



Australian
Competition &
Consumer
Commission

Media Merger Guidelines

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Note on terminology

Section 50 applies to:

- mergers, where typically the shareholders of two companies (the merger parties) become the shareholders of the new merged company; and
- acquisitions, where a company (the acquirer) acquires the shareholding or assets of another company (the target).

For convenience, this paper uses the terms ‘mergers’ and ‘merger parties’ when referring to either mergers or acquisitions.

Foreword

The Australian Competition and Consumer Commission (the **ACCC**) is the independent statutory authority responsible for administering the *Competition and Consumer Act 2010* (the **Act**), including the merger provisions in section 50.

The ACCC released the first version of its *Media Merger Guidelines* in August 2006. In 2016, the ACCC undertook to update these guidelines. This update is timely for two reasons.

First, there have been significant changes to the way media is delivered and consumed over the past ten years and these changes are altering the nature of competition in media markets.

Second, the government has proposed changes to Australia's media control and ownership laws established under the *Broadcasting Services Act 1992*. These changes would remove restrictions that prevent one person (or company) controlling:

- commercial television broadcasting licences that collectively reach more than 75 per cent of the Australian population (“reach rule”); and
- more than two of the three regulated media platforms – a commercial radio broadcasting licence, a commercial television broadcasting licence or an associated newspaper¹ – in any commercial radio licence area (“2 out of 3 rule”).

The removal of these restrictions would create the potential for mergers in the Australian media sector, all of which will be subject to section 50 of the Act.

Section 50 prohibits mergers that are likely to substantially lessen competition in any market. The ACCC's *Merger Guidelines* set out the ACCC's analytical approach to assessing mergers. The ACCC's *Media Merger Guidelines* supplement the analytical guidelines by drawing out key areas of focus for the ACCC when assessing mergers in the media sector. These will vary from merger to merger, but might include issues such as diversity of media voices, the impact of technological change, and access to content.

The *Media Merger Guidelines* include a number of case studies to illustrate the ACCC's approach. These may be updated from time to time to include more recent matters as they arise.

As markets continue to evolve, the ACCC's merger analysis will take these developments into account. It is not possible to indicate in advance what the outcomes of any proposed merger might be, as each case will turn on its unique set of facts. The ultimate test however will remain the same: whether a merger is likely to substantially lessen competition in any market in Australia.

¹ A newspaper is associated with a television broadcasting licence if more than 50 per cent of its circulation is within the relevant licence area. A newspaper is associated with a commercial radio broadcasting licence if more than 50 per cent of its circulation is within the relevant licence area and the newspaper's circulation covers at least 2 per cent of the licence area's population. Most small, community newspapers do not meet the threshold and, significantly, the definition also excludes major national newspapers *The Australian* and the *Australian Financial Review*.

Purpose of the Guidelines

1. The purpose of the guidelines is to highlight particular issues likely to be relevant to the ACCC's assessment of a media merger under section 50 of the Act. In doing so, the guidelines complement the ACCC's general [Merger Guidelines](#). Accordingly, a media company contemplating a merger should refer to both guidelines.
2. The *Media Merger Guidelines* are intended to help prospective merger parties develop a greater awareness of the general issues likely to be of interest to the ACCC when assessing a media merger. This will assist merger parties and third parties to provide the ACCC with more relevant and targeted submissions, and enable merger parties to anticipate the ACCC's likely areas of inquiry. The guidelines do not constitute legal advice.
3. The guidelines also do not indicate whether a particular hypothetical media merger might substantially lessen competition, and they cannot be definitive about market definition. In practice, individual mergers involve a great variety of facts and situations, and the competition analysis of particular issues needs to be tailored to the specific circumstances of each merger.

Role of the ACCC – how do we assess mergers?

