Restriction of Publication of Part Claimed

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Exclusive dealing notifications N10000521 and N10000523 lodged by TVSN Channel Pty Ltd

Submission by Australian Shopping Network Pty Ltd (openshop)

PUBLIC VERSION

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CONTENTS

1. **EXECUTIVE SUMMARY**

1.1 Australian Shopping Network Pty Ltd (**ASN**) is a dedicated television shopping channel retailer (**DTSCR**) operating in Australia. ASN trades as "**openshop**" and is referred to in this way throughout this submission.

1.2 openshop is identified as the sole target of the two exclusive dealing notifications lodged by TVSN Channel Pty Ltd (**TVSN**) with the Australian Competition and Consumer Commission (**ACCC**) on 18 May 2020 (the **Notifications**).

1.3 openshop opposes the Notifications.

1.4 openshop provided a submission dated 17 January 2020 opposing the previous exclusive dealing notification lodged by TVSN with the ACCC on 30 October 2019, and withdrawn by TVSN on 27 May 2020.

1.5 openshop launched in Australia in August 2019. Prior to this time, TVSN was the only DTSCR operating in Australia. TVSN had been operating for over 23 years in Australia without any competition from any other DTSCR. openshop is TVSN's closest competitor.

1.6 As a new entrant into the DTSCR market in Australia, openshop must compete with TVSN for suppliers and customers in circumstances where TVSN has been the sole DTSCR in Australia for over 23 years. The impact of the conduct which is the subject of the Notifications must be assessed in the light of these circumstances.

1.7 The markets which are relevant to the competitive assessment of the conduct the subject of the Notifications are markets in which TVSN or any person whose business dealings are restricted, limited or otherwise circumscribed by TVSN's conduct, supplies or acquires goods or services or would, but for the conduct, be likely to supply or acquire goods or services.

1.8 openshop submits that one of the markets, which facilitates the required analysis of the notified conduct and the potential harm flowing from it, is a market comprising a subset of suppliers for whom other retail channels are not an effective substitute. This is because the sales by those suppliers to DTSCRs represent a very substantial proportion and, in some cases, all of their total sales through all channels. These suppliers can be described as captive suppliers because selling their products only to other retailers or directly to consumers is, for them, not a feasible alternative to selling to a DTSCR. Products that are substantially sold through the DTSCR format by captive suppliers are typically the most suitable products for a DTSCR to sell as they have strong brand stories that resonate with customers and can be effectively demonstrated or explained by trained guests or presenters to stimulate and drive demand for these products. By way of example, [Restriction of Publication of Part Claimed].

1.9 There are other relevant markets in which to assess the competitive effects of the conduct the subject of the Notifications - including, the markets in which:

(a) content is supplied to viewers of their respective television shopping channels;

(b) the rights to show and transmit television shopping channels are acquired; and

(c) staff with expertise in DTSCR are hired.

1.10 openshop submits that the notified conduct has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market comprising a subset of suppliers for whom other retail channels are not an effective substitute and other relevant markets.

1.11 As regards <u>purpose</u>:

(a) TVSN does not have a legitimate commercial rationale or conventional economic rationale to engage in the notified conduct;

(b) TVSN's contentions as to the broad nature of the competition it faces is inconsistent with its stated rationale behind engaging in the notified conduct as the notified conduct extends well beyond suppliers in which TVSN has made an investment and well beyond protecting the investments TVSN purportedly makes in its suppliers;

(c) TVSN will, in effect, be immune from the prohibitions on anti-competitive conduct in the *Competition and Consumer Act* (**CCA**) and can, with impunity, explicitly threaten new suppliers that openshop is targeting, or existing suppliers of openshop, that may be critical to openshop's effective entry and expansion into dedicated television shopping, even if TVSN had no present or future intention to ever engage with those suppliers; and

(d) TVSN's contention that it requires the notified conduct to prevent "free-riding" from openshop is unfounded. openshop competes by differentiating its offers from those of TVSN and it will not be in openshop's interest to appropriate investments made by TVSN in its suppliers.

1.12 As regards likely effect:

(a) the notified conduct will make the barriers to entry for any potential entrant that may wish to launch a DTSCR in the future virtually insuperable by foreclosing all suppliers that would be available to new entrants or all key suppliers for effective entry;

(b) the notified conduct significantly weakens the competition between openshop and TVSN to acquire products from suppliers by entrenching TVSN's existing buyer power with suppliers. In circumstances where the notified conduct essentially provides suppliers with an "all or nothing" proposition, most suppliers would choose to supply TVSN instead of openshop given its significant incumbency advantages and the risk to suppliers of losing access to a significant present or future revenue stream;

(c) the notified conduct has the effect of reducing opportunities and choice for suppliers that generate a substantial proportion of their overall revenue through sale by way of DTSCRs (ie, captive suppliers). In particular:

(i) the "all brands and all products" aspect of the notified conduct would have a detrimental effect on captive suppliers, who often have product portfolios comprising numerous products, across multiple brands and even multiple product categories. A supplier that supplies a single product to TVSN would be restricted from supplying any other product in its portfolio to openshop, even if TVSN was offered the product and declined to acquire it; and

(ii) by restricting the ability of captive suppliers to promote their products through alternative suppliers to TVSN, consumers are denied access to products that would otherwise be supplied in the absence of the notified conduct and the potential benefits to consumers from innovation by captive suppliers.

(d) the notified conduct does not result in a market where DTSCRs will compete to have the product exclusively distributed on their channel based on the most attractive offer, as TVSN contends. The commercial reality is that TVSN simply refuses, or threatens to refuse, to engage with suppliers who deal with openshop or ceases, or threatens to cease, dealing with suppliers who deal with openshop.

(e) this conduct is only commercially rational because of TVSN's substantial market power. If it faced effective competition from one or more other DTSCRs, which could offer equivalent sales volumes, it could not afford to threaten or restrict suppliers, especially captive suppliers in this way.

(f) in the absence of the notified conduct, TVSN's suppliers would be incentivised to engage with openshop to seek competitive supply arrangements (on price or more favourable terms of sale) to either switch to openshop or to supply products concurrently through TVSN and openshop to drive maximum revenues.

1.13 The public benefits asserted by TVSN are non-existent, limited or are private benefits to TVSN. Any asserted benefits to the public do not outweigh the significant detriment to the public that has resulted or is likely to result from the notified conduct. By materially weakening the competitive tension between TVSN and openshop in the markets outlined above, the notified conduct will sound in a lessening of competition resulting in a corresponding public detriment.

1.14 These conclusions are consistent with and supported by the expert economic report prepared by Mr Greg Houston and Dr Luke Wainscoat, economists of HoustonKemp in respect of the conduct the subject of the Notifications (**HoustonKemp Report**). A copy of the HoustonKemp Report is annexed to this Submission.

1.15 The Notifications should be revoked. That is, the ACCC should notify TVSN, pursuant to s93(3) of the CCA, that the conduct, which is the subject of the Notifications, is not approved.

2. DEDICATED TELEVISION SHOPPING CHANNEL RETAILING

Overview of openshop

2.1 ASN operates the "openshop" television shopping channel in Australia.[1] ASN employs more than 100 local Australian staff.

2.2 The openshop channel launched in Australia on 1 August 2019. The openshop channel is broadcast on the Seven Network through Channel 75 in the metropolitan areas of Sydney, Melbourne, Brisbane, Adelaide and Perth, and on Channel 65 in regional Queensland. The openshop channel is not otherwise available in regional areas of Australia. openshop would wish to expand its broadcast footprint if its business grows in Australia.

2.3 The openshop channel is broadcast 24 hours a day, seven days a week, with up to 12 hours of live broadcasting <u>per week</u> comprised of 4 live hours on each Wednesday, Thursday and Friday at 9:30 am, 11:30 am, 1:30 pm, and 3:30 pm. openshop intends to increase the amount of live filming during the week if its business grows in Australia.

2.4 In comparison, TVSN has been broadcasting in Australia since 1995 and is currently able to reach virtually every household in Australia via:

(a) Foxtel Channel 176;

(b) Freeview Channel 14 (Metro);and

(c) Freeview Channels 57, 75 & 84 (in regional areas – Channel 75 is used by TVSN in Darwin).

2.5 TVSN is broadcast 24 hours a day, seven days a week, with up to 13 hours of live broadcasting <u>per day</u>.

openshop's entry into Australia

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1 ASN is a wholly owned subsidiary of Hyundai Home Shopping Network Corp (**HHSN**), a home shopping channel operator in South Korea. HHSN also operates in Vietnam and Thailand.

2.6 Before openshop launched in Australia in August 2019, TVSN was the only DTSCR operating in Australia. TVSN had been operating for over 23 years in Australia without any competition from any other DTSCR.

2.7 From approximately 2017, Australia was considered an attractive target market for entry through openshop for a number of reasons including:

(a) there was a clear opportunity for at least one additional DTSCR and it could transform the static Australian market by establishing an innovative DTSCR to compete closely with TVSN which could be expected to result in growth across the whole home shopping industry in Australia;

(b) compared to other countries, Australia's home shopping market and e-commerce market accounted for a relatively small proportion of the overall retail sales in Australia; and

(c) Australia's investment in e-commerce infrastructure (including online payment systems and logistics hubs) was growing which created an opportunity to establish a multi-prong offering as a DTSCR and e-commerce retailer.

2.8 The establishment of a new DTSCR in Australia required substantial initial investment and forward planning. Approximately [Restriction of Publication of Part Claimed] in initial capital was required to establish ASN and the "openshop" channel, and to cover ongoing operational costs. As at June 2020, out of the [Restriction of Publication of Part Claimed] initial investment, ASN has expended the total sum of approximately [Restriction of Publication of Part Claimed] as follows:

(a) Channel service fees paid to Channel 7 [Restriction of Publication of Part Claimed];

(b) Staff/labour costs ([Restriction of Publication of Part Claimed]);

(c) Leasing costs ([Restriction of Publication of Part Claimed]);

(d) IT costs ([Restriction of Publication of Part Claimed]);

(e) Production costs ([Restriction of Publication of Part Claimed]);

(f) Broadcasting costs ([Restriction of Publication of Part Claimed]);

(g) Security deposit costs ([Restriction of Publication of Part Claimed]);

(h) Motor vehicle costs ([Restriction of Publication of Part Claimed]); and

(i) Other costs including product purchasing, marketing, transaction fees, tax, and logistics ([Restriction of Publication of Part Claimed]).

2.9 Of these costs only a modest proportion, such as the security deposits and some equipment costs, would be able to be recovered if openshop were to exit the Australian market; the balance are sunk costs.

2.10 In addition to the significant capital investment required to establish openshop, there were also additional logistical challenges that involved significant forward planning and commitment on the part of ASN. The main challenges were to locate and contract with suitable network and production companies to host a brand new home shopping channel. It took over 2 years prior to entry to negotiate and sign the final agreements with those companies. Those agreements are described in more detail below:

(a) [Restriction of Publication of Part Claimed];

(b) [Restriction of Publication of Part Claimed]; and

(c) [Restriction of Publication of Part Claimed].

