

United States House Judiciary Committee
Subcommittee on Antitrust, Commercial and Administrative Law

*Prepared Testimony of Rod Sims, Chair,
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Chairman Cicilline, Ranking Member Sensenbrenner, and distinguished members of the Subcommittee, thank you for the invitation to appear today. It is an honour to be here and talk about the Digital Platforms Inquiry conducted by the Australian Competition and Consumer Commission (**the ACCC**). I hope the findings and recommendations from our Inquiry are useful as you seek to deal with these market power and related antitrust issues in the United States.

If there is one key message I want to convey today it is that antitrust issues have a central role to play in understanding and addressing concerns with digital platforms. This is why your hearings are so important. To be fully effective, however, antitrust needs to work as an integral part of a wider response. While there are real issues in relation to actual and potential exclusion, foreclosure and self-preferencing, there are also a wider array of market failures that must be addressed for the protection, and benefit of, society as a whole.

If I am allowed another key message, it is the importance of data and how it is used. Google and Facebook have access to unparalleled amounts of data which reinforces their market power, and which is collected from consumers without them being adequately informed, and without sufficient consumer control. The implications for consumers, businesses, the economy and our society cannot be overstated.

Australia conducted a unique inquiry

The Australian Digital Platforms Inquiry had the distinct benefit of being wide ranging, addressing competition (antitrust), consumer, privacy, advertising and media issues. We considered the market power wielded by the digital platforms and the role of data and particular behaviour in entrenching that market power, the competitive impact of the platforms on media and advertising markets, consumers' understanding of how their data is collected and used, the privacy implications of the use of that data and the impact of digital platforms on news and journalism.

The antitrust, consumer, privacy, advertising and media issues we identified are closely connected. For example, privacy issues are linked to consumer issues; are consumers being misled about what data is being accessed and how it is used? And these questions are closely connected to competition issues; the data consumers provide can be seen as the 'price' for using Google or Facebook, but if consumers are unaware about what data is being collected and how it is being used, how can rivals

compete by offering “a lower data price”, i.e. offering a similar but more privacy-friendly service? It is difficult to deal fully with competition issues without dealing with privacy and consumer issues, and vice versa.

The ACCC was well placed to carry out this Inquiry, as we are not just the antitrust enforcer, but also the Australian Government agency responsible for consumer protection, telecommunications and infrastructure regulation. Our Government recognised the value of this and set a broad terms of reference when directing us to conduct our inquiry into certain digital platforms in December 2017.

In considering these issues we recognised the substantial social and economic benefits that digital platforms, such as Google and Facebook, have provided for many businesses and consumers, in Australia and globally. However, while the benefits to consumers across the world are significant, this does not mean the associated problems should be left unaddressed.

Our approach to addressing these problems was threefold. First, for each problem identified we determined a solution. Second, we sought the most appropriate solution, whether it involved strict antitrust or involved broader policy and law. Third, we realised the problems would evolve further so the solutions had to as well. In particular, governments and the key institutions need a continuing flow of information to stay ahead of these issues.

Market power, and so antitrust, is at the core of concerns with the digital platforms, and something I know this Committee is giving serious consideration to. As I said at the ABA Antitrust Spring Meeting in DC earlier this year, however, while antitrust is a key part of the solution, more tools and interventions are needed. Antitrust experts should work closely with counterparts working in consumer law, privacy law, and with media law and policy to address the issues we have identified.

Australia’s final report was published in July this year, after 18 months. During this time we issued around 60 statutory notices compelling the provision of information and documents, analysed over 200 submissions, held numerous public forums and countless stakeholder meetings.

Today I am keen to share some of our key findings and recommendations. Many of the concerns identified in our report are similar to those arising in the United States. While the solutions we propose can be implemented by one country acting alone, they will clearly benefit significantly from international cooperation.

Before going further I should explain why the focus of our Inquiry was largely on Facebook and Google. Each month approximately 19.2 million Australians use Google Search, which is 93 per cent

of Australians aged 13 and over,¹ and 17.3 million access Facebook, which is 84 per cent of Australians aged 13 and over.² Amazon is a new entrant to Australia with currently little market share, however I know there are concerns in other jurisdictions about Amazon's market power. We believe that the recommendations we have made can deal with the problems associated with other platforms as they arise.

Google and Facebook and the value of data

The collection of user data is central to the business models of digital platforms like Google and Facebook, as it allows them to offer highly targeted advertising opportunities. Some 84% of Google's revenue comes from the sale of advertising opportunities³ and 98% of Facebook's revenue comes from advertising opportunities.⁴

The data collected by these platforms extends far beyond information provided or behaviour observed during users' direct interactions with their apps and services. Using their market power it also incorporates data collected from users' interactions with vast numbers of other websites and apps.