4. Section 50 of the Act prohibits acquisitions of shares or assets that would have the effect, or be likely to have the effect, of substantially lessening competition in any market in Australia. The ACCC's analytical framework for assessing mergers under section 50 is set out in its *Merger Guidelines*.
5. The ACCC also provides written guidance on the *process* it follows in assessing mergers in the ACCC's [Informal Merger Review Process Guidelines](#).
6. In determining whether a merger is likely to substantially lessen competition, the ACCC will consider ways in which a merger may result in competitive harm, and seek input from the merger parties and market participants on these issues. The ACCC also considers each of the merger factors in section 50(3) of the Act, as well as any other relevant factors. The merger factors provide insight as to the likely competitive constraints the merged firm will face following the merger and the possible competitive effects of the merger.

The forward looking nature of the competition test for mergers

7. When considering a merger, the ACCC adopts a forward-looking analysis into the effects or likely effects of a merger, applying the future "with-or-without" test. In other words, the ACCC considers the likely future competitive environment if the merger proceeds (the "with" position) to the likely future competitive environment if the merger does not proceed (the "without" position) to determine whether the proposed acquisition is likely to substantially lessen competition in any relevant market.
8. The ACCC will also take into account the changing nature of media technology and the competitive impacts of this technology, where there is sufficient evidence that the changes are likely to occur.
9. In undertaking its competition analysis, the ACCC focuses on the foreseeable future (generally one to two years, but longer in some cases).
10. The ACCC will not base its merger analysis on predictions or speculation about hypothetical technological changes outside its usual time frame for consideration.

Consistent with its assessment of mergers in all other sectors, the ACCC bases its decisions on the best available evidence about current and likely future competition in the market.

Markets likely to be affected

11. As a starting point, the ACCC considers the activities of the parties to a merger, including the products or services each party supplies and acquires, and then focuses on any areas of **overlap** between the parties. That overlap might be horizontal, where the firms operate at the same level of the supply chain, or vertical, where the firms operate at different levels of a single vertical supply chain. The ACCC will also consider the extent of any geographic overlap.
12. Media outlets typically generate revenue from advertising and/or subscription fees. In many cases, parties to a media merger may overlap in one or more of the following activities:
 - the supply of content to consumers, either directly or via a firm which acquires and aggregates content for supply to consumers,
 - the supply of advertising opportunities to advertisers, and
 - the acquisition of content from content providers.
13. These are likely to form the basis for the ACCC's consideration of the relevant markets in which to assess the likely competition effects arising from the proposed media merger.
14. The ACCC will then examine what substitutes are available to consumers and suppliers in each area of overlap arising from the merger, and whether these alternatives represent close substitutes. For this reason, the relevant markets for the purposes of the Act are not necessarily the same for every possible merger in an industry, even if a merger concerns the same products the ACCC has considered previously. Due to factors such as the specific operations of the merger parties, or the emergence of new technologies, the relevant market(s) will be defined according to the facts arising from each distinct merger proposal.
15. The ACCC will also consider the **extent of substitution** between the parties to the merger. In doing so, the ACCC may look at the **mode of delivery**. Media services using the same mode of delivery are likely to be closer substitutes than those operating via different platforms. In some cases, however, different modes of delivery have converged such that the supply of content or advertising across different platforms may compete more closely. Alternatively, some modes of delivery may be complementary rather than competitive.

Examples of modes of delivery include:

- free-to-air television broadcasting, accessed in home or via mobile devices
- subscription or pay television via cable or satellite (**pay-TV**), accessed in home or via mobile devices
- over-the-top (**OTT**) video or audio on demand services accessed via the internet
- **OTT** video and audio streaming services accessed via the internet, whether free or in exchange for payment
- Internet Protocol Television (**IPTV**) services
- other digital media platforms including online sites and social media

16. Substitution may be asymmetric. For example, for some consumers it is possible that free-to-air television may provide a close substitute for pay-TV, but not vice versa.
17. In assessing the extent of substitution between the merger parties, the ACCC may, depending on the circumstances of the matter, also consider the **type of content** supplied by each party, such as sport, entertainment, or local news content. For example, a channel providing only sports content might not be a close substitute for a news channel.
18. Market definition is a starting point in assessing the likely competition effects of a merger. In many cases, the ACCC will not need to identify the precise parameters of the market in order to assess the likely effects on competition. It may be sufficient for the ACCC to consider the areas of overlap and to identify any close substitutes in those areas, before proceeding to consider the likely competition effects arising from the merger.

