



Public Competition Assessment

2 March 2016

Foxtel Management Pty Ltd and Ten Network Holdings Ltd - proposed acquisitions

The ACCC's decision

1. On 22 October 2015, the ACCC announced its decision not to oppose certain proposed acquisitions by Foxtel Management Pty Ltd (**Foxtel**) and Ten Network Holdings Ltd (**Ten**).
2. The proposed acquisitions by Foxtel and Ten comprise:
 - Foxtel's proposed acquisition of up to 15% of Ten
 - Ten's proposed acquisition of 24.99% in Multi Channel Network Pty Ltd (**MCN**)
 - The proposed granting of an option to Ten by Presto TV Pty Ltd (**Presto**) to acquire 10% of Presto.
3. The ACCC decided that the proposed acquisitions would be unlikely to have the effect of substantially lessening competition in contravention of section 50 of the *Competition and Consumer Act 2010* (the **Act**). Section 50 prohibits acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in any market.
4. The ACCC considered the competitive effects of the proposed acquisitions in the following markets:
 - the national market(s) for the acquisition of television content (including possible markets, or sub-markets, for the acquisition of sports content and premium Australian original content)
 - the national market for the supply of free-to-air (FTA) television services
 - the national market for the supply of subscription television (STV) services
 - a broader national market for the supply of television viewing services encompassing (at least) both FTA and STV services
 - the national market for the supply of subscription video on demand (SVOD) services
 - the national market for the supply of television advertising services.

5. The ACCC concluded that:
 - Although the proposed acquisitions will lead to a greater alignment of the interests of Foxtel and Ten, and will increase the degree of influence Foxtel has over Ten, the proposed acquisitions, on their own, are unlikely to result in a substantial lessening of competition.
 - The proposed acquisitions are minority shareholdings and there are limitations on the extent to which Foxtel will be able to influence Ten as a result of holding a 15% shareholding in Ten.
 - The other FTA networks, STV providers and streaming service providers (including SVOD providers) will continue to have sufficient alternatives to allow them to obtain content that is attractive to viewers.
 - Foxtel and Ten will continue to face competition from the remaining FTA networks, and streaming services are also likely to become an increasingly competitive alternative for viewers, including for access to sports content.
 - Advertisers will continue to have alternatives to Foxtel and Ten for television advertising in the event that MCN attempted to increase advertising rates or engage in anticompetitive bundling practices post-acquisition.
6. As the proposed acquisitions raise important issues, the ACCC is issuing this Public Competition Assessment to outline reasons for its decision.
7. Please note that this and other public competition assessments are subject to the following qualifications:
 - (a) the ACCC considers each transaction on a case-by-case basis and so the analysis and decision outlined in one assessment will not necessarily reflect the ACCC's view of another transaction even where that other transaction may involve the same or a related market; and
 - (b) as assessments are brief and also do not refer to confidential information provided by the merger parties or other market participants, assessments do not set out all of the issues and information considered by the ACCC, nor all of the analysis and reasons of the ACCC.

Review timeline

8. The following table outlines the timeline of key events in this matter.

Date	Event
25 June 2015	ACCC commenced review under the Merger Process Guidelines.
24 July 2015	Closing date for submissions from interested parties.
19 August 2015	ACCC requested further information from the merger parties.
3 September 2015	ACCC received further information from the merger parties.
9 September 2015	Former proposed decision date of 10 September 2015 delayed by ACCC to allow additional time to consider the proposed acquisitions.
14 September 2015	ACCC published a Statement of Issues outlining preliminary competition concerns.
28 September 2015	Closing date for submissions relating to Statement of Issues.
22 October 2015	ACCC announced it would not oppose the proposed acquisitions.

9. The total elapsed time from start to finish was approximately four months. The total period net of time taken by the parties to submit information or documents was 74 business days.

Market inquiries

10. Submissions were received from, and market inquiries were conducted with, a wide range of industry participants, including competitors, potential competitors, advertising agencies, audio-visual content producers, other regulatory agencies and other interested parties during the course of the investigation.

Statement of Issues

11. The ACCC published a Statement of Issues on 14 September 2015. In the Statement of Issues, the ACCC expressed the preliminary view that the proposed acquisition had the potential to substantially lessen competition for the supply of FTA television services in Australia, particularly in the broadcasting of sports content, and reduce or even eliminate competition between Foxtel and Ten for the supply of advertising services.

12. The ACCC also expressed the preliminary view that the proposed acquisition was unlikely to result in a substantial lessening of competition in the supply of SVOD services to consumers.

