



Mr Gavin Jones
Director, Adjudication Branch
Australian Competition and Consumer Commission
23 Marcus Clarke Street
CANBERRA ACT 2601

By email: adjudication@acc.gov.au

30 January 2020

Dear Mr Jones,

Exclusive dealing notification N1000509 lodged by TVSN Channel Pty Ltd – interested party consultation

We refer to your letter dated 10 December 2019. Thank you for the opportunity to provide a submission on the exclusive dealing notification received by the Australian Competition and Consumer Commission (**ACCC**) from TVSN Channel Pty Ltd (**TVSN**).

This submission is on behalf of Prime Media Group (**Prime**) and Southern Cross Austereo (**SCA**). Prime and SCA are concerned that the arrangement proposed by TVSN will have the purpose or likely effect of substantially lessening competition in the television shopping channel market and that there is no discernible public benefit that would outweigh the potential detriment.

1. Background

By way of background, Prime and SCA are regional television broadcasters that operate free-to-air television stations across Australia.

Prime Media broadcasts in northern New South Wales, southern New South Wales, Australian Capital Territory, regional Victoria, Mildura, the Gold Coast area of south eastern Queensland and all of regional Western Australia.

SCA broadcasts in southern New South Wales, Queensland, the Australian Capital Territory, Griffith, regional Victoria, Tasmania, the Northern Territory and the Spencer Gulf region of South Australia.

Prime and SCA each transmit datacasting services dedicated to home shopping pursuant to datacasting licenses granted by the Australian Communications and Media Authority (**ACMA**) under clause 7 of Schedule 6 of the *Broadcasting Services Act 1992 (Cth)* (**BSA**).

Prime’s service is known as iShop TV (**iShop**), which is owned and operated by Prime in partnership with Brand Developers Aust Pty Ltd. iShop has been datacasting in Prime’s Australian markets since 1 May 2013.

SCA licenses a portion of its datacasting spectrum to independent home shopping operators as follows:

| Commenced broadcasting on SCA | Home shopping network | SCA TV licence area |
|--------------------------------------|--|--|
| 2013 | TVSN | Spencer Gulf TV1 Darwin TV1 |
| 2013 | Aspire TV, licensed by Brand Developers Aust Pty Ltd | Regional Victoria (Eastern Victoria TV1 and Western Victoria TV1) Southern New South Wales TV1 Regional Queensland TV1 Tasmania TV1 |

SCA also licensed a portion of its datacasting spectrum to TVSN in northern NSW from 2013 to 2017. SCA sold its northern NSW commercial television broadcasting and datacasting licences to WIN Corporation in 2017. SCA’s agreement with TVSN in relation to northern NSW was also novated to WIN at that time.

iShop and Aspire TV each broadcast infomercials, opportunities for consumers to purchase products, demonstrations and special offers.

2. Proposed conduct

According to TVSN’s Notification of Exclusive Dealing dated 30 October 2019 (**Notification**), TVSN has proposed that, in future, it will seek to engage its product suppliers on an exclusive basis, whereby any supplier who wishes to market, promote or sell specific products via TVSN cannot then market, promote or sell products on any other television shopping channel or direct selling medium via live presentations, demonstrations and special offers (the **Proposed Conduct**).

3. Concerns regarding the Proposed Conduct

Prime and SCA have concerns that the Proposed Conduct will significantly lessen competition for the supply of products not just on home shopping channels in Australia, but for broader retail outlets; that it has no discernible benefits to the public; and will have a detrimental impact on a number of stakeholders.

As further outlined below, we are of the view the Proposed Conduct will impact, or have the potential to impact, the following parties:

- (a) Television shopping channels, including Openshop, iShop and Aspire TV, as well as any other broadcaster that operates a shopping channel and any broadcasters who may introduce a home shopping channel in the future;

- (b) Other businesses involved in direct selling mediums such as live streaming the presentation or promotion of goods;
- (c) Product suppliers, distributors and manufacturers wishing to market and sell their goods via more than one of Australia's television home shopping channels; and
- (d) Consumers who will potentially have restricted access to product suppliers.

3.1 Other Television Home Shopping Channels

While TVSN only identified one potential competitor channel that may be impacted by the Proposed Conduct (being the Australian Shopping Network Pty Ltd which operates the 'Openshop' Channel), Prime and SCA submit that competition in the home shopping market will be lessened and their dedicated home shopping channels will be detrimentally affected by TVSN's proposed arrangement. Further, while TVSN has sought to clarify its definition of 'Competitor Shopping Channels'¹, the definition remains vague and in our view, the Proposed Conduct still has the potential to affect more stakeholders than have been identified by TVSN and subsequently lessen competition in the home shopping market. For example, breakfast and morning programs on free-to-air television stations frequently include live product demonstrations and promotions that are very similar to the content on dedicated home shopping channels.

Bearing in mind the current broadcast market in Australia and the rapidly changing television landscape, the Proposed Conduct also has the potential to create long term negative effects on the television home shopping market in Australia. Any network, streaming service or media organisation that introduces a television or live streaming channel focused on the sale of products in the future, will be restricted in their ability to source product suppliers, distributors and manufacturers who will be locked into an exclusive arrangement with TVSN.

3.2 Other businesses involved in direct selling of goods

It is not just competitor television shopping channels that will be impacted by the Proposed Conduct, but other businesses who use the technique of presentation and/or demonstration of goods as part of their marketing and sales processes. In the absence of a clear definition of what constitutes a Competitor Shopping Channel, the Proposed Conduct could have far-reaching consequences for any business that sells and advertises products using a presenter or live demonstration, whether these are via television or other broadcast mediums, such as the internet.