Types of mergers that may harm competition

19. Mergers can be classified as horizontal, vertical or conglomerate, and may involve firms that are either actual or potential competitors.
20. Horizontal mergers involve firms that compete at the same level in the supply chain, for example, two newspaper publishers in the same city.
21. Vertical mergers involve parties that operate at different levels of the supply chain, for example, a merger between a content provider and a network provider that bundles and delivers content to consumers.
22. Conglomerate mergers involve parties that are present in multiple markets and supply products that are typically related to each other in some way, such as products which are complementary in demand or supply. Mergers that will result in cross-platform media ownership, for example between a television network and a newspaper publisher, are typically a form of conglomerate merger.
23. In most cases, the ACCC's primary focus will be the likely unilateral effects on competition, as discussed below. Where appropriate, the ACCC might also need to consider the likelihood of coordinated effects arising from a media merger.

Unilateral effects

24. Unilateral effects may arise where, as a result of a horizontal merger, competition between the merging firms is eliminated.

25. The removal of an important source of competitive constraint that the merger parties exerted on each other before the merger may provide the merged entity with the ability to exercise market power, which can result in a significant and sustained:
- (a) **increase in prices** – in the media context, this could be an increase in the price of listing an advertisement for advertisers or an increase in subscription or cover prices;
 - (b) **reduction in service** – in the media context, this could be a reduction in the quality or variety of the service or content, or an increase in the number or length of advertisements. This can result in a loss of choice for consumers, a reduction in a type of content which consumers value, or a loss of a significant voice, for example through removing a publisher of local news;
 - (c) **reduction in incentive to innovate** – suppliers may have less incentive to invest in improving their products as they have less fear of losing customers to rivals.
26. In vertical mergers, unilateral effects may arise if the merger enables the merged firm to leverage its market power in one market to foreclose its competitors in another market. For example, the ACCC may be concerned where a merger between a content supplier and a television network gives the merged entity both the ability and incentive to restrict other networks from accessing compelling content, and this has the likely effect of substantially lessening competition.
27. The ACCC will also consider whether, post-acquisition, a merged firm would be able to exercise unilateral market power in a conglomerate merger. In some cases conglomerate mergers can raise competition concerns where they enable the merged firm to bundle products and services in a way that forecloses the merged firm's rivals and potential rivals, and reduces the competitive constraint those rivals provide.
28. Other unilateral effects that may arise from mergers include raising structural and/or strategic barriers to entry and facilitating access to commercially sensitive information.

Coordinated effects

29. The ACCC may also be concerned about mergers which increase the likelihood of coordinated conduct, which might range from muted competition through to tacit coordination or explicit agreement between firms not to compete.
30. Coordinated effects can arise when a merger alters the nature of interdependence between rivals such that coordinated conduct is more likely, more complete or more sustainable. For instance, a merger might assist firms in the market to implicitly or explicitly coordinate their pricing, output or related commercial decisions.
31. Coordinated effects are more likely to occur in markets characterised by a small number of firms and high barriers to entry and expansion shielding the incumbents from new competitors.
32. In considering whether a merger may give rise to coordinated effects, the ACCC will also consider minority shareholdings and whether a partial acquisition will lead to a greater alignment of interests and increased interdependence and coordination between parties. The issue of minority shareholdings is discussed further below.

Possible issues in the competition assessment of media mergers

33. This section provides a guide as to how the ACCC will consider particular issues arising in media merger assessments. These include:
- competition and media diversity
 - impact of technological change
 - access to key content
 - two-sided markets and network effects
 - bundling and foreclosure, and
 - minority shareholdings.
34. Other competition issues may also arise in media mergers.

