



Public Competition Assessment

14 June 2012

FOXTEL - proposed acquisition of Austar United Communications Limited

Introduction

1. On 10 April 2012, the Australian Competition and Consumer Commission (ACCC) announced its decision not to oppose the proposed acquisition of Austar United Communications Limited (**Austar**) by FOXTEL Management Pty Ltd (**FOXTEL**) (**the proposed acquisition**), subject to undertakings accepted by the ACCC on 9 April 2012 (**the undertakings**) pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) (**the Act**). The ACCC decided that the proposed acquisition, in conjunction with the undertakings, would be unlikely to have the effect of substantially lessening competition in any market in contravention of section 50 of the Act. .
2. The ACCC made its decision based on the information provided by the merger parties and information arising from its market inquiries. This Public Competition Assessment outlines the basis on which the ACCC reached its decision on the proposed acquisition, subject to confidentiality considerations.

Public Competition Assessment

3. To provide an enhanced level of transparency and procedural fairness in its decision making process, the ACCC issues a Public Competition Assessment for all transaction proposals where:
 - a merger is opposed;
 - a merger is subject to enforceable undertakings;
 - the merger parties seek such disclosure; or
 - a merger is not opposed but raises important issues that the ACCC considers should be made public.
4. This Public Competition Assessment has been issued because FOXTEL's

proposed acquisition of Austar United Communications Limited is subject to court enforceable undertakings.

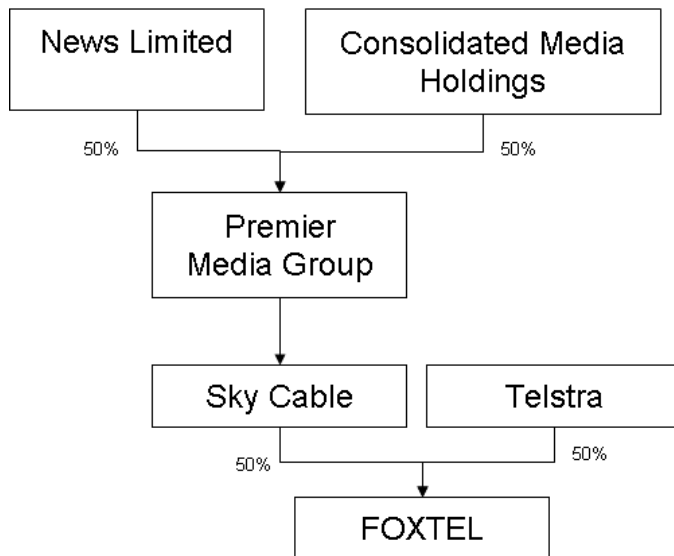
5. By issuing Public Competition Assessments, the ACCC aims to provide the public with a better understanding of the ACCC's analysis of various markets and the associated merger and competition issues. It also alerts the public to circumstances where the ACCC's assessment of the competition conditions in particular markets is changing, or likely to change.
6. Each Public Competition Assessment is specific to the particular transaction under review by the ACCC. While some transaction proposals may involve the same or related markets, it should not be assumed that the analysis and decision outlined in one Public Competition Assessment will be conclusive of the ACCC's view in respect of other transaction proposals, as each matter will be considered on its own facts.
7. Public Competition Assessments outline the ACCC's principal reasons for forming views on a proposed acquisition at the time the decision was made. As such Public Competition Assessments may not definitively identify and explain all issues that the ACCC considers arise from a proposed acquisition. Further, the ACCC's decisions generally involve consideration of both non-confidential and confidential information provided by the merger parties and market participants. In order to maintain the confidentiality of particular information, Public Competition Assessments do not contain any confidential information or its sources.

The Parties

FOXTEL

8. FOXTEL is owned by Telstra Corporation Ltd (50%), News Corporation Ltd (25%), and Consolidated Media Holdings Limited (25%). The ownership structure of FOXTEL is depicted in Figure 1, below.

Figure 1



9. FOXTEL is Australia's largest subscription television provider delivering audiovisual content to more than 1.6 million residential subscribers in metropolitan Australia.
10. FOXTEL delivers more than 200 channels, including high definition (HD) content, covering news, sport, general entertainment, movies, documentaries, music and children's programming.
11. Other FOXTEL services include:
 - services delivered through Telstra Mobile
 - live broadcasts on Virgin Australia aircraft
 - delivery of content via subscribers' personal computers
 - delivery of content via Microsoft Xbox
 - on demand programming via the internet.
12. FOXTEL had revenue of \$2.1 billion in 2010-11.

