THE ANTITRUST SOURCE: Thank you for taking time out of your busy week to meet with us today. Before we start, I wanted to congratulate the Australian Competition and Consumer Commission on its 2019 Government Agency of the Year Award last night.

ROD SIMS: Yes, very good.

ANTITRUST SOURCE: Could you begin by briefly describing the structure of the ACCC and its role in investigation and enforcement, as well as its relationship to the Director of Public Prosecutions, the courts, and the Competition Tribunal?

ROD SIMS: That's a big question. We are the competition enforcement agency; we’re the consumer enforcement agency.

We are the regulator of telecommunications and the regulator of a range of other infrastructure. And we also look out for consumer product safety. So we have, probably, the widest range of activities of any like regulator in the world.

In terms of competition and consumer enforcement, when that’s done, civilly, we can do that. When we have criminal cartel prosecutions, we pass a brief of evidence to the Commonwealth Director of Public Prosecutions, who then brings the prosecution. They do all criminal matters for all Commonwealth agencies.

If it’s a criminal matter, not only do we have to put a brief of evidence to the Commonwealth Office of Public Prosecutions but then it has to go to our lower Magistrates’ Court before it finds its way into the appropriate court that can hear the case, which is the Federal Court.

So that's criminal cartels. For all other matters, we’re a prosecutorial agency, and we bring proceedings in the Federal Court, whenever we take enforcement action, as I say, for conflict, consumer, or competition matters.

ANTITRUST SOURCE: Do you see it as efficient for the Commission to have such broad authority over not just competition matters, but also advertising and data rates and communications and transportation? Is that more challenging? Or is it more efficient to have such a broad role?

ROD SIMS: Oh, I think it’s more efficient. The two examples of that, I think, the consumer enforce-
ment benefits enormously from being linked to the competition enforcement. I think the FTC is trying a similar thing.

We’re also unique in that most of our enforcement teams do both competition and consumer work. And the litigation expertise we have in competition work and the way that’s done gives way to consumer enforcement work.

With consumer enforcement, we take a lot of cases against very big companies—recently Ford, Apple, Heinz, and a range of other companies. And we take all that very seriously. So the synergies between competition and consumer enforcement are very strong.

In relation to telecommunications, again, we regulate access to the network so that there can be competition. But being the competition and consumer enforcer also means we can bring a lot of skills to bear on the telecommunication sector.

So I think it just brings economies of scale to the regulator. I think it brings expertise that we can share in various ways. And it makes us, I think, more effective.

**ANTITRUST SOURCE:** The Commission also conducts market inquiries. Can you comment on the typical impetus to conduct an inquiry in a particular area?

**ROD SIMS:** We can either conduct market studies ourselves or the government can direct us to do so. Now, the term market studies means different things in different jurisdictions. It’s very confusing when people talk about us internationally. So we’ve done market studies, in communications, we’ve done them in the venture capital industry, and so on. When the government directs us to do them, though, they unlock our information gathering tools. So, just as we can with enforcement investigations, we can compel information, and it’s a criminal offense not to provide it. So that gives you access. That’s the big difference.

With a market study, the general objective is to make recommendations to government or to the industry itself. Most times, one or two enforcement investigations also result from the market study, which we do in the normal way where we come across things we wouldn’t have otherwise come across.

Thus, generally, the objective is recommendations to government. When the government asks us to do one, that’s exactly what they’re thinking—recommendations to government to inform public policy.

**ANTITRUST SOURCE:** One thing I noticed about the structure of the Commission is that you have a Deputy Chair with specific allocated responsibility for small business. What is the rationale for that? And what does that role entail?

**ROD SIMS:** We have two Deputies. One who has responsibility for consumer matters and one who has responsibility for small business. The small business person does a lot of relationship building, exchanging information with the hundreds of small business organizations that we have. And he also feeds in a small business perspective, particularly into franchising, but also into much of our consumer law enforcement, because consumer law is also small business law, because it is basically “don’t mislead.”

And when I speak to small businesses, the two biggest compliance issues have been misleading, and what in our jurisdiction are called “unfair contract terms,” which are standard form agreements—they’re not negotiated, so they’re very one sided. So we have a role in making sure those contracts are not unfair. And so, we take action there. We take action when small business
is misled by large business. So it’s just making sure we get that small business perspective, and that we stay very well connected with small business.