Competition and media diversity

35. 'Diversity' in a media context broadly refers to the range of media 'voices' available to consumers. While media diversity may manifest in a variety of ways, one example of a loss of diversity is where a transaction would result in a reduced number of voices and the potential for a consequential loss of, or reduction in, news or local and regional content.
36. The control and ownership framework within the *Broadcasting Services Act 1992* is essentially comprised of five rules which limit the 'control' of commercial television and radio broadcasting licences and associated newspapers. As discussed earlier, the government is proposing to remove two of these, the "reach rule", and the "2 out of 3 rule". Three other rules would remain:
- at least five independent media voices must be present in metropolitan commercial radio licence areas (the mainland state capital cities), and at least four in regional commercial radio licence areas (the "5/4 rule");
 - a person, either in their own right or as a director of one or more companies, must not be able to exercise control of more than one commercial television broadcasting licence in a licence area (the "one to a market rule"); and
 - a person, either in their own right or as a director of one or more companies, must not be able to exercise control of more than two commercial radio broadcasting licences in the same licence area (the "two to a market rule").
37. These rules are directed at preserving diversity in media markets. By comparison, the key purpose of the merger provisions of the *Competition and Consumer Act 2010* is to protect *competition* in markets in Australia, including media markets, by prohibiting mergers that are likely to substantially lessen competition in any market.
38. The diversity of media voices is interlinked with a number of issues the ACCC considers in its competition assessment under section 50 of the Act.
39. One important factor the ACCC takes into account is the level of **concentration** in a market. A key input in determining concentration is the market share of media outlets in a market both before and after the merger. A horizontal merger between media outlets which increases the merged entity's market share will increase the level of market

concentration. At the same time, the merger will lead to a reduction in the number of independent media outlets and potentially a reduction in the level of media diversity.

40. The level of concentration in a market can often provide an initial indication of whether the merger is likely to increase the market power of the acquirer, and also whether competitors would be likely to constrain the merger parties post-merger. While market concentration needs to be considered alongside a number of other factors (particularly height of barriers to entry and expansion), as a starting point, a reduction in the number of suppliers of a media product or service in a concentrated market may facilitate the merged entity to exercise market power.
41. Media outlets can produce content in-house (retail content) or source content from third parties (wholesale content). Different groups of consumers will place value on different types of content. If a particular company has a history of supplying its own distinctive or differentiated content in order to attract consumers, its acquisition might give the acquirer the ability and incentive to reduce or cease the supply of this content without risking a significant loss of sales. The **reduction of choice** available to consumers post-merger, among other factors, may have the effect of substantially lessening competition, while also reducing media diversity.
42. In assessing the likely competition effects in the market, the ACCC will consider not only the impact of a particular merger on the price of a product or service post-acquisition, but also whether the merger is likely to lead to an exercise of market power in non-price ways such as through a **reduction in quality**. In the context of media mergers, this could include whether a merged media business could exercise market power by reducing the quality or range of content it provides, or whether it will continue to be subject to other competitive constraints, for example, other content or other delivery modes.

Example – News Limited’s proposed acquisition of Federal Publishing Company Community Media Group (FPC) (2007)

News Limited, a major publisher of both paid and free newspapers across Australia, proposed to acquire FPC, which published and distributed a number of free community newspapers and magazines in Sydney, the Illawarra, the Gold Coast and the Sunshine Coast.

In its Public Competition Assessment, the ACCC noted that an acquisition may substantially lessen competition if it results in a substantial reduction in the quality of the relevant newspapers through a reduction in the diversity and coverage of content provided to readers. The ACCC considered whether sufficient competitive constraints would remain post-acquisition such that a reduction in the quality of the relevant newspapers, through a significant reduction in the diversity of views or the range of stories covered by those newspapers, would result in a loss of readership and a reduction in the attractiveness of the newspapers to advertisers.