Austar United Communications Limited

13. Prior to its acquisition by Foxtel, Austar was listed on the Australian Securities Exchange. Liberty Global, an international media company based in the United Kingdom, owned a 54.2% indirect majority interest in Austar as at 31 March 2011. The remainder of the issued capital were publicly held.

14. Austar had more than 750,000 subscribers. Austar's coverage area was approximately 2.4 million homes in regional and rural Australia, as well as the Gold Coast, Darwin and Hobart.
15. Austar provided over 180 "premier" channels and 13 HD Channels.
16. Austar had a 50% stake in XYZnetworks (a 50/50 joint venture with FOXTEL). XYZnetworks was the exclusive owner and/or distributor of twelve key channels including Arena, a number of Lifestyle-branded channels and VH1.

Other Industry Participants

Content producers, owners and suppliers

17. Content suppliers provide audiovisual content rights in a number of different formats, including stand alone programs or series of programs (e.g. drama programming and sports events) to broadcasters. Content is supplied to subscription television providers as channels or channel groups. Content suppliers source both domestic and international content from rights holders such as movie studios, sporting bodies (eg. the AFL and NRL), as well as from local production companies and commercial broadcasters producing content 'in-house'.
18. FOXTEL is also a wholesale supplier of original programming and aggregates its own linear channels using programs produced by or for FOXTEL as well as acquired from other content suppliers. Channels produced by FOXTEL in this way include FOX8 and the Comedy Channel.

Suppliers of content to consumers

19. Content is supplied to end consumers in a number of ways:
 - through subscription television services supplied over cable and satellite (FOXTEL and Austar)
 - by digital terrestrial signals produced by commercial and national free-to-air (FTA) broadcasters (including ABC, SBS, Seven, Nine and Ten)¹
 - through over the top subscription television services supplied via internet protocol (IPTV) (such as Fetch TV and FOXTEL on T-Box)

¹ These broadcasters also offer 'catch-up' services where consumers can view certain programs over the internet after they have been broadcast through the terrestrial signal.

- through linear channels, catch-up and streaming content supplied over the internet to various devices including computers, smartphones and tablets (e.g., iTunes, Apple TV, Google, YouTube, internet ready TVs, Sony Playstation). This includes video on demand services streamed or downloaded over the internet to various devices, on both a transactional (**TVOD**) or subscription (**SVOD**) basis.
- streaming or downloads of content to mobile devices including smart phones and an array of new ‘pad’ and ‘tablet’ style devices which can access audiovisual content based on pay-per-view and subscription models (e.g., Telstra’s mobile FOXTEL, Vodafone/3)
- rentals and sale of digital video discs.

Telecommunications providers

20. There are a number of telecommunications providers in Australia, such as Telstra, Optus, iiNet and TPG, which provide telecommunications services such as fixed line telephony, broadband and related services. Many of these providers also offer some form of audiovisual content to their customers.
21. Telstra is a 50% shareholder in FOXTEL and is the major wholesale and retail supplier of telecommunications services in Australia, including:
 - local, national, long-distance, international and mobile telephony
 - broadband access and content
 - data and internet services (including through Telstra BigPond)
 - wholesale services to other carriers, carriage service providers and ISPs
 - advertising, search and information services (through Sensis); and
 - subscription TV.
22. In addition to the above services, FOXTEL and Telstra agreed in 2011 to provide FOXTEL content on the Telstra T-Box by way of IPTV to end consumers in metropolitan areas of Australia. The T-Box is a digital set top box which connects a television to a broadband service in order to provide internet delivered and free-to-air entertainment. A range of FOXTEL packages are available for Telstra customers to acquire through the T-Box.