The parties

Foxtel

13. Foxtel is agent for (and manager of) the Foxtel Partnership. The partners in the Foxtel Partnership are Telstra Media Pty Limited (a wholly owned subsidiary of Telstra Corporation Limited) (**Telstra**) and Sky Cable Pty Limited (which is indirectly a wholly owned subsidiary of News Corporation) (**News Corp**).
14. Foxtel is Australia's largest STV provider. It delivers television content to over 2.6 million Australian subscribers. It also operates the Foxtel Play multiplatform subscription audio-visual content service (which allows subscribers to view Foxtel's television stations online via a tablet or smartphone device) and the Presto SVOD service (see below).
15. News Corp and Telstra each have the right to appoint one-half of the board of directors of Foxtel. In addition, News Corp has the right to appoint the Chief Executive Officer and Chief Financial Officer of Foxtel; Telstra has the right to terminate these officers.¹
16. Foxtel stated that the proposed acquisitions will deliver synergies and improved advertiser access through the MCN arrangement, and "represents the best long-term solution for a revitalised, competitive and profitable Ten".

Ten

17. Ten is an ASX-listed commercial broadcaster that operates three FTA television channels in Australia (Ten, Eleven and One). It also operates Tenplay, a multiplatform online catch-up service. Ten's five largest shareholders and their shareholdings at 16 October 2014² were:
 - Birketu Pty Ltd (a company controlled by Bruce Gordon) 12.62%, with a further 1.82% held by Birketu Investments Pty Ltd (also controlled by Bruce Gordon)
 - Hanrine Investments Pty Ltd (a company controlled by Gina Rinehart) 9.45%
 - HSBC Custody Nominees (Australia) 9.40%
 - Illyria Nominees Television Pty Limited (**Illyria**) (a company controlled by Lachlan Murdoch) 8.52%
 - Aidem Holdings Pty Limited (a company controlled by James Packer) 8.52%.

Multi Channel Network (MCN)

18. MCN is an advertising business that sells advertising services across a number of subscription television channel suppliers whose channels appear on the Foxtel platform and on other subscription platforms (e.g. Fetch TV). It also sells on-line advertising space for Telstra Media Pty Ltd.

¹ New Corp Annual Report (Form 10K) filed 13 August 2015.

² According to Ten's 2014 Annual Review.

19. Foxtel holds 75% of the shares in MCN and the remaining 25% are held by Fox Sports Australia Pty Ltd (owned by News Corporation). As part of the proposed acquisitions, Ten will acquire a 24.99% interest in MCN.
20. On 1 September 2015, MCN commenced acting as Ten's advertising sales representative pursuant to a sales representation agreement entered into by Ten and MCN in June 2015.³

Presto TV Pty Ltd (Presto)

21. Presto is an SVOD service that enables subscribers to stream audio-visual content from an online library via the internet when purchased with a monthly subscription. This content can be streamed on a range of devices, including televisions, tablets and smartphones.
22. Presto is a joint venture between Seven West Media Limited (**Seven**) and Foxtel.
23. The ACCC notes that Ten had entered into a supply arrangement with Presto. This arrangement is not subject to section 50, but may be subject to other provisions of Part IV of the Act.

Other industry participants

News Corporation (News Corp)

24. News Corp is the ultimate parent company of News Corp Australia Pty Limited (formerly News Limited), which is the owner of The Australian, The Herald Sun, and numerous other newspapers.
25. News Corp is one of the owners of Foxtel through its indirect ownership of Sky Cable Pty Limited.
26. News Corp is also the owner of Fox Sports Australia Pty Limited (**Fox Sports**), which supplies an Australian group of sports channels that is broadcast on Foxtel.
27. Rupert Murdoch is the Executive Chairman and Lachlan Murdoch is the Executive Co-Chairman of News Corp. The Murdoch Family Trust holds 38.4% of the voting B class common stock in News Corporation (with Rupert Murdoch holding a further 1% interest).⁴

Fox Sports Australia (Fox Sports)

28. Fox Sports compiles and produces the FOX SPORTS 1, FOX SPORTS 2, FOX SPORTS 3, FOX SPORTS 4, FOX SPORTS 5, FOX FOOTY and FOX SPORTS NEWS STV channels, available via the Foxtel platform. It also produces sporting coverage and broadcasts sporting content on Foxtel's internet TV service Foxtel Play, Foxtel on T-box, and Foxtel Go App.

³ This agreement is not subject to section 50 of the Act.

⁴ News Corp Proxy Statement, 1 September 2015.

Nine Network

29. The Nine Network (**Nine**), owned by the ASX-listed Nine Entertainment Co, operates three FTA television channels (Nine, GO! and GEM) and distributes content through its online catch-up service, 9Jumpin (rebranded '9Now' in January 2016). Nine also owns 50% of Stan, an SVOD service.

ABC

30. The Australian Broadcasting Corporation (**ABC**) is Australia's national public broadcaster. It operates several FTA channels (ABC1, ABC2, ABC3, ABC 4 Kids and ABC News 24) and also distributes content via its online video-on-demand and catch-up service, ABC iView. Some of the content available on ABC iView has not previously been broadcast on ABC's FTA network.