The ACCC found that while the acquisition might lessen the number of publishers in the community newspaper sector in northern and inner western Sydney, a range of other media voices would remain in those areas. The ACCC concluded that, given the existence of competitive constraints post-acquisition, it was likely that News Limited would continue to cover a wide range of local news stories so as to attract the widest possible range of readers, and therefore advertisers.

The ACCC did not oppose the proposed acquisition.

Impact of technological change and future developments in the market

43. Technology plays a significant role in the delivery of products and services in media and related markets, and it can have a significant influence on the competitive landscape. Similarly, changes in technology – and changes in how technology is used and applied by consumers and business – can shift the competitive dynamics of media markets, sometimes dramatically. For example, in the past ten years, the rise of digital media, including social media, has led to significant changes in how media content and advertisements are consumed and supplied.
44. Dynamic changes in a market may result from a range of factors including market growth, innovation, product differentiation and technological changes. These changes can impact market definition, the ACCC's competition assessment and the likely future without the proposed acquisition. How technology impacts a particular market or a particular transaction will depend on the circumstances of each case.
45. Consistent with the forward-looking nature of section 50, the ACCC will consider the current state of competition in the market and the potential for competition to change in the foreseeable future.
46. Advances in technology may have the effect of introducing entirely new products and services into existing markets, exposing traditional business models to challenges from new or different forms of competition. These changes may have the effect of increasing the **closeness of competition** between products or services that were previously less direct competitors.
47. New technology may also have an effect on **barriers to entry**. Where markets are growing rapidly, this may facilitate new entry or expansion and erode the market shares of established incumbents. Similarly, markets that are characterised by rapid product innovation may be unstable such that increased market power gained through a merger is only transitory in nature.
48. A supplier that has a history of innovation or introducing disruptive new products may be a 'maverick' or a **vigorous and effective competitor**. While it may have a comparatively small market share, it could have a disproportionately large impact on the level and form of competition in a market. This may be of particular relevance in media markets or markets which are developing quickly. As new products are introduced to compete in these markets, incumbent firms may wish to neutralise this threat by acquiring the maverick.
49. Not all technological change is necessarily pro-competitive – some changes may have little impact on competition, while others may introduce new sources of market power that could raise competition concerns. Alternatively, new technology may be complementary to, rather than competitive with, existing products or services.
50. Even if a market is dynamic and experiencing rapid technological innovation, if there are barriers that limit the ability of other suppliers to grow, the dynamic nature of the market will not necessarily overcome the competition concerns raised. In particular, network effects may mean that the first supplier in that market that is able to attract a large number of customers gains a significant and stable market position. This is discussed further below.
51. In each case, the ACCC will critically examine the extent to which current market dynamics are likely to accurately reflect future patterns. Where credible evidence supports the position that changes in a market are likely in the foreseeable future

(generally within one to two years), the ACCC will take these into account. Little weight will be given to speculation about future technological developments.

Example – Channel 7 and Foxtel proposed joint venture (2015)

Seven and Foxtel proposed to enter into a joint venture to collectively produce and supply a standalone subscription video on demand (SVOD) service, marked as “Presto Entertainment”.

The ACCC considered the proposed acquisition in the context of a national market for the acquisition of broadcast rights to general audio-visual content (excluding sporting rights), and a national market for the supply of paid general audio-visual content services to consumers.

The ACCC found that SVOD providers competed with a range of other providers, including traditional subscription and free-to-air TV providers, in the market for the acquisition of broadcast rights. The ACCC also found that SVOD and transactional video on demand (TVOD) services were likely to compete with traditional subscription television services in the supply of paid general audio-visual content services.

The ACCC did not oppose the proposed acquisition.