Timing

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

Date	Event
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26-May-11	ACCC commenced review under the Merger Review Process Guidelines.
16-Jun-11	Closing date for submissions from interested parties.
22-Jul-11	ACCC published a Statement of Issues outlining its preliminary competition concerns.
11-Aug-11	Closing date for submissions relating to Statement of Issues.
19-Aug-11	ACCC requested further information from the merger parties. ACCC timeline suspended pending receipt.
14-Oct-11	ACCC received further information from the merger parties. ACCC timeline recommenced. New decision date of 30 November 2011 indicated
28-Nov-11	ACCC timeline suspended at the request of FOXTEL to allow it to make further submissions.
7-Mar-12	ACCC commenced market inquiries on a draft s.87B undertaking proffered by the parties. ACCC timeline recommenced with an indicative decision date of 29 March 2012.
20-Mar-12	Closing date for submissions relating to draft s.87B undertaking.
27-Mar-12	ACCC timeline suspended to allow FOXTEL and the ACCC to continue negotiations on the draft s.87B undertaking.
5-Apr-12	ACCC timeline recommenced providing an indicative decision date of 10 April 2012
9-Apr-12	87B undertaking accepted by ACCC.
10-Apr-12	ACCC announced it would not oppose the proposed acquisition with the undertaking.

Market inquiries

23. The ACCC consulted widely with industry participants including subscription television providers, FTA television operators, content owners, telecommunications companies, internet service providers (**ISPs**), other current and potential suppliers of content to consumers and industry groups.

Statement of Issues

24. The ACCC published a Statement of Issues on 22 July 2011 identifying a number of potential competition concerns. In the Statement of Issues the ACCC stated its preliminary view that the proposed acquisition would likely lead to a substantial lessening of competition in the following markets:
- the national market for the supply of subscription television services;
 - the national market for the acquisition of audiovisual content; and
 - a number of markets for the supply of telecommunications products.

With/without test

25. In assessing a merger pursuant to section 50 of the Act, the ACCC considers the effects of the merger by comparing the likely competitive environment post-merger if the merger proceeds (the “with” position) to the likely future

competitive environment if the merger does not proceed (the “without” position).

26. During its assessment of the proposed acquisition, the ACCC took into account a number of potential future scenarios. Where relevant, these are discussed in the analysis below.

Market definition

27. The ACCC considered that the following two markets were most relevant to the assessment of the competitive impact of the proposed acquisition:
- the national market for the retail supply of subscription television services; and
 - a number of regional markets for the supply of fixed broadband and fixed voice telephony products.
28. The ACCC also considered the impact of the proposed acquisition in content acquisition markets and in the supply of subscription television services to consumers on the Gold Coast.

National market for the supply of subscription television services

29. The ACCC formed the view that there was a national market for the supply of subscription television services. Other sources of supply of audiovisual content to end consumers including FTA television, mobile TV and audiovisual content delivered on a transactional basis, including over the internet, were not sufficiently close substitutes to be considered in the same market as subscription television services.

Characteristics of subscription television services

30. Subscription television providers typically deliver a package of multiple linear television channels, each of which generally conforms to a particular genre or subject (such as children’s television or sport). Subscription television usually includes niche programming and often repeat programming at different times and dates.
31. Subscription television is provided to subscribers for a fee and is delivered to subscribers’ televisions, traditionally via cable or satellite distribution systems. However, based on information available to the ACCC, IPTV appeared to be emerging as a potentially significant alternative delivery mechanism through which subscription television could be provided to end consumers.

Subscription video on demand services

32. The ACCC also considered that SVOD services were likely to become closer substitutes for traditional subscription television, particularly for certain types of content such as movies. SVOD exhibits many of the same characteristics as subscription television. SVOD typically involves the consumer paying a regular fixed fee for a selection of aggregated content. The most significant difference from other subscription television services is that the consumer has a significant degree of freedom to determine the scheduling and precise composition of programming.

FTA television services

33. The ACCC recognised that FTA television operators compete to some extent with subscription television providers for the supply of audiovisual content to end consumers.
34. The ACCC formed the view that FTA television was not a sufficiently close substitute to be considered in the relevant market for the purposes of this competition analysis. The ACCC considered that the availability of FTA television, in combination with other sources of audiovisual content, would be likely to provide an ultimate competitive constraint to subscription television, but that other subscription television services were closer substitutes. If there was a market with multiple subscription television service providers, the competition between those providers would be significantly closer and more vigorous than between the subscription television providers and FTA television broadcasters.