SBS

31. The Special Broadcasting Service (**SBS**) is a national public broadcaster that operates under the *Special Broadcasting Services Act 1991* (Cth). It has a mandate to reflect the multicultural nature of Australian society. It operates three FTA channels (SBS ONE, SBS TWO and NITV) and also distributes content online through its website, SBS On Demand.

Fetch TV

32. Fetch TV is an Australian internet protocol television (**IPTV**) subscription television service that combines FTA television viewing with video recording functions, a movie-on-demand service, and other channels including ESPN, MTV, National Geographic, Animal Planet, BBC World News and CCTV News.

Netflix

33. Netflix is a US SVOD service provider. It has a library of content which it acquires or produces. Netflix launched in Australia in March 2015 and is currently the largest SVOD service provider.

Stan

34. Stan is an Australian SVOD service provider. It is a joint venture between Nine and Fairfax Media Ltd (**Fairfax**). Stan launched in Australia in January 2015.

Fairfax

35. Fairfax is an Australian media company with an integrated print, radio and online digital presence in metropolitan, rural and regional areas of Australia. Fairfax's digital and metropolitan print publications include The Sydney Morning Herald, The Age, The Australian Financial Review and numerous regional and community newspapers across Australia.

Endemol Shine

36. Endemol Shine Group (**Endemol Shine**), a 50:50 joint venture between 21st Century Fox and Apollo Management, is a global content creator, producer and

distributor with over 600 scripted and non-scripted formats⁵ across operations spanning more than 30 countries.⁶

37. Its Australian division, Endemol Shine Australia, is Australia's largest television production house with formats including MasterChef, The Voice, Big Brother, The Bachelor and The Biggest Loser.

Industry background

The changing media landscape

38. Significant technological developments in the media industry have led to rapid changes in how audio-visual content is consumed. Greater take-up of broadband services in Australia, with large or no data limits, has facilitated significant growth in the amount of audio-visual content consumed online on multiple devices, including smartphones, smart TVs and tablets.
39. Internet-based content delivery services allow consumers to view content when, where and how they want it. SVOD services such as Presto, Netflix and Stan have been successful in attracting customers and are continuing to grow their subscriber bases. FTA and STV providers have recently changed the way they deliver services, either increasing the amount of their content available online or, in the case of STV, reducing the prices for their services.
40. As a result of structural changes in the media industry and changes to consumers' viewing patterns, traditional audio-visual broadcasters are offering a mix of both linear and on-demand content distribution to maintain their audiences. Importantly, broadcasters are increasingly offering content that consumers prefer to watch live in order to maintain their audience share and advertising revenue. This type of content, which is known as 'appointment viewing' or 'water cooler programs', includes live sport, Australian-produced reality TV shows and news.

Market definition

41. The ACCC considered the competitive effects of the proposed acquisitions in the following markets:
 - the national market(s) for the acquisition of television content (including possible markets, or sub-markets, for the acquisition of sports content and premium Australian original content)
 - the national market for the supply of FTA television services
 - the national market for the supply of STV services
 - a broader national market for the supply of television viewing services encompassing (at least) both FTA and STV services

⁵ 'Format' refers to the overall concept and branding of a copyrighted television program.

⁶ 21st Century Fox was formed following the 2013 separation of the old News Corporation into 21st Century Fox and the new News Corporation (described in paragraphs 24-27 above). Rupert Murdoch and Lachlan Murdoch are Co-Chairmen of 21st Century Fox and James Murdoch is its Chief Executive Officer. According to 21st Century Fox's Proxy Statement of 29 September 2015, the Murdoch Family Trust holds 38.4% of the voting B class common stock in 21st Century.

- the national market for the supply of SVOD services
 - the national market for the supply of television advertising services.
42. The ACCC did not consider it necessary to reach a concluded view in relation to the precise boundaries of the relevant markets, and considered the broader competitive dynamics in each market and the potential for these dynamics to change in the foreseeable future.
43. However, the ACCC considered that differences in pricing models,⁷ the type of content delivered on different platforms, and the equipment, devices and complementary services needed to view content on different platforms would be likely to limit the degree of substitutability of FTA, STV, SVOD and direct streaming services for many viewers (and potential viewers). In addition, substitutability between platforms differs for particular types of content. For example, the ACCC considered there was greater substitutability between FTA and STV services for sports content than between these services and SVOD services, as there was a very limited amount of sports content currently broadcast on SVOD services. By contrast, direct streaming of sports content is likely to be viewed by viewers as a closer substitute.
44. The ACCC considered that it was also relevant to assess the potential competitive effects of the proposed acquisitions in a broader market for television services that encompasses (at least) both FTA and STV services, in addition to separate markets for these services. While FTA services are each other's closest substitutes, the ACCC considered that STV was likely to be the next closest substitute.
45. Advertisers typically seek to advertise across a range of platforms (including television, online, radio and print) to maximise their reach and target specific types of viewers. Television is an important medium for advertising because it combines visual imagery, sound and movement, and it has the ability to reach large audiences. The ACCC considered that it was relevant to assess the proposed acquisitions in a national market for television advertising services.