Access to key content

52. Compelling, premium or key content is content that is likely to attract significant numbers of consumers. Premium content can allow providers to implement cross promotions and 'lead-in' strategies, leading to a ratings 'halo' effect that increases the provider's ratings overall.
53. The ACCC's past reviews have found that live sports content, in particular premium sports, is an extremely important part of a free-to-air network and a pay-TV provider's program offering due to the higher ratings it achieves, and the fact that viewer interest in major sports is generally focused on live content.
54. 'Water-cooler programming' or 'appointment viewing' refers to content which consumers prefer to watch live and which viewers like to discuss shortly after. This can include live sport, reality TV shows and news. As consumers prefer to watch this type of programming live, water-cooler programming may be of particular importance to broadcasters as it can help them to maintain their audience share and advertising revenue.
55. In past matters, the ACCC has found that the difficulty of obtaining supply of premium or compelling content can be a barrier to entry. While the precise nature of what is regarded as premium or compelling content may change over time, as consumers' viewing patterns and preferences change, the ACCC considers that the benefits to incumbents of having the exclusive rights to premium content is unlikely to decrease in the foreseeable future.
56. With technological advances facilitating a range of new delivery modes, a firm's ability to provide compelling content across both traditional and online media is likely to be of continuing importance. The availability of new platforms provides more opportunities for providers to cater to consumer demand.
57. Competition concerns from a merger may arise if the merger significantly increases the holdings of exclusive content or significantly increases the ability of the merged firm to acquire such content, for instance through vertical integration.
58. The ability of existing suppliers to control access to compelling content can create a barrier to entry and expansion, as it can hinder the ability of suppliers that do not have access to this content to grow and compete.
59. In its assessment, the ACCC will consider the temporal element of programming content, including how frequently these contracts come up for renewal and how consumer preferences might change over time. The ACCC will also consider whether a media merger will result in the merged firm having market power in the acquisition of key content, or an increased ability to influence or control the release windows for key content, in such a way that it inhibits competition with its rivals or inhibits the development of competition on other modes of delivery.
60. The ACCC might also be concerned in situations where content holders prefer to sell their rights to key content in a single package, making it commercially unattractive or unviable for smaller participants in the market to acquire that content.

Example – Foxtel’s proposed acquisition of Austar (2011-2012)

Foxtel and Austar were both providers of subscription television services, with Foxtel being the largest provider in Australia and primarily focussed on subscribers in metropolitan areas while Austar’s coverage areas were primarily in regional and rural Australia.

The ACCC consulted widely with market participants to understand 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. By acquiring content on an exclusive basis, Foxtel and Austar had been able to attract large numbers of end consumers. In turn this increased the attractiveness of their platforms to content rights holders and enhanced their ability to obtain content on an exclusive basis and attract additional subscribers.

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 audio-visual content, sometimes exclusively. The ACCC was particularly concerned that the increased scale of the merged firm would further increase its ability to obtain some content on an exclusive basis, particularly content for which Foxtel and Austar previously bid independently, and that this may further increase the already high barriers to entry.

The ACCC considered that IPTV (an “over the top” digital service) was likely to emerge as an important platform for the delivery of subscription television services, and had the potential to lower the existing infrastructure barriers to the supply of subscription television services.

One of the ACCC’s key concerns was that the merger would allow 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 on this emerging platform.

The ACCC did not oppose the proposed acquisition, subject to an undertaking.

Two-sided markets and network effects

61. A two-sided market is one in which a platform or intermediary brings together two distinct groups of users which interact with each other. Two-sided markets often arise in the context of services which generate revenue through advertising.
62. Network effects are present in a market if the value a user places on a product or service increases if there are more overall users of that product or service. For example, the benefit to an individual user from using a social networking site increases if all their friends also use that site.
63. Some two-sided markets may experience strong network effects. For example, readers will be more likely to use a classified service if they consider it comprehensive and has the most classified advertisements. If it obtains a high readership, this in turn attracts more advertisers.
64. Network effects can raise the barriers to entry and expansion and impede effective competition from developing. In a market in which network effects are important, established suppliers may enjoy a first mover advantage and occupy a dominant position in a market that is enduring and difficult for new entrants to disrupt. This may result in highly concentrated markets and dominant firms with market power.

