



Statement of Issues

14 September 2015

Foxtel Management Pty Ltd and Ten Network Holdings Ltd proposed acquisitions

Purpose

1. Outlined below is the Statement of Issues released by the Australian Competition and Consumer Commission (**ACCC**) in relation to:
 - Foxtel Management Pty Ltd's proposed acquisition of up to 15% of Ten Network Holdings Ltd (**Ten**)
 - Ten's proposed acquisition of 24.99% of Multi Channel Network Pty Ltd (**MCN**) and
 - the proposed granting of an option to Ten by Presto TV Pty Ltd (**Presto**) to acquire 10% of Presto,

(the proposed acquisitions).

2. This Statement of Issues aims to:
 - give the ACCC's preliminary views on competition issues arising from Foxtel's proposed acquisitions with Ten
 - identify areas of further inquiry
 - give all interested parties an opportunity to comment
 - invite interested parties to submit information to assist the ACCC's assessment of the issues.

Overview of ACCC's preliminary views

3. The legal test which the ACCC applies in considering the proposed acquisition is in section 50 of the Competition and Consumer Act 2010 (the **Act**). Section 50 prohibits acquisitions that substantially lessen competition in a market, or are likely to do so.

4. The ACCC divides its preliminary views in this Statement of Issues into two categories: 'issues that may raise concerns' and 'issues unlikely to raise concerns'.

Issues that may raise concerns

5. The ACCC is concerned that the proposed acquisitions will result in an alignment of interests between Foxtel and Ten that may:
 - favour Ten in the bidding for sports content against other free-to-air (**FTA**) television providers
 - reduce or even eliminate competition between Foxtel and Ten for the supply of advertising services.
6. The ACCC's preliminary view is that these effects may substantially lessen competition in one or more of the following markets:
 - markets for the acquisition of television content, particularly sports contents
 - markets for the supply of FTA television services (including a broader market for the supply of television viewing services encompassing both FTA and subscription television (**STV**) services)
 - markets for the supply of television advertising services.

Issues unlikely to raise concerns

7. The ACCC does not consider that the proposed acquisitions would be likely to cause a substantial lessening of competition in the supply of subscription video on demand (**SVOD**) services to consumers.

Making a submission

8. The ACCC is seeking submissions from interested parties, particularly on the following key issues:
 - the likely effect of the proposed acquisitions on competition for the acquisition of television content, in particular sports content
 - the likely effect of the proposed acquisitions on competition in the supply of FTA television services to consumers
 - the likely effect of the proposed acquisitions on competition in the supply of television viewing services in a broader market encompassing both FTA and STV services
 - the likely effect of the proposed acquisitions on competition for the supply of advertising services to advertisers.
9. Detailed discussion of these and other issues, along with specific questions, is contained in this Statement of Issues.

10. Interested parties should provide submissions by no later than 5pm on 28 September 2015. Responses may be emailed to mergers@acc.gov.au with the title: Foxtel/Ten proposed acquisitions.
11. The ACCC anticipates making a final decision on 22 October 2015. However, this timeline can change. To keep abreast of possible changes to timing and to find relevant documents, interested parties should visit the Mergers Register on the ACCC's website at www.accc.gov.au/mergersregister.

Confidentiality of submissions

12. The ACCC will not publish submissions regarding the proposed acquisition. The ACCC will not disclose submissions to third parties (except our advisors/consultants) unless compelled by law (for example, under freedom of information legislation or during court proceedings) or in accordance with section 155AAA of the Act. Where the ACCC is required to disclose confidential information, the ACCC will notify you in advance where possible so that you may have an opportunity to be heard. Therefore, if the information provided to the ACCC is of a confidential nature, please indicate as such. Our Informal Merger Review Process Guidelines contain more information.

About ACCC ‘Statements of Issues’

13. A Statement of Issues published by the ACCC is not a final decision about the proposed acquisitions, but provides the ACCC’s preliminary views, drawing attention to particular issues of varying degrees of competition concern, as well as identifying the lines of further inquiry that the ACCC wishes to undertake.
14. A Statement of Issues provides an opportunity for all interested parties (including customers, competitors, shareholders and other stakeholders) to ascertain and consider the primary issues identified by the ACCC. It is also intended to provide the parties to the proposed acquisitions and other interested parties with the basis for making further submissions should they consider it necessary.

Timeline

Date	Event
25 June 2015	ACCC commenced its review of the proposed acquisitions
14 September 2015	ACCC publication of Statement of Issues
28 September 2015	Closing date for submissions relating to Statement of Issues
22 October 2015	Proposed date for announcement of ACCC’s final decision

The parties

Foxtel

15. Foxtel Management Pty Ltd is agent for (and manager of) the Foxtel Partnership (together, **Foxtel**). 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).
16. Foxtel is Australia's largest STV provider. It delivers audio-visual content to over 2.6 million Australian subscribers. It also operates the Foxtel Play multiplatform subscription audio-visual content service and SVOD service Presto (see below).
17. News Corporation (**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 (while Telstra has the right to terminate these officers).

Ten

18. 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 as at 16 October 2014¹ 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) Limited 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%.
19. The current board of Ten comprises:
 - David Gordon, Chairman and Non-Executive Director (joined the Ten board in April 2010)
 - Brian Long, Deputy Chairman and Lead Independent Director (joined the Ten board in July 2010)

¹ Source: Ten 2014 Annual Review. A notice of change of interests of a substantial holder filed on 22 May 2015 indicates that Lazard Asset Management Pacific Co had an interest of 8.83% as at that date.