Competition analysis

With/without

46. Section 50 of the Act prohibits mergers or acquisitions that would have the effect or be likely to have the effect of substantially lessening competition in a market. In assessing a proposed acquisition pursuant to section 50 of the Act, the ACCC considers the effects of the acquisition by comparing the likely future competitive environment post-acquisition if the acquisition proceeds (the "with" position) to the likely future competitive environment if the acquisition does not proceed (the "without" position) to determine whether the proposed acquisition is likely to substantially lessen competition in any relevant market.
47. The ACCC considered that the likely competition effects of the proposed acquisitions were most appropriately assessed against a future without the

⁷ For example, SVOD providers and Foxtel have different subscription charging models (with Foxtel also carrying some advertising), whereas FTA providers do not charge viewers a subscription fee but effectively 'charge' viewers by providing programming content bundled with advertising.

acquisitions in which Ten, MCN and Presto continue their current operations under their current ownership (the status quo).

48. Although Ten's ratings and financial performance are weaker than they have been in the past, the ACCC was not satisfied that Ten's performance would decline significantly without the proposed acquisitions. In fact, Ten's ratings had slowly improved in the months leading up to the ACCC's decision and it was expected that this would continue to have a positive effect on its advertising revenue in the future without the proposed acquisitions. Therefore, the ACCC considered the most likely future without the acquisitions was the status quo, where Ten continues to exert *at least* the same competitive constraint on its rivals as it did prior to the announcement of the proposed acquisitions.

Ability and incentive to exert control or influence

49. As the proposed acquisitions involve minority acquisitions, the ACCC's competition assessment considered the extent to which the proposed acquisitions would result in the ability of Foxtel to influence Ten's decision making or in an alignment of incentives between Foxtel, Ten, MCN and Presto.
50. The ACCC considers that Foxtel's acquisition of up to 15% of the issued share capital in Ten will enable Foxtel to exercise an increased degree of influence over Ten. That increased influence may arise from a range of factors including:
- the significance of Foxtel's investment in Ten
 - the right for Foxtel to have one of six seats on the Ten board (taking into consideration the additional sway that board member may have as a result of Foxtel's extensive industry experience)
 - the possibility that Lachlan Murdoch⁸, who will also have a representative on Ten's board), may have an incentive to align with Foxtel in some situations given his and the Murdoch Family Trust's interests in News Corp, and indirectly, Foxtel.
51. Significantly, the ACCC recognised that there will be limitations on the extent to which Foxtel would be able to exert influence over Ten in circumstances where the interests of Foxtel and Ten were not aligned, including:
- the four remaining members of the Ten board will comprise two independent directors and representatives of other major shareholders, including Birketu (owned by Bruce Gordon). These board members do not have relationships with or direct or indirect interests in Foxtel or News Corp
 - all directors on the Ten board – no matter whose interests they represent – are required to act in the best interests of Ten in accordance with their statutory and fiduciary duties, and with any board protocols which may be in place.

⁸ The ACCC notes the relationship between Mr Murdoch and Foxtel (through News Corp). Mr Murdoch's Illyria has an 8.52% interest in Ten and will have a board representative (giving the News Corp-aligned interests two of six board representatives).

Markets for the acquisition of television content

52. The ACCC investigated whether the proposed acquisitions, by more closely aligning the interests of Ten and Foxtel, may have the effect of limiting the ability of other FTA providers to compete:
- for the acquisition of sports content
 - for the acquisition of non-sport content.
53. Each of these potential effects in the relevant market is analysed below.

Acquisition of sports content

Background

54. The ACCC investigated whether the proposed acquisitions and subsequent alignment of Foxtel, Fox Sports and Ten's incentives to enter into joint bids, commercial arrangements or bid exclusively with each other would reduce or foreclose the ability of other FTA networks to compete for sports rights.
55. Sports content, in particular premium sports content⁹, is an extremely important part of an FTA network's program offering due to the high ratings it achieves. Viewer interest in major sports is generally consistent over many years, whereas interest in other programs or formats (for example, reality television programs) can fluctuate more rapidly over time.
56. The consistent ratings of major sports allow FTA networks to implement cross promotions and 'lead-in' strategies¹⁰ around these major events, leading to a ratings 'halo' effect that increases the network's ratings overall. The benefits from sports content lead FTA networks to generally spend a significant proportion of their programming budgets on the acquisition of premium sports rights. Sports content is also very important to Foxtel's ability to attract subscribers.
57. The ACCC considers that the benefits to FTA networks and STV providers of having the rights to premium sporting events are unlikely to decrease in the foreseeable future.