I think when I joined the organization, I thought it was unusual to have that role. But now that I’m in the organization, it is a tremendously helpful role. And our interaction with small business benefits enormously from having that role.

ANTITRUST SOURCE: Australia has a voluntary merger notification regime. What are your views on the effectiveness of the voluntary regime? Is the Commission not seeing mergers that it would have liked to have seen before they closed?

ROD SIMS: We’re taking action when companies have merged when they haven’t come to us, and that has sent a message that companies really should come to us.

Australian law simply says it’s illegal to have a merger or acquisition which has the likely effect of substantially lessening competition. So it all gets determined through the courts, if it gets that far.

If somebody goes ahead with a merger and we later form the view that it would have the likely effect of substantially lessening competition, we can take them to court, we can seek the unwinding of the acquisition. And we’ve done that a number of times. So I don’t think we have a problem with it. We had one a couple of years ago, where a company went ahead with the merger, and we forced them to divest. That’s a very recent signal to companies.

As to the complexity though, it’s got advantages and disadvantages. When we do a merger investigation, it is an investigation. It’s just like we’re gathering evidence to prosecute somebody in court. Because we have a prosecutorial system, and because it’s an informal regime, the merger parties don’t get access to the file and a range of other things that they would in a formal merger regime.

Now if they want to seek merger approval under the formal regime, then they get certain access to information. But in the informal arrangement, they don’t.

The advantage of the informal arrangement though is that it’s very flexible. There are no upfront requirements for information, and merger parties predominantly find it an efficient way to obtain clearance. While we don’t have set statutory timelines within which our decisions must be made, our merger approvals, even on complex mergers, are often faster, I think, than they are in the U.S. or the EU or in Britain.

So it has that flexibility. And most of the merger parties like it, except when we oppose the merger and they somehow think the system is flawed. But it has a fairly high degree of acceptance.

ANTITRUST SOURCE: Does the Australian substantive test for merger review include a component of public benefit that might allow a merger to proceed even if the transaction is found to result in a substantial lessening of competition?

ROD SIMS: No, that is not entirely right. There’s no public benefit test in our substantive merger test. In fact there is no public benefit test in any of the things we do, with one notable exception, and this exception may well be unique. Public benefit is taken into consideration when companies apply to us for authorization of activity that would otherwise be illegal. So they could come to get a cartel authorized. They could come to get a merger authorized. They could come to get all sorts of conduct authorized. Then we apply a combined substantial lessening of competition and public benefit test to decide whether the cartel or merger should be given approval to go ahead.
But in reality, this happens, mainly, frankly, for cartel behavior. And to give you a very good example and a very common example, you could have three coal mining companies wanting to collectively bargain with a monopoly port.

So if they get together to bargain with the port, absent authorization, that’s per se illegal under our cartel laws. But we may authorize that because they’re dealing with a monopoly, so we may find that the competition detriment is negligible and is likely to be outweighed by efficiency public benefits, and so we grant authorization.

It’s only three or four authorization applications a year that are complex. But as I say, if there’s large, competitive detriment, the arrangement just would not get authorized. So the bulk of the authorization applications are granted as it’s usually authorizing behaviors that the law captures but that really don’t substantially lessen competition.

I don’t know, but I suspect in the U.S. that companies would just proceed with the conduct anyway on the basis that the DOJ or the FTC may not go after them. I don’t know.

A good example is, I read recently, where your media companies wanted the law changed so they could collectively bargain with Facebook and Google. In Australia, they could come to us to get that authorized. It wouldn’t need a law change, and we would decide whether or not they could or they couldn’t based on a public benefit test. That’s where public benefit comes in. But it’s not a relevant factor in our merger decisions unless the merger parties seek merger authorization. It is also not a relevant factor in our competition enforcement.

**ANTITRUST SOURCE:** In the merger context, I note that the Commission recently pursued a gun-jumping case for pre-closing coordination between the parties. Is that a new area of focus?

**ROD SIMS:** No, it’s not an area of focus, but it’s something that, if we find it, we will act upon very strongly. We think gun-jumping in relation to merger activity is extremely serious. And if we see it, we’ll take very strong action. I wouldn’t say it’s an area of focus. I mean, we are looking forward, of course, but it’s something we do act very strongly on.

**ANTITRUST SOURCE:** In the absence of a merger notification regime, would a gun-jumping case be brought under the cartel provisions?

