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3 April 2020

Luke Woodward
Partner
Competition + Regulation
Gilbert + Tobin

By email: [REDACTED]
Cc: [REDACTED]

Dear Mr Woodward

Re: Exclusive dealing notification N1000509 lodged by TVSN Channel Pty Ltd – market feedback

I refer to the notification of exclusive dealing lodged by TVSN Channel Pty Ltd (**TVSN**) on 30 October 2020.

The Australian Competition and Consumer Commission (**ACCC**) has conducted market inquiries with a range of interested parties. **Attachment A** sets out a summary of the issues raised by interested parties, both publicly and confidentially (in a de-identified form). **Attachment A** also includes the ACCC's preliminary views about some of the concerns raised by interested parties.

The summary and comments should not be regarded as representing the ACCC's concluded view or an exhaustive review of the competition concerns it may have. We are still conducting targeted market inquiries with market participants and new issues may come to light.

I have also set out an information request at **Attachment B**.

Next steps

I request your response to the **Attachment B** information request, and any response you wish to provide to the issues summarised at **Attachment A**, by **17 April 2020**.

Subject to our consideration of any request for exclusion from the public register, a public version of your response to this letter with confidential information redacted will be placed on the ACCC's public register.

This letter will also be published on the public register.

If you wish to discuss the issues identified in **Attachment A** or the information request, or wish to explain some of your responses to the information request, please contact Miriam Kolacz on (03) 9658 6476 or at miriam.kolacz@acc.gov.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'G Jones', with a long horizontal flourish extending to the right.

Gain Jones
Director
Adjudication

Attachment A

The notified conduct

Section 3.1 of the exclusive dealing notification lodged by TVSN (**Notification**) describes the notified conduct as follows:

TVSN proposes to engage suppliers on the condition that if the supplier, distributor or manufacturer wish to market, promote and sell products via TVSN, then that supplier, distributor or manufacturer must not market, promote or sell products on another television shopping channel or direct selling medium involving video footage or live streaming in the presentation and promotion of goods, and which utilise the presentation and / or demonstration of goods as an integral part of the marketing and sales process (**Competitor Shopping Channels**).

In a subsequent letter dated 10 January 2020 (available on the ACCC's [public register](#)), TVSN sought to clarify what it intends by the term Competitor Shopping Channels. However, the clarification provided was expressed only in general and qualified terms. TVSN states that the term Competitor Shopping Channels, as used to describe the notified conduct, means (emphasis added):

A dedicated shopping channel which utilises the live presentation and / or live demonstration of goods as an integral part of the marketing and sales process. A dedicated shopping channel is *generally* broadcast on free-to-air television or subscription television, and supplemented through other online platforms. A dedicated shopping channel would *generally* operate 24 hours per day, 7 days a week, with features such as an advertised schedule featuring times of live shopping shows or repeat shopping shows, presenters trained to deliver specific shopping shows, a call centre to place sales orders and a customer service centre (the Shopping Channel Features).

The ACCC does not consider that the letter provided on 10 January 2020 clearly and unambiguously clarifies the intended scope of the notified conduct.

In any event, while it is open to TVSN to provide additional information clarifying the intended scope of the notified conduct, this cannot change the actual scope of the conduct originally notified. The ACCC must assess the notified conduct as described in section 3.1 of the Notification. Any protection afforded by the Notification against breaching the exclusive dealing provisions of the *Competition and Consumer Act 2010* (Cth) is in respect of the conduct as notified.

The ACCC's market inquiries

The ACCC has received public submissions from Australian Shopping Network Pty Ltd (**Openshop**), Nine Entertainment Co. (**Nine**), Seven West Media (**Seven**), and a joint submission from Prime Media Group and Southern Cross Austereo (**Prime/SCA**). Each of these businesses operates either a dedicated television shopping channel and/or free-to-air television stations whose broadcast schedules include programming that features product demonstrations and promotions.

The ACCC also received one confidential submission from a business that supplies TVSN. This has been excluded from the public register.

The ACCC also undertook market inquiries with a range of interested parties.