2.11 Moreover, openshop also had to recruit experienced and qualified staff before it could commence trading.

openshop's business model and product offering

2.12 As a new entrant into the DTSCR market in Australia, openshop must compete with TVSN for suppliers and customers in circumstances where TVSN has been the sole DTSCR in Australia for over 23 years.

2.13 openshop sells a range of products across categories which include fitness, beauty, kitchen and food, electronics, homewares, jewellery, travel, and garden and leisure to consumers in Australia. These are substantially the same categories as the products sold by TVSN.

2.14 openshop particularly focuses on products in each category which are suitable for sale by the DTSCR format. They typically include:

(a) products with a clear "brand story" that would benefit from a detailed *explanation* by a presenter or guest to create an emotional connection between the customer and the product or brand;

(b) products that would benefit from a detailed *demonstration* by a presenter or guest highlighting their unique selling points;

(c) products that can be modified, bundled with other products, or include a free gift when purchased; and/or

(d) products that are a "unique find" that are not available in bricks and mortar stores due to the scale required.

2.15 Unsurprisingly TVSN appears to focus on products with the same or very similar attributes.[2]

2.16 It is essential for openshop to be able to supply a wide range of quality and reputable brands/products across the above product categories to be able to offer an attractive and competitive alternative to TVSN for customers.

2.17 Within each product category there are different suppliers who vary significantly in size, brand recognition, suitability to the DTSCR format and willingness to supply their products through a DTSCR. Some of these brands are global (for example, [Restriction of Publication of Part Claimed]) or very large Australian brands (for example, [Restriction of Publication of Part Claimed]) that are widely sold across a range of retail channels. Other brands are much smaller, are substantially sold through the DTSCR format and are not widely available through other retail channels (for example, [Restriction of Publication of Part Claimed]). These suppliers can be described as captive to the DTSCR channel. openshop requires a mix of each of these types of suppliers in order to compete successfully against the incumbent TVSN.

2.18 Products that are substantially sold through the DTSCR format by captive suppliers are typically the most suitable products for a DTSCR to sell as they have strong brand stories that resonate with customers and can be effectively demonstrated or explained by trained guests or presenters to stimulate and drive demand for these products.

2.19 [Restriction of Publication of Part Claimed]

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2 Gilbert + Tobin, *TVSN Channel Pty Ltd Exclusive dealing notification*, April 2020, 4-5.

2.20 openshop provides a multi-prong offering to its customers by selling its products concurrently through the openshop television channel (Channels 75/65), the openshop website (https://www.openshop.com.au), the openshop App (available on Google Play and the Apple App store) and openshop's social media pages (Facebook, Instagram and YouTube). Similarly, TVSN supplies its products through a dedicated television shopping channel with the ability to purchase products over the phone or online. TVSN also has an App and social media pages. As noted elsewhere in this submission, TVSN reaches a much broader, national audience than openshop.

2.21 TVSN claims in its supporting submission to its Notification to differentiate itself from openshop by:[3]

(a) providing consumers with the "thrill of the find" or "the unique or curated choice" within the live television format;

(b) providing entertaining and informative content that demonstrates product features in a way that is interesting in the live television format;

(c) providing a great customer experience incorporating the thrill of the find, ease of purchase, fast delivery, money back guarantees, great after purchase care, and assuring customers that TVSN's selection of products have passed TVSN's high quality standards;

(d) investing heavily in the identification and sourcing of products and takes the risk on its ability to market and sell those products in Australia;

(e) working with suppliers to launch, build or nurture their brand and to sell their brand story through the live television format; and

(f) transferring confidential and proprietary information to suppliers to build their skillset in how to most profitably present their products in the live television format.

2.22 Each of these features is an <u>inherent feature</u> of the DTSCR format itself. These features differentiate DTSCRs from other retail channels that may sell the same or similar products. TVSN could not credibly claim to have discovered these features or to own any of them.

2.23 TVSN's contention that openshop, by attracting producers, presenters, contractors, employees, guests or suppliers that have had any relationship with TVSN, is undermining or "free-riding" on TVSN's business conceals the history and reality of DTSCR in Australia. Any individual or company with experience in DTSCR in Australia must have had a past or existing relationship with TVSN because it was the only DTSCR operating in Australia for over 23 years.

2.24 As a new DTSCR entrant in Australia, in addition to seeking talent from overseas or from related segments, openshop has competed to engage individuals with previous experience in DTSCR in Australia to work for, or be involved with, openshop. This recruitment is essential for effective entry and illustrates the competition which a new entrant generates.

2.25 openshop would struggle to operate as a viable competitor to TVSN without recruiting individuals with previous DTSCR experience in Australia. To protect itself from so-called "unfair" competition, TVSN has available to it all the usual means (intellectual property rights, confidentiality agreements, etc) to protect its proprietary rights and confidential information.

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[3] Gilbert + Tobin, *TVSN Channel Pty Ltd Exclusive dealing notification*, April 2020, 4-5.

2.26 openshop seeks to compete with TVSN across a wide range of service attributes, selection of products, marketing, terms of sale and broadcasting style as described further below:

(a) openshop offers more product bundling and free gifts compared to TVSN. For example, when openshop sells a Samsung TV, a Samsung sound bar may be included as a bundle which is only available for purchase at openshop.

(b) openshop offers more favourable terms of sale to customers compared to TVSN. For instance, when openshop commenced trading, favourable terms such as free delivery and reward points were offered to customers. Customers are also able to purchase openshop's products using "Afterpay" or "Zip" which are not yet available on TVSN.

(c) openshop focuses on balancing its product offering across a range of product categories to attract a wider group of customers.

(d) openshop provides a more "unique or curated choice" than TVSN does because openshop focuses on a smaller range of products for a longer period of time per product compared to TVSN. Each of openshop's segments contain 1-2 products and are approximately 56 minutes in length. In comparison, TVSN typically focuses on over 4 products per hour long segment.

(e) openshop has the ability to offer its Australian suppliers access to the South Korean home shopping market through its relationship with HHSN.

2.27 openshop derives all of its revenue from the sale of products through its various sales channels. In its first year of trading (ie, 1 August 2019 to 1 August 2020), openshop generated revenue of [Restriction of Publication of Part Claimed] of which [Restriction of Publication of Part Claimed] or [Restriction of Publication of Part Claimed] is attributable to sales of its top 25 products.

openshop's relationship with, and investment in, suppliers

2.28 Upon entering the Australian market as the second DTSCR to TVSN, openshop focused on sourcing suppliers from multiple sources including existing and past suppliers of TVSN, past suppliers of YESSHOP,[4] South Korean suppliers used by HHSN, and new suppliers that did not have experience in DTSCR. Currently, about [Restriction of Publication of Part Claimed] of openshop's products are sourced locally and [Restriction of Publication of Part Claimed] are sourced internationally.

2.29 TVSN was previously the sole DTSCR in Australia and those suppliers essentially comprised the finite pool of suppliers that had any experience in supplying via the DTSCR format in Australia. In order to attract suppliers, including these suppliers, openshop had to offer competitive terms including offering attractive payment terms. For example, [Restriction of Publication of Part Claimed]

2.30 [Restriction of Publication of Part Claimed]

2.31 As described above, within each of the product categories supplied by openshop and TVSN is a range of different suppliers for that category that vary significantly in size, brand recognition, suitability to the DTSCR format and willingness to supply their products through a DTSCR. There are particular global or large Australian brands within some product categories that are well-known market leaders and would present the most attractive offering to openshop in terms of customer engagement and sales volume. There are also smaller brands within each product category that are often the most suitable brands for the

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[4] YESSHOP was a New Zealand based DTSCR that briefly launched in Australia via pay television provider Foxtel on 29 February 2016. YESSHOP ceased trading on 29 September 2016.

format and are brands that are substantially sold through DTSCRs (by captive suppliers) and otherwise not widely available through other retail channels.

2.32 Most suppliers that supply brands substantially through DTSCRs, and certainly any with previous experience supplying to DTSCRs in Australia, have an existing or previous relationship with TVSN. It is very difficult for openshop to identify reputable suppliers of this kind that do not have any connection to TVSN, unless openshop sources the supplier from overseas which involves significantly increased time, complexity, such as more complex supply chains, and cost on the part of openshop.

2.33 The lifecycle of openshop's products, from initially sourcing the product to finally distributing the product to consumers, requires significant investment on the part of openshop. This lifecycle is described below:

(a) openshop has a dedicated team of buyers that identify and source new products from a range of different suppliers (from the sources described above). openshop's buyers will carefully assess the quality of new products and whether they are appropriate for sale with openshop and through the DTSCR format. openshop purchases the relevant products directly from suppliers, incurring the volume and financial risk on all products it sources if those products cannot be sold. [Restriction of Publication of Part Claimed]. When launching new products, openshop incurs significant risks including:

(i) the buying method (mostly non-returnable products);

(ii) inventories;

(iii) broadcasting time allocation;

(iv) production and broadcasting in compliance with applicable laws and regulations;

(v) import permits and customs;

(vi) IP rights or licences; and

(vii) production costs.

(b) After identifying a potential new supplier, openshop engages in discussions with that supplier to see if openshop can agree with the supplier to acquire the supplier's product(s) for promotion and sale across its platforms. If a supply contract is agreed with a supplier, openshop then issues purchase orders for the relevant product and takes steps to prepare the promotional and marketing content for that product.

(c) openshop then engages with the supplier throughout pre-production steps to prepare product-specific content for use on openshop's platforms including image and video content for advertisements, image and video content to be used during the live segment, content for social media posts, and openshop's online shopping site. Intellectual property in the promotional materials created by ASN belongs exclusively to the supplier.

(d) The pre-productions steps for a single product typically include openshop's producers working with the supplier to create the content strategy for the product, providing a presenter, training an on-air guest provided by the supplier, and providing hair and make-up services before shooting. openshop shares its know-how in developing products and brands gained from the industry practice through strategy meetings (2-3 times) with buyers, producers and presenters.

(e) openshop organises and creates the production for the live segment demonstrating the product on the "openshop" channel. A typical live segment will include a guest provided by the supplier and at least one openshop presenter who will explain the brand story of the product and demonstrate how the product works throughout the segment. The "show charges" incurred in connection with the live segment include (if required) openshop's personnel cost for models, presenters, chefs, hair and makeup and product images. [Restriction of Publication of Part Claimed]. openshop incurs all of the other costs of production including crew, lighting, venue, equipment, editing etc.

2.34 The investment that openshop makes in each of its suppliers across each of the above steps in the product lifecycle is related to the size of the supplier relative to the product category in which they operate. Global or large Australian brands (such as [Restriction of Publication of Part Claimed]) typically provide most or all of their own marketing and promotional content as they generally have a widely recognised "brand story" and existing promotional content.