Uncertainty about future broadcasting of premium sports rights

58. The ACCC took into account in its consideration of the proposed acquisitions the fact that rights to the most popular premium sports will not become available for some years.
59. Seven and Nine have obtained the FTA rights to content for the top four premium sports for the next 4-8 years. This includes the AFL, NRL, Australian Open tennis and international cricket played in Australia (including T20, one-day internationals and test matches). The rights to the domestic Big Bash League are currently held by Ten until 2018. During the course of the ACCC's investigation, the AFL (all rights) and NRL (FTA and digital rights only)

⁹ The ACCC considers that premium sport content encompasses the AFL, NRL, Australian Tennis Open and International cricket played in Australia, and potentially the Big Bash League.

¹⁰ Lead-in strategies relate to programs retaining a significant proportion of the audience of the program scheduled immediately before it.

completed negotiations for the broadcast of their content, with agreements entered into until 2022 for each code.

60. Given this, the ACCC took into account the uncertainty about the likely competitive dynamics when sporting bodies, including the AFL and NRL, will commence the next round of negotiations to license their rights. The ACCC considered that there may be potential, in the next five years or so, for significant growth in SVOD and other streaming services, such as direct streaming of live sports content. Such developments would potentially increase competition for sports rights, in particular non-premium sports rights, in the future.

Bargaining and countervailing power of sporting bodies

61. The ACCC found that some sporting bodies have a degree of bargaining power when negotiating the sale of premium sports rights, as their content is extremely valuable to both FTA networks and Foxtel, and this power may increase in the future if sporting bodies are able to use direct streaming as an alternative.
62. The ACCC found that sporting bodies, when negotiating the sale of sports viewing rights, seek to optimise the overall returns they obtain by balancing audience reach and revenue considerations. Foxtel has historically been the highest bidder for these rights because it can recoup the cost through subscription revenue. However, Foxtel cannot deliver the same level of audience reach as the FTA networks as its penetration rate is only approximately one third of Australian households. Consequently (and in combination with the functioning of the anti-siphoning regime discussed from paragraph 87), it is common to see the highest-rating games or events broadcast on FTA (and in many cases simulcast on Foxtel) and the remaining less popular games or events shown exclusively on Foxtel.¹¹ This gives the sporting body the desired balance between reach and revenue.
63. Sporting bodies also aim to balance short-term with longer-term considerations. In the short-term, sporting bodies may forgo some revenue (by selling games or events to a FTA network rather than exclusively to Foxtel) in order to expand the reach of their sport and thereby build (or maintain) the broad popularity of the sport over time. Over the longer-term, greater popularity will lead to higher ratings and future revenues for their rights. For example, Netball Australia chose Ten to televise some matches from its domestic competition (the ANZ Championship) and Netball World Cup to increase exposure to the sport as this was expected to build interest, audiences and its fan base. To achieve this, Netball Australia did not charge Ten for these rights; in fact, Netball Australia's sponsors paid Ten for making the air time available.
64. Options to provide direct streaming of sports content through apps, gaming consoles, AppleTV or through websites are also increasingly available to sporting bodies in Australia, following similar developments in the United States and Europe.¹² At the time of the ACCC's decision, there were several examples of live streaming of sport in Australia:

¹¹ Examples of this include the AFL, NRL, and V8 Supercars and Formula 1 motor racing.

¹² If a sporting body were to decide to stream its own content, it would not need to replicate Foxtel's existing infrastructure (set-top boxes and access to satellite/HFC) in order to reach consumers. Streaming services use existing platforms in consumers' homes (such as Apple TV, Xbox, tablets and mobile telephones).

- The AFL digital pass broadcasts every game live through its app, operated by Telstra, on mobile and tablet devices for an annual fee of \$89.99. The app includes advanced statistics and full replays on demand.
- The NRL digital pass has similar features as the AFL digital pass and is also operated by Telstra. It costs \$89.99 per year.
- The Cricket Australia Live Pass provides live streaming and match highlights of all cricket (domestic and international matches) played in Australia on its website and mobile devices. The pass costs \$29.99 for a year or \$4.99 for 24 hour access.
- Cricket Australia has recently launched a channel on Apple TV which featured interviews, skill tutorials and highlights, and additional content created by Nine.
- Seven created a website and app to stream its live FTA coverage of tennis content on a computer or mobile device, including Wimbledon, the Davis Cup and the Australian Tennis Open in 2016.
- SBS simulcasts its FTA coverage of live cycling races (e.g. the Tour de France, World Championships) on its Cycling Central website. SBS also has an app for the Tour de France enabling users to stream live coverage. The app also provides information about the stage, riders and teams.

65. These options are expected to grow as customer viewing trends change and as home internet functionality increases, and they would give sporting bodies the choice of streaming their own content or selling to streaming providers, in addition to their current options of selling their rights to FTAs or Foxtel. Foxtel has also responded to the potential of streaming services to compete with STV broadcasts of sports by offering its own streaming services for sport through its Foxtel Play and Foxtel Go services.

66. However, the potential for SVOD services and other streaming services (e.g. YouTube, Google) to provide a viable alternative to FTA or STV networks is dependent on these services being able to monetise their content, for example through advertising, pay-per-view fees or various types of subscriptions. There remains, therefore, some uncertainty as to the likely constraint of these alternative services on FTA and STV providers.

