

# NOTIFICATION OF EXCLUSIVE DEALING

To the Australian Competition and Consumer Commission:

## Notifying party

1. Provide details of the notifying party, including:

1.1. name, address (registered office), telephone number, and ACN

**Name** TVSN Channel Pty Ltd  
(hereafter referred to as **TVSN**)

**Address (registered office)** 431 Warringah Road  
Frenchs Forest  
NSW, 2086

**Telephone Number** [REDACTED]

**ACN** 111 806 958

1.2. contact person's name, telephone number, and email address

**Contact Person's name** Luke Woodward  
Partner, Gilbert + Tobin

**Telephone Number** [REDACTED]

**Email address** [REDACTED]

1.3. a description of business activities

TVSN is an Australian retailer which sells consumer products through live presentation and demonstration on a dedicated television shopping channel. TVSN employs over 250 people and is owned by Direct Group Pty Limited which is an Australian-based home shopping company.

Its television channel operates 24 hours a day, seven days a week, with up to 13 hours of live programming per day created by TVSN's directors, producers, creative and technical personnel and broadcast from TVSN's own television studio.

Most shows feature a specific category of merchandise such as jewellery, health and fitness, beauty, fashion, kitchen, homewares, electronics and manchester and many shows feature products that are new to Australia or the television shopping format.

TVSN identifies and sources products to purchase from around the world that cater to its customer base, pass its stringent quality assurance and compliance requirements and suit its sales platform - presentation through live, informative and entertaining television demonstration. TVSN is also the owner of the registered trade mark or brand name for certain products sold via TVSN's television shopping channel and in some cases develops products directly with designers or personalities including engaging manufacturers to develop and manufacture the designs.

Products can be ordered via TVSN's website and over the phone. TVSN has an on-site Customer Care Centre and customers can place orders or speak to a Customer Care Representative 7 days a week between the hours of 6 am to 1am Monday to Friday and 7am to 1am Saturday and Sunday. TVSN also has an automated telephone ordering system that can take telephone orders 24 hours a day, 7 days a week.

TVSN also provides a product distribution function as well as after sales support and a customer loyalty program. TVSN devotes a considerable amount of resources to warehousing, packaging, postage and stock management with the ability to stock and deliver products to customers from TVSN's on-site warehouse facility. After sales support and the terms of trade that customers receive when buying products from TVSN is essential to customer loyalty. TVSN assists its customers in accessing supplier guarantees and warranties and complements its after sales support with a customer loyalty program. TVSN also conducts after sales communications based on rating and review feedback and takes that feedback into account as part of its efforts to continually improve its service offering to customers.

As a by-product or consequence of selling products purchased from suppliers via its television shopping channel, TVSN also provides suppliers with marketing and promotional services. TVSN does not market or promote products or provide marketing services where it is not selling or acting as retailer in relation to those products.

Marketing and promotional services includes the development and creation of the televised campaign or feature (including training and support for any supplier provided on-air presenter/ guest), display on the accompanying TVSN website, and the creation of other promotional collateral or materials in support of turning the time that the product is featured on the TVSN television channel into sales. This can include, features in the TVSN Shopper's Guide (the monthly publication issued by TVSN outlining TVSN television channel's planned programming for that month together with other marketing information or product or event features), features in TVSN catalogues (printed and/or electronic product catalogues distributed from time to time to customers), features in marketing events or campaigns and other promotional activities.

1.4. email address for service of documents in Australia.

**Email  
address**



## **Details of the notified conduct**

2. Indicate whether the notified conduct is for:

2.1. exclusive dealing (s. 47 of the *Competition and Consumer Act 2010* (Cth) (the **Act**))

Notice is hereby given, in accordance with subsection 93 (1) of the Act, of particulars of proposed conduct of a kind referred to in subsection 47 (5) of that Act in which the notifying party proposes to engage.

2.2. resale price maintenance (s. 48)

No.

2.3. collective bargaining (s. 93AB). If the notified conduct is for collective bargaining, whether the notified conduct includes a collective boycott.

No.

3. Provide details of the notified conduct including:

3.1. a description of the notified conduct

TVSN is a dedicated television shopping channel retailer (hereafter **DTSCR**). A DTSCR is a retailer which predominantly utilises the live presentation or live demonstration format to sell products to consumers within Australia or New Zealand on a dedicated television shopping channel (ie, one that generally operates 24 hours a day, 7 days a week).

