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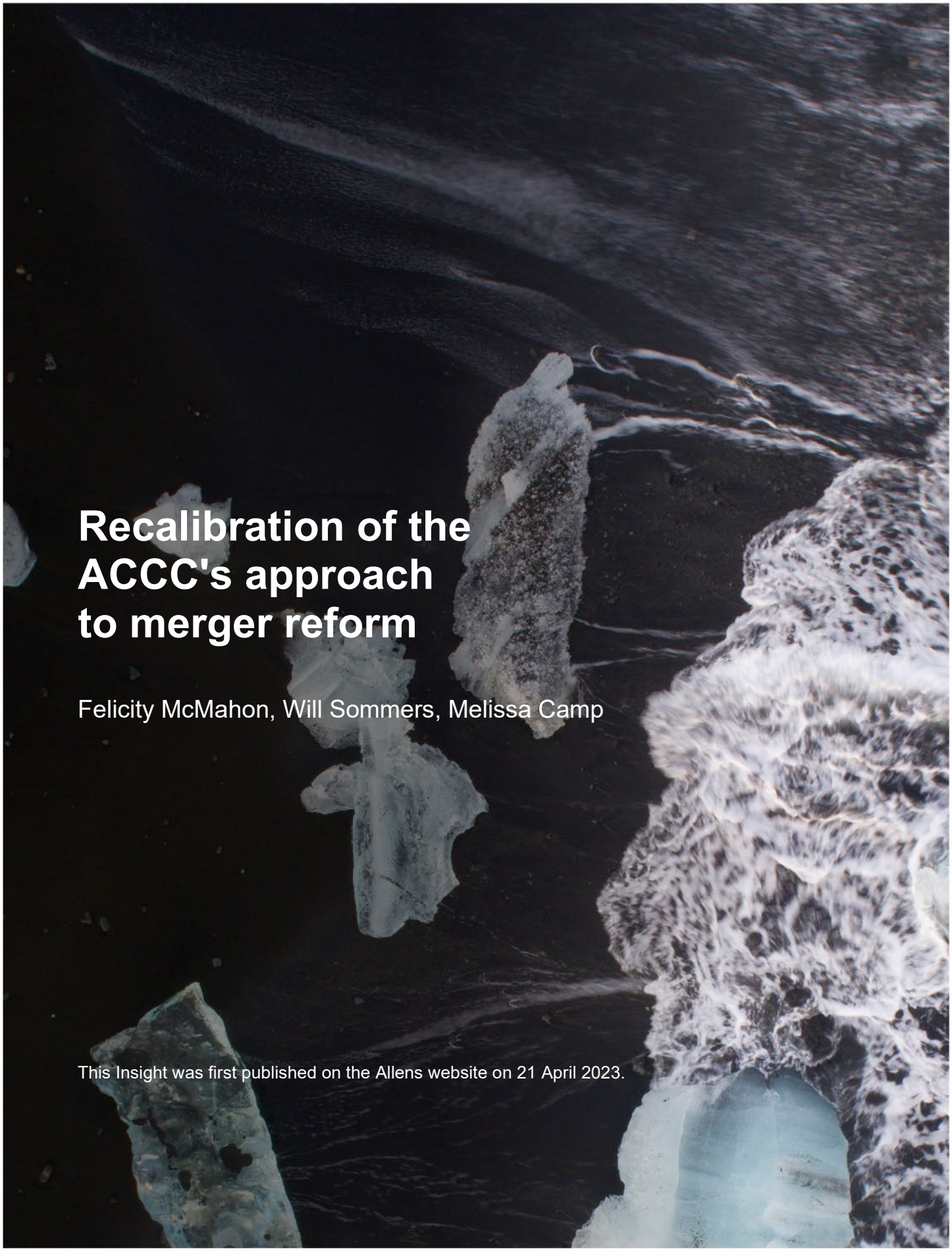

Recalibration of the ACCC's approach to merger reform

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ACCC Chair releases further details on proposed merger law reforms

In August 2021, former ACCC Chair Rod Sims kicked off a lively debate by outlining the regulator's vision for an overhaul of Australia's merger regime, which we covered in previous *Insights*. Following further announcements by current Chair Gina-Cass Gottlieb that the ACCC continues to support the introduction of a mandatory merger regime, we analysed the relevant factors when designing a mandatory merger regime for a modern economy, and explained why we don't believe there is a convincing case for replacing the current regime.