- Paul Gleeson, a Director of Ten (joined the Ten board in 1998)
- Jack Cowin, a Director of Ten (joined the Ten board in 1998)
- Dean Hawkins, a Director of Ten (joined the Ten board in April 2010)
- Christine Holgate, a Director of Ten (joined the Ten board in April 2010)
- Siobhan McKenna, a director of Ten who was initially appointed to the Ten board on 27 June 2012 as a nominee of Cavalane Holdings Pty Ltd (controlled by James Packer) and is the managing partner of Illyria Pty Ltd (controlled by Lachlan Murdoch)
- John Klepec, a Director of Ten who was appointed to the Ten board on 3 November 2014 as a nominee for Hanrine Investments Pty Ltd (controlled by Gina Rinehart).

Multi Channel Network (MCN)

20. 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.
21. Currently, 75% of the shares in MCN are held by Foxtel and 25% are held by Fox Sports Australia Pty Ltd (owned by News Corp).
22. 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.

Presto

23. Presto is an SVOD service that enables subscribers to stream audio-visual content from an online library via the internet when they purchase a monthly subscription.
24. Presto is a joint venture between Seven West Media Limited (**Seven**) and Foxtel.

Other industry participants

News Corporation (News Corp)

25. 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.
26. News Corp is one of the owners of Foxtel through its indirect ownership of Sky Cable Pty Limited.
27. News Corp is also the owner of Fox Sports Australia Pty Limited (**Fox Sports**), an Australian group of sports channels that is broadcast on Foxtel.

28. 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).²

Fox Sports

29. 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 subscription television 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. It is owned by News Corp Australia Pty Limited.

Seven West Media Network (Seven)

30. Seven West Media Limited is an ASX-listed multi-platform media company. Seven operates three FTA television channels in Australia (Seven, 7TWO and 7mate). Seven also distributes content through its Yahoo!7 joint venture, including its online catch-up service PLUS7, and has an interest in the Australian News Channel (**ANC**), which owns and operates Sky News in Australia in addition to other channels. As noted above, it also has an interest in Presto.

Nine Network

31. The Nine Network (**Nine**), owned by the ASX-listed Nine Entertainment Co, operates three free-to-air television channels (Nine, GO! and GEM) and distributes content through its online catch-up service, 9Jumpin. Nine also owns 50% of Stan, an SVOD service.

ABC

32. The Australian Broadcasting Corporation is Australia's national public broadcaster that operates several FTA channels (ABC1, ABC2, ABC3, ABC 4 Kids and ABC News 24) and also distributes content via its online catch-up service, ABC iView.

SBS

33. The Special Broadcasting Service 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.

Fetch TV

34. 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 premium channels including

² News Corp 2015 Proxy Statement.

ESPN, MTV, National Geographic, Animal Planet, BBC World News and CCTV News.

Netflix

35. 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

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

Endemol Shine

37. 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 formats³ across operations spanning more than 30 countries.
38. Its Australian division is Endemol Shine Australia which is Australia's largest television production house with formats including MasterChef, The Voice, Big Brother, The Bachelor, and The Biggest Loser.
39. Rupert Murdoch and Lachlan Murdoch are Co-Chairmen of 21st Century Fox and James Murdoch is Chief Executive Officer. The Murdoch Family Trust holds 38.4% of the voting B class common stock in 21st Century Fox (with Rupert Murdoch holding a further 0.7% interest).⁴

Industry background

The changing media landscape

40. 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 has facilitated significant growth in the amount of audio-visual content consumed online on multiple devices, including smartphones, smart TVs and tablets.
41. 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 reducing the prices for their services. For example, Seven recently announced that it will stream its FTA channels online and Foxtel has restructured the pricing of its channel packages, with its basic package reduced from \$49 per month to \$25 per month in November 2014.

³ 'Format' refers to the overall concept and branding of a copyrighted television program.

⁴ 21st Century Fox SEC filing - Schedule 13G/A filed by Cruden Financial Services LLC on 13 February 2015.

42. 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 as consumers' viewing patterns change. Importantly, broadcasters are increasingly offering content that consumers prefer to watch live in order to maintain their audience share. This type of content, which is known as 'appointment viewing' or 'water cooler programs', includes live sport, Australian-produced reality TV shows and news.

Audio-visual advertising services

43. Advertisers can advertise their products on a number of platforms, including television, online, radio and print. Advertisers typically seek to advertise across a range of platforms in order to maximise their reach as well as to target specific demographic characteristics.
44. For some categories of advertising, television is an important medium for advertisers because it combines visual imagery, sound and movement, and it has the ability to reach large audiences.
45. Media buyers (or media agencies) are often engaged by advertisers to negotiate the terms on which advertising is purchased from the various media providers and broadcasters.