It is estimated that over 70 per cent of the top million websites have a Google tracker, and more than 20 per cent have a Facebook tracker.⁵ An estimated 88 per cent of apps in the Google Play Store send user data to Google, and 43 per cent to Facebook.⁶

There is much commentary about the unprecedented amount of data collected by Google and Facebook. The multiple touch points Google and Facebook have with users, and the depth and quality of the data held, provides each of them with a strong competitive advantage in advertising markets. It creates barriers to rivals entering their markets and also allows them to expand into adjacent markets by leveraging their market power in, respectively, search and social media.

The business models of Google and Facebook have grown considerably through acquisitions. As you know, Google is reported to have spent at least US\$23 billion buying 145 companies between 2004 and 2014,⁷ and Facebook is reported to have spent at least \$23 billion buying 72 companies since 2004.⁸

¹ Based on Australian Bureau of Statistics, [Australian Demographic Statistics for December 2018](#), released 20 June 2019.

² Based on Australian Bureau of Statistics, [Australian Demographic Statistics for December 2018](#), released 20 June 2019.

³ Alphabet Inc, [Form 10Q for the Quarterly Period Ending 30 June 2019](#), p. 10.

⁴ Facebook, [Facebook Records Second Quarter 2019 Results](#), p. 1.

⁵ S Englehardt and A Narayanan, [Online Tracking: A 1-million-site Measurement and Analysis](#), Princeton Web Census, p. 8.

⁶ Oxford University, [Third Party Tracking in the Mobile Ecosystem](#), 2018 p. 5.

⁷ J Lipton, [Google's best and worst acquisitions](#), CNBC, 19 August 2014.

⁸ S Toth, [72 Facebook Acquisitions – The Complete List \(2019\)! \[INFOGRAPHIC\]](#), TechWyse, 17 June 2019.

Financial markets expect continuing growth and higher profits from Google and Facebook in the future, via growth or expansion into adjacent markets. Our broad calculations estimated that, at the time of publishing our final report, 46-64% of Google's current share price and 50-67% of Facebook's current share price could be attributed to expectations for future growth.⁹ Without such growth their share price would more than halve.

The relationship between antitrust, consumer and privacy concerns

As outlined earlier, the operation of digital platforms in data-driven markets raises new issues at the intersection of antitrust, privacy and consumer protection considerations. Access to data is a key source of market power but, despite the importance of data collection, consumers are not fully informed of, and cannot effectively control, how their data is collected, used and shared. This is because digital platform privacy policies are usually long, vague, complex, and extremely hard to navigate.

Our Inquiry found, for example, these privacy policies would take an average reader 10 to 20 minutes to read, and use language complex enough to require a college-level understanding of English to comprehend.¹⁰ That's if anyone was actually reading them.

While this is obviously worrying from a privacy point of view, the fact digital platform users are not informed about the collection and use of their data impacts competition and consumer welfare. The information asymmetry reduces consumers' ability to make informed choices based on how their data will be handled, in turn preventing competition on this important element of digital platforms' service offerings.

The extensive data collection practices of the digital platforms reflects an imbalance of bargaining power between platforms and their users. The ubiquity of Google and Facebook mean many consumers feel they have to join or use these platforms, and agree to their non-negotiable terms of use, in order to receive communications and remain involved in community life. It is critical that consumers are provided with adequate information, and greater control over the collection and use of their data.

For these reasons, consumer and privacy laws can be as important as antitrust law in addressing harms that digital platforms may cause to markets and consumers.

⁹ Australian Competition and Consumer Commission, [Digital Platforms Inquiry Final Report](#), p. 7.

¹⁰ Australian Competition and Consumer Commission, [Digital Platforms Inquiry Final Report](#), p. 598.

Accordingly, the ACCC has made recommendations to combat these potential harms through:

- strengthening consumer and privacy protections
- the establishment of a special unit within the ACCC to continually monitor and report publicly on the behaviour of the digital platforms, and
- taking strong enforcement action against competition and consumer law breaches.

Together these mechanisms give the ACCC a strong foundation and range of options to address the consumer harm and market inefficiencies caused by the digital platforms.