67. The ACCC concluded that Foxtel will ultimately continue to exercise considerable market power when negotiating to acquire sports rights. This is particularly so for premium sports, given its ability to pay significant sums to sporting bodies for these rights compared to alternative acquirers.

The importance of partnering with Foxtel to acquire sports rights

68. The ACCC has in the past found that there were substantial potential commercial benefits to be gained by both Foxtel and an FTA network from joint bids or other commercial arrangements. This was found to be the case for a significant proportion of the premium sporting rights that were likely to be attractive to a FTA television network.¹³

¹³ See for example paragraph 41 of the ACCC's Public Competition Assessment for Seven Group Holdings Limited - proposed acquisition of remaining shares in Consolidated Media Holdings Limited, published 15 February 2013.

69. The ACCC considers that although entering into joint bidding and other commercial arrangements with Foxtel remain advantageous in some contexts, such arrangements may not be as important as they were in the past. The ACCC found that it is not always necessary for FTAs to partner or enter into commercial arrangements with Foxtel or Fox Sports to acquire premium sports rights.
70. The introduction of the FTA multi-channels has increased the ability and incentive of FTA networks to acquire sports content packages in full, including sports content that has in the past been acquired by Foxtel (in particular, non-premium sports and the less popular games for premium sports). In addition, the multi-channels give FTA broadcasters greater flexibility in broadcasting sport content to avoid conflicts with other programming. Some events that were previously broadcast on both Foxtel and a FTA network can now be acquired and shown exclusively by a FTA broadcaster. Less valuable content that previously would have been shown on Foxtel (e.g. the outside courts at the Australian Open Tennis) can now be shown on FTA multi channels and FTA digital platforms.
71. For example, the following sports rights were sold to an FTA broadcaster without a partnership with Foxtel:
- The AFL separately sold FTA rights to Seven, STV rights to News Corp and mobile rights to Telstra.
 - The NRL sold its FTA and digital rights without involvement from Fox Sports or Foxtel, and its STV and other digital rights were to be dealt with separately at a later date.
 - Rights to the Australian Open Tennis, Summer Olympics, Winter Olympics, the Australian Open Golf, The Australian PGA Championship and all Swimming Australia events were all purchased solely by Seven.
 - Rights to the International cricket matches played in Australia (i.e. Test matches, one day internationals and international T20 matches) were purchased solely by Nine.
 - Rights to the Big Bash League were purchased solely by Ten.
 - Rights to the Football World Cup (soccer) were purchased solely by SBS.
72. The ACCC considered, however, that there may remain circumstances in which it is advantageous for an FTA network to partner or enter into commercial arrangements to acquire both premium and non-premium sports rights with Foxtel. This includes content that would not be profitable for an FTA network to acquire, for example the least popular AFL or NRL games. It may also include significant high profile events, where a higher premium can be extracted by a sporting body through coordination and division of rights between Foxtel and an FTA or SVOD service.
73. In considering whether the proposed acquisition may result in Foxtel exclusively partnering with Ten for the acquisition of sports rights, the ACCC reached the conclusion that Foxtel would not have the ability or incentive to require sporting bodies to only deal with Foxtel and Ten in partnership. Sports rights are of significant value to Foxtel and while it may favour a partnership with Ten, it is unlikely to forego rights in order to partner exclusively with a company in which it only has a 15% equity interest.

Acquisition of non-sport content

Background

74. During the course of its investigation, market participants submitted that premium Australian content is increasingly important for FTA networks to attract audiences and, in the case of Foxtel, subscribers. This type of content, such as Australian-produced reality TV shows, is characterised as ‘water cooler programming’ (which viewers discuss with friends and colleagues the next day) and as ‘appointment viewing’ (which viewers prefer to watch live rather than on catch-up or online). This has resulted in broadcasters acquiring and producing more of this type of content in recent years.

