

# **ACCC Merger Reform Proposals**

In April 2023, Gina Cass-Gottlieb, Australian Competition and Consumer Commission (ACCC) Chair addressed the National Press Club, renewing calls for merger reform and outlining the ACCC's latest proposals

## ACCC'S PROPOSED REFORMS TO MERGER REVIEW PROCESS



### Formal mandatory suspensory clearance model

Shift from the current voluntary informal clearance model to a formal mandatory and suspensory clearance model, in line with other OECD jurisdictions



# Mandatory notification based on materiality thresholds

All proposed mergers above set materiality thresholds (which have yet to be outlined) would need to be notified to the ACCC. Thresholds could be based on size of the proposed transaction, size of the business being acquired globally and/or within Australia, or a combination of these factors



# Introduction of upfront information requirements

The ACCC argues this would help combat against parties increasingly providing late, incomplete or incorrect information under the existing informal review process



## Completion of transactions would be prohibited unless and until merger clearance is

Suspension of merger transactions pending clearance

granted by the ACCC or the Australian Competition Tribunal (Tribunal) on review



### may raise competition concerns

Public benefit test retained

competition grounds

Discretionary "call-in" power

Parties would retain the option to apply for merger clearance on public benefit grounds if ACCC (or Tribunal, on review) is not satisfied that a transaction can be cleared on

For situations where a proposed merger doesn't meet the relevant notification threshold(s), the ACCC would have power to call-in the transaction for formal review where it considers it



Streamlined notification waiver process Parties to non-contentious transactions would be able to apply for notification waivers to be exempt from making a full formal application. The ACCC expects most mergers would be dealt with

via waiver, similarly to the pre-assessment stage of the current informal regime



Appeals and review ACCC denials of merger clearance would be reviewable by the Tribunal (as is currently the case for merger authorisation decisions). The Federal Court would consider any declaration and judicial review applications, as well as transactions that do not trigger notification thresholds

# ACCC'S PROPOSED REFORMS TO SUBSTANTIVE MERGER TEST



# **Broadening of SLC test**

The current prohibition on

mergers which 'substantially lessen competition' (SLC) in a relevant market under section 50 of the Competition and Consumer Act 2010 (Cth) (CCA) would be amended to make it clear that the SLC test includes "entrenching, materially increasing or materially extending a position of substantial market power". This is designed to address not only incremental changes resulting from mergers but also entrenchment of dominant positions in markets. as well as creeping acquisitions



# New merger factors

To be incorporated into section 50(3) CCA to focus on overall market changes that may result from a merger including:

- impact on the height of barriers to entry loss of actual or potential competitive rivalry
- increased access to, or control of, data, technology or other significant assets
- whether the acquisition is part of a series of relevant acquisitions; and whether the acquisition entrenches or extends a
- position of substantial market power

# **TOP TAKEAWAYS**

#### Economic conditions are central to this debate ACCC has flagged that current economic conditions including the cost-of-living crisis, supply chain constraints,

geopolitical uncertainty, transitions to energy sustainability and advances in "gatekeeper" digital technology indicate a critical need to update the merger clearance regime to be more effective and aligned with international practice, particularly given the pivotal role of competition in driving investment and innovation. However, in the intermediate term, Government may be reluctant to impose any regulatory constraints that could stifle M&A activity in the current economic climate. Fundamental shift in default position and onus

#### The proposed reforms arguably realign the balance from enabling transactions to halting them. Currently, the ACCC must initiate Federal Court action and prove likely SLC to prevent or unwind transactions. The proposed

reforms shift the onus to private parties to establish positively to the ACCC's (or Tribunal's) satisfaction that an SLC is not likely to occur. This may result in increased administrative burden on both the ACCC and/or Tribunal and potentially longer timeframes in the assessment of notified mergers, so adequate resourcing of both regulatory bodies will be critical. Thresholds still to be determined

#### Proposed materiality thresholds have not yet been outlined but Ms Cass-Gottlieb noted these "required careful consideration". There is also currently no indication whether industry-specific thresholds will be proposed (as previously suggested by former Chair Rod Sims in 2021), although the ACCC remains focussed on competition

issues in digital platforms and other highly concentrated markets. Impact on M&A activity and trends A mandatory regime would place increased transaction costs and regulatory burdens on M&A activity, including

## delays, increased deal risks and complexity. If reforms are introduced, there will likely be a peak in merger activity ahead of the date they take effect. A new regime may also have other flow-on effects in practice, such as

influencing choice of transaction structure and the relative attractiveness of more "contentious" bidders. Public benefit test retained In a shift from initial merger reform proposals by Sims in 2021, the ACCC now advocates for the existing public

benefit test to be retained. However, this would now operate as a "second stage" avenue of clearance approval

in circumstances where the ACCC has already concluded the transaction is likely to result in an SLC.

#### Businesses will need to overcome practical hurdles Businesses contemplating merger activity will need to build in the new mandatory regime into their transaction

processes, completion timeframes and terms, ensuring sufficient time and resources to apply for and obtain relevant approvals.

What's next? Watch this space!

At this stage, the ACCC has provided a paper detailing the proposed reforms to the Federal Treasury. The Government will now decide whether (and if so, when and how) to enact the proposed amendments to the CCA

As is typical, a comprehensive process of stakeholder consultation will occur before any changes are

- made. Key details of a new regime would need to be fleshed out and refined, including the determination of materiality thresholds, appropriate length of statutory review periods, eligibility and process for seeking notification waivers, specifics of the call-in process and the review and appeal framework LexisNexis® Practical Guidance will provide further updates and analysis on any developments

including draft legislation, consultation terms of reference and submission deadlines.

Read the full transcript of Ms Cass-Gottlieb's address here.

see our comprehensive topic on Mergers in Practical Guidance Competition including our Guidance Notes: The prohibition in section 50 and Mergers in Digital Markets.

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For further details on the current merger control regime under the CCA,