcement.

Sadden: You recently spoke at the FTC hearings and described two antitrust campaigns with a parallel to Brexit terminology, the "Leave" campaign and the "Stay" campaign. Could you explain and expand on this a bit and for further reference, listeners should check out the recent CPI Europe Column piece you wrote on the topic "Leave, Remain & Common Ground: Pragmatism in Dealing with Tech Giants."

Marsden: Well, one of the things we noticed with our six-month review in the Furman Report and the evidence taking, we brought in, there was a really polarized set of debates. "Leavers" in the antitrust world, I feel are trying to leave the consumer welfare standard, leave evidence-based analysis, leave expert-driven decision making and leave indeed independent decision making and indeed leave enforcement, leave ex-post enforcement. And just intervene, do breakups, market share caps, structural divestments, and price caps if need be. The other side of the campaign is the "Remain" campaign who essentially are either the big tech companies or in some cases some of the competition authorities who are saying "move

The full interview can be listened to at: <https://soundcloud.com/user-698490989/cpi-audio-interview-with-philip-marsden>

along, nothing to look at here." If they're a tech company, they say, "Look, competition is a click away. Data is free, don't worry about it and you should be grateful for all the innovation."

And if they're a competition authority, many of those authorities say, "Just leave us to continue with our antitrust enforcement, leveraging theories, installation theories, abuse of dominance theories, and we'll just bring more of those cases and we'll just be a bit braver." And we felt that the Furman Report, that there's something in between both of those, not a third way, not a middle way. It's actually closer to the "Remainer" way, which is speeding up antitrust law enforcement, changing some aspects of merger control and developing a pro-competitive regulatory code to bring out some ex-ante codes of conduct for digital companies that have strategic market status, so that they actually don't do the harms in the first place.

Sadden: I think we can all look for some common ground on a lot of different levels, not only for antitrust. Next, I would like to discuss the issue of data portability. Open Banking in the UK is often referenced as a benchmark for data portability. How do you, or should you, take the approach which has been adopted for that sector and apply it to different industries with different business models?

Marsden: Sure. Well, I had the great honor of being the deputy chair of the CMA's Open Banking Inquiry. And what we found there was very similar to the "Leave" and "Remain" antitrust debate I just mentioned, which is we had a great deal of popular pressure and political pressure to break up the banks, which indeed are platforms for many other services and digital in many ways as well. And we had a great deal of arguments from the banks that nothing needed to be done. They just needed to get a bit more engaged with their consumers.

And we found that open banking remedies and data portability remedies would actually give consumers and FinTech intermediaries better ability to introduce competitive services and essentially, you know, to cut through it to the chase, to make sure that banks that were perhaps sitting on old IT systems and not even using their own consumer data would have that sort of feel of people chasing after them.

Sort of the breath on the back of the neck thing of a runner behind them to induce them to indeed engage with their own consumers. So we were trying to stimulate incumbents, doing more for their consumers through better engagement, and we were trying to stimulate entry to try to create that discipline as well. And indeed in Britain, we found that the measure of success wasn't switching. Indeed, our evidence showed that more Britain's switch their spouses more frequently than they switch their banks. We understood that they're well likely to stay with their own particular banking platform and this is what they may well want to do with their own digital platform indeed. But we want to see more competition within those services that those platforms offer and hopefully more opportunities for the big platforms that need to feel some competitive pressure.

Sadden: I have a quote from you, from CNN I believe, stating that, "Antitrust authorities are increasingly concerned when

platforms act as gatekeepers." Can you please give an example of this and what are some of the pros and cons of this development?

Marsden: Sure, so I think that on this "Leave" side of the campaign, you see some governments indeed have said, "Look, we don't even want these large platforms selling their own products on their own platforms. They're a gatekeeper for third party suppliers and we don't want that even happening." And indeed, one government has legislated against this in particular happening.

Other countries are being more careful but are bringing abuse of dominance cases about this sort of argument that if you are the retailers so to speak or the owner of the platform, you have an opportunity to favor your own services over others. And this kind of favoritism happens all the time in the offline world, and it is probably happening in the online world as well, too. But the question is, is there any harm to consumers net. And so what we're noticing is a kind of a competition among competition policies and legislators to try to address these issues.

But what I think we have to do, first of all, is work out whether there's any real harm indeed. Our Furman Report feels that there is a degree of harm there and therefore we felt that rather than chase after these big platforms in a differentiated approach around the world and equally having the platform companies and their advisors play Whac-A-Mole with follow-on enforcement around the world, why don't we set out an agreed code of conduct ex-ante for what is and isn't permissible on these platforms, and then everybody can get on with actually bringing these great services to market.

Sadden: And lastly, referencing the title of the upcoming conference in Melbourne on April 30th what do you think are some steps towards a path forward for dynamic competition in dynamic markets?

Marsden: It's a really exciting time in this policy space at least because I do think that unlike the other "Leave" and "Remain" space, there's hope for some common ground. So you've got the fabulous interim report of the Australian Competition and Consumer Commission. You've got the European trio report, you've got various words from the Furman Report and other jurisdictions. You've got actual deeds, not just words, deeds in the Netherlands, in France, and in Germany with respect to actual enforcement. So if anything, I think there's a great deal of pressure to come up with something that identifies a common ground. And indeed, I think the tech companies want that as well, so they don't have to deal with so many divergent regimes.

Sadden: Well, thank you once again, Professor Marsden, for sitting down with CPI for this interview and we look forward to seeing you on Tuesday, April 30th in Melbourne for the CPI conference, "Dynamic Competition in Dynamic Markets: A Path Forward." We hope to see many of our listeners there. Thanks a lot.

Marsden: Thank you.







Visit www.competitionpolicyinternational.com/MelbourneConference
to see more photos and videos from the conference.

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.

Link:

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

FINANCIAL REVIEW

FACEBOOK, GOOGLE ARE NOT PUBLISHERS, SAYS US ANTI-TRUST EXPERT

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.

THE AUSTRALIAN

BUSINESS BEING IGNORED IN VOTER-FOCUSSED 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.



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%99hipster-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 settle-

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

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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

Link:

<https://www.afr.com/business/media-and-marketing/facebook-and-google-rake-in-billions-but-pay-little-tax-20190430-p51iol>



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 pre-emptively, 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 pre-emptively 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."

Link:

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



IS FINING BIG TECH COMPANIES THE MOST EFFECTIVE WAY TO PROTECT USERS?

Justine Parker

Apr 30, 2019

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
Producer: Justine Parker

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The Digital Industry Group Inc. (DIGI) is a non-profit industry organisation that advocates for the interests of the digital industry in Australia. DIGI believes in a balanced approach to regulating the online world that harnesses the tremendous social and economic opportunities digital services bring to Australia and globally, while also ensuring these services are used in a positive and beneficial way. DIGI's members include Google, Facebook, Twitter, Amazon and Verizon Media.



Founded in 2004, Facebook's mission is to give people the power to build community and bring the world closer together. People use Facebook to stay connected with friends and family, to discover what's going on in the world, and to share and express what matters to them.



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The Competition Law and Economics Network is a network of people engaged in research, teaching and other activities in areas related to competition law and economics at the University of Melbourne. The Network has been established by the Melbourne Law School, but has members and encompasses activities from other University of Melbourne faculties - particularly the Faculty of Business & Economics and the Melbourne Business School. The Network thus reflects the interdisciplinary nature of this field of regulation.

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