**ROD SIMS:** Yes. Correct.

**ANTITRUST SOURCE:** And is the recent gun-jumping enforcement tied into some of the recent amendments to the cartel provisions that extended the concept of concerted practices beyond what was in the legislation before?

**ROD SIMS:** No, we’ve had changes to our dominance regime and our concerted practices regime that I think largely flow from court decisions, where it’s been decided that the court decisions have meant that the law hasn’t acted as Parliament intended.

And so, to give an example, our law says you can’t engage in cartel activity based on a contract arrangement or understanding. Now, our courts have interpreted even the understanding as meaning you have to have some form of commitment. This probably wouldn’t arise in the U.S. If we had U.S. court interpretation, we would not need concerted practices.

We had a very good example where egg producers sent out e-mails saying there was an over-supply of eggs, and they wanted to have a meeting of the egg industry to cull the hens, where they
jointly agreed to cull the hens. Now, we had the same reaction you just had, that this was a very strange thing to do. But nonetheless, they did it. And there are a number of e-mails, and there were a couple of meetings held.

We took action against them, but lost the case because the court found we had not proven that any one egg producer had entered into an agreement with another egg producer saying, “If you cull your hens, I’ll cull mine.”

I think under U.S. law, on advice anyway, we wouldn’t have had that problem. You would not have needed to go to that extent. So it’s just fixing up a problem in the law. But that’s what it’s designed to deal with.

ANTITRUST SOURCE: With reference to litigation by the Commission, in one of your early speeches, after becoming Chair of the Commission, you commented that a success rate in litigation of close to 100 percent is too high.

ROD SIMS: Yes.

ANTITRUST SOURCE: Have you remedied that? Have you lost enough cases recently?

ROD SIMS: Yes, we have. And that has caused some amusement in the organization, where someone high-fived me when he lost a case and it showed they were contributing to my objective.

I think we’re around about 80, 85 percent of cases that we win, and I’m comfortable with that. I think 100 percent shows that we were being too conservative.

So our view is if we see behavior that we think is in breach of certainly what the law should be about and it’s arguable whether or not it is, but it involves large consumer detriment, then we’ll take the case on. We might lose or we might win. But my lawyers have to tell me that we’re on very firm ground before we take action.

I mean, if we judge the behavior is really not what the competition laws were meant to allow, and there was large detriment, we’ll take it on. And that, in Australian law, our law has many more provisions than yours does—many more provisions than either the U.S. or the EC. Because it’s got many more provisions, it can get interpreted in ways that, I think, are not really intended. So you can get some legal interpretations that say, “Look I know this really was anti-competitive behavior.” But because of this particular provision over here, it’s open to the court to interpret it this way. So, this case could easily fail. But we’ll still take it on.

ANTITRUST SOURCE: That’s generally across the board?

ROD SIMS: For competition and consumer enforcement, yes.

ANTITRUST SOURCE: Can you comment on your recent experience in cartel enforcement? The Commission has been relatively more assertive in that area as well.

ROD SIMS: It probably doesn’t apply as much because cartel is a per se offense, rather than the substantial lessening of competition, which is where judgment comes in more. But nonetheless, our cartel provisions are also quite complex. And so we have taken cases where, in our view, there was cartel activity, but the provisions of the law still meant there’s some risk.
Look, we’ve now got a very active criminal cartel program. The law allowed us to take criminal cases from mid-2009. It took some time for us to find cases where all the behavior was post-mid-2009. We found when the behavior straddled 2009, that the cases were too complicated because forward looking from mid-2009, you couldn’t rely on things that happened earlier, and that made the case very, very complex.

We then took time to, I guess, work out, that there was a difference between criminal prosecutions and civil prosecutions. And we set up a dedicated criminal cartel unit. All they do is criminal cartels. They’ve got special procedures and they know what they’re doing.

We’ve now got that up and running. And we will bring at least two or three criminal cartel cases a year. We’ve already had two successful prosecutions. We’ve got four cases in court at the moment. We’ll add to that with another two this year. So we have a very active program. But we’ll add two to three a year.

To what extent is the case volume driven by immunity and cooperation?

About 75 percent immunity, and 25 percent through various forms of intelligence.

Switching to dominance and vertical restraints, I gather that the November 2017 amendments revised the concept of misuse of market power and no longer required a showing of anticompetitive purpose. Has that substantially changed the Commission’s approach in that area?