The market feedback is summarised below, including de-identified feedback that the ACCC received through confidential submissions and market inquiries. Public submissions are available on the ACCC's [public register](#).

The ACCC's preliminary views about some of the concerns raised by interested parties are also summarised below.

Impact on competition and public detriments

Views of suppliers¹

The ACCC has interviewed a number of suppliers. Each supplier requested that they speak to the ACCC on a confidential basis.

Most of the suppliers to whom the ACCC spoke and who expressed concerns about the notified conduct also said that they are concerned that their ongoing commercial relationship with TVSN may be adversely affected if their comments about the notified conduct are made public.

Generally, suppliers have indicated that they value their ongoing and often long-term commercial relationships with TVSN. Some suppliers indicated that they would not be concerned about TVSN engaging suppliers on condition that the supplier did not market, promote or sell products on another television shopping channel because they are not currently interested in pursuing the option of supplying another television shopping channel. The ACCC notes that suppliers with this preference are not affected by the notified conduct. Rather, the effect of the notified conduct is to prevent suppliers who do wish to supply TVSN as well as other television shopping channels from doing so.

Most suppliers indicated that they would value the opportunity, or at least the choice, to be able to supply other television shopping channels while continuing to supply TVSN. In particular, some suppliers indicated that they would value the opportunity to supply Openshop, as this would provide an opportunity to reach a larger audience, including possibly a younger demographic, diversify their sales channels and customer base, and increase sales. Suppliers also noted that supplying Openshop may provide opportunities to build relationships that could assist them in expanding into overseas markets where Openshop's parent company operates television shopping channels.

Most suppliers indicated that if forced to choose between supplying TVSN exclusively or being able to supply other television shopping channels but not TVSN, they would (at least in the short term) be likely to continue to supply TVSN. This is because there would be a high cost of losing their potentially significant revenue streams through TVSN, and there is a significant risk that they are not able to replace this revenue by supplying other television shopping channels, at least in the short term.

Accordingly, most TVSN suppliers consider that the notified conduct would prevent them from supplying other television shopping channels, particularly Openshop, for fear of damaging or ending their relationship with TVSN.

The degree of risk that suppliers perceive in deciding whether to effectively 'switch' from TVSN to Openshop appears to depend on several key factors, including: the size of their business; the proportion of their total sales derived through TVSN; how crucial the television

¹ Suppliers, distributors or manufacturers as described in section 3.1 of the Notification.

shopping medium is as a distribution channel for their product(s); and the likelihood that they will be able to replace these sales elsewhere.

In addition to concerns about how the notified conduct may impact their own businesses, some suppliers raised concerns that the notified conduct may inhibit the ability of other television shopping channels, particularly new entrants, to compete with TVSN by restricting the availability of suppliers to them. These concerns are similar to those expressed by competitors of TVSN, as summarised below.

Views of television broadcasters

Openshop submits that prior to it launching, TVSN held a monopoly position in the sale and promotion of goods by means of a television shopping network format and the notified conduct will entrench this position. Openshop, Seven and Prime/SCA all submit that TVSN engaging suppliers on an exclusive basis will inhibit the ability of television shopping channels to compete with TVSN to engage suppliers. Nine, Seven and Prime/SCA also submit that the notified conduct will raise barriers to entry in establishing a television shopping channel.

Nine, Seven and Prime/SCA also raise concerns that the notified conduct will inhibit the ability of free-to-air broadcasters to compete with dedicated television shopping channels through programing that features live product demonstrations and promotions.

Openshop, Nine, and Prime/SCA submit that a restriction on suppliers who supply TVSN also supplying other television shopping channels and/or featuring on programs that include live product demonstrations and promotions, reduces opportunities and choice for suppliers in promoting their products and competition between suppliers in doings so, and restricts consumer access to these products.

Preliminary views of the ACCC

The ACCC has not yet formed a view about the scope of the relevant market(s) for the purpose of assessing the likely impact on competition of the notified conduct. In particular, the ACCC is considering the degree of substitutability between opportunities available to suppliers to promote and/or distribute their products through dedicated television home shopping channels and opportunities available through other mediums. For example, infomercial and/or advertorial advertisements that are incorporated into some free-to-air network programing.