Since then, Ms Cass-Gottlieb has released further detail on what reforms she has in mind. Addressing the National Press Club on 12 April 2023, she reiterated her support for merger reform in Australia, noting that the ACCC has adjusted its view on certain elements of the proposed reforms, due to stakeholder feedback and her experiences since becoming Chair just over 12 months ago.

In this *Insight*, we explain these further details and how the proposed reforms have changed since first being raised in 2021.

What's new?

Ms Cass-Gottlieb's address to the National Press Club confirmed that core elements of the proposed reforms would remain, including:

- making merger clearances **mandatory**, ie replacing our current voluntary 'informal' merger review process with a mandatory formal clearance process;
- making it **easier** for the ACCC to **oppose** mergers, by shifting the onus onto merger parties to 'satisfy' it that the proposed acquisition is not likely to have the effect of substantially lessening competition; and
- **curtailing the role of the court** and limiting parties' ability to challenge the ACCC's decision to limited merits review.

The Chair also set out a number of clarifications to the proposed reforms, including:

- merger parties would have the option to apply for clearance on **public benefits** grounds, but only as a 'second stage option' if the applicants are not able to first satisfy the ACCC or the Australian Competition Tribunal that a transaction can be cleared on competition grounds;
- **additional factors** to be considered when applying the **'substantial lessening of competition' test** would be legislated, including:
    - the **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**;
- the regime will include **mandatory review thresholds**, which could be based on transaction/business size, which, if met, would require parties to seek approval before implementing the transaction;
- the ACCC would have the power to call in any transactions below those mandatory review thresholds; and
- the **review period may vary** depending on the **complexity** of the transaction, with the possibility of a shorter and more limited process.

Evolution of reforms

The evolution of the key elements of the ACCC's proposed merger reforms is below:

Issue	ACCC concern	Proposed reforms: 2021	Updates to proposed reforms: 2023
Australia's merger review regime	Notification is not mandatory in Australia and merger parties are not prevented from completing the transaction until they have received merger clearance. To prevent a merger that the ACCC considers to be anti-competitive, it must apply to the Federal Court.	• **Mandatory filing for transactions that meet thresholds**: Merger review would be mandatory for transactions above certain thresholds. • **Suspensory**: For transactions that meet the filing thresholds, parties would be prohibited from completing the merger until clearance was granted. • **Residual call-in power**: The ACCC would have a 'call-in' power to review acquisitions below the thresholds, where necessary. • **Simplified process option** for acquisitions unlikely to raise serious competition concerns. • **Limited merits review** to the Australian Competition Tribunal would be available based on the evidence before the ACCC.	The proposed regime will include the core structural elements outlined in 2021 (see column to the left), plus additional elements raised by Ms Cass-Gottlieb in April 2023, informed by stakeholder feedback and recent experience with formal merger authorisations. These additional elements are set out in this column.
Thresholds for filing	There are no thresholds. It is a question of substance: ie will the transaction have the effect of substantially lessening competition?	No detail provided.	The ACCC will look to international merger regimes when formulating recommendations for thresholds. There could be a combination based on: • **transaction value**: the size of the proposed transaction; and/or • **size of parties**: the size of the business being acquired globally and/or within Australia.
Process options	To obtain comfort that transactions do not raise concerns, parties can choose three alternatives: informal review, formal authorisation or seeking a declaration from the Federal Court. Each has its own idiosyncrasies.	• **Mandatory merger review process**: A new mandatory formal merger review regime for mergers that fall above certain thresholds or that are 'called-in' by the ACCC. • **Increased document requirements**: Parties would need to submit all information upfront to the ACCC.	• **Mandatory merger review process**: The Chair also proposes a new mandatory formal merger regime, with reviews possible by application to the Tribunal. • **Federal Court declarations still possible**: The regime would also retain parties' ability