The proposed acquisitions of minority shareholdings

46. The proposed acquisitions by Foxtel and Ten comprise:
- an investment by Foxtel of \$77 million in Ten as part of a broader equity raising, which will result in Foxtel acquiring up to 15% of the issued share capital of Ten
 - the acquisition by Ten of a 24.99% stake in MCN
 - an option being granted to Ten by Presto for two years to acquire a 10% shareholding in Presto.
47. The three separate but related proposed acquisitions will be considered within this Statement of Issues.
48. The proposed acquisitions are subject to ACCC approval.
49. Ten has also entered into other arrangements with MCN and Presto. In particular, Ten has appointed MCN as sales representative of Ten's television and digital advertising inventory from 1 September 2015 and Ten proposes to provide selected programming content and some advertising to Presto in the period prior to any exercise by Ten of the option to acquire an interest in Presto. These arrangements are not subject to section 50, but may be subject to other provisions of Part IV of the Act. They also form part of the competitive landscape in which the ACCC is assessing the proposed acquisitions.
50. Given the proposed acquisitions involve minority shareholdings, the ACCC is considering the extent to which these shareholdings (on their own or together

with any aligned interests) result in an alignment of incentives between Foxtel, Ten, MCN, and Presto.

51. With respect to Foxtel's proposed acquisition, the ACCC considers that Foxtel's proposed 15% minority shareholding in Ten needs to be considered in the context of the following:

- the proposed changes to the Ten board, including a Foxtel nominee director, the reduction in the size of the board from eight directors to six, the proposed composition of the board with two independent directors (one as chair) and representatives from three other major shareholders, and other confidential information provided by the parties in relation to governance and related arrangements
- the relationships or links between the parties and the other major shareholders in Ten and the extent to which the interests of any other major shareholder of Ten may align with those of Foxtel and Ten in specific circumstances (where, for example, a decision may be commercially advantageous to each of Ten, Foxtel and that other shareholder). To the extent those circumstances exist, this may impact on the ability of Foxtel to influence Ten or simply for Foxtel and Ten to act in a manner that is in their mutual interests. In particular, the ACCC is considering:
 - the extent to which the interests of Lachlan Murdoch, who has an 8.52% interest in Ten (through Illyria) and is also Executive Co-Chairman of News Corp (and may have interests in News Corp through the Murdoch Family Trust), may align with those of Foxtel in light of News Corp's 50% interest in Foxtel and 100% interest in Fox Sports
 - the fact that Mr Murdoch was previously interim Chief Executive Officer of Ten, Chairman of Ten and a member of the Ten board, and has significant experience and reputation in the media industry
 - the fact that, in the period 23 November 2010 to 26 March 2014, Mr Murdoch (through Illyria) had an agreement with another substantial shareholder controlled by Mr Packer in relation to acting in concert when exercising votes attached to their respective shareholdings in Ten. Mr Packer remains a major shareholder of Ten through Aidem Holdings Pty Limited
 - whether, if the interests of Foxtel and Mr Murdoch are aligned, this would be in effect the largest shareholding block in Ten.
- the potential significance and importance of the Foxtel investment in Ten, the relationship between Ten and MCN (controlled by Foxtel), and the 10% option in Presto in relation to Ten's future operations and strategic direction.

52. The ACCC acknowledges that directors on the Ten board are required to act in the best interests of Ten in accordance with their statutory and fiduciary duties and with any board protocols in place. However there may be circumstances in which nominee directors can act both in the best interests of Ten and of their respective companies when making decisions.

53. The ACCC also acknowledges that major shareholders without any links or relationships to the parties, assuming they have board representation, may serve as a disruptive influence on any influence exerted by Foxtel over Ten.
54. The ACCC is considering similar issues with respect to Ten's minority acquisition in MCN and the proposed option for Ten to acquire 10% of Presto.

Future with and without the acquisitions

55. 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.
56. 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.
57. The ACCC's preliminary view is that the likely competition effects of the proposed acquisitions are most appropriately assessed against a future without the acquisitions in which Ten, MCN and Presto continue their current operations under their current ownership (the status quo).

Market definition

58. The ACCC assesses the competitive effects of proposed acquisitions in relevant markets. The starting point for defining relevant markets involves identifying the products actually or potentially supplied by the merger parties. The ACCC then considers what other products constitute sufficiently close substitutes to provide a significant source of constraint on the merged entity.
59. The ACCC's preliminary view is that the following markets are relevant to its review of the proposed acquisitions:
 - the national market for the supply of FTA television services
 - the national market for the supply of STV services
 - a broader market for the supply of television viewing services encompassing (at least) both FTA and STV services
 - the national market for the supply of SVOD services
 - 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 television advertising services.
60. The ACCC recognises that convergence within the media industry is increasing the substitutability of services provided over different platforms, including FTA, STV and SVOD. While the take-up of SVOD services is currently low as a percentage of the Australian population, take-up has grown very rapidly since new SVOD providers entered the Australian market this year.

61. The ACCC notes that differences in pricing models⁵, the type of content delivered on different platforms, and the equipment, devices and complementary services needed to view content on different platforms are likely to limit the degree of substitutability of FTA, STV and SVOD services for many viewers (and potential viewers). For example, while SVOD services may provide some content (such as TV programs and movies) comparable to that available on FTA and STV channels, the ability of many consumers to effectively stream this content is currently restricted by the limited availability of a sufficiently fast and stable internet connection (which reduces the quality of the viewing experience).
62. In addition, substitutability between platforms differs for particular types of content. Of particular relevance to the proposed acquisition, there is greater substitutability between FTA and STV services for sports content than between either of these services and SVOD services because very limited amounts of sports content are currently offered by SVOD providers.
63. The ACCC's preliminary view is that a broader market for television services that encompasses (at least) both FTA and STV services is relevant to its review. While FTA services are each other's closest substitutes and have been defined as a separate market, the ACCC's preliminary view is that STV is likely to be the next closest substitute and hence it is also relevant to define a broader market. The ACCC does not consider that it is necessary to reach a view on whether the broader market includes SVOD services, given these services are currently unlikely to be a close substitute for FTA and STV services for viewers of sport content and premium reality television shows (which comprised the top ten most popular types of content on FTA and STV television in 2014, according to OzTAM figures).
64. The ACCC invites comments from market participants on its preliminary view of the relevant markets.