Other audiovisual content delivery services

35. The ACCC considered that mobile television services were unlikely to be close substitutes for subscription television services. However, the ability for a subscription television service provider to be able to offer a roaming service (on tablet devices or mobile phones) in conjunction with or as an adjunct to their main television service, was considered to be of increasing importance in the marketplace and may improve the attractiveness of those subscription television services.
36. The ACCC also considered that there was limited substitution between subscription television services and audiovisual content acquired by consumers on a transactional basis, including physical movie rental and online TVOD. On the basis of the available information, the ACCC considered that these types of services were more complementary to other types of audiovisual content delivery

services than substitutes for them, either being utilised at different times or places than those services, or as a supplement to those audiovisual content delivery services. Like mobile content services, TVOD services were considered to be important services to be offered in conjunction or as an adjunct to the core subscription television offer.

Conclusion

37. In conclusion, the ACCC considered there was a national market for the supply of subscription television services, delivered by any distribution method including cable, satellite and IPTV. The ACCC considered that SVOD was likely to become a closer substitute for subscription television over time, particularly in relation to certain types of content such as movies. Based on available information, the ACCC considered that other sources of supply of audiovisual content to end consumers including FTA television, mobile TV and audiovisual content delivered on a transactional basis, including over the internet, were not sufficiently close substitutes to be considered in the same market as subscription television services.

National market for the acquisition of audiovisual content

38. The ACCC formed the view that there was a national market for the acquisition of audiovisual content.
39. The ACCC recognised that in this market, the closeness of competition between subscription television and FTA providers varied. For certain types of content, for example individual entertainment programs and some sporting events, subscription television providers and FTA television operators compete. However, for other types of content such as complete linear channels, FTA television provided little or no constraint on subscription television.
40. The ACCC did not consider it necessary to decide whether there were separate markets for the acquisition of particular content, such as the major sporting rights.

Regional markets for the supply of telecommunications services

41. The ACCC considered that it was also relevant to assess the competitive impact of the proposed acquisition in a number of relevant telecommunications product markets in regional areas, in particular, in relation to the supply of broadband, fixed voice telephony and mobile telephony. However, for the purposes of this review, it was not necessary for the ACCC to precisely define the product or geographic dimensions of these markets.

Barriers to Entry

42. The ACCC assessed the nature and extent of any barriers to entry or expansion in the market for the supply of subscription television services to end consumers. The ACCC also considered whether barriers to entry or expansion in this market would increase as a result of the proposed acquisition.
43. The ACCC considered that the most significant barriers to entry and expansion in this market were related to:
- infrastructure; and
 - access to content.
44. The ACCC also considered that issues relating to having access to an established customer base were relevant to access to content barriers.

Barriers to entry: Infrastructure

45. The ACCC considered that the sunk costs related to the infrastructure required to establish a subscription television service distributed, by either a cable or satellite, were very high and likely to be considered insurmountable. As a result, the ACCC considered that new entry to this market via cable or satellite would be highly unlikely.
46. However, the ACCC considered that there were a number of technological developments which were likely to facilitate the roll out of subscription television services using IPTV. The ACCC considered that these developments had the potential to lower the infrastructure barriers to entry for subscription television service providers. In this regard, the ACCC noted the entry of FetchTV as well as other competitors.
47. Accordingly, the ACCC considered that while the infrastructure barriers to entry in the subscription television market were previously very high, particularly over traditional networks, they were reducing over time and would continue to break down in line with technological developments.

Barriers to entry: Compelling content

48. The ACCC considered that the most significant barrier to entry in the market for the supply of subscription television to consumers was the acquisition of certain audiovisual content including on an exclusive basis.

49. The ACCC consulted widely on this issue to ascertain the nature and extent of the barriers to entry and expansion arising from content exclusivity. Market participants identified an inability to access compelling content as the most significant barrier to entry in the market for the supply of subscription television.
50. The ACCC also formed the view that, even in the absence of the proposed acquisition, the acquisition of certain audiovisual content rights on an exclusive basis was a significant barrier to entry in the market for the supply of subscription television. Through the acquisition of content on an exclusive basis, FOXTEL and Austar had been able to attract large numbers of end consumers, which in turn increased the attractiveness of their platforms to content rights holders. This further enhanced their ability to obtain content on an exclusive basis and attract additional subscribers.
51. Moreover, the ACCC considered that the increased scale of the merged firm would, to some extent, further increase the ability of the merged firm to obtain some content on an exclusive basis, particularly content for which FOXTEL and Austar bid independently. This may have had the effect of further increasing barriers to entry.