2.35 In contrast, openshop is generally required to play an active role in developing the "brand story" for smaller suppliers that substantially supply their products through DTSCRs and is involved in creating most, if not all, of the marketing content for these products ([Restriction of Publication of Part Claimed]). openshop generally creates video and image content for products of this kind and advertises this content via its online platforms (Instagram, Facebook, Google and openshop's online shop) as well as through the television broadcast for the brand. Accordingly, openshop's investment in these products is greater than for larger products as openshop incurs time and cost to produce video and image content, create and maintain online advertisements, pay for employees to create and manage the brand's advertisements, and production costs for broadcast on the openshop channel. openshop also shares a greater level of know-how and training with these types of suppliers as they typically have less resources and experience in supplying through DTSCRs compared to larger suppliers.

2.36 The acquisition and supply of products by openshop is inherently risky as there is no guarantee that a brand campaign will be successful on the openshop channel. openshop will typically need to explore hundreds or thousands of products to identify those that may be suitable to feature on the openshop channel and it is very difficult for openshop to predict whether a particular products will be successful. It is only after openshop has developed the brand campaign, produced the recorded and live content and aired the program (and incurred the costs associated with each of these steps) that it become clearer to openshop whether a product will resonate with customers based on whether the product generates sufficient sales to be commercially successful for openshop.

2.37 A substantial proportion of air time on the openshop channel is therefore dedicated to products that successfully generate consumer engagement and sales following their brand campaign launch. For instance:

(a) during the month of August 2020, openshop sold [Restriction of Publication of Part Claimed]different products across the 744 total playout slots available in that month (31 days x 24 slots per day that are each 56 minutes in length);

(b) the products that most successfully generated sales for openshop during the month of August 2020 ([Restriction of Publication of Part Claimed]) had their brand campaigns (each of 56 minutes duration) featured on the openshop channel between [Restriction of Publication of Part Claimed] times each in that month. Each of these products are sold by captive suppliers to openshop in the manner described above; and

(c) the products that do not successfully generate sufficient consumer engagement and sales following their campaign launch are aired on the openshop channel much more infrequently than successful products and are eventually removed from the openshop channel. This is because openshop does not have the resources to continue to produce programs for products which are not commercially successful for openshop. For instance, during the month of August 2020, the brand campaigns for each of [Restriction of Publication of Part Claimed](each of 56 minutes duration) were each aired on the openshop channel only [Restriction of Publication of Part Claimed] times before they were removed as they did not generate sufficient sales for openshop.

2.38 [Restriction of Publication of Part Claimed]

Comparison to international markets

2.39 TVSN claims that exclusivity arrangements are a key part of the business models adopted by DTSCRs internationally including in the United States, the United Kingdom, Japan, Italy and China. openshop observes that:

(a) exclusivity provisions are not a feature of arrangements between HHSN and suppliers in any of the competitive markets in which HHSN operates, namely South Korea, Vietnam and Thailand;

(b) each of the markets TVSN points to as examples of business models operating with exclusivity provisions are also characterised by many more market participants than exist in Australia (USA – at least 10 participants; UK – at least 16 participants) and accordingly, the competitive effects of any exclusivity arrangements will necessarily be felt differently;

(c) the exclusivity arrangements in those countries must comply with the applicable competition law in those countries. The intended consequence of notifying TVSN's conduct in Australia is to immunise it from the relevant competition law prohibitions in Australia;

(d) TVSN has been the sole DTSCR in Australia for over 23 years and has existing relationships with most, if not all, of the existing and potential suppliers to DTSCRs in Australia. Faced now with close competition from another DTSCR for the first time, TVSN is seeking competition law immunity so that it can engage in conduct with its existing and potential which is intended to exclude openshop from the market;

(e) TVSN's response to the first direct competition which it has faced is not to compete on the merits but, rather, to use its buyer power to prevent or hinder the development of that direct competition; and

(f) the comparison with the overseas markets identified by TVSN is of no assistance in assessing the purpose and likely effect of TVSN's conduct in the Australian market. In none of those markets is there a sole participant which has powerfully entrenched and long standing relationships with the existing pool of suppliers, many of which are dependent on that relationship.

3. COMPETITION ASSESSMENT OF THE NOTIFIED CONDUCT

Scope and likely operation of the notified conduct

3.1 TVSN has notified two types of inter-related exclusive dealing conduct:

(a) Refusal to acquire; and

(b) Conditional acquisition.

3.2 The Notifications, supporting submission and CEG economic opinion do not describe the scope and likely operation of the notified conduct in any detail, but any assessment of the anti-competitive purpose and effect of the notified conduct requires close analysis of the descriptions of it.

Refusal to acquire

3.3 TVSN describes its "refusal to acquire" conduct as follows:

> *"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.*
>
> *…*
>
> *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."*

3.4 TVSN's notified "refusal to acquire" conduct has the following features:

(a) TVSN's conduct explicitly targets openshop.

(b) The number of suppliers from whom TVSN can refuse, and threaten to refuse, to acquire products is, on the face on the Notification, unlimited.

(c) The types of suppliers from whom TVSN can refuse, and threaten to refuse, to acquire products are unlimited.

(d) TVSN can refuse, and threaten to refuse, to acquire all the products of a supplier and not just the product which the supplier has supplied, or proposes to supply, or has not agreed not to supply, to openshop.

(e) TVSN can, indefinitely, refuse and threaten to refuse to acquire all products from a supplier who has, at any time in the past, supplied any product to openshop.

(f) TVSN can, indefinitely, refuse and threaten to refuse to acquire all products from a supplier who proposes to supply, at any time in the future, any product to openshop.

(g) TVSN can, indefinitely, refuse and threaten to refuse to acquire all products from a supplier who does not agree not to supply, at any time in the future, any product to openshop.

3.5 TVSN's notified "refusal to acquire" conduct constitutes the practice of exclusive dealing as set out in sub-section 47(5) of the *Competition and Consumer Act* (**CCA**). The conduct will contravene the prohibition in sub-section 47(1) of the CCA if it has the purpose or effect, or is likely to have the effect, of substantially lessening competition in any relevant market.

3.6 If the ACCC does not notify TVSN under sub-section 93(3) that the notified "refusal to acquire" conduct of refusing and threatening to refuse to acquire products is not "approved", TVSN will be indefinitely unfettered as to the threats it can make to every supplier and potential supplier of products to openshop. For example, TVSN could, with impunity, inform (by email, website statement, advertisement, etc) every potential supplier of openshop that it will never acquire any products from any business which supplies any products to openshop. TVSN could also target its threats at suppliers likely to be critical for openshop's effective entry and expansion into dedicated television shopping. In both cases it would be immune from any sanction or consequences under the CCA.

Conditional acquisition

3.7 TVSN describes its "conditional acquisition" conduct as follows:

> *"The notified conduct relates to TVSN's proposal to: acquire, or offer to acquire, products or services from a supplier (and as a consequence, invest in the development, promotion and sales of those products) on condition that the supplier (or related body corporate) will not, without the written consent of TVSN, supply those products or services, or any other products or services (together, products) under the same brand or in the same product category for feature or sale by another DTSCR for a period up until:*
>
> > *– 4 months after products purchased by TVSN from the supplier are received in Australia and available for sale by TVSN (having passed quality assurance procedures); and*
> >
> > *– 4 months after the completion of specific promotions, campaigns, events or television programs that TVSN intended would feature the products or use the services and that were notified by TVSN to the supplier,*
>
> *(together, the exclusivity period).*
>
> *Where a contract or agreement is entered into with a supplier, this proposal will be reflected in the contract or agreement. While the agreement may permit the supplier to terminate the agreement at its own election on giving one month's notice, the four-month exclusivity periods referred to above will continue to apply, as per usual contractual survival provisions, to cover any portion of the exclusivity period that remains post-termination.*
>
> *TVSN wishes to insert a clause into its supplier contracts to reflect the notified conduct. While the exclusivity is term limited, 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."*

3.8 This conduct involves TVSN's imposition on a supplier of the condition that the supplier will not supply products to openshop for a period (the **Condition**).

3.9 TVSN's notified "conditional acquisition" conduct has the following features:

(a) TVSN's conduct explicitly targets openshop.

(b) The number of suppliers on whom TVSN can impose and seek to impose the Condition is, on the face of the Notification, unlimited.

(c) The types of suppliers on whom TVSN can impose and seek to impose the Condition are unlimited.

(d) The Condition requires the supplier not to supply openshop any of its products which are under the same brand, or in the same product category as the product which the supplier supplies to TVSN.

(e) The product categories identified by TVSN in the Notification are exceptionally broad and include fashion, health and fitness, beauty, kitchen and food, electronics, homewares, jewellery, travel and garden and leisure.

(f) TVSN can impose and seek to impose the Condition on a supplier, even though TVSN acquires only one of that supplier's products or brands. The effect of this would be, by way of example, that a supplier with 100 "electronics" products across different brands that supplied only one of those products to TVSN could not supply any of the other 99 "electronics" products or brands to openshop, even if TVSN had no interest in acquiring any of those products.

(g) The so-called "exclusivity period" commences, as a practical matter, when TVSN and a supplier are negotiating a supply agreement and lasts until the later of 4 months after the product is available for sale by TVSN and 4 months after the completion of various activities notified by TVSN to the supplier which feature the product.

(h) The exclusivity period can be effectively ever-greened by TVSN by acquiring products sequentially from a supplier.

(i) TVSN can, indefinitely, impose and seek to impose the Condition on all suppliers.

3.10 TVSN's notified "conditional acquisition" conduct constitutes the practice of exclusive dealing as set out in sub-section 47(4) of the CCA. The conduct will contravene the prohibition in sub-section 47(1) of the CCA, if it has the purpose or effect, or is likely to have the effect, of substantially lessening competition in any relevant market.

3.11 If the ACCC does not notify TVSN under sub-section 93(3) that the notified conduct of imposing and seeking to impose the Condition is not "approved", TVSN will be indefinitely unfettered as to its ability to impose and seek to impose the Condition on every supplier and potential supplier of products to openshop. In addition to imposing the Condition in every supplier contract, TVSN could, with impunity, inform (by email, website statement, advertisement etc) every potential supplier to openshop about the Condition. This would put all potential suppliers on notice that TVSN will only acquire products from businesses which are prepared to agree not to supply products to openshop for an extended period.

3.12 The period during which the Condition will be operative will be considerably longer than the 4 month periods referred to in the description of the notified conduct. The highlighting of the 4 month periods in the Notifications could, superficially, create the impression that the impact of the Condition is temporally quite limited. That impression is misleading.

3.13 According to its submission:

(a) TVSN invests heavily in sourcing, developing and presenting the products it retails which involves forward planning in terms of programming, scheduling, production, promotion of future events and campaigns and the purchasing of stock;

(b) Suppliers may require that products be purchased more than 6 months in advance of the intended televised feature or event;[5] and

(c) Programming, production and purchasing the relevant product has lead times of anywhere between 3-18 months.[6]

3.14 The addition of the 4 month period, after the completion of all campaigns, events, programs featuring the relevant product, to the time periods described by TVSN for sourcing, programming and purchasing the product means that the Condition will be practically

[5] Gilbert + Tobin, *TVSN Channel Pty Ltd Exclusive dealing notification*, April 2020, 9.