In this context “live” can include a show recorded earlier provided it has the interactive or unscripted features with intermittent or continuous consumer calls to action that distinguish it from a pre-recorded infomercial or advertisement.

The notified conduct relates to the following:

- TVSN can refuse to acquire products and services from a supplier, or has the ability to terminate the supplier agreement, for the reason that the supplier (or related body corporate) has supplied or proposes to supply, or has not agreed not to supply, products or services to another DTSCR.

Where a contract or agreement is entered into with a supplier, this will be reflected in the contract or agreement. The agreement will permit the supplier to terminate the agreement at its own election on giving one month’s notice.

DTSCRs do not include other retailers which do not predominantly utilise the live presentation or live demonstration format to sell products on a dedicated television shopping channel, other broadcasters who may program live presentation or demonstration formats for the sale of consumer products but do not themselves retail those consumer products, or other marketing or distribution channels which the supplier might choose to use to market and/or sell their products including:

- the supplier’s own direct channels;
- other online retail outlet options;
- a bricks and mortar outlet; or
- other televised options including any of the various choices for advertorial or infomercial advertisements, where the supplier is the retailer and receives the product sales and/or the “live” presentation or demonstration format is not used such as, but not limited to:
  - slots on Spree TV, Aspire TV or iShop TV (which do not use the “live” presentation/ demonstration format); or
  - segments broadcast within or during other programming such as Nine’s Today Extra, Channel Seven’s Morning Show and Daily Edition and Channel Ten’s Studio Ten; and
  - segments broadcast in-between programming or during advertorial breaks on the various television channels.

As none of the above options are DTSCRs, the notified conduct does not prevent the supplier from choosing to market and/or sell their products via these options.

Nor does it actually prevent the supplier from choosing to use another DTSCR to feature its products instead of TVSN or from switching from TVSN to another DTSCR.

As at the date of this notification, Hyundai-Openshop is the only other retailer which properly fits the description of a DTSCR and comes within the scope of the exclusive dealing conduct.

### 3.2. any relevant documents detailing the terms of the notified conduct

There are no other relevant documents providing further detail on the terms of the notified conduct.

### 3.3. the rationale for the notified conduct

In order to viably compete against the myriad of options available to consumers for the purchase of consumer goods (including online, mobile, bricks and mortar and other DTSCRs), TVSN seeks to differentiate itself within the live presentation television format.

Creating this differentiated sales outlet for consumers requires significant investment by TVSN (including identifying and sourcing the products and developing the campaign for how that product can best be promoted to optimise the conversion of minutes of television air time into sales dollars).

This involves:

- the use of confidential TVSN know-how and proprietary information which has been developed over time and through experience of what has worked in terms of generating sales and what has not;
- TVSN taking the volume and financial risk on the ability to sell the stock it has purchased via its television shopping channel format; and
- Forward planning in terms of programming, scheduling, production, promotion of future events and campaigns and the purchasing of stock (which depending on the nature of the product and the size of the order might be required well in advance of the intended televised feature or event - sometimes more than 6 months in advance).

TVSN's choice to acquire and invest in the promotion of a supplier's products is based on it having qualities that align with the TVSN business model for viability within the retail space. A model which comprises TVSN's ability to offer customers a 'unique find' within the live demonstration format used by DTSCRs as well as different, informative and entertaining content.

TVSN has finite business, financial and retail space (in TVSN's case – viewing time) resources available to promote and sell the products it acquires from suppliers. As with any retailer, it is fundamental that it have the commercial freedom to choose which suppliers to deal with, including the commercial freedom not to invest its scarce resources in purchasing products from suppliers selling to other direct format competitors. In the event that a supplier elects to use another DTSCR, TVSN will no longer wish to use its finite resources and warehousing space to hold those products when those resources can be better used to stock and promote other products which align with the TVSN business model.

The notified conduct protects the investment TVSN has made in its own brand and the expectation from customers that TVSN will offer them a unique find within the live presentation format and programming content that is different from what can be seen on other DTSCRs. It also reduces the risk of TVSN's brand positioning suffering the negative consequences of another DTSCR providing a poor customer experience (in terms of quality, terms of trade and/or after sales support) or positioning a brand or product and its features and attributes in a way that conflicts or tarnishes the trust relationship between TVSN and its customers.