Market inquiries

65. On 3 July 2015 the ACCC commenced market inquiries regarding the proposed acquisitions. A wide range of interested parties have provided responses.
66. Market inquiries have indicated a diversity of views about the proposed acquisitions. Some market participants have expressed the view that Ten's ability to compete in the relevant markets may be strengthened by the capital injection arising from Foxtel's investment in Ten.
67. Ten has ranked third in terms of ratings after Nine and Seven for much of its history. Over the last three years, however, Ten experienced a further decline in its ratings and its share of FTA advertising revenues had declined relative to Seven and Nine. While Ten's audience share has improved recently, its share of FTA advertising revenues remains significantly below that of Seven and Nine and is less than its share of audiences (that is, Ten's 'power ratio', which

⁵ 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.

measures the ratio of advertising revenue share to audience share, is historically low). Ten's financial performance has also declined in recent years, as discussed in Ten's half-year financial results released in April 2015.

68. To assist it in reaching a final decision, the ACCC is seeking further evidence and submissions from market participants in relation to whether or not the proposed acquisitions may lead to a substantial lessening of competition in the relevant markets.

Issues that may raise concerns:

Markets for the acquisition of television content

69. The effect of the proposed acquisitions in aligning the interests of Ten and Foxtel may be to limit the ability of other FTA providers to compete:

- for the acquisition of sports content
- for the acquisition of non-sport content, including premium Australian original content.

70. Each of these concerns is discussed below.

The acquisition of sports content

71. The ACCC is concerned that the proposed acquisitions may raise competition concerns in relation to the acquisition of sports content by aligning the incentives that Foxtel, Fox Sports and Ten have to enter into joint bids and other commercial arrangements for the acquisition of sports rights in a manner that reduces the ability of the other FTA networks to compete for those rights. Fox Sports and Foxtel may decide to favour partnering with Ten in bidding for the acquisition of sports content.
72. Being able to come to such arrangements with Fox Sports or Foxtel would enhance Ten's ability to acquire the FTA rights to sports content, especially premium sports content, leading to improved ratings and a greater ability to attract advertising revenue. Ten would therefore have a strong incentive to enter into such arrangements with Fox Sports or Foxtel.
73. Foxtel's acquisition of an interest in Ten would, by giving Ten a substantial capital injection, augment and support Ten's ability to bid for premium sports (and other) content and improve its ratings and advertising revenues.
74. The ACCC is considering whether the proposed acquisitions will enhance the alignment of incentives between Foxtel, Fox Sports and Ten and may give Fox Sports and Foxtel an incentive to enter into such arrangements (where they are mutually beneficial). Foxtel's acquisition of an interest in Ten would result in Foxtel (and ultimately News Corp) obtaining a financial return from entering into such arrangements with Ten.
75. The alignment of the interests of Fox Sports, Foxtel and Ten may lead Fox Sports and Foxtel to favour Ten over its FTA competitors in bidding for the acquisition of sports content. This would be likely to reduce the ability of other FTA networks, that do not have similar arrangements, to compete for the acquisition of this content in certain circumstances, including where:

- sporting rights holders prefer to sell their rights, in particular their premium sports rights, in a package. Where it is commercially unattractive for a single FTA network to acquire or broadcast the entire package, an FTA network will have an incentive to enter into a commercial arrangement with Foxtel for it to broadcast the matches or events that are surplus to its own requirements.
 - the broadcast rights to a sporting event are likely to be split between FTA and STV providers. The ability of an FTA network to partner with Fox Sports or Foxtel to negotiate and present a unified bid to the sporting rights holder may be advantageous. Bidding in this way enables any potential conflicts between FTA and STV scheduling interests to be resolved by the successful bidders, rather than requiring the rights holder to attempt to reconcile inconsistent bids from separate FTA and STV networks.
 - due to the high cost of producing live sport, there are significant commercial benefits from sharing production costs between the FTA and STV networks that enter into commercial arrangements for the acquisition of sports content.
76. These commercial considerations mean that the ability to jointly bid or enter into commercial arrangements with Fox Sports or Foxtel in relation to the acquisition of sporting rights may enable an FTA network to submit higher value or otherwise more attractive bids for sporting rights.
77. In addition, the operation of the Federal Government's anti-siphoning regime, which states that certain sports content must be offered to FTA networks before it is offered to an STV provider, creates an imperative for Foxtel to partner with an FTA network in the acquisition of listed events. While the sporting events on the anti-siphoning list are not required to be broadcast on an FTA network, Foxtel is unable to acquire or broadcast these rights (where they have been acquired by Fox Sports or News Corp), unless they have first been offered to an FTA network. The effect of the anti-siphoning regime is likely to further align the interests of Fox Sports, Foxtel and Ten to coordinate in bidding for these rights.
78. The ACCC's market inquiries have indicated that while SVOD providers may enter the markets for the acquisition of sports rights in future, they are not likely to acquire a significant amount of premium sporting rights in the near future. Therefore, for the foreseeable future, Fox Sports and Foxtel are effectively the only parties in Australia with whom FTA networks can enter into commercial arrangements in relation to the acquisition of sporting rights packages (for both FTA and STV) from rights holders.
79. The ACCC understands that Fox Sports acquires a large volume of sports content and often enters into commercial arrangements with FTA networks for the acquisition of sports rights. Foxtel also acquires sports rights (although fewer than Fox Sports) and sometimes enters into commercial arrangements with FTA networks for those rights.
80. For example, a broadcast deal for the AFL was recently announced, with Foxtel (through News Corp), Seven and Telstra to hold the STV, FTA and digital rights from 2017 to 2022. Other examples where an FTA network has previously entered into commercial agreements with Fox Sports or Foxtel to acquire those rights, and may do so again in the future, include Australian Rugby Test matches, V8 Supercars, Australian Masters Golf, Wimbledon, the Rugby World Cup and the Cricket World Cup.