[6] Gilbert + Tobin, *TVSN Channel Pty Ltd Exclusive dealing notification*, April 2020, 11.

operative and preclude a supplier, which is dealing with TVSN, from supplying products to openshop for anywhere between 12 and 24 months.

Relevant markets

3.15 The ACCC must consider whether TVSN's notified conduct has the purpose or effect of substantially lessening competition or would be likely to have the effect of substantially lessening competition. The markets which are relevant to this assessment are markets in which TVSN or any person whose business dealings are restricted, limited or otherwise circumscribed by TVSN's conduct, supplies or acquires goods or services or would, but for the conduct, be likely to supply or acquire goods or services.

3.16 TSVN asserts that ".. *it cannot be said that the relevant market is as narrow as a market for the retail supply of products by way of a dedicated television shopping channel broadcast on free-to-air and/or subscription television, or the acquisition of products for promotion and sale via a dedicated shopping channel broadcast on free-to-air and/or subscription television*."[7] TVSN also asserts that this conclusion is supported by the CEG report.[8] In fact, the CEG report merely repeats the assertion that ".. *the markets in which TVSN supplies its products and services are broader and include more competitors than just DTSCRs*.."[9] CEG makes no mention of markets in which TVSN and its closest competitor, openshop, acquire products.

3.17 openshop submits that the identification of markets is the essential first step in assessing present competition and the likely competitive effects of the notified conduct. The process of identification has been described as follows:

> "*identifying a market and defining its dimensions is a 'focusing process', requiring selection of 'what emerges as the clearest picture of the relevant competitive process in the light of commercial reality and the purposes of the law'. The process is 'to be undertaken with a view to assessing whether the substantive criteria for the particular contravention in issue are satisfied, in the commercial context the subject of analysis'. 'The elaborateness of the exercise should be tailored to the conduct of issue and the statutory terms governing the breach'. Market definition is in that sense purposive or instrumental or functional*."[10]

3.18 More briefly it has been stated that market definition, ".. *is undertaken to facilitate the analysis of the conduct at issue, and the potential harm set to flow from it*."[11]

3.19 Exclusive dealing conduct is likely to have the effect of substantially lessening competition in a relevant market if:

(a) a comparison of the nature and extent of competition in any relevant market in the future with the notified conduct and without the notified conduct indicates that competition is lessened by the notified conduct; and

(b) that lessening of competition is real or of substance and thereby meaningful and relevant to the competitive process.[12]

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7 Gilbert + Tobin, *TVSN Channel Pty Ltd Exclusive dealing notification*, April 2020, 15.

8 Gilbert + Tobin, *TVSN Channel Pty Ltd Exclusive dealing notification*, April 2020, 15.

9 CEG, *TVSN exclusive supplier arrangements*, April 2020, [82].

10 *Australian Competition and Consumer Commission v Flight Centre Travel Group Pty Ltd* (2016) 261 CLR 203 at [69].

11 *Australian Competition and Consumer Commission v Pacific National Pty Ltd* [2018] FCA 1221 at [464].

12 *Stirling Harbour* (2000) ATPR 41-752 at [114].

3.20 openshop submits that one of the markets, which facilitates the required analysis of the notified conduct and the potential harm flowing from it, is a market comprising a subset of suppliers for whom other retail channels are not an effective substitute.

3.21 Some suppliers to TVSN can and do supply substantial volumes of their products to other retailers – bricks and mortar, and online. By contrast, the products of other suppliers are particularly suited to retailing by way of a dedicated television shopping channel. As the monopoly television shopping channel in Australia for around 23 years, TVSN has identified suppliers whose products are particularly suited to television shopping. The sales by those suppliers to TVSN represent a very substantial proportion and, in some cases, all of their total sales through all channels. For those suppliers, selling their products only to other retailers or directly to consumers is not a feasible alternative to selling to a dedicated television shopping channel.

3.22 These suppliers can be described as captive suppliers. TVSN's submission highlights the importance of identifying those products which are particularly well-suited to television shopping and, by implication those suppliers which are or will be captive. A product which is particularly well-suited to television shopping is very attractive to TVSN. For the same reason, television shopping is of particular importance to the supplier of such a product because the sales channel will maximise their sales. Other sales channels are not feasible alternatives. By way of example, [Restriction of Publication of Part Claimed]. Each of these products are generally not available in bricks and mortar stores which makes television shopping is an essential sales channel for the suppliers of these products.

3.23 openshop submits that there are also other relevant markets in which to assess the competitive effects of the conduct the subject of the Notifications - including, the markets in which:

(a) content is supplied to viewers of their respective television shopping channels;

(b) the rights to show and transmit television shopping channels are acquired; and

(c) staff with expertise in DTSCR are hired.

The notified conduct has the <u>purpose</u> of substantially lessening competition in a market comprising the subset of suppliers for whom other retail channels are not an effective substitute and other relevant markets

3.24 TVSN had a monopoly on dedicated television shopping in Australia for over 23 years. During that period it was the sole dedicated television shopping option in Australia for all suppliers of products. Faced now, for the first time, with the prospect of close competition, TVSN is engaging in conduct to nip that competition in the bud. It is seeking perpetual protection for all the notified conduct from the prohibitions in section 47 on anti-competitive exclusive dealing.

3.25 The detriments and public benefits of each type of notified conduct should be assessed separately. Nonetheless, it is clear that both types of notified conduct stem from TVSN's concerns about openshop's attempt to enter Australia. Both Notifications identify openshop as the only entity which "*comes within the scope of the ...conduct*". The Notifications are, apart from the descriptions of the notified conduct, substantially identical and are supported by the same supporting submission and economist's opinion.

3.26 The fact that TVSN is currently able to engage in both types of conduct (because it has not given any undertaking to refrain from any of the conduct and it is protected by the Notifications) and seeks to be able to continue indefinitely to engage in both types of conduct is relevant to inferences concerning TVSN's purpose in targeting openshop and the likely effect of its conduct as a whole on competition.

3.27 TVSN contends that it requires the notified conduct to provide it with a level of commitment and certainty to undertake investments in its suppliers in order to viably compete against the myriad of options consumers have available to them.[13] The primary problem with this supposed rationale for the conduct expressly targeted at openshop is that it is entirely inconsistent with TVSN's contentions as to the broad nature of the competition it faces. If TVSN faces close competition from all other retail channels, it will lose, to those other channels, the benefit of its investments in the brands which it sells because consumers will shop around between the different channels for the best deal.

3.28 TVSN also contends that it requires the notified conduct to prevent "free-riding" from openshop.[14] openshop strongly rejects TVSN's assertion that openshop could "free-ride" off the resources and investments that TVSN places into the brand development of a product if openshop were to supply the same product through its platforms.

3.29 First, as described above, the type of investment and know-how described by TVSN as unique features requiring protection through the notified conduct are in fact inherent features of any successful DTSCR.

3.30 Secondly, it would be contrary to openshop's interests to use any proprietary content developed by TVSN. openshop may use content provided to it by a supplier. This generally only occurs with global or large Australian brands that have created their own promotional and marketing content to be used across retail channels to ensure consistent brand positioning. A suggestion that TVSN has some claim in respect of content produced and supplied by the brands is not plausible.

3.31 If a supplier owns any content that was developed with TVSN before the supplier moved to openshop, openshop does not use that content in the creation of its brand campaign for that supplier. It is not in openshop's interests to misappropriate such content because openshop competes by differentiating its offers from those of TVSN. openshop seeks to create programs that are differentiated stylistically from TVSN's programs in order to attract viewers away from TVSN.

3.32 In any event, TVSN could enforce its intellectual property rights and confidentiality protections to prevent unlawful content copying if it was concerned that competing DTSCRs would misappropriate such content. To the extent that TVSN does not have intellectual property rights in its "content", it is seeking to use the Notification procedure to sustain its historic monopoly in DTSCR retailing.

3.33 The 'refusal to acquire' conduct in particular goes well beyond the protection of any investment which TVSN has made in particular products which it acquires from its suppliers.

3.34 As described in section 3.4 above, the number of suppliers from which TVSN could threaten to refuse to acquire products is unlimited, and the time period during which TVSN could make such threats is infinite. TVSN seeks to be able to explicitly threaten any and all new suppliers that openshop may approach , or existing suppliers of openshop, which may be critical to openshop's effective entry and expansion into dedicated television shopping, even if TVSN had no present or future intention to ever engage with those suppliers. The virtually unlimited scope of this conduct makes it plain that its purpose is to prevent or deter openshop from competing directly and closely with it.

3.35 TVSN does not have a conventional economic rationale to engage in the notified conduct. As noted in the HoustonKemp Report:

> *In contrast, TVSN's notification is being made by the retailing or downstream party to the proposed vertical relationship. This circumstance in which the retailing party is*

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[13] Gilbert + Tobin, *TVSN Channel Pty Ltd Exclusive dealing notification*, April 2020, 8-9.

[14] Gilbert + Tobin, *TVSN Channel Pty Ltd Exclusive dealing notification*, April 2020, 9-10.

seeking an exclusive dealing relationship has not been examined nearly as much in the economic literature. One instance in which this was examined found that retailers with market power may want to impose vertical restraints to increase prices and restrict output.

Given the underlying theory as to the circumstances in which exclusive dealing may be competition and welfare enhancing, it is more difficult to see why the notified conduct would be in the interest of TVSN, as opposed to its suppliers, absent any increase in market power. TVSN has said that it would invest more with the notified conduct than will otherwise be the case, but this means that its costs will be higher. In order to earn sufficiently greater profits to compensate for this increased investment, TVSN would need either to charge higher prices or to increase its sales volumes, presumably by taking market share from openshop.[15]

The notified conduct has or is likely to have the <u>effect</u> of substantially lessening competition in a market comprising the subset of suppliers for whom other retail channels are not an effective substitute and other relevant markets

<u>*The notified conduct raises barriers to entry*</u>

3.36 The barriers to entry for a viable DTSCR in Australia are high. A potential entrant must identify and contract with suitable commercial partners and suppliers in advance of the channel launch date, and incur significant upfront and ongoing costs, most of which are not recoverable if the entrant exits the market. The main steps include:

(a) identifying a television network in Australia with available broadcasting spectrum to host a television shopping channel. openshop understands that there is currently very limited free to air broadcasting spectrum available in Australia;

(b) aligning the potential entrant's vision for a new channel with the television network's strategy, because not every television network may be interested in hosting a television shopping channel, or hosting more than one television shopping channel;

(c) committing to a medium to long term contract with the television network to launch a new channel which includes incurring significant upfront and ongoing costs, most of which would not be recoverable if the entrant was to exit the market;

(d) identifying and contracting with a wide range of suppliers, in advance of the launch of the channel, to ensure that the channel has a diverse range of products from the launch date. This involves incurring significant upfront volume and financial risk on all products it sources if those products cannot be sold;

(e) identifying and contracting with a production company to arrange an appropriate venue and equipment which includes incurring significant upfront and ongoing costs, most of which would not be recoverable if the entrant was to exit the market;

(f) identifying and contracting with a logistics company to establish a distribution system for products to be sold by the DTSCR; and

(g) recruiting experienced and qualified staff across various roles including management, supply, production and logistics.

