

Australis-Foxtel — why the merger was opposed



Few Commission actions have attracted as much comment as its decision late last year to oppose the proposed merger of Foxtel (which is jointly owned by News Ltd and Telstra) and Australis Media.

It is unfortunate that much of the accompanying publicity has obscured the reasons for the Commission's stance and confused the issues.

The companies formally notified the Commission on 25 July that heads of agreement for the merger had been signed.

With a completely open mind on the matter, though recognising its significance, the Commission began detailed market inquiries.

Over the following several months it sought information from Australis and Foxtel themselves — in meetings and by exchange of correspondence — and raised competition issues with them.

It advised the companies of the authorisation procedure available under the Act.

This is important. The authorisation process gives the Commission power to exempt conduct which would otherwise breach the Act — such as a merger with substantial anti-competitive consequences. To do so it must be satisfied that the public benefits flowing from the conduct outweigh its anti-competitive effects.

Authorisation is a very public process, permitting participation by interested parties other than the main players.

It is particularly well suited to examination of the 'failing company' issue in merger matters.

However, Foxtel and Australis elected not to test the matter in this fashion and informed the Commission that the merger would go ahead unless it sought an injunction.

After extensive inquiries and a full assessment of the information before it, the Commission advised the parties of its concerns about the proposal. It requested undertakings that they take no further steps to complete the merger without seven days notice to the Commission.

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Foxtel and Australis declined to give this undertaking, leaving the Commission no option but to go to the Court for an injunction.

It did so on the grounds that the merger would reduce competition in the pay TV and local telephony markets.

In pay TV, the Commission believed that the merger would give a combined Foxtel/Australis Media business a large market share — especially important when it comes to obtaining and retaining programming.

In telephony, the capacity of Optus to compete with combined pay TV and telephony services would be weakened.

The case was scheduled for a three week hearing — to be heard and determined before last Christmas.

However, the companies chose not to contest the case, and subsequently terminated the merger proposal.

The Commission believes that in time its opposition to the proposal will be seen as an important decision in defence of competition of the local telephony market, which is of vital importance to the economy as a whole.

It was convinced that had the merger gone ahead Optus, Telstra's only facilities-based competitor, would have withdrawn from the telephony and pay TV markets — becoming just another of the many small players dependent on access to Telstra's networks. The ultimate losers would have been Australian telephone users.

This was not mere speculation, but based on intensive market investigations. And the view that the merger would breach the Act was unequivocally supported by Senior Counsel. That the Commission was prepared to contest the matter in Court against such powerful interests amply demonstrates its confidence in these assessments.

Much has been made in some quarters of Australis' financial difficulties and the resulting loss of jobs.

The Commission's view is that these are of its own making, the result of high-cost, high-risk commercial decisions in a market dominated by very powerful players.