81. The ACCC recognises that some sports rights are acquired by an FTA network without the involvement of an STV broadcaster. For example, Nine has recently entered into an agreement with the National Rugby League (NRL) for the broadcast of four live games per week from 2018 to 2022 without entering into an agreement with Foxtel. No agreement has been reached for the broadcast of the remaining games but given the lack of alternative STV broadcasters currently offering sports content, it is likely that they will ultimately be broadcast on Foxtel, which may also simulcast the matches shown on Nine.
82. Examples of sports rights being acquired in full by an FTA network without the involvement of an STV broadcaster include the Summer and Winter Olympics, Australian test cricket series, the Melbourne Cup, Australian Open Tennis, and Australian Open Golf.
83. The ACCC notes that the AFL and NRL rights deals referred to above were both concluded prior to the proposed acquisitions. While Foxtel has secured AFL rights and is likely to continue to broadcast NRL matches, the fact that these deals will be in effect until 2022 will reduce Ten's ability to secure these rights for the duration of the agreements. However, Foxtel has the right to sub-licence one AFL game each round during the term of the agreement and there has been speculation that if it does the game will be broadcast on Ten. Since the NRL has not yet assigned all of the rights to its content, there may be the potential, subject to the contractual arrangements with Nine, for Foxtel and Ten to acquire some or all of these remaining rights.
84. The ACCC understands that some sporting rights holders may have significant bargaining power because of the importance of premium sports content to both Foxtel and the FTA networks, which may limit the risk of harm to competition from the proposed acquisitions. Sporting rights holders typically seek to optimise the overall benefits to them by balancing the greater audiences available on FTA networks (which assist them to build and maintain the popularity of their sport over time) and the greater revenues possible from selling exclusive rights to an STV network. The ACCC is aware that sporting rights holders may include certain provisions, such as 'must show' clauses in rights contracts to prevent an FTA network or Fox Sports from on-selling exclusive rights to certain games or events to an STV provider so that they achieve an optimal balance between revenue and greater audience reach.
85. In addition to concerns in relation to the acquisition of sports content as outlined above, the ACCC is also concerned that Ten may be less likely as a result of the proposed acquisitions to compete against Foxtel for sporting rights for non-premium sports content.
86. The FTA networks typically do not compete strongly with Foxtel for the rights to non-premium sports because these sports usually do not attract large enough audiences for the FTA broadcasters, as their advertising revenues are based to a large degree on their ratings performance. In contrast, Foxtel raises a large proportion of its revenue through subscriptions, enabling it to respond to the intensity of viewer preferences, and offers a wide range of programming designed to appeal to a diversity of subscribers and to differentiate itself from FTA content which is available at no charge to viewers. Foxtel therefore has an incentive to acquire a range of sports content, for both premium and less popular sports, because of its importance in attracting subscribers. The ACCC

understands that Foxtel currently offers 68 channels, nine of which are dedicated to sport.

87. The ACCC understands that FTA networks are likely to compete with Foxtel to acquire the rights to non-premium sports content when the popularity of a sport grows. For example, in 2012 SBS acquired the rights to some of the A-League soccer matches which were previously only aired on Foxtel. FTA networks may also compete with Foxtel to acquire rights to non-premium sports content when they consider there is a real potential to build a larger television audience for that sport by promoting it on an FTA channel. For example, in 2013 Ten acquired the rights to the Big Bash League cricket tournament that had previously been aired exclusively on Foxtel. The ACCC is concerned that the proposed acquisitions may weaken Ten's incentive to compete aggressively with Foxtel for these and similar rights.
88. The ACCC is concerned that a reduction in competition for the acquisition of sports content may result in some holders of non-premium sports rights receiving less for their rights and having less opportunity to build their supporter base through exposure to the greater audiences potentially available on FTA networks. In turn, this could reduce their ability to raise revenue from other sources, such as memberships and sponsorships.
89. The ACCC invites comments from market participants on:

- the importance to an FTA network of being able to partner with Fox Sports and/or Foxtel in relation to the acquisition of sports rights
- the likelihood of an FTA network being able to partner with a commercially viable alternative to Foxtel when bidding for sports rights
- whether the proposed acquisitions are likely to lessen competition for the acquisition of non-premium sports
- whether the bargaining power of sports rights holders and their incentive to increase reach would prevent a substantial lessening of competition in the acquisition of sports rights
- the effect of the proposed acquisitions on the price paid to rights owners for broadcast rights.