3.37 The notified conduct will make the barriers to entry for any potential entrant that may wish to launch a DTSCR in the future virtually insuperable by foreclosing an unlimited number of

[15] HoustonKemp, *Effect of exclusive dealing by TVSN on competition*, October 2020, [82] – [83].

suppliers that would be available to new entrants, likely including all or most of the key suppliers for effective entry.

3.38 If any existing suppliers to TVSN were effectively forced to choose between continuing to supply TVSN exclusively or supplying a new entrant, it is very unlikely that they would consider "switching" to a new entrant. This is because the notified conduct essentially provides suppliers with an "all or nothing" proposition to either supply exclusively to TVSN or to be forever cut off from TVSN.

3.39 openshop expects that suppliers (both existing and new), if forced to choose between supplying TVSN exclusively or being able to supply to a new entrant (or openshop) and not TVSN, most suppliers would choose to supply TVSN given its significant incumbency advantages and the risk to suppliers of losing access to a significant present or future revenue stream.

3.40 The result of this is that a new entrant would effectively be required to engage with suppliers that had no relationship with TVSN, and likely no experience in supplying through DTSCRs in Australia, which would put the new entrant at a very significant competitive disadvantage upon launch.

3.41 openshop intends to grow its business in Australia both in terms of live broadcasting time per week and geographical footprint of the openshop channel in Australia. The notified conduct restricts openshop's ability to find and engage with suppliers and reduces the attractiveness of openshop to viewers and consumers which are both essential factors that underpin openshop's potential growth strategy. Consequently, this deprives metro television shopping viewers of greater choice and access to products and restricts regional television shopping viewers from ever having an alternative choice to TVSN.

Acquisition of products from suppliers for resupply on their respective television shopping channels

3.42 Both the refusal to supply and the conditional acquisition conduct are likely to have the effect of substantially lessening competition in the markets in which TVSN and openshop compete to acquire products from suppliers to supply on their respective television shopping channels.

3.43 The notified conduct significantly weakens the competition between openshop and TVSN to acquire products from suppliers by entrenching TVSN's existing buyer power with suppliers. As described in paragraph 3.36 above in relation to potential new entrants, the notified conduct results in an "all or nothing" proposition for suppliers currently; to either supply exclusively to TVSN or to be forever cut off from TVSN by engaging with openshop. As a new entrant in August 2019, openshop's ability to access new suppliers has been significantly impeded by TVSN existing buyer power which TVSN has used to prevent or hinder its suppliers from switching to openshop. TVSN's buyer power will only be entrenched further if the ACCC does not revoke the Notifications.

3.44 The suppliers that will be most directly affected by the notified conduct are suppliers that generate a substantial proportion of their overall revenue through sale by way of DTSCRs (ie, captive suppliers). As noted in the HoustonKemp Report:

> *Competition between DTSCRs to acquire products will be reduced by the conduct because many suppliers will be left with a choice between using only TVSN or only openshop. Most suppliers are likely to choose TVSN because it is the much larger incumbent. This will have its greatest effect on competition for suppliers offering products that are particularly suited for sale through the DTSCR format. Such competition could be lessened substantially because those suppliers may be left with TVSN as their only realistic choice.*

> …
>
> *Without the conduct, openshop would be able to compete to purchase products from any supplier. For many suppliers that use a variety of retail channels, this competition between openshop and TVSN will have a relatively small effect because the proportion of sales through DTSCRs is likely to be low. In particular, that is likely to be the case for the large well-known brands that are sold through a number of other routes, including bricks and mortar stores and online.*
>
> *However, the loss of competition between openshop and TVSN could be substantial for captive suppliers selling products that are particularly suited to the DTSCR format. In other words, for suppliers that can only choose TVSN or openshop in order to sell their products in Australia, the conduct may leave them with TVSN as the only realistic choice.*[16]

3.45 The acquisition of products from suppliers which are captive to the DTSCR channel is critical to the ongoing financial viability of DTSCRs generally because these products are most suited to the DTSCR format. Most existing captive suppliers in Australia have an existing or previous relationship with TVSN. Any captive suppliers that are established in the future would also seek to deal with TVSN due to the significant incumbency advantages enjoyed by TVSN. These suppliers would not want to risk being unable to obtain access to TVSN's revenue stream (for new suppliers), or to replace this revenue stream (for existing suppliers) by taking the risk of contracting with the new entrant, openshop, instead of TVSN. In essence, the notified conduct has the effect of reducing opportunities and choice for captive suppliers in promoting their products through alternative suppliers to TVSN which, in turn, restricts consumer access to these products.

3.46 As described in section 3.4 above, the refusal to acquire conduct permits TVSN to refuse, or threaten to refuse to acquire any or all of the products from a supplier if that supplier has supplied any product to openshop in the past, or proposes to supply any product to openshop in the future. The conditional acquisition conduct restricts suppliers from supplying to openshop any products in the same brand or category as the product which the supplier supplies to TVSN. The exceptionally wide scope of the product categories identified by TVSN in the Notification is such that the conditional acquisition conduct could operate in practice to prevent a supplier from supplying any products to openshop during the exclusivity period in circumstances where most suppliers would generally only supply products of the same product category (as broadly defined by TVSN).

3.47 This "all brands and all products" aspect of the notified conduct would have a detrimental effect on captive suppliers in particular. Captive suppliers often have product portfolios comprising numerous products, across multiple brands and even multiple product categories. [Restriction of Publication of Part Claimed]. A supplier that supplied a single product to TVSN would be effectively restricted by the conditional acquisition conduct from supplying any other product in its portfolio to openshop, even if TVSN was offered the product and declined to acquire it. For captive suppliers this would have a dampening effect on their ability to supply some products into the market at all and their incentive to innovate for new products. Consequently, consumers are denied access to products that would otherwise be supplied in the absence of the notified conduct and the potential benefits to consumers from innovation by captive suppliers.

3.48 By way of example, openshop refers to the public submission lodged by Mr Vic Cherikoff of Australian Functional Ingredients Pty Ltd dated 14 August 2020 that describes Mr Cherikoff's dealings with TVSN. Mr Cherikoff supplied a product, Kalari Crush, to TVSN for over 13 years. Recently, Mr Cherikoff pitched a new product to TVSN called LIFE which TVSN declined to stock. Following TVSN's rejection of his offer for LIFE, Mr Cherikoff offered LIFE

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16 HoustonKemp, *Effect of exclusive dealing by TVSN on competition*, October 2020, [89], [117] – [118].

to openshop. TVSN discovered this offer and ended its long-standing relationship with Mr Cherikoff for the Kalari Crush product. Mr Cherikoff now supplies his LIFE product to openshop. Mr Cherikoff, a captive supplier, lost substantial sales to TVSN of his Kalari Crush product because he wanted to supply to openshop a completely different product which was of no interest to TVSN. This illustrates how TVSN's conduct will: inhibit the growth of businesses like Mr Cherikoff's business; discourage suppliers from developing new products and innovating; and thereby harm consumers

3.49 openshop's experiences with suppliers during the period in which TVSN has been engaging in the conduct the subject of the Notifications includes the following:

(a) [Restriction of Publication of Part Claimed]

(b) [Restriction of Publication of Part Claimed]

(c) [Restriction of Publication of Part Claimed]

3.50 openshop disagrees with TVSN's claim that the notified conduct results in a market where DTSCRs will compete to have the product exclusively distributed on their channel based on the most attractive offer. The commercial reality is that TVSN does not prepare a compelling, competitive offer to hold on to existing suppliers or to attract new ones – it simply relies on its substantial buyer power and refuses, or threatens to refuse, to engage with suppliers who deal with openshop or ceases, or threatens to cease, dealing with suppliers who deal with openshop.

3.51 The notified conduct deters suppliers, particularly captive suppliers, from engaging with openshop at all for fear of being excluded by TVSN completely and losing a substantial revenue stream. This conduct only makes commercial sense because of TVSN's substantial market power. If TVSN faced effective competition from one or more other DTSCRs, which could offer to purchase equivalent volumes, it could not afford to threaten or restrict suppliers, especially captive suppliers in this way. The exclusivity is intended to and does entrench TVSN's position as the monopsonist DTSCR.

3.52 Further, the conditional acquisition conduct will, as a practical matter operate to preclude a supplier, which is dealing with TVSN, from dealing with openshop for anywhere between 12 and 24 months. That period can extend indefinitely if a product is reordered or another product is purchased due to the lengthy lead times for products supplied to DTSCRs. This will result in significant incumbency advantages for TVSN, contrary to TVSN's claims that the exclusivity period is "limited".

3.53 The refusal to acquire conduct is <u>not</u> temporally limited and would allow TVSN to threaten suppliers at large that any existing or future revenue stream they could potentially obtain through TVSN would be forever closed off to them if they supply a single product to openshop.

3.54 In the absence of the notified conduct, TVSN's suppliers would be incentivised to engage with openshop to seek competitive supply arrangements (on price or more favourable terms of sale) to either switch to openshop or to supply products concurrently through TVSN and openshop to maximise sales. This would be normal commercial conduct, which would benefit consumers. It would also be normal competitive conduct for openshop, in the absence of the notified conduct, to approach and engage in negotiations with TVSN's suppliers for the supply of products, including those TVSN does not supply or chooses not to supply.

3.55 Accordingly, real potential competition and not the theoretical competition in "to be the exclusive DTSCR for each product", as TVSN contends, is effectively 'nipped in the bud' including:

(a) competition for suppliers to engage in negotiations with openshop without fear of a supplier's relationship with, and revenue source from, TVSN being damaged or eliminated;

(b) competition that would occur between DTSCRs selling the same products or competitive products and vigorously competing on price, range and terms of sale (including through bundling products) for customers; and

(c) the introduction of new products that TVSN's suppliers may wish to produce and supply but TVSN declines to acquire; thereby depriving consumers of new product choices.

3.56 When openshop launched in August 2019 there were, initially, a number of examples of a supplier simultaneously supplying its products to TVSN and to openshop with the result that customers had the benefit of competition in relation to the price and non-price terms offered by the parties.

3.57 In openshop's initial submission to the ACCC dated 17 January 2020, openshop described this type of competition occurring with respect to products supplied by Legmaster, Samsung, Trophy Skin, Django & Juliette and Diana Ferrari (see page 5). TVSN states that its sale of these products at discounted prices reflects TVSN acting in accordance with its business model of not wanting to continue to promote products which are being supplied via another DTSCR,[17] which openshop understands to mean that TVSN is offering clearance rates to sell out those products and then will not acquire further products or brands from those suppliers.