However, the ACCC's preliminary view is that the relevant market is not as broad as that submitted by TVSN. That is, the retail market for consumer goods in Australia. The scope of the conduct suggests a narrower market definition. It would be unlikely to be commercially viable for TVSN to prevent suppliers from also supplying Competitor Shopping Channels, unless TVSN had some degree of market power such that a significant portion of TVSN suppliers are restricted from supplying Competitor Shopping Channels.

The ACCC's market inquiries to date, and in particular, the views expressed by suppliers about the importance of being able to continue to supply TVSN, indicate that many suppliers will forgo opportunities to supply Competitor Shopping Channels if required to exclusively supply TVSN.

Consequently, it appears that the notified conduct is likely to create barriers to entry and reduce the ability of Competitor Shopping Channels to compete with TVSN. This in turn is likely to reduce the pressure on TVSN to compete for customers and/or suppliers by lowering its fees or prices (including negotiating smaller margins on stock purchases) and/or increasing the quality of its services.

For consumers, reduced competition between Competitor Shopping Channels and/or between suppliers may result in higher prices, reduced product quality, less product differentiation and lower quality of product information.

Public benefits

In deciding whether to issue a notice to revoke the protection afforded by a notification, the ACCC first assesses whether the notified conduct is likely to substantially lessen competition. If the ACCC concludes that it would, it then assesses whether the notified conduct would result, or be likely to result, in a public benefit that would outweigh the public detriment of the notified conduct. The ACCC's assessment of public benefits largely focuses on how the conduct may provide value to the community generally.

TVSN submits that the notified conduct would have the public benefit of preventing 'suppliers from obtaining the considerable benefits of training in Australian Consumer Law and exposure to a target market on the TVSN channel so that consumers try their products, in order to switch to exposure on a Competitor Shopping Channel, undermining TVSN's core business'. However, in market inquiries, suppliers did not consider that they had been provided with substantive training by TVSN in relation to these issues. Several suppliers explained that TVSN employs a brief, initial 'screen-test' (akin to an audition) prior to a supplier presenter's first on-screen appearance, but did not consider that they had received broader training from TVSN.

TVSN also submits that one of the purposes of the notified conduct is to 'prevent TVSN suppliers from misusing TVSN's proprietary TV shopping selection information sales metrics data and using such information and data in conjunction with the Competitor Shopping Channels'. Openshop submits that to the extent that such information is confidential, it can be protected by contractual provisions between TVSN and suppliers. No supplier indicated that TVSN provides them with information or data beyond basic sales figures, and several suppliers expressed frustration at a perceived lack of transparency regarding TVSN's provision of sales and audience data. More generally, suppliers indicated that they are not provided with, and do not have access to, other TVSN proprietary or confidential information.

TVSN further submits that the notified conduct 'limits the risk of consumer confusion in relation to pricing, brand content, quality, service policies and consumer trust'. Suppliers do not share this concern. Several suppliers noted that consumers regularly see identical products and brands advertised through multiple channels, including different television networks, and submitted that consumers are astute enough to understand which television shopping channel they are viewing if they see an identical product advertised. Several suppliers also said that if they were appearing on both TVSN and Openshop they would be likely to differentiate their product offerings on each channel.

TVSN submits that the notified conduct would have the public benefit of preventing 'Competitor Shopping Channels from diluting consumer interest in TVSN shows, which would occur if products featured by TVSN in one of its programs were later featured by a Competitor Shopping Channel'. TVSN also submits that the notified conduct has the purpose and would have the public benefit of increasing 'brand loyalty and sales of TVSN marketed products by ensuring that the product lines that it offers are only featured on the TVSN channel, not any Competitor Shopping Channels'. Openshop and Prime/SCA submit that these are private benefits to TVSN.

Preliminary views of the ACCC

The ACCC notes that market inquiries do not support TVSN's submission that restricting TVSN suppliers from also supplying Competitor Shopping Channels is necessary to protect TVSN's proprietary and/or confidential information, avoid customer confusion or that TVSN provides training that could be used by suppliers in a way that could undermine TVSN's business model.