The Australian dominance law prior to November 2017 was largely useless, very hard to take action against. That was because it had a provision in there that an offending firm had to be found to have taken advantage of its substantial market power. The courts interpreted that to mean the company offending had to do something that small firms couldn’t do. It was an extreme interpretation.

If you owned a monopoly asset, and you leveraged that, and in any competitive way in another market, the law was fine, the law could work with that, because you had this monopoly asset that nobody else had. And so you could do that. But if you were a firm that didn’t have a monopoly asset, and was just engaging in anticompetitive behavior that would fit under the dominance rules of other countries, in Australia, it was very hard to get a conviction because the company could simply say, “What we were doing is something a smaller company could do.”

It was a very strange position. So we had a company that was a large company, and another company came into its territory. The larger company said to the smaller company, “You must get out of my territory, otherwise I will come into yours and flood your markets with zero priced goods and drive you out of existence.”

We lost the case, because the court argued because a smaller firm could have engaged in the same thing, we didn’t have a case. Now I’m simplifying the case enormously. But the law was unworkable. So the November 2017 change means we have a law that, I think, works in a similar way to the U.S. and the EC. And that law is going to be very useful to us. And we’ve got three or four cases under investigation at the moment. And I’m confident we’ll take one or two cases under the new law before the end of the year.

Is the threshold of substantial degree of market power higher or lower, or similar to other jurisdictions?
**ROD SIMS:** I think it’s broadly similar. Some may argue it’s a bit lower. But you need to have substantial market power and in a very economic sense. That is, you need to be able to act in a way that is not significantly constrained by your competitors. And if you’re in that position, then you’re deemed to have substantial market power.

The word “dominance,” which other jurisdictions use, suggest it could be read as a higher standard, but I don’t think in practice it really is. I think dominance, and having a position where you’ve got substantial market power, means you can act not much constrained by your competitors. I think they’re very similar things.

**ANTITRUST SOURCE:** Particularly with the change in the law—and I think you’ve touched on this a bit already—are you seeing Australian businesses making more use of the ability to seek authorization for proposed conduct?

**ROD SIMS:** No, nobody’s done that yet.¹ The debate when the law was introduced, was hysterical, as it often is when you’re making substantial change to these things. So, look, I think, the debate by business was overstated. And it became a battle over certain issues that were political at the time, and had nothing to do with the change in the law.

I just don’t imagine we’re going to get many cases for authorization for conduct that would be caught by the new dominance provisions. The companies that operate internationally in Australia were totally unconcerned by the change in the law. It was only local companies in Australia that complained about it, because they said, “We used to be able to get clear advice that we could do all these things.”

So, I don’t think they’ll come to us for authorization because, if they’re doing things that substantially lessen competition in Australia, and are doing things that will get caught by the law in the United States, and get caught by the law in the EU, they know we’re not going to authorize it. So I don’t think the fuzziness they were trying to portray in the law is actually there.

**ANTITRUST SOURCE:** But what about for resale price maintenance? Is there a separate track for getting authorization for that?

**ROD SIMS:** RPM conduct is still illegal per se. Businesses can seek immunity through the two standard processes under Australian competition law: authorization, and now also notification. There are some administrative differences between these two processes, but the same test, which is that RPM can only be exempted if the public benefits outweigh the public detriments. We look at any RPM skeptically because we are always concerned about the harm to consumers from removing discounts and reducing competition on price.

**ANTITRUST SOURCE:** We touched a little bit on the misleading advertising side. Would you like to comment on the Commission’s priorities for misleading advertising and representations?

**ROD SIMS:** We take Consumer Law extremely seriously in Australia. We’ve recently got the law changed in November 2018. So the consumer law penalties will be the same as competition law

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¹ Since the interview, the ACCC has received an application for authorization of an industry code for new technology companies that includes seeking protection under the new misuse of market power provisions.
penalties. In the extreme, a company could be liable for a penalty of up to 10 percent of its turnover for misleading consumers.

In our view, misleading consumers can cause as much damage as cartel activity can. I mean, we have had cases where companies mislead consumers, charged them double the price, and the consumers would not have paid had they not been misled.

We don’t have many cartels that see prices doubled. We’ve had some, but I think the economic effect is the same. So we take it very seriously. And a big priority is misleading consumers by large firms.