3.58 Contrary to TVSN's views, this is demonstrative of price competition that would occur in the absence of the notified conduct to the benefit of consumers. If suppliers were not anti-competitively restricted by TVSN from engaging with openshop, some of them would seek to explore the opportunity to access an additional channel to market for their products to increase sales volumes. The examples described above with respect to Mr Cherikoff, [Restriction of Publication of Part Claimed] clearly illustrate this. Without the notified conduct, TVSN's response to the direct and close competition from openshop for the same products would be to compete on the merits for the acquisition of those products from the suppliers and the supply of those products to consumers.

Supply of content to viewers of their respective television shopping channels

3.59 TVSN and openshop compete closely to supply content to viewers of their respective television shopping channels. The lessening of competition in the market in which TVSN and openshop acquire products from suppliers has a consequential competitive effect on competition for viewership. In particular, by virtue of the notified conduct, TVSN can reserve for itself (by exclusively engaging) the "best" brands across categories (ie, those well-known, high quality brands), leaving openshop the opportunity to engage only with those suppliers that TVSN does not want to deal with across categories, including because they are less reputable in Australia. The quality of the offering will be reflected in the size of viewership openshop is capable of attracting.

3.60 It is essential for openshop to be able to supply a wide range of quality and reputable brands/products across each product category to be able to offer a viable and attractive alternative television channel to TVSN for customers. Within each product category, it is simply not correct to say that there is an unlimited array of suppliers from which openshop could obtain products to sell via its channel. To the contrary, there is not an unlimited array of suppliers from which openshop could obtain products. There are product categories in which certain major suppliers sell the most popular and reputable brands that openshop requires in order to compete effectively with TVSN.

[17] Gilbert + Tobin, *TVSN Channel Pty Ltd Exclusive dealing notification*, April 2020, 24.

3.61 For instance, TVSN currently lists 37 brands on its website under the Kitchen and Food category.[18] TVSN's brands include major premium suppliers such as Breville, DeLonghi, KitchenAid, Philips, Scanpan, Smeg, Tefal and Vitamix. openshop currently lists 30 brands across its corresponding Kitchen and Food category.[19] Within this category, openshop [Restriction of Publication of Part Claimed].

3.62 More specifically in the coffee machines category: TVSN supplies coffee machines manufactured by DeLonghi, Breville, Smeg and Jura; each a premium, market leading brand). By contrast openshop has been able to only secure supply from one coffee machine manufacturer, TODO; an entry level Australian brand.

3.63 The notified conduct is intended to prevent openshop from acquiring goods from any high quality suppliers which are supplying to TVSN. By entrenching TVSN's powerful market position with high quality brands that wish to supply via DTSCR in Australia, the notified conduct reduces the attractiveness of openshop to viewers relative to TVSN and reduces the competitive constraint of openshop on the quality of TVSN's television programs.

Acquisition of rights to show and transmit television shopping channels

3.64 openshop has a contract with Seven Network to broadcast the openshop channel in Australian metropolitan areas. TVSN has a contract with Network Ten and Foxtel to broadcast the TVSN channel to virtually every household in Australia. There is currently very limited free to air broadcasting spectrum available in Australia.

3.65 By reducing openshop's ability to compete with TVSN as set out above, the notified conduct also lessens openshop's ability and incentive to vigorously compete with TVSN for broadcasting rights which is dependent on openshop's ability to generate sufficient revenue to enable it to acquire further rights to show and transmit in regional and other areas in which TVSN current operates so as to broaden its target audience across Australia.

Acquisition of talent/staff with expertise in DTSCR

3.66 As described in sections 2.23 to 2.25 above, openshop competes with TVSN to attract producers, presenters, contractors, employees and guests with appropriate skills, including previous experience in DTSCR in Australia to work for, or be involved with, openshop.

3.67 Again, the lessening of competition in the market in which the parties acquire products, including from captive suppliers, means that the channel is restricted in the suppliers with which it can deal which restricts the number of viewers and sales it can make which undermines the attractiveness of openshop as a place where talent would wish to work thereby reducing openshop's ability to vigorously compete with TVSN to acquire talent / retain skilled staff with relevant expertise.

4. ANY LIMITED PUBLIC BENEFITS ARE OUTWEIGHED BY SIGNIFICANT PUBLIC DETRIMENTS

The public benefits put forward by TVSN are limited or are private benefits to TVSN

4.1 The CCA does not define what constitutes a public benefit. The courts have considered that anything of benefit to the community generally will be a public benefit.[20] In *Re-7-Eleven Store Pty Ltd* (1994) ATPR 41-357, the Tribunal explained, in the language of *QCMA*:

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18 See https://www.itvsn.com.au/department/90000, accessed 30 September 2020.

19 See https://www.openshop.com.au/index (Kitchenware, Beverage, Kitchen Appliances, and Microwaves categories), accessed 30 September 2020.

20 *Re Queensland Co-op Milling Assn Ltd* (1976) 25 FLR 169.

> *"…anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements… the achievement of the economic goals of efficieny and progress." Plainly the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources. We bear this in mind that … efficiency is a concept that is usually taken to encompass "progress" and that commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency*".

4.2 TVSN asserts that the following public benefits result from the conduct the subject of the Notifications:

(a) encouraging investments in product development, marketing and the sales process

(b) facilitating investments in brand positioning; and

(c) reducing the cost of supplying products on dedicated television shopping channels, including planning programming, purchasing inventory and developing collateral for product campaigns.[21]

4.3 As regards (a), TVSN contends that the notified conduct encourages investment in product development, marketing and the sales process, avoiding the 'hold-up problem'.[22] The degree and significance of TVSN's investment in its suppliers is overstated by TVSN. As described above, openshop does not have the ability to free ride off TVSN's investments as TVSN contends. The notified conduct also does not address any externalities in a way that has a significant public benefit. The HoustonKemp Report sets out the reasons why this is the case and concludes that:

(a) there is no substantial vertical externality that would lead to significantly less investment by TVSN without the notified conduct, relative to with the notified conduct; and

(b) there is no substantial horizontal externality that would lead to significantly less investment by TVSN without the notified conduct, relative to with the notified conduct.[23]

4.4 TVSN's contention that it could not secure its margins on successful campaigns without the notified conduct is unfounded. Even if this contention could be proved, which TVSN has not done, this is a private benefit to TVSN and not the public.

4.5 TVSN's contribution in bringing new products to Australia, or to the DTSCR format, would still occur in the absence of the notified conduct. TVSN's incentives to identify and source new products to supply on its television channel exist without the notified conduct. Finding and bringing new unique find products to consumers is a necessary feature of any successful DTSCR.

4.6 As regards (b), the notified conduct would have a very limited effect on facilitating investments in brand positioning across brands that feature on dedicated retail shopping channels. In openshop's experience, suppliers of brands have significant input on the positioning of their brands. A number of the suppliers and brands that feature on DTSCRs are owned by large companies that control the positioning of those brands consistently across all retail channels nationally, or even globally. It is simply not credible for TVSN to claim that it has had a meaningful role in assisting companies like DeLonghi, Smeg and Bose with their brand positioning.

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21 Gilbert + Tobin, *TVSN Channel Pty Ltd Exclusive dealing notification*, April 2020, 18.

22 Gilbert + Tobin, *TVSN Channel Pty Ltd Exclusive dealing notification*, April 2020, 18.

23 HoustonKemp, *Effect of exclusive dealing by TVSN on competition*, October 2020, 23-24.

4.7 Claims by TVSN that consumers might be confused by different brand positioning across retail channels is also not credible. openshop is not aware of any evidence of customer confusion. It is very common for a consumer of products to "shop around" various retailers to find the best offer available. It is an experience Australian consumers are perfectly able navigate without confusion and to the extent any confusion arises from an experience with a particular retailer – that retailer will simply lose the sale.

4.8 As regards (c), TVSN's assertion that the notified conduct will result in operational efficiencies does not result in a public benefit. The costs and inefficiencies that TVSN seeks to lessen through the notified conduct (unsold inventory, late changes to programming, adjustments to collateral) are private costs to TVSN and are the result of the natural uncertainty in a competitive market. The benefits of continued competition greatly outweighs the burden of such costs and inefficiencies.

4.9 In any event, openshop expects that its costs would be higher than TVSN's on a per product basis due to less efficient economies of scale in circumstances where openshop has only been operating for just over a year and TVSN has legacy production arrangements in place for over 23 years. A lessening of TVSN's costs relative to openshop's would only further weaken openshop's ability to compete with TVSN.

4.10 Competitive and economically efficient markets are generally viewed as the best way to enhance the welfare of consumers. Conduct that restricts competition can result in public benefits where those restrictions achieve a more efficient outcome, and thus higher welfare, than would be the case without the restrictions.[24] This is not the case here. There is no market failure or economic inefficiency that the notified conduct seeks to address to benefit the welfare of consumers. The notified conduct would not meaningfully reduce the cost of supplying products on dedicated retail shopping channels, and to the extent it does, the exclusion of openshop means that those cost savings would not be passed on to the consumer.

Significant public detriments outweigh any limited public benefits

4.11 openshop submits that, as outlined above, the lessening of competition resulting from the notified conduct is substantial. A lessening of competition does not, however, have to be substantial to comprise a detriment to the public.[25] By weakening the competitive tension between TVSN and openshop in the markets outlined above, the notified conduct will cause a lessening of competition resulting in a corresponding public detriment.

4.12 Significantly, the notified conduct deprives captive suppliers of effective competition between TVSN and openshop for the acquisition of their products, or some of them, by entrenching TVSN's incumbency advantages. This may result in less favourable price and non-price terms for captive suppliers who have no alternative route to market for substantial proportions of their products.

4.13 The reach of the notified conduct is effectively unlimited and will likely prevent the supply of a range of products and brands through television shopping channels at all unless TVSN chooses to supply them. This results in consumers having significantly reduced access to products via the DTSCR format and less incentives for suppliers of products to innovate new products, if their only route to supply those products via DTSCR is limited to TVSN.

5. CONCLUSION

5.1 openshop submits that the ACCC can be satisfied that:

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[24] ACCC Guidelines for Authorisation of Conduct (non-merger) (March 2019), 43.

[25] ACCC Guidelines for Authorisation of Conduct (non-merger) (March 2019), 48; *Australian Competition and Consumer Commission v Australian Competition Tribunal* [2017] FCAFC 150 at [11].

(a) the refusal to acquire conduct has the purpose and/or has the likely effect of substantially lessening competition in contravention of section 47 of the CCA; and

(b) the conditional acquisition conduct has the purpose or has the likely effect of substantially lessening competition in contravention of section 47 of the CCA; and

in all the circumstances, the conduct described in the Notifications has not resulted and is not likely to result in a benefit to the public. Alternatively, any asserted benefits to the public do not outweigh the detriment to the public that has resulted or is likely to result from the notified conduct.

5.2 Accordingly, openshop submits that the ACCC should ought to notify TVSN under sub-section 93(3) of the CCA that the Notifications are not approved.