The ACCC also notes that preventing dilution of consumer interest in TVSN shows and increasing TVSN brand loyalty represents a transfer of audience from Competitor Shopping Channels to TVSN, rather than generating a net increase in audience or sales across all television shopping channels.

The ACCC considers that a central tenet of most of TVSN's public benefit arguments is that precluding TVSN suppliers from also supplying Competitor Shopping Channels will maintain and enhance TVSN's ability to operate its television shopping network. In particular, restricting suppliers from supplying its competitors is said to prevent 'free riding' on TVSN's service by Competitor Shopping Channels and suppliers.

In this respect, the ACCC considers that arrangements that facilitate more vigorous or effective competition are likely to result in a public benefit. However, it is not necessarily the case that protecting the position of a particular competitor in a market is likely to produce a public benefit, particularly if the means of doing so is likely to reduce the ability of Competitor Shopping Channels to compete with TVSN and create barriers to entry.

In this case, the notified conduct is likely to impose at least some restriction on the ability of Competitor Shopping Channels to compete with TVSN. In order to accept that the notified conduct would maintain and enhance TVSN's ability to efficiently operate its television shopping network, and that this constitutes a public benefit, the ACCC would need to be satisfied that:

- free-riding is occurring
- the free-riding is significantly affecting TVSN's ability to supply sales, marketing and promotional opportunities to suppliers and/or retail products and services to customers, or its incentives to make the necessary investments to continue to do so, and
- the notified conduct will sufficiently address the free-riding so as to allow and incentivise TVSN to continue to supply these products and services.

The ACCC's preliminary view is that the information it has obtained to date does not support the argument that free-riding is significantly affecting TVSN's ability to supply these products and services to suppliers and customers.

Attachment B

Request for information and documents

1. Describe in detail the types of information in each of the following categories that TVSN is seeking to limit Competitor Shopping Channels having access to:
 - (a) on the job training, TVSN know how, confidential information and sales / operational processes provided or made available to trained television shopping presenters, and
 - (b) TVSN's proprietary sales processes, dollars per minute product selection criteria and information and training techniques.as described in section 3.3 of the notification.
2. Describe in detail TVSN's proprietary TV shopping selection information and sales metrics data, as referred to in section 9.4(a)(4) of the notification, that TVSN states that it is seeking to prevent TVSN suppliers from misusing.
3. Describe in detail each process that TVSN undertook, other than developing and/or implementing the notified conduct, to:
 - (a) limit Competitor Shopping Channels having access to TVSN's proprietary sales processes, dollars per minute product selection criteria and information and training techniques
 - (b) prevent TVSN suppliers from misusing TVSN's proprietary TV shopping selection information sales metrics data and using such information and data in conjunction with Competitor Shopping Channels
 - (c) limit the risk of consumer confusion that TVSN considers may otherwise arise in relation to pricing, brand content, quality, service policies and consumer trust
 - (d) prevent dilution of consumer interest in TVSN shows, and
 - (e) explore ways to discourage or prevent suppliers or potential suppliers from marketing, promoting or selling products on Competitor Shopping Channels.
4. For the period of 1 February 2018 to the date of this letter, and for the purpose of addressing points (a) to (e) in question 3 above, provide details of any requirements that TVSN has stipulated or requested be included in any contract entered into between a third party and any person appearing on TVSN in any of the following roles:
 - trained television shopping presenter
 - presenter
 - guest presenter
 - auditioned guest
 - auditioned brand representative
 - ambassador
 - brand-owner, or
 - brand-representative

(On-screen Role).