Competition Analysis

52. The ACCC considered that, in the absence of the undertaking, the proposed acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in:
- the national market for the retail supply of subscription television services; and
 - a number of regional markets for the supply of fixed broadband and fixed voice telephony products.
53. The foundation of the ACCC's concern was that the proposed acquisition would:
- bring together the two market participants in Australia who had a substantial customer base in subscription television and access to compelling content; and
 - extend Telstra's 50% ownership from one of those key players (i.e. FOXTEL), to both of them (i.e. FOXTEL and Austar).
54. Based on information obtained during the course of its review of the proposed acquisition, the ACCC considered that three primary structural issues were

generally relevant to competition in telecommunications and audiovisual markets in the context of the proposed acquisition:

- access to content delivery infrastructure;
- access to compelling content; and
- an established substantial subscription television customer base.

55. The ACCC considered that Austar had a distinct and established substantial customer base; actual or potential independent access to compelling content; and access to satellite content delivery infrastructure. The proposed acquisition would consolidate these three core structural underpinnings in FOXTEL.

56. Without the proposed acquisition, there would have been greater potential for competition between Austar and FOXTEL and Telstra in the subscription television and telecommunications markets. That potential competition could have unfolded in a number of ways. The ACCC considered that the two most likely scenarios were:

- Austar independently entering into telecommunications markets by offering consumers bundles comprising subscription television content and telecommunications services or entering alliances with ISPs to offer such bundles; and/or
- the breaking down of historical geographic broadcast rights demarcation between FOXTEL and Austar, particularly through the emergence of national content delivery competition using IPTV.

Telecommunications markets

57. The ACCC considered that if the proposed acquisition proceeded:

- Telstra's ownership of 50% of a combined FOXTEL-Austar would be likely to limit the development of competition in markets for the supply of fixed broadband and fixed voice services; and
- Telstra, by virtue of its shareholder relationship with FOXTEL, would be likely to obtain preferential access to audiovisual content from FOXTEL and the proposed acquisition would have extended this advantage to the distinct geographic areas serviced by Austar.

58. Further, as telecommunications networks and IPTV continued to develop, the ACCC considered that it would be likely that it would become increasingly important for retail telecommunications service providers to be able to offer

consumers bundles comprised of subscription television content with fixed voice and broadband services in order to be able to compete effectively with other retail telecommunications service providers. The increasing importance and value of bundling compounded the ACCC's competition concerns arising from the proposed acquisition because:

- entry by Austar into telecommunications markets would become both more likely to occur and more likely to have a significant competitive impact absent the acquisition, given Austar's ability to offer compelling subscription television content; and
- the competitive advantage enjoyed by Telstra by virtue of its shareholder relationship with FOXTEL and consequently, the detrimental effect of extending this relationship to Austar, would be likely to increase.

Subscription television market

59. Without the proposed acquisition, the ACCC considered that as telecommunications networks and content delivery platforms developed and improved, FOXTEL and/or Austar would have been likely to develop IPTV services that were differentiated from their existing satellite and cable subscription television services.
60. Additionally, the ACCC considered that FOXTEL and Austar were likely to have an incentive to supply their differentiated IPTV services on a national basis. Over time, this would make it increasingly likely that the historical geographic demarcation of broadcast rights between FOXTEL and Austar would have broken down. For this differentiated competition to be effective, FOXTEL and/or Austar would not have needed to replicate all of their satellite broadcast content in an IPTV service, and the content on those services could have continued to be developed over time.
61. The ACCC considered that FOXTEL and Austar would have been in the best position to access the necessary rights to develop strong competitive national IPTV products, either directly or in partnership with other parties such as Telstra or other telecommunications service providers, given their existing relationships with content suppliers arising from access to an existing substantial subscription television customer base.

Conclusion

62. The ACCC was concerned that the proposed acquisition would have:

- foreclosed potential future competition between FOXTEL and Austar in the supply of subscription television services, particularly by way of IPTV delivery;
- foreclosed potential future competition between Telstra and Austar in the supply of telecommunications services; and
- allowed the merged entity to leverage its substantial customer base in the national market for the retail supply of subscription television services to acquire IPTV rights on an exclusive basis and consequently constrain competitive entry or expansion by other parties.