65. By raising barriers to entry, network effects can be an important factor in assessing the likely competition effects of media mergers.

Example – Carsales.com Limited’s proposed acquisition of interests associated with the Trading Post brand (2013)

Carsales and Trading Post both supplied online general merchandise and automotive classified advertising. Under the proposed transaction, Carsales would license the TradingPost.com.au brand and operate the website for a period, and then have the ability to acquire the brand at the end of that period.

Carsales was the largest online automotive classifieds business in Australia, based on audience share, inventory share and revenue share. Taking into account these measures, along with other confidential information available to the ACCC, the ACCC considered Trading Post to be one of Carsales’ closest and most effective competitors.

The ACCC found high barriers to entry and expansion into the relevant markets for the supply of classified advertising. In particular, the two sided nature of the markets and the associated network effects had important implications for the nature of competition within the markets, as well as ease of entry and expansion. In markets with network effects, new entrants face difficulties in achieving the necessary ‘critical mass’. To overcome barriers arising from network effects, a new entrant would need to spend large amounts on marketing and brand awareness to attract both advertisers and consumers, and even this would not guarantee success.

The ACCC opposed the acquisition, concluding that it would increase the already high barriers to entry for the supply of online automotive classified advertising. By adding significant inventory and audience to its websites, the acquisition would also reinforce the network effects or ‘virtuous cycle’ that Carsales enjoyed through having the largest inventory and audience in the market.

Bundling and foreclosure

66. **Bundling (or tying)** refers to the practice of supplying or offering to supply complementary products as a package.
67. **Foreclosure** refers to strategies a vertically integrated firm might adopt by which it uses its position in one market to foreclose rivals in another market. For example, it may raise prices or limit access for downstream competitors to an important input, or raise the cost or limit access to a sufficient customer base for upstream competitors.
68. The ACCC will closely examine any media merger that enables the merged entity to leverage its market power in one market to substantially lessen competition in another market. For example, a vertical merger between a content supplier that produces premium content and a free-to-air network may raise competition concerns if rival networks or competitors on other platforms need access to the premium content in order to compete effectively. The ACCC is only concerned where these strategies are likely to have the effect of substantially lessening competition.
69. Cross-platform media mergers may provide the merged entity with the opportunity to bundle or tie the supply of products and services across multiple platforms.
70. In some cases, competition concerns can arise where a merger facilitates bundling or tying of products which results in the foreclosure of the merged firm’s rivals. For example, where a bundle contains a product (such as key content) which cannot be purchased or used separately, the access of rivals to a sufficient customer base may be hindered or in some cases denied altogether.

71. Bundling and foreclosure may also raise competition concerns under other provisions of the *Competition and Consumer Act 2010*.

Example – Foxtel’s proposed acquisition of Austar (2012)

In assessing the likely competition effects of the proposed acquisition, the ACCC looked closely at the position of Telstra Corporation, which owned a 50% shareholding in Foxtel. Telstra was also a major wholesale and retail supplier of fixed and mobile telephony, data and internet services. In addition, Foxtel and Telstra had an agreement for Foxtel to provide its content on the Telstra T-Box (a digital set top box) by way of IPTV to end consumers.

The ACCC investigated whether Telstra was likely to be able to leverage its relationship with Foxtel to provide a bundle of services including telecommunications services and subscription television, to the detriment of competition in telecommunications markets. The ACCC considered that as telecommunications networks and IPTV continued to develop, it was 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.

The ACCC considered that if the proposed acquisition proceeded, Telstra’s interest in a combined Foxtel-Austar would be likely to limit the development of competition in telecommunications markets for the supply of fixed broadband and fixed voice services; and Telstra, by virtue of its shareholding in Foxtel-Austar, would be likely to obtain preferential access to audio-visual content from the merged entity.