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	Informal review has no document requirements, with the detail required determined by the significance of the issues and iteratively based on engagement with the ACCC. **Formal authorisation** is a public process with high levels of transparency, and the filing must be in accordance with the ACCC's form and accompanied by certain prescribed documents. **Seeking a declaration from the Federal Court** is a comparatively more document-intensive process.	• **Simplified process option**: A simpler 'notification waiver' process would be available for acquisitions that are above the notification thresholds but unlikely to raise serious competition concerns, effectively enabling merger parties to proceed with the acquisition without the need for a Phase 1 review. • **Pre-assessment process to remain**: For acquisitions below the notification threshold, merger parties can continue to seek ACCC clearance under the existing informal pre-assessment process.	to apply to the Federal Court for declarations. • **Simplified process option:** The Chair clarified that non-contentious acquisitions that are ***above*** the notification thresholds could qualify for a notification waiver. If granted, merger parties would not need to file a full application and the matter would be dealt with more quickly. This would work in a similar way to the ACCC's current pre-assessment process. The Chair did not provide further detail on Rod Sims' previous position that the current informal pre-assessment process would be available for clearance of acquisitions ***below*** the notification thresholds. • The **review period** may vary depending on the complexity of the transaction, with simple applications having a shorter review period than more complex ones.

Merger factors	The current merger factors in section 50(3) of the *Competition and Consumer Act 2010* (Cth) place undue weight on market characteristics that may limit or offset anti-competitive effects, rather than on factors indicative of anti-competitive effects, such as how the acquisition will change the structural conditions for competition.	• **Structural changes in market relevant**: Revise the mandatory merger factors to be considered when assessing a transaction to focus on the structural conditions for competition that are changed by the acquisition.
		
		• **'Killer' acquisitions and data**: As recommended in the ACCC's Digital Platform Inquiry Final Report, incorporate additional merger factors that consider (i) the likelihood the acquisition will remove a potential competitor and (ii) the nature and significance of assets being acquired, including data and technology.
			• **Additional merger factors**: In addition to revising the mandatory merger factors as proposed in 2021, factors would be added, including:
			  • the 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.

Onus of proof	Section 50 of the CCA prohibits mergers that have the effect, or are likely to have the effect, of substantially lessening competition. Who bears	• **Onus of proof on merger parties**: To approve a merger, the ACCC must be satisfied that the proposed acquisition is not likely to have the effect of	• The onus of proof under the new regime would be consistent with the current authorisation test: ie the parties would need to satisfy the ACCC that the

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	the onus of proof depends on the which process is followed. **Declaration**: The party making the application in the Federal Court bears the onus of proving that the transaction does not substantially lessen competition. **Injunction**: The ACCC makes the application in the Federal Court and bears the onus. **Authorisation**: The ACCC must be satisfied that either the transaction does not substantially lessen competition or that the public benefits outweigh any public detriments.	substantially lessening competition.	transaction does not substantially lessen competition.
Standard of proof	To successfully challenge a merger, the ACCC must go to court and prove on the balance of probabilities that there is a real commercial likelihood of a substantial lessening of competition.	• **Lower standard of proof**: By amending the definition of 'likely' in s50, lower the standard of proof so that a merger will breach competition laws where there is a 'possibility that is not remote' that the transaction would substantially lessen competition.	• **Keep current standard of proof**: In contrast to the 2021 proposals, there are not likely to be any changes to the 'substantial lessening of competition' test as initially proposed. Commissioner Stephen Ridgeway recently noted that the courts have provided some clarity, with 'likely' now generally understood to mean 'real chance'.
Legal test	**Informal review and clearance:** no substantial lessening of competition. **Formal authorisation**: either no substantial lessening of competition or public benefits outweighing public detriments. **Declaration applications to the Federal Court**: The court will make a declaration if it finds that	• **Substantial lessening of competition** test only. No public benefits test was suggested.	• **Substantial lessening of competition** test to remain. • **Public benefits**: Merger parties would have the option of applying for clearance on public benefits grounds, but only as a 'second stage option' if the applicants are not able to first satisfy the ACCC or Tribunal that a transaction can be cleared on competition grounds. It is not clear how this 'second stage' would work in practice.