Other issues

Content acquisition

63. The ACCC also considered whether the proposed acquisition was likely to result in a substantial lessening of competition in the national market for the acquisition of audiovisual content.
64. The ACCC noted that FOXTEL and Austar previously submitted joint bids or otherwise aggregated their buying power for particular content, particularly many sports rights. In instances where FOXTEL and Austar were jointly bidding or aggregating their buying power, the ACCC considered that the proposed acquisition was unlikely to substantially change the competitive dynamic in relation to the acquisition of audiovisual content, particularly for cable and satellite distribution rights.
65. The ACCC considered that to the extent that competition in the market for the acquisition of audiovisual content was likely to be impacted by the proposed acquisition, any such effect was further limited as a result of the undertaking. As outlined below, the undertaking precludes FOXTEL from acquiring certain audiovisual content for distribution on IPTV on an exclusive basis. The undertaking is intended to limit the ability of FOXTEL to take advantage of its increased subscriber base arising from the proposed acquisition, to achieve favourable contract terms. This gives new competitors the opportunity to acquire certain content and compete with FOXTEL in the market for the supply of subscription television services. The ACCC notes that much of the content for which FOXTEL and Austar did not submit joint bids or aggregate their buying power is subject to the non-exclusivity prohibition in the undertaking.

Supply of subscription television to consumers on the Gold Coast

66. While FOXTEL and Austar otherwise supplied subscription television services in different geographic markets, they overlapped in the supply of subscription television services to residential and commercial customers in the Gold Coast region. FOXTEL and Austar each standardised many elements of their respective subscription television offerings on a national basis (including the pricing of packages). The ACCC's investigations found that there were some differences between the offerings of FOXTEL and Austar to customers on the Gold Coast (which generally reflected differences in the national offers of the two companies), but did not consider that the differences were meaningful enough that the removal of this choice to customers on the Gold Coast would constitute a substantial lessening of competition for the purposes of the Act.
67. The ACCC also considered that the undertaking had the potential to increase competition in subscription television markets, which could be of benefit to customers on the Gold Coast.

Undertaking

68. On 9 April 2012, the ACCC accepted a court enforceable undertaking from FOXTEL, pursuant to section 87B of the Act.

Key elements of the undertaking

69. The core element of the undertaking is an obligation on FOXTEL not to acquire certain distribution rights to certain independent content on an exclusive basis. These distribution rights include IPTV and some mobile distribution rights, but exclude most satellite and cable distribution rights. The undertaking also prevents FOXTEL from acquiring those same rights from anyone if an ultimate shareholder, or related entity of an ultimate shareholder, acquires those rights on an exclusive basis.
70. The content protected by the undertaking includes linear channels offered by independent content suppliers, subscription video on demand (SVOD) rights from independent content suppliers for programs that are under licence for their linear channel, linear movie rights and current SVOD movie rights from 50% of the major movie studios and 50% of eight named independent studios, movie TVOD rights and library SVOD movie rights. The undertaking also prevents FOXTEL from preventing a party which acquires any of the above rights from offering a 'companion' mobile service using that content.

71. As the ACCC's competition concerns primarily related to competition using IPTV technology, FOXTEL will retain the ability to acquire exclusive rights for the distribution of content by cable, satellite and mobile networks to mobile devices (other than 'companion' mobile rights).
72. In addition, the undertaking aims to further lower barriers to entry by providing necessary signal access to linear channels distributed by independent content suppliers (and which FOXTEL itself distributes to its subscribers) to third parties.
73. The undertaking also extends FOXTEL's Special Access Undertaking,² so that content providers can access Austar subscribers as well as the existing arrangements for FOXTEL subscribers. The Special Access Undertaking provides terms on which content providers are able to access FOXTEL set top boxes for the purpose of providing services to FOXTEL's customers.

