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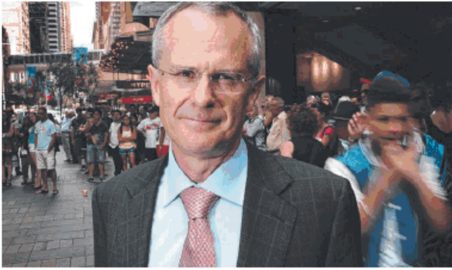

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ACCC chairman Rod Sims

Lessons in US court's digital platforms ruling

MATTHEW LEES

As the ACCC mulls what to do about Google and Facebook in its digital platforms inquiry, a decision in the US Supreme Court this week has called into question how competition laws apply to such businesses.

In Australia, those laws include the controversial "effects test", introduced late last year as part of the federal government push against misuse of market power.

In a split 5-4 decision, the US Supreme Court has rejected the arguments of state and federal governments, and upheld "anti-steering" clauses in contracts American Express has with retailers.

The clauses, which have been around since the 1950s, prevent retailers from offering consumers incentives to use another credit card that would charge the retailer a lower fee.

But the really critical aspect of the decision is what it says about "two-sided platforms" like Amazon and eBay.

Economic theory has it that such platforms have "network effects". That means, for example, retailers who accept American Express cards gain from more customers using American Express cards, and customers using cards benefit from more retailers accepting them. Relying on these ideas, the majority justices took a benign approach to two-sided platforms.

To find that the platform is acting anti-competitively, Justice Thomas considered, it's not enough to look at what the platform is doing to retailers — you have to look at the consumer side of the platform, too.

This approach is bad news for vendors looking to competition laws to protect them when selling through digital platforms. It suggests they need to show that consumers, not just vendors, are worse off.

Looking at both sides of the platform, the majority justices were not persuaded there was any substantial harm to the credit card market.

American Express charging retailers higher fees allows it to offer consumers greater rewards. In fact, the anti-steering provisions prevent retailers from free-riding on the reputation of American Express by attracting consumers on the basis of accepting the card and then encouraging them to use a different card.

The counterargument was put forcefully for the minority by Justice Breyer, who pointed out that, with the protection of the anti-steering clauses, American Express had been able to increase the fees it charges retailers 20 times in five years without losing market share.

One competitor (Discover) had failed in its attempt to launch a low-fee card because retailers were unable to steer customers towards it. And even if retailers could offer consumers incentives to use other credit cards, those consumers could still choose to use American Express based on the more valuable customer rewards it offers.

US commentators have noted that the court split along partisan political lines and speculated about the impact of further appointments by the Trump administration.

However, the different judgments this week also reflect different economic philosophies. The minority sought to protect effective markets. The majority sought to protect what they saw as American Express' legitimate business model and to make sure competition laws do not "chill the very conduct (they) are designed to protect".

There are echoes of these arguments in the national debate we've been having on competition law in Australia.

But the real lesson for Australia from the decision is the difficulty of applying competition laws to real-world cases. The intent of our new "effects test" — banning conduct that substantially lessens competition — sounds great in theory but it leaves a lot of the work to judges in deciding what's anticompetitive and what's not.

Judges are required to evaluate complex evidence, including conflicting expert opinions and potentially, as in this case, competing economic theories. Regulators won't like every court decision. Nor will the business community, which is already experiencing the uncertainty over how the "effects test" applies to different industries and situations.

Is a business required to give a competitor access to their facilities or supply them with a product or input? If so, on what terms? What action are they allowed to take, and not allowed to take, to strengthen or defend their market position against a new competitor or disrupter?

The ACCC is due to give Treasury its preliminary report from the digital platforms inquiry in December, with the final report due in June next year. In light of the US Supreme Court's decision, the ACCC will need to consider whether it can rely on the new "effects test" to solve all competition problems with digital platforms, or whether a more targeted approach is required.

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