CONFIDENTIAL APPENDIX 1

Confidential list of suppliers referred to in paragraph 2.30 of the Submission

[Restriction of Publication of Part Claimed]

Effect of exclusive dealing by TVSN on competition

A report for Ashurst

Public version

19 October 2020

Report authors

Greg Houston

Luke Wainscoat

Contact Us

Sydney
Level 40
161 Castlereagh Street
Sydney NSW 2000

Phone: +61 2 8880 4800

Disclaimer

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Executive summary

1. We have been engaged by Ashurst Australia (Ashurst) on behalf of its client, Australian Shopping Network Pty Ltd (ASN), for the purpose of obtaining legal advice in respect of two exclusive dealing notifications (the notifications) lodged by TVSN Channel Pty Ltd (TVSN) with the Australian Competition and Consumer Commission (ACCC).

2. TVSN and ASN (trading as openshop) are dedicated television shopping channel retailers (DTSCRs), ie, they use live presentations or demonstrations to sell a wide range of products to Australian consumers on a dedicated television shopping channel. For 23 years TVSN had been the only DTSCR in Australia, until openshop entered in August 2019. There are still no other DTSCRs in Australia.

3. The notifications set out the notified conduct, the essence of which is for TVSN to be able to acquire products from suppliers on an exclusive basis.

4. We have been asked by Ashurst to respond to the report prepared by CEG that examines the competitive effects of the notifications.

Practical effect of the notified conduct

5. We understand that suppliers to DTSCRs vary significantly in their size, brand recognition, suitability to the DTSCR format and willingness to supply their products through a DTSCR. Some of these brands are global or very large Australian brands that are widely sold across a range of retail channels.

6. Other brands are much smaller, are substantially sold through the DTSCR format and are not widely available through other retail channels. We understand that suppliers of these brands are ‘captive’ to the DTSCR channel, because of their particular suitability to it. In other words, it would be much less effective (or not feasible) to sell them through other channels.

7. The notified conduct is exclusive dealing because it would allow TVSN to acquire products from a supplier on an exclusive basis, ie, the supplier would not be able to sell goods in the same product category or brand to other DTSCRs.

8. The exclusivity applies across a broad range of products, ie, not only to the product being purchased by TVSN, but also:

   a. all products of the same brand offered by the supplier in question; and

   b. all products in the same product category offered by the supplier in question.

9. The exclusivity may also apply over a long period of time, since it applies from the point at which TVSN ‘acquires, or offers to acquire’ a product (or service) up until:

   a. four months after products purchased by TVSN from the supplier are received in Australia and available for sale by TVSN; and

   b. four months after the completion of specific promotions, campaigns, events or television programs that TVSN intended would feature the products or use the services and that were notified by TVSN to the supplier.

10. On our assumptions, the period of exclusivity will be 12 months from the point at which TVSN acquires or offers to acquire a product from a supplier to the point at which the supplier will be able to supply a product to openshop in the same brand or product category as the product in question. This is a

conservative estimate given that programming, production and purchasing can take up to 18 months. The exclusionary period will last forever if TVSN was to purchase one or more products in the same brand or product category from a supplier every 12 months or less.

11. The cost of switching between supplying openshop and TVSN would be very substantial for suppliers that sold products through the DTSCR format frequently because they would not be able to sell any products for at least 12 months. The overall effect of the notified conduct is that TVSN would be allowed to undertake conduct such that suppliers selling frequently through DTSCRs will choose either:

   a. to supply TVSN indefinitely; or

   b. to supply openshop indefinitely.

Exclusive dealing in the economic literature

12. Exclusive dealing is a type of vertical restraint, ie, a restriction imposed by one member of a vertical relationship on another. This type of conduct can have a range of different pro- and anti-competitive effects, depending upon the circumstances and the conduct. The best way to examine the overall effect of the notified conduct is therefore to assess both the anti and pro-competitive effects it will have.

13. A common type of exclusive dealing is a franchise relationship, with the traditional form being one in which there is an upstream manufacturer and a downstream retailer, such as a car dealership. The manufacturer may want the dealer to invest in facilities or human capital in order to provide better services to customers. Unless the dealer can be assured that its investments are fully protected, the dealer may underinvest. Offering a dealer an exclusive territory can encourage the dealer to make the investments that the manufacturer wishes it to make. The exclusivity may give the dealer a degree of geographic market power, but the increased investment means that the conduct can have a net positive effect on welfare, depending on how much competition and investment are affected.

14. In the circumstance of a car dealership, an exclusive dealing relationship is in the interests of the manufacturer, because it encourages the dealer to put in more effort to sell the manufacturer’s product, without involving any investment by the manufacturer. Manufacturers often seek these kinds of restraints.

15. In contrast, TVSN’s notification is being made by the retailing or downstream party to the proposed vertical relationship. This circumstance in which the retailing party is seeking an exclusive dealing relationship has not been examined nearly as much in the economic literature. One instance in which this was examined found that retailers with market power may want to impose vertical restraints to increase prices and restrict output.

16. Given the underlying theory as to the circumstances in which exclusive dealing may be competition and welfare enhancing, it is more difficult to see why the notified conduct would be in the interest of TVSN, as opposed to its suppliers, absent any increase in market power. TVSN has said that it would invest more with the notified conduct than will otherwise be the case, but this means that its costs will be higher. In order to earn sufficiently greater profits to compensate for this increased investment, TVSN would need either to charge higher prices or to increase its sales volumes, presumably by taking market share from openshop.

Anti-competitive effects

17. The effect of the notified conduct can be examined by comparing competition in two states of the world, ie:

   a. one in which the notified conduct takes place; and

b. one in which the notified conduct does not take place.

18. TVSN and openshop compete against each other in a number of ways, including:

    a. to attract viewers to their television shopping channels;

    b. to acquire products from suppliers;

    c. to sell products to DTSCR viewers, and online;

    d. to hire staff; and

    e. to acquire the rights to transmit television shopping channels.

19. There are separate markets for the wholesale supply of products that are particularly suited for sale through the DTSCR format, and the wholesale supply of other products because:

    a. other channels do not offer the same benefits as DTSCRs for products that are particularly suited for sale through the DTSCR format; and

    b. DTSCRs are able to identify those products that are particularly suited for sale through the DTSCR format.

20. Competition between DTSCRs to acquire products will be reduced by the conduct because many suppliers will be left with a choice between using only TVSN or only openshop. Most suppliers are likely to choose TVSN because it is the much larger incumbent. This will have its greatest effect on competition for suppliers offering products that are particularly suited for sale through the DTSCR format. Such competition could be lessened substantially because those suppliers may be left with TVSN as their only realistic choice.

21. The notified conduct limits competition between TVSN and openshop for viewers because TVSN is able to secure the suppliers of its choice, whereas the availability of suppliers to openshop is limited.

22. The differentiation between DTSCRs caused by the notified conduct also weakens competition between suppliers. By way of illustration, consider a simple example with two suppliers and two retailers. When there is no exclusive dealing and no differentiation at the retail level, the retailers will set their prices close to their long run marginal costs. An increase in the price of one supplier will cause both retailers to raise their retail prices for that product, but the retailers will not increase their margin on the other product.

23. With exclusive dealing and the resulting differentiation between retailers, an increase in the price set by one supplier would be more likely to cause the retailer of that product to raise its price, and the other retailer to respond by increasing its margin on the competing product, because the retailers are differentiated. The supplier considering raising its price therefore has a greater incentive to do so because it expects the rival retailer to raise the price of the competing product.

24. The reduction in competition for viewers and limit on who can be a supplier has the effect of restricting the ability of openshop to expand and to compete against TVSN to hire staff. These weaken the competitive constraints faced by TVSN.

25. Last, openshop will not be able to compete as vigorously with TVSN for broadcasting rights if its ability to grow and expand is restricted.

26. Any reduction in competition between DTSCRs could have a substantial effect given that it is difficult, costly and takes a substantial amount of time to become a DTSCR in Australia.

27. We conclude that there are a number of ways in which the notified conduct lessens the competitive constraints on TVSN.

Pro-competitive effects

28. An increase in investment is a well-recognised benefit in the economic literature that can arise as a result of exclusive dealing. In contrast, we are not aware of any of the other benefits of exclusive dealing cited by CEG as having been identified as such in the economic literature.

29. First, CEG says that the notified conduct would lead to increased investment by TVSN because there are horizontal and vertical externalities as a result of such investment. We disagree with CEG's conclusion that a vertical externality exists because TVSN undertakes efforts that confer an indirect benefit to suppliers in the form of increased profits.

30. It seems improbable that the amount of brand and product promotion being undertaken by TVSN could have a material effect on major brands such as Bose, HP, Nokia, KitchenAid or Tom Tom. Those brands have an existing suite of products and so it is also highly unlikely that their product development is being substantially affected by TVSN's investment. DTSCRs assist with marketing and promotional strategies, but well-known brands would have much of this material already prepared.

31. We understand from openshop that some investment is required to bring products to market, and that this investment is greater for smaller, less well-known brands. However, this investment does not appear to provide a substantial benefit to the supplier, other than the usual benefit from any situation in which a retailer sells a supplier's product.

32. It is not clear what TVSN would do differently without the notified conduct, ie, it would still need to find and buy products, make the best television programs it is able to in order to maximise its sales and provide the best customer service possible so that customers come back to TVSN.

33. CEG says that there is a horizontal externality because a rival DTSCR could benefit from substantial investments made by TVSN that are specific to the products and brands of its suppliers if the rival DTSCR supplies simultaneously with TVSN.

34. It is not clear how, as a practical matter, such an indirect benefit could arise. It seems highly unlikely that a significant number of viewers could see the same two products on TVSN and openshop, and that seeing the product on TVSN would lead to the viewer purchasing a product from openshop.

35. openshop does not benefit from any content that is created by TVSN. openshop cannot use content that is owned by TVSN. openshop seeks to create programs that are differentiated stylistically from TVSN's programs in order to attract viewers away from TVSN. Consistent with this, we understand that openshop does not use content that is owned by a supplier and was developed with TVSN. In which case, there is no significant horizontal externality.

36. We conclude that there is no apparent horizontal or vertical externality that would lead to significantly less investment by TVSN without the conduct, relative to with the conduct.

37. CEG states that the investment problem is particularly acute because its effort with suppliers commonly involve a 'trial and error' process. We disagree that the existence of a trial and error process is a reasonable basis for an investment problem, not least since trial and error processes are a normal form of competition between retailers. Competition spurs firms to find the most successful products before their rivals.

38. Second, CEG states the notified conduct will allow TVSN to differentiate itself. This results in a weakening of competition, rather than a benefit. There are many other ways that DTSCRs can differentiate themselves without the notified conduct.

39. Third, CEG says that the notified conduct will protect TVSN from customer confusion and the negative consequences of competing DTSCRs providing a poor customer experience.

40. As a practical matter, it seems very unlikely that there could be a substantial problem with customers becoming confused about seeing the same product on openshop and TVSN – it is common for retailers of all types to sell the same products and brands and this does not usually appear to give rise to great consumer confusion. TVSN should not need to protect itself from the poor service of its rivals; rather, such a circumstance would usually represent an opportunity to out-compete rivals and win customers.