Objective of the undertaking

74. The objective of the undertaking is to address the ACCC's concerns about competitive detriment that would otherwise arise as a result of the proposed acquisition.
75. As outlined above, the ACCC considered that as markets and content delivery technologies developed, IPTV was likely to be a critical area of potential competition between FOXTEL and Austar. In addition, as IPTV was a developing content delivery mechanism, it exhibited dynamic characteristics which created the potential for new entrants into the market, provided that the merged entity was unable to act to prevent this emerging competition.
76. Thus, the undertaking aims to address the ACCC's concerns by preventing FOXTEL from entering into arrangements with certain content suppliers to acquire content on an exclusive basis so as to enable competing content aggregators and/or telecommunications service providers to bid to acquire rights to content which can be provided as part of an IPTV service. Such exclusive arrangements would have had the potential to stifle new entry in the IPTV sector before new entrants were able to achieve sufficient scale in the market to effectively compete with incumbent providers for access to that content.

² Special Access Undertaking to the Australian Competition and Consumer Commission under Subdivision B of Division 5 of Part XIC of the *Trade Practices Act 1974 (Cth)* executed by FOXTEL Management Pty Ltd for and on behalf of the FOXTEL Partnership and FOXTEL Cable Television Pty Ltd on 1 December 2006

77. By reducing exclusive rights to content, the undertaking aims to lower barriers to entry and allow new or enhanced competition in telecommunications and subscription television markets. The undertaking aims to make available sufficient attractive content to emerging competitors to enable them to develop competitive and sustainable IPTV offers.
78. The undertaking is directed at reducing FOXTEL's ability, directly or indirectly, to take advantage of its substantial subscriber base to obtain exclusive rights to attractive content. This in turn is intended to present opportunities for smaller competitors or new entrants to develop attractive content services and grow a sufficient subscriber base to be able to maintain and continue to develop competitive IPTV offers after the undertaking has expired. The ACCC considers that this approach is most likely to reduce barriers to entry without dampening incentives for content suppliers or subscription television operators to be innovative and competitive.
79. The undertaking does not prevent FOXTEL from acquiring exclusive rights in relation to individual sports. The ACCC considered that to the extent that FOXTEL's (and its shareholders') ownership of exclusive sports rights may raise competition concerns, these concerns existed independently of the proposed acquisition.

Ultimate shareholders and the undertaking

80. While the undertaking contains some provisions to prevent FOXTEL's ultimate shareholders acting to circumvent FOXTEL's obligations in the undertaking, the ACCC did not consider that it was necessary for any of FOXTEL's ultimate shareholders to be a party to the undertaking in order to address the ACCC's competition concerns.
81. The ACCC considered that there is a meaningful difference in incentives between FOXTEL's ultimate shareholders in relation to content acquisition and supply. In particular, the non-Telstra shareholders may have an incentive to allow FOXTEL to acquire IPTV rights and supply content to a broad range of parties, including competitors or potential competitors of Telstra.
82. The ACCC also considered that the incentive of each ultimate shareholder to undertake costly exclusive content acquisitions which may have defensive benefits to FOXTEL is muted by virtue of them only having a partial shareholding in FOXTEL.

83. The undertaking also prohibits FOXTEL from bidding jointly or in concert with any of its ultimate shareholders for exclusive rights for any of the content that FOXTEL is prohibited from acquiring exclusively by the undertaking. This prohibition is intended to prevent FOXTEL's ultimate shareholders from taking advantage of any increase in content buying power that FOXTEL gains from the acquisition of Austar's customer base.

Duration of the undertaking

84. The term of the undertaking is 8 years from the date on which the undertaking commenced (8 April 2012). The ACCC considered that this was an appropriate length of time for the undertaking to be in force for two main reasons.
85. Firstly, all of the exclusive content supply agreements between FOXTEL and independent content suppliers in existence at the date of the undertaking will have expired by 2016, meaning that third parties should have a number of years after this date to negotiate content supply arrangements without FOXTEL having the ability to acquire the relevant rights on an exclusive basis.
86. Secondly, the ACCC considered that this period of time should be sufficient to give new entrants the ability to enter the market, or for existing players to expand, and achieve sufficient scale to be able to compete in the market without the protections given by the undertaking.

Conclusion

87. On the basis of the above, and taking into account the undertakings proposed by FOXTEL and accepted by the ACCC, the ACCC formed the view that the proposed acquisition of Austar United Communications Limited by FOXTEL would not be likely to have the effect or be likely to have the effect of substantially lessening competition in any market in contravention of section 50 of the Act.