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	the transaction does not substantially lessen competition in any market.		
Appeals	Parties may apply to the Federal Court for a declaration or seek judicial review of ACCC or Tribunal decisions. Parties may also apply to the Tribunal for a limited merits review of ACCC formal authorisation decisions.	Parties may apply to the Tribunal for a limited merits review of ACCC decisions. Application to the Federal Court would be available in relation to mergers that fall outside the mandatory merger regime.	• The ACCC Chair clarified that the Australian Competition Tribunal is the appropriate review body for mergers that fall within the mandatory merger regime (ie mergers that meet the notification thresholds, or are 'called in'). The Federal Court would consider acquisitions that fall outside the mandatory merger regime (eg merger enforcement matters that do not trigger the notification thresholds), as well as declaration or injunction applications and judicial review.

Firms with market power	The ACCC considered acquisitions by firms with substantial market power are more likely to have the effect of substantially lessening competition, and acquisitions that entrench market power ought not to require specific proof of anti-competitive effects.	• **Separate test for firms with substantial market power**: Where one of the merger parties has substantial market power, an acquisition will be deemed to substantially lessen competition where it entrenches, materially increases or materially extends that market power.	• **Separate test for firms with substantial market power:** The ACCC Chair clarified that changes to the regime would deal with firms with substantial market power in two ways:
			  • legislation would confirm that the 'substantial lessening of competition test' includes '**entrenching, materially increasing or materially extending** a position of substantial market power'; and
			  • the extent to which an acquisition **entrenches or extends** a firm's substantial market power would also be one of the merger factors considered by the ACCC in applying the 'substantial lessening of competition' test.

Digital platforms	The ACCC considered that current merger laws do not prohibit acquisitions by digital platforms where there is a low likelihood of a substantial lessening of competition, but where, if it does occur, the impacts	• **Separate test for specified digital platforms**: Specified digital platforms would be subject to a tailored merger test. • The ACCC did not reach a view on which test should apply but considered that, at a minimum, the probability of competitive	• **Unclear if separate test for specified digital platforms**: The Chair did not specify if the ACCC would continue to propose a separate merger test for specified digital platforms. However, she stated that Australia's current laws cannot adequately address competition

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	are substantial and long lasting.	harm that needs to be established would be lower than that applying to acquisitions in the economy more generally.	and consumer issues raised by digital platforms, and the ACCC has recommended a range of reforms, including mandatory codes of conduct for designated influential digital platforms. In addition, the new proposed merger factors appear to be aimed at addressing ACCC concerns regarding digital platforms.
Other agreements in merger assessments	Merger parties may enter into other agreements that impact competition. Due to the anti-overlap provisions, the effects of these agreements are considered separately to the effects of the merger.	• **ACCC can consider other relevant agreements**: The competitive effects of agreements entered into by merger parties can be considered together with the merger as part of the substantial lessening of competition assessment.	• No additional information provided in April 2023 speech.

What next?

It is clear that the debate on Australia's merger regime has well and truly begun. There's still a lot we don't know about what is being proposed, including the timeframe for bringing proposals to Parliament and the extent of the Federal Government's appetite for merger reform. There's also a lot more detail to come, including:

- the **filing thresholds** to apply;
- the level of **control** or **influence** necessary for the mandatory regime to apply;
- if there will be a **separate test for specified digital platforms**;
- the level of **transparency** provided in any mandatory ACCC review processes; and
- any **fees** that would be imposed for ACCC reviews.

We expect that this debate will carry on as the ACCC continues to consult with government, competition law specialists and the business community. We look forward to continuing to contribute to that conversation, including through our analysis of the key issues in designing a mandatory merger regime for a modern economy, which you can find here.

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