The acquisition of non-sport content, including premium Australian original content

90. The ACCC is considering whether the alignment of incentives associated with the proposed acquisitions may lead Foxtel, Ten and Presto to enter into commercial agreements to acquire the rights to certain non-sports content across all platforms (i.e. STV, FTA and SVOD) on an exclusive basis and control release windows⁶ for that content to the detriment of their competitors.

⁶ '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.

91. The ACCC understands that content acquirers already seek to control the time period before the rights to content are made available for broadcasting on other platforms by acquiring 'holdback' rights in relation to the content.
92. The ACCC's market inquiries have indicated that premium Australian original content is increasingly important for a television broadcaster to attract audiences and, in the case of Foxtel, subscribers. The ACCC is considering market concerns that as a result of the Murdoch family's interests in 21st Century Fox, the proposed acquisitions would be likely to give Ten an advantage in the acquisition of premium prime time original Australian content from Endemol Shine, which is Australia's largest television production house and owns the rights to the formats for high-quality, high-rating Australian programming.
93. If the proposed acquisitions have the effect of aligning the incentives of Endemol Shine with Ten (through the common ownership interests in each of News Corp and 21st Century Fox), this may result in Ten gaining a position of advantage in acquiring premium Australian original content relative to competing FTA providers.
94. These potential effects of the proposed acquisitions may lessen competition in the relevant market for the acquisition of non-sport content, result in some producers of non-sport content receiving less for their rights, and lead to a reduction in either the quantity or quality of non-sport programming available to FTA viewers.
95. Based on the information available to it, the ACCC understands that premium non-sport content differs from premium sports content in several ways:
 - Non-sport content does not have the enduring brand loyalty of premium sports, for which viewer interest is generally consistent over many years. Viewer interest in non-sport programs and formats fluctuates over time as tastes in such content change more rapidly. Innovative program ideas and formats can quickly attract significant audiences and ratings from existing programs and formats.
 - There is competition for formats. Popular formats may change hands, by being acquired by another production house or by an FTA network or STV provider.
 - Differentiation by STV providers and FTA networks may limit the extent to which they compete for the same non-sport content. In 2014, of the top 20 most popular programs on FTA networks (in the five main capital cities), ten were reality television shows, eight were sports programs and two were episodes of a new-release television mini-series; for STV providers, 18 of the top 20 were sports and the other two were popular recent movies (according to OzTAM figures).
96. The ACCC invites comments from market participants on:
 - the extent to which Ten, Foxtel and Presto will have aligned incentives to enter into commercial agreements to acquire the rights to certain non-sports content across STV, FTA and SVOD platforms

- the extent to which content acquirers currently acquire holdback rights to control the time period before the rights to content are made available for broadcasting on other platforms and the significance of holdback rights for the ability of FTA networks to acquire premium non-sport content
- the likely effect of Ten, Foxtel and Presto acting together to acquire the rights to certain non-sports content on the ability of other FTA networks to acquire compelling non-sports content
- the extent to which the proposed acquisitions would be likely to result in Ten gaining a position of advantage in acquiring premium Australian original content relative to competing FTA providers
- whether the proposed acquisitions would be likely to align the incentives of Endemol Shine and Ten, which would place Ten in a position of advantage in acquiring premium Australian original content relative to competing FTA providers.
- the ability of FTA and STV providers to acquire or produce compelling non-sport content, including innovative programs and formats
- the extent to which STV providers and FTA networks compete for the same types of premium non-sport content

Supply of FTA television services and supply of television viewing services encompassing both FTA and STV services

97. The ACCC's preliminary view is that the proposed acquisitions may substantially lessen competition in the supply of FTA services to consumers and in a broader market for the supply of television viewing services encompassing both FTA and STV.
98. The ACCC is concerned that Ten's FTA competitors may be less able to engage in direct competition with Ten for viewers and advertisers following the proposed acquisitions, potentially leading to a reduction in the quality or choice of FTA television programming available to viewers.
99. Based on the information available to it, the ACCC considers that premium sports are an extremely important part of an FTA network's program offering. Premium sports provide an FTA network with a high degree of ratings certainty, as viewer interest in major sports is generally consistent over many years, whereas interest in other programs or formats fluctuates more rapidly over time. The consistent ratings of major sports enable FTA networks to implement cross promotion and lead in strategies around sporting events, leading to a ratings 'halo' effect whereby broadcasting premium sports increases the network's ratings overall. These benefits cause FTA networks to spend a significant proportion of their programming budgets on the acquisition of premium sports rights.
100. Sports content is also very important to Foxtel for attracting subscribers. As noted above, the ACCC understands that Fox Sports acquires a large volume of sports content, which is broadcast on Foxtel's sports channels and Foxtel also acquires sports rights in its own right.

