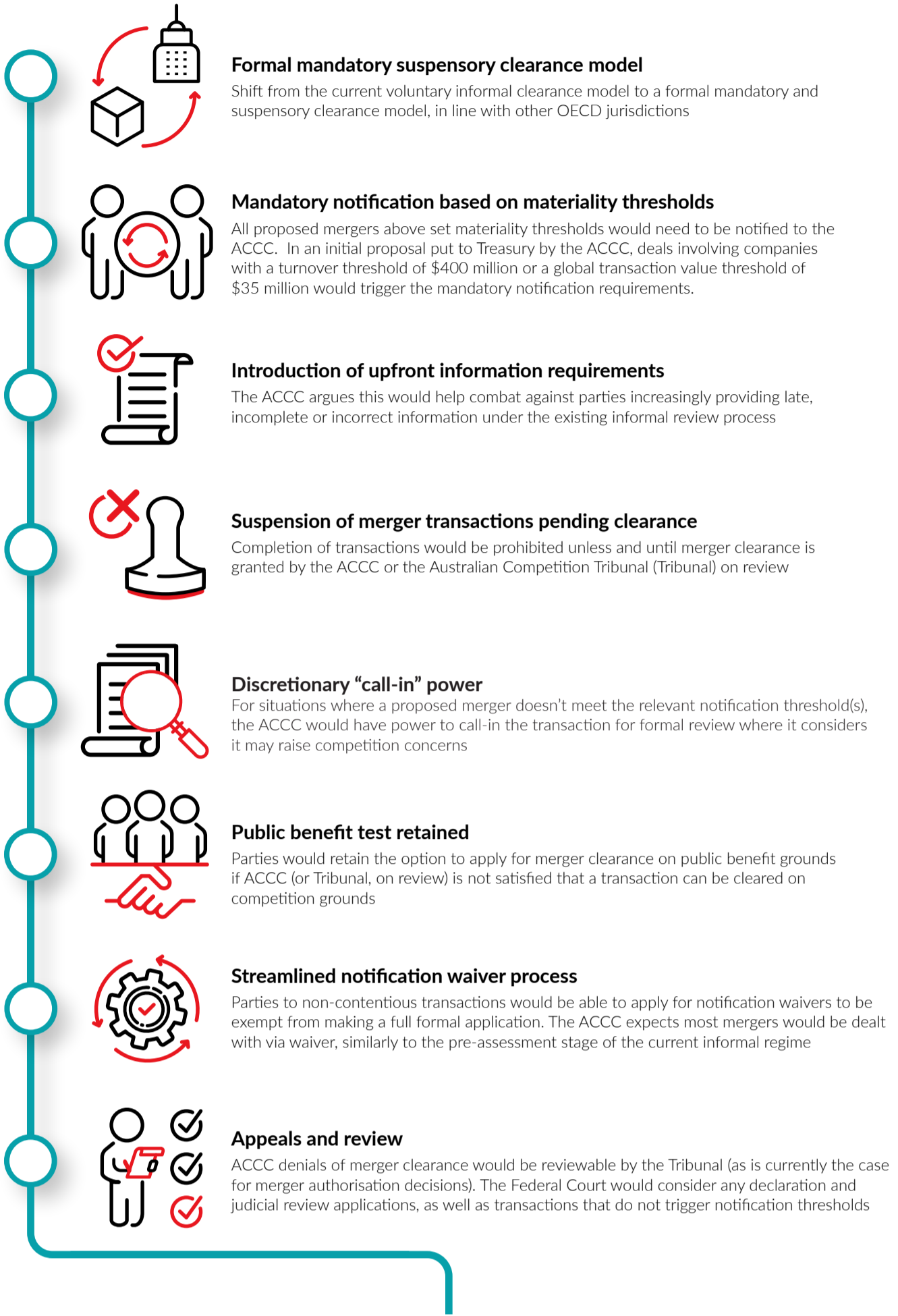


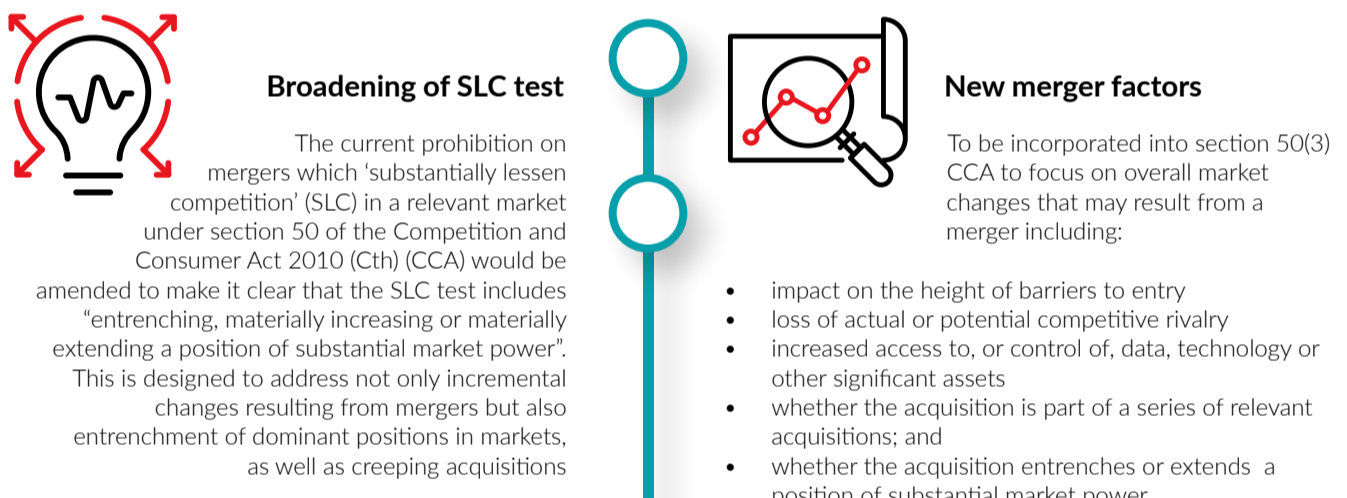
# ACCC Merger Reform Proposals

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



## ACCC'S PROPOSED REFORMS TO SUBSTANTIVE MERGER TEST



### 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.

#### 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.

#### Thresholds still to be confirmed

Materiality thresholds were suggested by the ACCC in a proposal it made to Treasury in March 2023, but it remains to be seen whether these will be the final figures proposed by the ACCC or adopted by Government. Ms Cass-Gottlieb has noted that determining the thresholds requires "careful consideration", and it appears likely that they will be set with reference to the value of the proposed transaction, the size of the business being acquired globally and/or within Australia, or a combination of these factors.

### 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 confirmation 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](#).  
 For further details on the current merger control regime under the CCA, 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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