The impact on news and journalism

Digital platforms have clearly disrupted traditional media markets and, in particular, have threatened the sustainability of print (now print/online) news businesses. The growth of digital platforms marked a continuation of the fall in advertising revenue for print/online news businesses that began with the loss of classifieds in the early days of the internet. Between 2008 and 2018, the Australian print sector's advertising revenue fell from \$8.3 billion to \$1.9 billion, adjusted for inflation; a decline of 77 per cent.¹¹

Our final report paints a stark picture of the resulting reduction in particular types of journalism produced in Australia over recent years. This includes local government and local court reporting, which we consider important to the healthy functioning of the democratic process. Strikingly, we found that 106 Australian local and regional newspapers closed between 2008 and 2018, leaving 21 local government areas without coverage from a local newspaper in either print or online formats.¹² These findings mirror recent research showing that 1 in 5 local newspapers in the United States have closed in the last 15 years, leaving 200 counties with no local newspaper.¹³

As our Inquiry recommends, governments will need to find ways to support the production of high-quality news without compromising the crucial independence of journalism.

Platforms like Google and Facebook are not just rivals for the supply of advertising opportunities. Our inquiry estimated that around 50 per cent of traffic to online news websites comes from Google or Facebook. If this figure is adjusted to take into account access to news directly through publishers' apps, 38 per cent of traffic comes from Google and Facebook. Either way, these platforms are unavoidable partners for many news businesses.

¹¹ Australian Competition and Consumer Commission, [Digital Platforms Inquiry Final Report](#), Fig. 3, p. 18.

¹² Australian Competition and Consumer Commission, [Digital Platforms Inquiry Final Report](#), p. 562.

¹³ P Abernathy, [The Expanding News Desert](#), University of North Carolina at Chapel Hill, 2018, p. 8.

While the digital platforms clearly value the news media content they are able to display to their users, Google and Facebook are each more important to news media businesses than any one news media business is to Google or Facebook. This creates an imbalance of bargaining power between digital platforms and news media businesses, meaning that agreements they reach are likely much different to those that would be reached in a competitive market.

Our Inquiry heard complaints about a lack of transparency in ranking of news content; algorithms that devalue original news stories and content behind a paywall; restrictions on the types of advertising available in certain formats; and the potential impacts of so-called 'Google snippets' on traffic to media websites. The ACCC has proposed practical solutions to address the consequences of this imbalance in bargaining power.

Australian consumers are increasingly accessing news via algorithm-driven digital platforms. This 'atomises' journalism, displacing individual stories from their publishers and other original sources, weakening brand associations and placing consumers at risk of being exposed to deliberately misleading and harmful news (disinformation).

While the leading platforms have taken some steps to address this risk, we consider it is important that there is a consistent, transparent oversight and independent monitoring, and that digital platforms implement consistent and robust complaints-handling processes for serious instances of disinformation.

Ultimately these are issues of responsibility. The business systems of the digital platforms mean they take little or no responsibility for the content on their sites or curated on their platforms. There is a clear role for government to address this.

The impact on the advertising market

The large digital platforms have also reshaped the advertising industry. We found that Google and Facebook are the channels by which most online advertising is purchased and sold in Australia. These two companies also receive the majority of online advertising spend in our country, and have captured more than 80 per cent of all growth in Australian online advertising in the past three years.

Australian advertisers are highly dependent on Google and Facebook to reach consumers online. However, there is a lack of transparency in the operation of the online advertising markets that these platforms dominate. In particular, it is unclear how Google and Facebook rank and display advertisements, and the extent to which each platform may be self-preferencing its own services or associated businesses at the expense of rival advertisers and consumers.

These problems are compounded by the complexity and opacity of the ‘ad tech supply chain’; the process by which technology offered by Google and others matches advertisers with websites and apps selling ad space, using automated bidding to instantaneously deliver targeted ads to users. The prices charged by ad tech suppliers, and the share of advertising expenditure they retain, are largely unknown to both the purchasers of the advertisements and the websites or apps hosting the advertisements. For these reasons, it is very difficult for advertisers to know where their advertising dollar goes, and for website or app owners to know the true value of their advertising inventory.

Market participants are quite reasonably questioning the efficiency of this programmatic advertising process. The lack of transparency means we don’t yet fully understand what inefficiencies or antitrust issues have arisen here and in other areas of the online advertising market.

Our Inquiry recommends a detailed investigation into the supply of ad tech services in order to increase the transparency of this market and determine whether any competition or efficiency concerns exist.

The importance of international cooperation

The magnitude and complexity of the problems identified by our Inquiry highlight the need for decisive action. The size of the multinational major digital platforms should not deter us.

As I’ve been reminding people at home, Australia can act alone. Facebook and Google are clearly subject to our laws. They either comply with the rules or do not do business in our country.