The ACCC was also concerned that the merged entity might be able to leverage its substantial customer base in the national market for the retail supply of pay-TV services to acquire content rights on an exclusive basis, and consequently constrain competitive entry or expansion by other parties on other emerging platforms.

The ACCC did not oppose the proposed acquisition, subject to an undertaking.

Minority shareholdings

72. The ACCC approaches its competition assessment of mergers involving the acquisition by one party of a controlling interest in another company in the same way as an acquisition of all the shares of the target company. While a majority shareholding would in many cases ensure control, much lower shareholdings might also be sufficient. In some circumstances, a minority shareholding that does not reach the level of control may also be of concern.
73. The ACCC’s *Merger Guidelines* provide more details on factors the ACCC may consider in determining whether a minority acquisition may give rise to a contravention of section 50 of the Act. These include the size and significance of the proposed shareholding and the appointment of directors to the target firm’s board.

Example – Foxtel and Ten Network’s proposed minority acquisitions of Ten, MCN and Presto (2015)

Foxtel proposed to acquire up to 15% of Ten while Ten proposed to acquire a 24.99% stake in MCN, a supplier of advertising opportunities on subscription television channels. Ten also had an option to acquire 10% of Presto TV, a joint venture between Foxtel and Seven West Media.

The ACCC considered, among other issues, the extent to which the proposed acquisitions would result in Foxtel being able to influence Ten’s decision making, or in an alignment of incentives between Foxtel, Ten, MCN and Presto.

In considering whether Foxtel’s acquisition of a minority shareholding would enable it to exercise an increased degree of influence over Ten, the ACCC looked at a range of factors including the significance of the size of Foxtel’s investment, Foxtel’s right to appoint directors to the Ten board, and the composition of the rest of the board.

The ACCC also looked at whether the proposed acquisitions would lead to a greater alignment of the interests of Foxtel and Ten, thereby altering their incentives, but concluded that the proposed acquisitions were unlikely to result in a substantial lessening of competition.

The ACCC did not oppose the proposed acquisition.

Engaging with the ACCC

74. Merger parties are encouraged to consult with the ACCC well before completing a merger which is likely to fall within the notification threshold set out in the ACCC's *Informal Merger Review Process Guidelines*.
75. Where a proposed merger is notified to the Foreign Investment Review Board (FIRB) and competition concerns may be relevant to that proposal, FIRB will consult with the ACCC.
76. The ACCC may also liaise with other relevant government agencies. In the case of media mergers, this may include the Australian Communications and Media Authority (ACMA).

Potential for remedies

77. In some cases, merger parties can offer the ACCC a court enforceable undertaking under section 87B of the Act to implement structural, behavioural or other measures that address the competition concerns identified by the ACCC. Undertakings of this type are also referred to as 'remedies.'
78. Merger parties are encouraged to discuss the form and content of an undertaking with the ACCC before the document is prepared. The *Merger Guidelines* provide guidance on the types of undertakings the ACCC accepts, but as a general principle the ACCC is more likely to accept structural remedies over behavioural remedies to resolve its competition concerns.
79. The process by which the ACCC will consider proposed undertakings is set out in the ACCC's *Informal Merger Review Process Guidelines*.

Example – Foxtel's proposed acquisition of Austar (2011-2012)

Foxtel provided a court enforceable undertaking to address the ACCC's concerns that the merger would increase the merged firm's ability to obtain exclusive content. The core element of the undertaking was an obligation on Foxtel not to acquire certain distribution rights to certain independent content on an exclusive basis.

As a result, the ACCC did not oppose the merger. The objective of the undertaking was to lower barriers to entry in telecommunications and subscription television markets. It aimed to make available sufficiently attractive content to emerging competitors to enable them to develop competitive and sustainable offers. It also sought to limit the ability of the merged entity to take advantage of its increased subscriber base to achieve favourable contract terms.