Foreclosure of competition for non-sport content

75. The ACCC investigated whether the proposed acquisitions would give Foxtel, Ten or Presto the incentive and ability to agree to acquire the rights to certain non-sport content across all platforms (i.e. STV, FTA and SVOD) on an exclusive basis and to control release windows¹⁴ for that content. In this scenario, competitors to Foxtel, Ten and Presto may have a limited ability to compete for this content as they do not have a presence across all of these platforms.
76. The ACCC considered that there are some types of content where there may be advantages to acquiring it across all platforms. For example, drama and documentary programs that can attract new and repeat viewers over an extended period could be broadcast on Foxtel, Ten and potentially Presto. However, the ACCC also understands that STV, FTA and SVOD providers have different preferences for content. For example, competitive reality TV shows (such as *The Block*, *MasterChef*, and *The Bachelor*), which are designed to be appointment viewing and have limited repeat value, are generally not suitable for broadcasting on STV networks where many programs are repeated daily.
77. The ACCC understands that the control of release windows applies more to movies than television content and that competition for non-sport content generally focusses on competition by FTAs for first release rights. FTA networks can already acquire non-sport content in conjunction with STV or SVOD providers. For example, Seven (50% owner of Presto) and Nine (50% owner of Stan) already acquire SVOD rights along with FTA rights for some content. FTA networks, STV and SVOD providers can also seek to control the time period before the content can be broadcast on other platforms by acquiring holdback rights, thereby giving them exclusivity over that content for a defined period. For example, Foxtel acquired holdback rights for the television series *Game of Thrones* to ensure the series was exclusive to its platform.
78. Given the information above, it is unlikely that the proposed acquisitions will provide Foxtel, Ten or Presto with a significant competitive advantage over its competitors as the content utilised by each platform to attract the majority of its viewers, and how that content is consumed, are different. The ACCC therefore concluded that Foxtel, Ten and Presto would not, as a result of the proposed acquisitions, have a significantly greater incentive or ability to acquire content on an exclusive basis, or with holdback rights.

¹⁴ ‘Release windows’ – the time period in which content is shown on a particular platform, such as first-run rights, second-run rights, and so on.

79. The ACCC also considered concerns raised by market participants that the proposed acquisitions would result in Ten gaining an advantage in the acquisition of premium prime-time original Australian content from Endemol Shine, given the Murdoch family interests in each of Endemol Shine and Foxtel. Endemol Shine is Australia's largest television production house and owns the rights to the formats for high-quality, high-rating Australian programming. Given the increasing importance of premium Australian original content to FTA networks and Foxtel in attracting audiences and subscribers respectively, any advantage Ten would obtain through the proposed acquisitions in acquiring this content could give it a significant competitive advantage against its FTA rivals.
80. The ACCC considered that, although access to Endemol Shine content is important, even if it could be said that Endemol Shine would favour Ten, there would remain alternative options for the acquisition of premium prime-time original Australian content post-acquisition. The ACCC is aware that FTA networks can and do produce their own premium non-sport content. For example, Seven has in-house production capacity and produces programs such as My Kitchen Rules, Packed to the Rafters, Home and Away, Winners and Losers, and Million Dollar Minute.
81. In addition, a number of production companies produce premium prime-time original content in Australia, including Fremantle Media, Cavalier Productions, ITV, Matchbox, Zapruder and Essential Media. The ACCC did not receive information indicating significant barriers to these production companies expanding their production of such content should there be an incentive for them to do so. These companies compete to supply this content to FTA networks, STV providers and SVOD providers.

Conclusion – markets for the acquisition of television content

82. The ACCC concluded that the proposed acquisitions would be unlikely to result in a substantial lessening of competition in the markets for the acquisition of television content.

The national markets for the supply of FTA services and supply of television viewing services encompassing (at least) both FTA and STV services

83. The ACCC's preliminary view was that the proposed acquisitions may raise competition concerns in the market for the supply of FTA services and a broader market that includes both FTA and STV services. This view was based on the potential for the proposed acquisitions to reduce the ability of FTAs to compete effectively for viewers and advertisers against a more closely aligned Ten and Foxtel, potentially leading to a reduction in the quality or choice of FTA television programming available to viewers.
84. As discussed above, premium sports content is important to both FTA networks and Foxtel as it provides more consistent ratings than other content, can have a 'halo' effect of increasing overall ratings, allows networks to cross promote and, in the case of Foxtel, is critical to attracting subscribers.
85. The ACCC investigated whether the proposed acquisitions and potential alignment of Foxtel, Fox Sports and Ten's incentives would result in Foxtel and

Ten obtaining a significantly increased proportion of the rights to premium sports, primarily through Foxtel and Ten partnering with each other exclusively when bidding for these rights. The ACCC concluded, for a range of reasons including those set out above, that this was unlikely to occur. In addition to the reasons set out above as to why Foxtel and Ten would not have the ability and incentive to exclusively partner for the acquisition of sports rights, there are limits on how much sport content a single FTA network could acquire, even in combination with Foxtel, due to:

- the high cost of premium sports rights
- the likelihood of scheduling clashes on the main channel and the reluctance of premium sports rights holders to agree to their most popular games being shown on multi-channels or STV, and
- the likelihood that an FTA network could not satisfy a sporting body that it would be able to promote its sport effectively if it held the rights to a major competing sport (such as the AFL and NRL).