101. 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. In fact, the ACCC considers that these benefits are likely to continue as ratings for live sporting events are unlikely to be affected by other forms of audio-visual distribution such as 'on demand' viewing over the internet. The ACCC notes that five of the top ten FTA programs in 2014 were sports content (based on OzTAM figures).
102. Given the importance of premium sports content to an FTA network's ability to compete strongly with other FTA networks and with STV providers for viewers and advertisers, the ACCC is concerned that the advantage Ten could gain in acquiring sporting content (discussed above) may lead to a substantial lessening of competition in a broad market for television viewing services that includes (at least) FTA and STV services.
103. Foxtel competes for viewers with the FTA networks, and the FTA networks compete with each other and with Foxtel, by offering compelling content that cannot be seen on their competitors' platforms (or cannot be seen without a delay that reduces its value to viewers). Sport is a key element of this competition, because of viewers' high and consistent interest in the major sports and because the value of sports content is greatest when shown live. Exclusive rights to sports content, and rights to broadcast an entire sporting series or season, are particularly important to Foxtel, in building and maintaining its subscriber base as many viewers are willing to pay to see all games or events live for the sports they follow.
104. Bidding partners for any sporting rights are also rivals at the margin, both wishing to optimise their share of the rights (for example, an FTA broadcaster will wish to show more and better live games, whereas Foxtel will wish to maximise its level of exclusive rights). Market inquiries raised concerns that if there is an alignment of Foxtel, Fox Sports and Ten's incentives flowing from the proposed acquisitions, the outcome of any joint bid between Ten and Foxtel (or Fox Sports) may be more and/or better games being shown exclusively on Foxtel compared to the outcome of a joint bid or arrangement between Foxtel and an FTA broadcaster in which it did not hold a significant shareholding. This strengthening of Foxtel's sports rights position would reduce the competitive constraint imposed on Foxtel by FTA services and increase its ability to attract subscribers and to charge higher subscription rates, and would also serve to further entrench Foxtel's dominance in STV broadcasting.
105. It has been argued that the relatively low level of penetration of STV in Australia compared to, for example, the UK and the US, is in part due to the anti-siphoning regime and that a tie up between Foxtel and Ten could significantly alter the competitive landscape.
106. The ACCC is considering whether, as a result of the proposed acquisitions, the alignment of incentives would lead to Ten granting Foxtel exclusive rights to broadcast more high-rating games or events live on Foxtel. This may be likely to occur where Foxtel and Ten benefit from such arrangements to the detriment of Ten's FTA competitors.
107. Given the importance of premium sports content to Foxtel's ability to compete strongly with the FTA networks (and vice versa), the ACCC is concerned that if such arrangements were put in place, it may lead to a substantial lessening of

competition in a broader market for the supply of television services that includes FTA and STV services.

108. However, the ACCC is also considering the alternative view, put by some market participants, that such arrangements may strengthen Ten's ability to compete with other FTA networks, particularly Seven and Nine, which recently obtained rights to AFL and NRL games respectively, in the narrower market for the supply of FTA television services.
109. The ACCC is also considering whether some sporting rights holders may seek to prevent arrangements between Foxtel and Ten that granted Foxtel exclusive rights to broadcast more high-rating games or events live on Foxtel and fewer, or less popular, games or events live on FTA television.
110. As noted above in the context of sports rights, the ACCC understands that some sporting rights holders may have significant bargaining power because of the importance of premium sports content to both Foxtel and the FTA networks, and that sporting rights holders typically seek to use this power to optimise the overall benefits of audience reach and revenue.
111. In relation to non-premium sports content, the ACCC is concerned that, where FTA networks compete with Foxtel to acquire the rights to this sports content, the proposed acquisitions may weaken Ten's incentive to compete aggressively with Foxtel for these rights. This could result in a reduction in competition for the acquisition of this content by FTA networks (as previously discussed) and lead to FTA consumers receiving a lower quality or quantity of games or events compared to the likely scenario absent the acquisitions. On the other hand, the ACCC is considering whether any such coordination by Ten/Foxtel could provide an incentive for Seven and Nine to acquire such content, including whether the expansion of FTA to multi-channels has increased their incentive to acquire, and ability to broadcast, a wider range of sports content.
112. The ACCC is also concerned that the proposed acquisitions may further weaken competition for the supply of FTA services through their effect on the acquisition of non-sport content, particularly in relation to premium (that is, high rating) original Australian content.
113. Ten's likely advantage in acquiring premium sports content post-acquisition could allow it to leverage that advantage into the market for the acquisition of non-sport content (though the 'halo' effect)—a strategy that may be denied to other FTA networks as a result of the proposed acquisitions.
114. Such an advantage for Ten would be likely to result in lower ratings for the other FTA networks, which would reduce their ability to attract advertising revenues. Lower advertising revenues would reduce their capacity to compete in acquiring compelling non-sport content, further lessen competition in the television viewing market and lead to a reduction in either the quantity or quality of non-sport programming available to FTA viewers.
115. Similar to the situation for sports content, the proposed acquisitions could, by aligning Foxtel's and Ten's incentives, result in arrangements for the coordinated acquisition of non-sport content result in more compelling content being acquired by Foxtel to the detriment of FTA networks other than Ten. However, the ACCC is also considering whether any such coordination may give the other FTA networks an incentive (and whether they would have the

ability) to acquire or produce compelling non-sport content to offset any attempt to damage their capacity to attract viewers.

116. The ACCC invites comments from market participants on:

- the importance of sports content to FTA networks and Foxtel, including the significance of any 'halo' effect on overall ratings
- the likely effect of the proposed acquisitions on competition between Foxtel and FTA networks, and among FTA networks, for viewers based on their ability to obtain premium sports content
- the extent to which sporting bodies are able to determine when and where their games or events are broadcast on FTA and STV networks, including any views on the significance of the recent NRL and AFL broadcasting deals for competition for the acquisition of sports content and in the supply of FTA and STV services
- the effect of the proposed acquisitions on the scheduling of sporting content, the quantity of sporting content shown on FTA television and the impact on the quality of FTA television for viewers
- the effect of the proposed acquisitions on the ability of Foxtel's and Ten's FTA competitors to acquire compelling non-sport content and compete for television viewers
- the likely effect of the proposed acquisitions on competition between Foxtel and FTA networks, and among FTA networks, for viewers based on their ability to obtain premium non-sport content.