### 3.4. any time period relevant to the notified conduct.

TVSN wishes to insert a clause into its supplier contracts to reflect the notified conduct. It is intended that the notification protection cover the ability to introduce or operate on the basis of such a clause in TVSN's ongoing commercial dealings with suppliers. In other words, the period of protection afforded under the notification is not intended to be time limited.

4. Provide documents submitted to the notifying party's board or prepared by or for the notifying party's senior management for purposes of assessing or making a decision in relation to the notified conduct and any minutes or record of the decision made.<sup>1</sup>

The decision to notify was not made at the board level. TVSN's senior management decided to avail itself of the notification regime. Whilst, there was no view taken that the notified conduct would result in a substantial lessening of competition, the notified conduct is a form of exclusive dealing and the notification was made to provide business certainty.

5. Provide the names and/or a description of the persons or classes of persons who may be directly impacted by the notified conduct (including targets in collective bargaining or boycott conduct) and detail how or why they might be impacted.

Suppliers to TVSN will not be able to simultaneously sell or market and promote their products through another DTSCR but can:

- switch to another DTSCR; and
- at any time, supply, market and promote their products through any other medium including:
  - the supplier's own direct channels;
  - other online retail outlet options;
  - a bricks and mortar outlet; or
  - other television-based options including any of the various choices for advertorial or informercial advertisements such as:
    - slots on Spree TV, Aspire TV or iShop TV; or
    - segments broadcast within or during other programming such as Nine's Today Extra, Channel Seven's Morning Show and Daily Edition and Channel Ten's Studio Ten; and
    - segments broadcast in-between programming or during advertorial breaks on the various television channels.

See Confidential Attachment A to the Supporting Submission dated 30 April 2020 which provides further information in relation to suppliers.

At present, only Hyundai-Openshop fits the description of a DTSCR. The notified conduct will mean that although products will not be simultaneously marketed on more than one DTSCR, DTSCRs will still compete to have the product exclusively distributed on their television shopping channel.

## **Market information and concentration**

6. Describe the products and/or services, and the geographic areas, supplied by the notifying parties. Identify all products and services in which two or more parties to the notified conduct overlap (compete with each other) or have a vertical relationship (e.g. supplier-customer).

TVSN is a consumer goods retailer selling a broad range of products across fashion, health and fitness, beauty, kitchen and food, electronics, homewares, jewellery, travel and garden and leisure to consumers in both Australia and New Zealand.

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<sup>1</sup> Notifying parties are encouraged to consult with the ACCC prior to lodgement to discuss the scope and range of documents needed in the context of the proposed conduct the subject of the notification.

The products retailed by TVSN through live presentation or demonstration on its television sales channel are sold in the context of the broader retail markets for each relevant product category.

7. Describe the relevant industry or industries. Where relevant, describe the sales process, the supply chains of any products or services involved, and the manufacturing process.

See Supporting Submission dated 30 April 2020 for further information.

8. In respect of the overlapping products and/or services identified, provide estimated market shares for each of the parties where readily available.

TVSN's sales of products in each of the categories listed above would only represent a fraction of one percent of those products sold in Australia.

9. In assessing a notification, the ACCC takes into account competition faced by the parties to the proposed conduct. Describe the factors that would limit or prevent any ability for the parties involved to raise prices, reduce quality or choice, reduce innovation, or coordinate rather than compete vigorously. For example, describe:

9.1. existing competitors

As noted above, TVSN competes with other online and bricks and mortar retailers for customer sales (including, Hyundai-Openshop, department stores eg, David Jones and Myer, product specialists eg, Chemist Warehouse, Priceline, Adore Beauty, Bing Lee and JB HiFi, supplier's direct channels and online market places like eBay and Amazon). It also competes with other broadcasters for consumer interest and viewership.

9.2. likely entry by new competitors

TVSN competes with countless other retailers. The notified conduct is not a barrier to new entry, nor does it prevent entrants or existing competitors from reaching minimum efficient scale.

9.3. any countervailing power of customers and/or suppliers

TVSN is constrained in setting prices and determining the service/quality offering to consumers by the easy availability of identical products or close substitutes from numerous competing retail outlets. Competition is a click away, and consumers can and do search the web to compare offers.