86. The ACCC also investigated whether the proposed acquisitions would result in a reduction in the quality and quantity of games broadcast on FTA in instances where Foxtel and Ten jointly acquire the rights to a sport. For example, this may occur through Foxtel seeking to secure rights to a greater share of premium sports content to increase its subscription base, with Ten retaining the less popular sports content.
87. The ACCC considered that Ten would only agree to do so if it was also in Ten's best interests. The ACCC also considered that the anti-siphoning regime, as well as some bargaining power of sporting bodies (discussed above), and competition from independent FTA networks and SVOD providers, would be likely to constrain any attempt by Foxtel to work with Ten to shift the most popular sporting events to Foxtel.
88. The anti-siphoning regime states that pay TV broadcasters are prohibited from acquiring the rights to televise an event on the anti-siphoning list unless:
- the rights are held by commercial television licensees who have the right to televise the event to more than 50 per cent of the Australian population
 - the rights are held by either the ABC or SBS, or
 - national or commercial television broadcasters have not obtained these rights by 12 weeks before the start of the event.
89. In relation to non-sport content, the ACCC concluded that Ten may in some cases, as a result of the proposed acquisitions, be able to compete more effectively for high-rating proven content and Foxtel and Ten may be able to compete more effectively for content that can be shown (concurrently or at different times) on STV and FTA channels. However, as noted above, the ACCC found that a large amount of this content is available. Ten and Foxtel would not be able to acquire a large enough proportion of this content to create an inadequate supply to other FTA networks.
90. Taking these factors into account, and the fact that Foxtel will have only a minority shareholding in Ten, the ACCC concluded that the proposed acquisitions would be unlikely to result in a substantial lessening of competition

in either the market for the supply of FTA services or a broader market that includes FTA and STV services.

The national market for the supply of television advertising services

91. The ACCC investigated whether the proposed acquisitions may give Foxtel and Ten an ability and incentive to coordinate (through MCN) their offers to advertisers and whether this would lessen competition in the supply of television advertising services, including by reducing the number of independent competitors available to advertisers.
92. The ACCC considered that the proposed acquisitions, and in particular Ten's acquisition of a 24.99% interest in MCN, could increase the ability and incentive for Ten and Foxtel to offer bundled advertising packages across their platforms, and to integrate their advertising strategies. The ability of MCN to offer packages of advertising opportunities across multiple platforms is likely to increase the attractiveness of Ten to advertisers and strengthen its ability to compete against Seven and Nine. The addition of Ten to MCN will enable it to market directly to advertisers who previously would not have considered Foxtel due to its small audience share compared to FTA networks.
93. However, the ACCC considers that advertisers will continue to be able to access alternative television advertising services to MCN. Seven and Nine are likely to continue to offer attractive advertising opportunities (based on continued access to compelling sports and non-sport content) and to have the resources and ability to acquire or innovate to develop even more attractive advertising opportunities in the future.
94. The ACCC concluded that the proposed acquisitions would be unlikely to substantially lessen competition in the national market for the supply of television advertising services. In reaching this conclusion the ACCC also considered that as the proposed acquisitions are minority acquisitions, Foxtel and Ten will be subject to provisions of the Act other than section 50 which would apply to any agreements between them to coordinate or bundle advertising packages.

The national market for the supply of subscription-video-on-demand (SVOD) services

95. The ACCC considered whether the proposed acquisitions, and in particular Ten's option to acquire a 10% interest in Presto, would raise competition concerns by limiting the ability of other SVOD providers to acquire the content necessary to compete with Presto. Specifically, the ACCC considered whether by bidding jointly for content, Foxtel, Ten and Presto could limit other SVOD providers from accessing content necessary to make them effective competitors.
96. Several new entrants commenced supply of SVOD services in Australia in 2015. There has been strong take-up of these services, particularly Netflix, which has over one million subscribers in Australia (although some of these subscribers are on free trial offers).
97. These SVOD providers do not currently broadcast sport content, which has most value when viewed live. There is a large back catalogue of non-sport content available from a range of producers globally, and this currently forms the majority

of content shown on SVOD platforms. As SVOD providers charge a low monthly fee, they typically do not commission a large volume of original content or acquire a significant volume of first-run content unless, like Netflix, they have global scale which allows them to spread the costs of such content over a large subscriber base.

98. The proposed acquisitions are unlikely to prevent these and other SVOD competitors of Presto from being able to acquire enough content to attract a sufficient subscriber base to be commercially viable.
99. The ACCC concluded that the proposed acquisitions would be unlikely to result in a substantial lessening of competition in the market for the supply of SVOD services.

Conclusion

100. The ACCC formed the view that the proposed acquisitions would be unlikely to have the effect of substantially lessening competition in any relevant market. The ACCC's decision does not extend to MCN's arrangement with Ten in relation to managing Ten's advertising sales and supply agreement with Presto, which is not subject to the merger provisions of the Act.
101. The ACCC, however, will closely examine any future acquisitions by the merger parties, including where increases in shareholdings are made possible through changes to the existing media diversity and control rules.
102. Unlike most acquisitions reviewed by the ACCC, which result in the target coming under the control of the acquirer, the proposed acquisitions involve minority interests with limited associated rights, meaning that the merger parties will remain separate entities and therefore competitors post acquisition. Accordingly, any arrangements between Foxtel, Ten and Presto following the proposed acquisitions will be subject to the competition provisions of the Act. The ACCC will closely examine any arrangements between Foxtel, Ten and Presto which may raise competition concerns.