5. Describe in detail the process TVSN undertook to develop the notified conduct and decide to lodge a notification with the ACCC under section 93(1) of the CCA.
6. Describe TVSN's understanding of the factors that influence suppliers' or potential suppliers' decisions about whether to market, promote and sell products through a television shopping channel or through other means and how TVSN seeks to address those factors.
7. Describe TVSN's understanding of the factors that influence suppliers' or potential suppliers' decisions about which television shopping channel or television shopping channels to market, promote and sell products through and how TVSN seeks to address those factors.
8. Describe in detail TVSN's business model, including a description of TVSN's costs and how it sets prices for, or recovers costs from, suppliers and/or consumers.
9. For the period of 1 June 2019 to the date of this letter, state:
 - (a) the proportion of sales made through TVSN's website and sales made through TVSN's television channel, and
 - (b) the details known to TVSN of any suppliers who products were sold concurrently via TVSN and a Competitor Shopping Channel, including the names, direct email addresses and phone numbers of those suppliers, and the details of those product(s).
10. For the period of 1 February 2019 to the date of this letter, list the names of all suppliers and identify which suppliers switched between TVSN and Openshop at any time and the date at which each supplier switched.
11. For TVSN's current 50 largest suppliers by both value of sales and the number of products sold via TVSN, provide the:
 - (a) name, title and direct email address of a senior manager
 - (b) value of sales sold via TVSN, and
 - (c) quantity of products sold via TVSN.
12. For the period of 1 February 2018 to the date of this letter, provide the name, direct email address and phone number for each consumer or supplier who has raised concerns with TVSN about suppliers marketing, promoting or selling products on Competitor Shopping Channels.
13. For the period of 1 February 2018 to the date of this letter, provide the name, title, company, direct email address and phone number for all suppliers or potential suppliers that have complained to or raised concerns with TVSN about TVSN requiring or proposing to require that suppliers or potential suppliers not market, promote or sell products on Competitor Shopping Channels.
14. For the period of 1 February 2018 to the date of this letter, describe in detail any instances of Competitor Shopping Channels "free-riding" on TVSN's product research, training of guest presenters, demonstration techniques and/or brand reputation.
15. Describe in detail TVSN's understanding of why it is important to TVSN for consumers not to watch similarly formatted shows of same branded products on Competitor Shopping Channels, and why this reasoning may not apply to other marketing formats.
16. Describe in detail any instances of current or former suppliers:

- (a) misusing TVSN's metrics data and/or using TVSN's metrics data in conjunction with any Competitor Shopping Channel, or
 - (b) "free-loading" on the benefits of exposure to TVSN marketing, quality assurance, and training in Australian Consumer Law, in order to switch their supply to a Competitor Shopping Channel, thereby undermining TVSN's core business.
- 17. Provide TVSN's monthly revenue figures for the 2017, 2018 and 2019 calendar years, broken down into revenue from:
 - (a) product sales, and
 - (b) any other source, such as fees or commissions.
- 18. Describe in detail TVSN's formal or informal policies or guidelines that prevent or restrict any person or class of persons from appearing on TVSN in any On-screen Role.
- 19. Provide details about the audience of TVSN and any Competitor Shopping Channels, including:
 - (a) the number of TVSN viewers for the 2017, 2018 and 2019 calendar years, broken down on a monthly basis, and broken down by television, website or other platforms
 - (b) if known to TVSN, the number of Openshop television viewers in 2019, including if available, broken down by month
 - (c) the number of consumers who purchased a product from TVSN for the 2017, 2018 and 2019 calendar years, broken down by month
 - (d) any research about audience demographics commissioned, undertaken by or provided to TVSN between 1 February 2018 and the date of this letter, and
 - (e) any research about audience viewing habits and in relation to television shopping channels commissioned, undertaken by or provided to TVSN between 1 February 2018 and the date of this letter.
- 20. Provide copies of each version of the:
 - (a) standard TVSN Supplier Agreement (as described in section 7(iii) of the notification) that suppliers engaged by TVSN have entered into at any time between 1 February 2018 and the date of this letter, and
 - (b) standard form contract that any person appearing on TVSN in any On-screen Role is or has been required to enter into with TVSN that has been in place at any time between 1 February 2018 and the date of this letter.
- 21. Provide copies of each document routinely provided to persons appearing on TVSN in an On-screen Role, whether engaged directly by TVSN or through a third party, that constitute or contribute to the on the job training provided by TVSN.
- 22. Provide the current versions of the Direct Group and (if applicable) TVSN confidentiality policies, for example, as referred to in the TVSN Brand Ambassador Agreement.