So that’s why we’re taking cases against Heinz, against Apple. Ford was an unconscionable conduct case, which I think is treating consumers extremely badly. When large companies do that, we take that seriously, as well. So misleading behavior by large companies is something we treat very seriously.

ANTITRUST SOURCE: I note that you’ve held the position of Chair of the Commission since 2011. Your term will be expiring in 2022. Can you comment on the benefits of having consistent leadership of the Commission for that period of time, as opposed to what is typically a more frequent turnover in other jurisdictions around the world?

ROD SIMS: Oh, look, I think there’s a balance. I think having five to seven-year terms is sensible, because it does lead to stability. I think anything less would see too much change in an organization. In Australia, being appointed for 10 years is not unusual. My two predecessors were both appointed for eight years. So I guess 11 is a little high. That was the government’s decision, not mine. So look, I certainly think at the end of 11 years, it’ll be time to move on and pass the baton to somebody else.

But I think, at certain levels, stability is important. We’ve got three commissioners now who have been reappointed, and they will each serve 10 years. So my 11 years is only a little bit more than theirs.

It’s nice to have a mix. We’ll have a new commissioner starting in June. It’s nice to have a mix of people who’ve been there for some time, and people coming in. So if we get our timing right, we’ve always got a couple of new players joining.

Four players have been there for some time. I think the stability is not just the chair, it’s trying to get stability in the team and not have too many new faces all at once.

ANTITRUST SOURCE: And you had private sector experience before joining the Commission. How valuable or important is that for someone holding a senior position with a competition authority?

ROD SIMS: Oh, I think it’s extremely valuable. I spent nearly 20 years in public policy and then nearly 20 years in the private sector. And the combination of the two provides very valuable perspectives.

I spent nearly 20 years advising companies on commercial corporate strategy. So when they come along and tell me various things, I’m in a nice position to form judgments about the accuracy, or otherwise, of those statements. So, yes, I think it’s just invaluable to your perspective to have worked in the private sector.

ANTITRUST SOURCE: Would you like to make any concluding comments about your priorities for the future?
ROD SIMS: I’ll make one comment on our digital platform short inquiry. That has, I think, caused some confusion. When we get asked to do these inquiries, as I mentioned earlier, they are very much aimed at recommendations to the government.

We can also find matters that we want to investigate with an eye to enforcement, and out of the digital platform inquiry, we’re about two thirds of the way through that. We’ve got, I think, five investigations underway in relation to digital platform behavior.

But, basically, the end result is recommendations to government. And we’ve had some statements that the standard of proof behind our recommendations is not up to, basically, a competition enforcement standard. To which my answer is, “This isn’t a competition enforcement investigation. This is a government-directed inquiry, so that we can provide recommendations to government that they can then assess, and they may or may not wish to act on them.”

So it’s not as if we’re compiling a brief of evidence to put before a court. We’re providing evidence, information and analysis leading to recommendations that the government may or may not want to act on. We are a multi-faceted organization.

We do take competition matters, essentially, against the consumer welfare standard. We do the same with our consumer work. But where we’re giving recommendations to government, yes, they have to be fact-based, they have to be well analyzed. At the end of the day, the government is wanting our recommendations on very important issues, and we have to provide balanced arguments to them. It’s not as if we’re gathering evidence—in the same way as you would for competition enforcement. And I think there’s been some confusion over what an inquiry is.

And also as I say, we have no power to put in place anything from those recommendations. That is entirely up to government, which they can accept or not, and various people can still comment on our report once it’s finalized at the end of June. And their comments can influence what government does as well. So the next stage of this is a very public process, a comment on our report, leading to decisions by government.

ANTITRUST SOURCE: Looking back over the time that you’ve had as the ACCC, what’s the thing that you’re most proud of?

ROD SIMS: I think the combination of getting our success rate down to that 85, rather than the 100 we talked about earlier, so that we are taking on important cases and not being too conservative.

And I’m also very proud of the fact that we convinced the government to change the consumer penalties to make them much, much higher.

To give an example of that, we were getting $10 million penalties against Ford, $9 million against Apple, and they are way too low to grab the attention of companies like that. The Ford behavior was treating their customers in particular circumstances, which I won’t go into, unconscionably. To then see a $10 million penalty there I think is inadequate. To have that now, potentially, considerably higher, I think is an achievement I’m very proud of.

ANTITRUST SOURCE: Thank you very much.