However, it would be preferable, and more effective, if we worked together with other nations, such as the United States, to not only develop solutions to the problems we all share but also to work together to enforce them. Society as a whole can only benefit from such cooperation.

Our proposed solutions

Our main proposed policy solutions to the problems we identified in our report are set out in the following table.

I hope that the holistic approach to the interrelated competition, consumer protection, privacy, media and advertising issues taken in the Australian Digital Platforms Inquiry will make a positive contribution to the **Subcommittee on Antitrust, Commercial and Administrative Law’s** consideration of these critical issues.

Relevant Recommendations of the Digital Platforms Inquiry Final Report	
Concern	Key recommended solutions
The large digital platforms like Google and Facebook have the ability and incentive to foreclose rivals in new and future markets.	<p>Recommendation 1: Changes to merger law</p> <p>Updating Australia’s merger law to incorporate the likelihood that an acquisition would remove a potential competitor from the market; and the nature and significance of assets, including data and technology, acquired through a merger.</p>
	<p>Recommendation 4: Proactive investigation, monitoring and enforcement</p> <p>Establishing a specialist branch within the ACCC to proactively monitor, investigate and enforce antitrust <i>and</i> consumer protection laws involving digital platforms to ensure effective operation of the markets in which they operate.</p>
The lack of transparency in online advertising makes it difficult for both market participants and enforcement agencies to know whether inefficiencies or antitrust issues have arisen in this market.	<p>This branch would also produce regular reports and make recommendations to Government to address consumer harm and impediments to the efficient operation of the relevant markets on a continuing basis.</p>
	<p>Recommendation 5: Inquiry into ad tech services and advertising agencies</p> <p>Conducting an inquiry into the competition for the supply of ad tech services and online advertising services by advertising and media agencies in order to improve transparency in this market and assess antitrust issues.</p>
The large digital platforms exploit their position of market power by requiring businesses to yield data and consumers to make uninformed decisions in agreeing to extensive data collection, preventing competition on the basis of data handling and privacy.	<p>Recommendation 16: Strengthen protections in the Privacy Act</p> <p>Modernising Australia’s privacy legislation to address issues arising from data collection practices including strengthening notification and consent requirements and allowing erasure of personal information.</p>
	<p>Recommendation 18: Privacy code for digital platforms</p> <p>Introducing an enforceable industry code of practice to enable proactive and targeted regulation of digital platforms’ data practices.</p>
	<p>Recommendation 20: Prohibition against unfair contract terms</p> <p>Amending Australian consumer law to make unfair contract terms prohibited (not just voidable) and subject to pecuniary penalties.</p>
	<p>Recommendation 21: Prohibition on certain unfair trading practices</p> <p>Amending Australian consumer law to prohibit certain unfair trading practices.</p>
The large digital platforms exercise market power in their dealings with media businesses, making it very difficult to monetise journalism on their platforms.	<p>Recommendation 6: Implement a harmonised media regulatory framework</p> <p>Implementing a new framework for effective, consistent and platform-neutral regulation of media businesses, publishers, broadcasters and digital platforms.</p>
	<p>Recommendation 7: Code of conduct to govern relationships between digital platforms and media businesses</p> <p>Requiring designated large digital platforms to each implement a code of conduct to govern their relationships with news media businesses, including minimum commitments around</p>

	<p>data sharing, notification of changes to ranking and display of news content and fair negotiation of revenue sharing arrangements. The code is to be enforceable, and a mandatory standard can be imposed if an appropriate code is not submitted.</p>
<p>Disruption of the media industry by the large digital platforms has threatened consumers' access to journalism relevant to the healthy functioning of democracy by contributing to the spread of low-quality news content and disinformation.</p>	<p>Recommendation 8: Copyright take-down code for digital platforms</p> <p>Implementing a mandatory industry code to ensure effective and timely removal of copyright-protected content from digital platforms operating in Australia.</p>
	<p>Recommendation 14: Monitoring credibility signalling on digital platforms</p> <p>Directing an independent Government agency to monitor the voluntary initiatives of digital platforms to help users identify the reliability of news content.</p>
	<p>Recommendation 15: Code to counter disinformation</p> <p>Introducing an industry code to govern large digital platforms' handling of complaints about instances of disinformation that may cause serious public harm.</p>
<p>Recommendation 23: Ombudsman scheme for digital platforms</p> <p>Establishing an independent ombudsman that will resolve complaints and disputes between consumers and digital platforms, including in relation to scams and the removal of scam content.</p>	