

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 would need to be notified to the ACCC. In an initial proposal put to Treasury by the ACCC, deals involving companies with a turnover threshold of \$400 million or a global transaction value threshold of \$35 million would trigger the mandatory notification requirements.



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



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

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



Public benefit test retained

Discretionary "call-in" power

the ACCC would have power to call-in the transaction for formal review where it considers it may raise competition concerns

For situations where a proposed merger doesn't meet the relevant notification threshold(s),



competition grounds

Streamlined notification waiver process

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



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

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

Economic conditions are central to this debate

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

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

The proposed reforms arguably realign the balance from enabling transactions to halting them. Currently, the

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.

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

LexisNexis® Practical Guidance will provide further updates and analysis on any developments

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

including our Guidance Notes: The prohibition in section 50 and Mergers in Digital Markets.

Stay up to date on Competition and M&A issues by subscribing to our Practice Area Round-ups.

For further details on the current merger control regime under the CCA, see our comprehensive topic on Mergers in Practical Guidance Competition