Further, TVSN is constrained with respect to the terms it offers suppliers given the large range of competing distribution channels. This includes the supplier's continued choice between DTSCRs under the notified conduct – where the channel offering the most attractive proposition and terms to suppliers will be successful.

9.4. any other relevant factors.

TVSN does not have the ability to successfully engage in foreclosure strategies. Specifically, it does not have the ability and incentive to:

- foreclose another DTSCR; or
- prevent another DTSCR or any other retailer from achieving minimum efficient scale.

Nor does it have any ability to foreclose a supplier's access to consumers.

See Supporting Submission dated 30 April 2020 and CEG economic report for further information.

## **Public benefit**

10. Describe the benefits to the public that are likely to result from the notified conduct. Provide information, data, documents or other evidence relevant to the ACCC's assessment of the public benefits.

See section 4 of the Supporting Submission dated 30 April 2020 and the economic report of CEG in support of this notification.

In summary, it is well-recognised in competition jurisprudence and economic literature that strong public benefits can flow from exclusivity aligning the incentives of suppliers and retailers to achieve more efficient investment outcomes and allocation of scarce resources.

Under the notified conduct, the interests of TVSN will be more aligned with the supplier to better promote the brand and the products in line with its business model, recover its investment and sell purchased stock. It will also allow for a reduction in information asymmetry between suppliers and consumers with a greater incentive to invest more in the presentation of products and explain their features and uses. This investment also has the potential to increase interbrand competition. A product that a consumer may have walked past on the shelf (because they did not know what it was or how it could be used) may now be considered by the consumer as something which he/she could buy following the live demonstration. That process may involve the customer considering all the alternative brands of that product type.

## **Public detriment (including likely competitive effects)**

11. Describe any detriments to the public that are likely to result from the notified conduct, including those likely to result from any lessening of competition. Provide information, data, documents, or other evidence relevant to the ACCC's assessment of the detriments.

The notified conduct does not have the purpose, effect or likely effect of substantially lessening competition in any relevant market and will not result in any public detriment.

The fact that an exclusivity by definition creates a restriction or limit on a commercial freedom is not in and of itself a public detriment. Exclusivity conditions are common in commercial dealings and it is well-recognised that exclusivity can enhance the efficiency and competitiveness of markets and generate benefits for both parties and the broader public. It is only under certain conditions that exclusivities will result in outcomes that substantially lessen competition. Those conditions do not exist in relation to this notification.

TVSN does not have the ability to successfully engage in foreclosure strategies. Specifically, it does not have the ability to foreclose another DTSCR or prevent it from achieving minimum efficient scale.

Nor does it have any ability to foreclose a supplier's access to consumers.

Consumers can buy identical or substitute products from a myriad of options (including online, mobile or in-store options and for that matter, substitutable products from other DTSCRs). The notified conduct does not change that.

The notified conduct does not prevent the supplier from marketing and/or selling their products via any other marketing or distribution channel, including through live or pre-recorded television formats.

Nor does it actually prevent the supplier from:

- choosing instead of TVSN to use another DTSCR to feature its products (with DTSCRs competing to have the supplier's products on their channel); or

- having commenced sales through TVSN, subsequently switching from TVSN to another DTSCR, upon termination of the supplier agreement.

See sections 3 and 9 of the Supporting Submission dated 30 April 2020 and the economic report of CEG in support of this notification for further information.

### **Contact details of relevant market participants**

12. Identify and/or provide names and, where possible, contact details (phone number and email address) for likely interested parties, such as actual or potential competitors, customers and suppliers, trade or industry associations and regulators.

See Confidential Attachment A to the Supporting Submission dated 30 April 2020.

### **Any other information**

13. Provide any other information you consider relevant to the ACCC's assessment of the notified conduct.

See the Supporting Submission dated 30 April 2020 including confidential attachments and the economic report of CEG in support of this notification.

## Declaration by notifying party

Authorised persons of the notifying party must complete the following declaration.

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned are aware that giving false or misleading information is a serious offence and are aware of the provisions of sections 137.1 and 149.1 of the *Criminal Code* (Cth).



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Signature of authorised person

Lawyer acting for notifying party

.....  
Office held

Luke Woodward

.....  
(Print) Name of authorised person

This 8th day of May 2020

*Note: If the Notifying Party is a corporation, state the position occupied in the corporation by the person signing. If signed by a solicitor on behalf of the Notifying Party, this fact must be stated.*