Reduced competition for the supply of television advertising services

117. As noted above, the proposed acquisitions may reduce the competing FTA networks' ability to acquire the compelling sports and non-sport content needed to attract audiences and maintain or increase their ratings. This would reduce their ability to attract advertising. Over time, this may weaken the competitive pressure exerted by the other FTA networks and lead to higher prices for advertisers.
118. The ACCC is also concerned that the acquisitions may give Foxtel and Ten an incentive to coordinate (through MCN) their offers to advertisers and that this may lessen competition in the supply of television advertising services, including by reducing the number of independent competitors available to advertisers. This may result in increased prices to advertisers.
119. Currently Seven and Nine are Ten's closest competitors for the sale of advertising, and they each have larger shares of FTA advertising revenues than Ten. Although less direct, there is also competition between FTA advertising and STV advertising services. MCN accounts for the vast majority of STV advertising revenue.
120. To the extent that they align the advertising offers of Ten and Foxtel, the proposed acquisitions will reduce the options available to television advertisers.

121. In addition, the ACCC understands that Foxtel obtains detailed information about the viewing habits of its subscribers via information obtained from the Foxtel box in its subscribers' homes. The ACCC understands that the information collected in this way includes details of which channels and programs its subscribers watch on Foxtel and FTA networks, including FTA providers that compete with Ten, where the subscriber watches FTA programs through the Foxtel set-top box. Market inquiries have indicated concerns that this detailed information about FTA viewing habits could be used to give Ten information about its competitors' viewers that is not currently available to those competitors, because they have no hardware equivalent to the Foxtel set-top box.
122. The ACCC is further considering what information Ten will be able to access and whether access to such information in conjunction with programmatic advertising techniques could reduce the ability of other FTA competitors to offer a close competitive alternative to Foxtel and Ten in the supply of advertising services.
123. A substantial lessening of competition in the market for television advertising could result in MCN increasing the prices it can charge advertisers.
124. The ACCC invites comments from market participants on:
 - the ability and incentive for Ten to coordinate with and influence MCN in relation to the advertising strategies adopted for the different channels represented by MCN
 - the effect of the proposed acquisitions on the ability of other FTA networks to compete with the advertising offerings of Ten and Foxtel, and the impact of this on competition in the market for television advertising.

Issues unlikely to raise concerns:

Reduced competition in the national market for the supply of SVOD services

125. The ACCC's preliminary view is that the proposed acquisitions are not likely to lead to a substantial lessening of competition in the supply of SVOD services to consumers.
126. The ACCC considered the potential for the proposed acquisitions to raise such concerns by limiting the ability of alternative SVOD providers to compete with Presto, acting in partnership with Foxtel and Ten, in the acquisition of non-sports content.
127. A number of new entrants commenced supply of SVOD services in Australia in 2015, and the ACCC considers there is a low risk that the proposed acquisitions would create such a barrier to expansion and to any other potential entrants as to amount to a substantial lessening of competition in the supply of SVOD services. In particular, the acquisition is unlikely to prevent Presto's competitors from being able to acquire enough attractive non-sport content required to attract a sufficient subscriber base to be commercially viable.
128. This is because currently there is limited competition between SVOD providers and STV and FTA broadcasters for the acquisition of certain types of content. SVOD services broadcast some types of content, such as TV programs and

movies, that are also broadcast by STV and FTA but tend not to offer programs that are of most value when viewed live, such as sport and reality television shows. SVOD providers, such as Netflix and Stan, also produce or commission some of their own non-sport content.

129. The ACCC also considers it unlikely, at this stage, that the proposed acquisitions would substantially lessen competition in the supply of SVOD services to consumers by limiting the ability of alternative SVOD providers to compete with Presto, acting in partnership with Foxtel and Ten, in the acquisition of sports content. As noted above under 'The acquisition of sports content', the ACCC's market inquiries have indicated that while SVOD providers may enter the markets for the acquisition of sports rights in future, they are not likely to acquire a significant amount of premium sporting rights in the foreseeable future.

130. ACCC invites comments from market participants on:

- the extent to which SVOD services compete with FTA and STV for the acquisition of content
- whether the proposed acquisitions are likely to limit the ability of competing SVOD services, and potential new entrants, to acquire sufficient attractive content to build and maintain a commercially viable subscriber base.

ACCC's future steps

131. The ACCC will finalise its views on this matter after it considers submissions received in response to this Statement of Issues.

132. The ACCC now seeks submissions from market participants on each of the issues identified in this Statement of Issues and on any other issues that may be relevant to the ACCC's assessment of this matter. Submissions are to be received by the ACCC no later than 28 September 2015 and should be emailed to mergers@acc.gov.au

133. The ACCC intends to publicly announce its final view by 22 October 2015. However the anticipated timeline may change in line with the Merger Review Process Guidelines. A Public Competition Assessment for the purpose of explaining the ACCC's final view may be published following the ACCC's public announcement.