3.3 Product suppliers

If product suppliers, distributors and manufacturers (together referred to as **Retailers**) are restricted from marketing, promoting and selling their products on television shopping channels or direct selling mediums other than TVSN, these Retailers will be prevented from accessing buyers that they otherwise would have been able to access if not for the exclusive arrangements in place with TVSN.

3.4 Consumers

If Retailers are only able to sell their products via TVSN, this will result in public detriment in the form of restricted consumer choice as to how consumers purchase products via either home shopping television channels or any other means that fall within TVSN's broad definition of

¹ TVSN 'Clarification re. Notification of Exclusive Dealing,' 10 January 2020

Competitor Shopping Channels. The Proposed Conduct would mean consumers will only be able to purchase certain products from a television home shopping channel operated by TVSN resulting in a significant concentration of market power in the hands of TVSN and less consumer choice.

4. Lack of Detailed Information

In our view, in addition to the negative impacts on the above parties, TVSN's Notification does not include adequate detailed information in order to fully understand the effect or likely effect of the Proposed Conduct on the home shopping market. As will be further outlined below, TVSN has failed to:

- (a) define the market in which the Proposed Conduct will operate;
- (b) adequately outline any public benefit as a result of the Proposed Conduct; and
- (c) articulate the terms and scope of any proposed agreements between TVSN and Retailers.

4.1 Definition of Market

TVSN has not provided a sufficient definition of the market, nor has it provided requisite market information that would enable a determination on the effect or likely effect of competition in a market resulting from the Proposed Conduct. TVSN has broadly identified the market as "the retail market for consumer goods in Australia"² and has also referred to itself as "akin to an (on-line) department store"³. While it has attempted to clarify the definition of 'Competitor Shopping Channels' by letter dated 10 January 2020, TVSN's definition of 'dedicated shopping channel' remains ambiguous. TVSN has used the term 'generally' to describe both the manner in which a 'dedicated shopping channel' may broadcast and how it might operate.⁴ In our view the definitions of 'Competitor Shopping Channels' and 'dedicated shopping channel' are too vague to be able to determine the scope of the market impacted by the Proposed Conduct.

TVSN has also made no attempt to identify the market shares of the various stakeholders that will be impacted by the Proposed Conduct, failing to mention iShop and Aspire TV or any other home shopping channel in Australia (other than Openshop) as potential parties that may be impacted by the Proposed Conduct and not adequately describing how it proposes to classify "direct selling mediums" which has the potential to be defined very broadly. Without this baseline information, it is difficult to understand how TVSN can identify either a public benefit or public detriment, nor how it can conclude that the Proposed Conduct "would not have an effect on existing competitors".⁵

4.2 Public Benefit

TVSN has not articulated how the Proposed Conduct will create any public benefit whatsoever. It appears that TVSN has simply outlined its business strategy and listed the benefits that will flow to TVSN as a result of the Proposed Conduct, rather than identify any benefit to the public. Other than bolstering consumer trust in TVSN, which is arguably not a benefit to the public, but a benefit to TVSN, we fail to see how the Proposed Conduct creates any benefits to the public.

² TVSN Notification of Exclusive Dealing dated 30 October 2019, page 5

³ Ibid, page 8

⁴ TVSN 'Clarification re. Notification of Exclusive Dealing' 10 January 2020

⁵ TVSN Notification of Exclusive Dealing dated 30 October 2019, page 8

4.3 Exclusivity Arrangement

TVSN has provided no information on the proposed terms of the agreements between TVSN and its Retailers, including how many Retailers will be impacted by the arrangement, whether the arrangement will apply to TVSN's on-air or online Retailers (or both), the length of any exclusivity period, whether these arrangements will apply to all current and/or future Retailers (which may impact new competitors entering the market) or whether there will be an option for Retailers to opt-out of such an arrangement.

Prime and SCA contend that this information is material to assessing the impact on competition within the home shopping market as well as the impact on other stakeholders such as advertisers and the Retailers themselves.

5. Potential Impacted Parties Unaware of TVSN's Proposed Conduct

In addition to the matters outlined above, we believe that there are numerous stakeholders that will potentially be negatively impacted if the Proposed Conduct is allowed, who have not been made aware of the Notification and who therefore have not had the opportunity to submit their opposition to the Proposed Conduct. In our view, a more thorough and detailed analysis of the impacted stakeholders should be conducted, including but not limited to, other home shopping channels in Australia and their product suppliers, advertisers and consumers.

6. Conclusion

For the reasons outlined above, Prime and SCA are concerned that the Proposed Conduct is harmful, will lessen or deter competition in the home shopping market by restricting other home shopping channels and mediums from sourcing suppliers and advertisers; constraining suppliers in how and with whom they choose to market and sell their products; and limiting consumer choice.

We do not accept that the Proposed Conduct will result in any benefits to consumers and reiterate that TVSN has failed to identify any possible public benefit in its Notification.

For the reasons outlined above and in the absence of a clear understanding of the impact of the Proposed Conduct on the home shopping market, Prime and SCA submit that any likely benefit will be outweighed by public detriment.

If you have any queries about this submission or would like to discuss the issues further, please contact:

- Sarah Kossew, Legal Counsel, Prime Media Group on [REDACTED] or [REDACTED];
- Tony Hudson, Head of Legal and Corporate Affairs, Southern Cross Austereo on [REDACTED] or [REDACTED].