41. We conclude that it is highly unlikely that there will be a substantial pro-competitive effect as a result of reducing confusion about products or any harm to TVSN's brand.

42. Finally, CEG states that the notified conduct will result in operational efficiencies because planning becomes uncertain and more costly to TVSN without the conduct.

43. It is not clear from the CEG report why planning for TVSN becomes more uncertain or costly without the notified conduct. The most likely reason for the added uncertainty with openshop as a supplier is that this provides more competition leading to uncertainty as to the future level of sales. To the extent that this is the case, the benefits from such competition would outweigh any potential costs.

44. We conclude that it is very unlikely that there are substantial net benefits from TVSN being able to operate more efficiently with the notified conduct.

Conclusion

45. There are a number of ways in which the notified conduct is likely to have the effect of substantially lessening competition in one or more markets in which TVSN acquires and/or supplies products or services in Australia. There are no material benefits to the public from the notified conduct, so these cannot outweigh the lessening of competition.

1. Introduction

46. We have been engaged by Ashurst Australia (Ashurst) on behalf of its client, Australian Shopping Network Pty Ltd (ASN), for the purpose of obtaining legal advice in respect of two exclusive dealing notifications (the notifications) lodged by TVSN Channel Pty Ltd (TVSN) with the Australian Competition and Consumer Commission (ACCC) on 18 May 2020.

47. TVSN and ASN (trading as openshop) are retailers of a wide range of products in Australia using their own television and online sales channels.[1] The notifications set out the notified conduct, the essence of which is for TVSN to be able to acquire products from suppliers on an exclusive basis.[2]

48. We have been asked by Ashurst to respond to the report prepared by CEG that examines the competitive effects of the notifications.[3]

49. The remainder of our report is structured as follows:

    a. in section two we set out relevant background, including a description of the services provided by TVSN and openshop, an assessment of the practical effect of the notified conduct on openshop, and make some observations in relation to the relevant economic literature;

    b. in section three we describe the likely anti-competitive effects of the notified conduct and make a number of observations on the description of these effects by CEG; and

    c. in section four we describe the likely pro-competitive effects of the notified conduct and make a number of observations on the description of these effects by CEG.

[1] Gilbert + Tobin, *TVSN Channel Pty Ltd exclusive dealing notification*, April 2020, p 1; and Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, September 2020, p 5.

[2] We set out what we understand to be the effect of the notified conduct in more detail in section 2.2.

[3] Ashurst, *Letter of engagement – Australian Shopping Network Pty Ltd*, August 2020, p 1.

2. Background

50. In this section we set out relevant background for the remainder of our report, including a description of the services provided by TVSN and openshop, an assessment of the practical effect of the notified conduct on openshop, and the usual situation in which exclusive dealing is found to be pro-competitive in the economic literature.

2.1 Dedicated television shopping channel retailers

51. Dedicated television shopping channel retailers (DTSCRs) use live presentation or live demonstrations to sell products to consumers on a dedicated television shopping channel. For 23 years TVSN had been the only DTSCR in Australia, until openshop entered in August 2019.[4] There are still no other DTSCRs in Australia.

52. Other countries have a number of DTSCRs, including at least ten in the United States and 16 in the United Kingdom.[5]

53. TVSN and openshop both sell a wide range of products, including fitness, beauty, kitchen and food, electronics, homewares, jewellery, travel, garden and leisure products to consumers in Australia.[6] TVSN and openshop focus on products that are suitable for sale by the DTSCR format, ie:[7]

> products with a clear "brand story" that would benefit from a detailed *explanation* by a presenter or guest to create an emotional connection between the customer and the product or brand;
>
> products that would benefit from a detailed *demonstration* by a presenter or guest highlighting their unique selling points;
>
> products that can be modified, bundled with other products, or include a free gift when purchased; and/or
>
> products that are a "unique find" that are not available in bricks and mortar stores due to the scale required.

54. Suppliers vary significantly in their size, brand recognition, suitability to the DTSCR format and willingness to supply their products through a DTSCR.[8] Some of these brands are global (for example, [Restriction of Publication of Part Claimed]) or very large Australian brands (for example, [Restriction of Publication of Part Claimed]) that are widely sold across a range of retail channels.[9]

55. Some other brands are much smaller, are substantially sold through the DTSCR format and are not widely available through other retail channels (for example, [Restriction of Publication of Part Claimed]).[10] We understand that suppliers of these brands are 'captive' to the DTSCR channel, because of their particular suitability to it.[11] In other words, it would be much less effective (or not feasible)[12] to sell them through other channels. This may be because, for example, a product has a

[4] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 2.6.

[5] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 2.39 (b).

[6] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 2.13; and Gilbert + Tobin, *TVSN Channel Pty Ltd Exclusive dealing notification*, April 2020, p 1.

[7] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, paras 2.14.

[8] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 2.17.

[9] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 2.17.

[10] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 2.17.

[11] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, paras 2.17 and 2.18.

[12] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 3.21.

strong brand story that resonates with customers and the product can be effectively demonstrated or explained by trained guests or presenters.[13]

56. Products from captive suppliers are important for DTSCRs. For example, [Restriction of Publication of Part Claimed].[14]

57. We understand that openshop requires a mix of the types of suppliers and products in order to compete successfully against TVSN.[15]

58. TVSN and openshop both typically undertake a series of steps in order to identify and prepare their products for sale, ie:[16]

   a. buyers identify and source products, including assessing whether the products are appropriate for sale through the DTSCR format;

   b. the DTSCR purchases the product and then takes steps to prepare the promotional and marketing content for that product;

   c. the DTSCR engages with the supplier to prepare product-specific content, such as images for the DTSCR's website;

   d. the DTSCR works with the supplier to create a content strategy for the product; and

   e. the DTSCR organises and creates the production for the live segment demonstrating the product, with the supplier typically paying for show charges, including the cost of models, presenters, chefs, hair and make-up, with the DTSCR typically paying for all of the other product costs, including the crew, lighting, venue, equipment, editing, etc.

59. The investment that openshop makes in the above steps is related to the size of the supplier relative to the product category in which they operate, ie:[17]

   a. global or large Australian brands (such as [Restriction of Publication of Part Claimed]) typically provide most or all of their own marketing and promotional content since they generally have a widely recognised 'brand story' and existing promotional content; whereas

   b. openshop is involved in creating most, if not all, of the marketing content for smaller brands that substantially supply their products through DTSCRs.

60. It follows that openshop's investment is larger when working with captive suppliers because it incurs time and cost to produce video and image content, create and maintain online advertisements, pay for employees to create and manage the brand's advertisements, and production costs, for broadcast on the openshop channel.[18]

2.2 Practical effect of the notified conduct

61. The notified conduct is for TVSN to:

[13] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 2.18.

[14] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 3.22.

[15] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 2.17.

[16] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 2.33; and Gilbert + Tobin, *TVSN Channel Pty Ltd Exclusive dealing notification*, April 2020, pp 5 and 8-9.

[17] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, paras 2.34-2.35.

[18] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 2.35.

a. be able to acquire from suppliers on an exclusive basis (exclusive acquisition conduct), ie:[19]

> acquire, or offer to acquire, products or services from a supplier (and as a consequence, invest in the development, promotion and sales of those products) on condition that the supplier (or related body corporate) will not, without the written consent of TVSN, supply those products or services, or any other products or services (together, products) under the same brand or in the same product category for feature or sale by another DTSCR for a period up until:
>
> - 4 months after products purchased by TVSN from the supplier are received in Australia and available for sale by TVSN (having passed quality assurance procedures); and
> - 4 months after the completion of specific promotions, campaigns, events or television programs that TVSN intended would feature the products or use the services and that were notified by TVSN to the supplier
>
> …

b. be able to refuse to acquire from suppliers (refusal to acquire conduct), ie:[20]

> [be able to] 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.

62. The notified conduct is exclusive dealing because it would allow TVSN to acquire products from a supplier on an exclusive basis, ie, the supplier would not be able to sell goods in the same product category or brand to other DTSCRs.

63. The exclusive acquisition conduct applies across a broad range of products, ie, not only to the product being purchased by TVSN, but also:

a. all products of the same *brand* offered by the supplier in question; and

b. all products in the same *product category* offered by the supplier in question.

64. The notified conduct does not define ‘product category’, but the notifications refer to categories of merchandise such as ‘…jewellery, health and fitness, beauty, fashion, kitchen, homewares, electronics and manchester.’[21] Assuming each of those is a product category, we understand that most suppliers would offer goods in only one category. In that circumstance, the exclusive acquisition conduct would, in most cases, mean that a supplier could not supply any products to another DTSCR if it sold products to TVSN.

65. By way of example, assume there is a firm supplying electronic goods to consumers through a range of channels, including DTSCRs. The supplier has three brands covering basic goods, mid-range and luxury items, and it offers a number of products including laptops, televisions, headphones, mobile phones and a range of accessories. In that circumstance, TVSN would be able to purchase the luxury branded televisions on the condition that the supplier did not sell any of the other goods it supplies to openshop because they are all part of the same product category, ie, electronics.

66. The refusal to acquire conduct applies more broadly across all products offered by a supplier.

67. The exclusive acquisition conduct may apply over a long period of time, since it applies from the point at which TVSN ‘acquires, or offers to acquire’ a product (or service) up until:[22]

[19] TVSN, *Notification of exclusive dealing (re: exclusive acquisition conduct)*, May 2020, p 3

[20] TVSN, *Notification of exclusive dealing (re: refusal to acquire conduct)*, May 2020, p 3.

[21] TVSN, *Notification of exclusive dealing (re: refusal to acquire conduct)*, May 2020, p 1.

[22] See paragraph 61.

a. four months after products purchased by TVSN from the supplier are received in Australia and available for sale by TVSN; and

b. four months after the completion of specific promotions, campaigns, events or television programs that TVSN intended would feature the products or use the services and that were notified by TVSN to the supplier.

68. TVSN goes through a process to purchase its supplies and prepare the programming and marketing that can take a substantial period of time. TVSN undertakes:[23]

> Forward planning in terms of programming, scheduling, production, promotion of future events and campaigns and the purchasing of stock. Depending on the nature of the product and the size of the order, a supplier might require that products be purchased well in advance of the intended televised feature or event - sometimes more than 6 months in advance.

69. We understand that for TVSN '[p]rogramming, production and purchasing the relevant product has lead times of anywhere between 3-18 months.'[24]

70. We show the combined effect of these arrangements for the period of exclusivity in figure 2.1 below, adopting the assumptions that:

a. TVSN acquires, or offers to acquire a product six months before its associated television program is aired;[25]

b. TVSN begins to sell a product one month after it is received in Australia and available for sale; and

c. the product is sold over a period of two months during which there are campaigns and television programs showing the product.

71. On these assumptions, the period of exclusivity will be 12 months from the point at which TVSN acquires or offers to acquire a product from a supplier to the point at which the supplier will be able to supply a product to openshop in the same brand or product category as the product in question, as set out in figure 2.1. This is a conservative estimate given that programming, production and purchasing can take up to 18 months.[26]

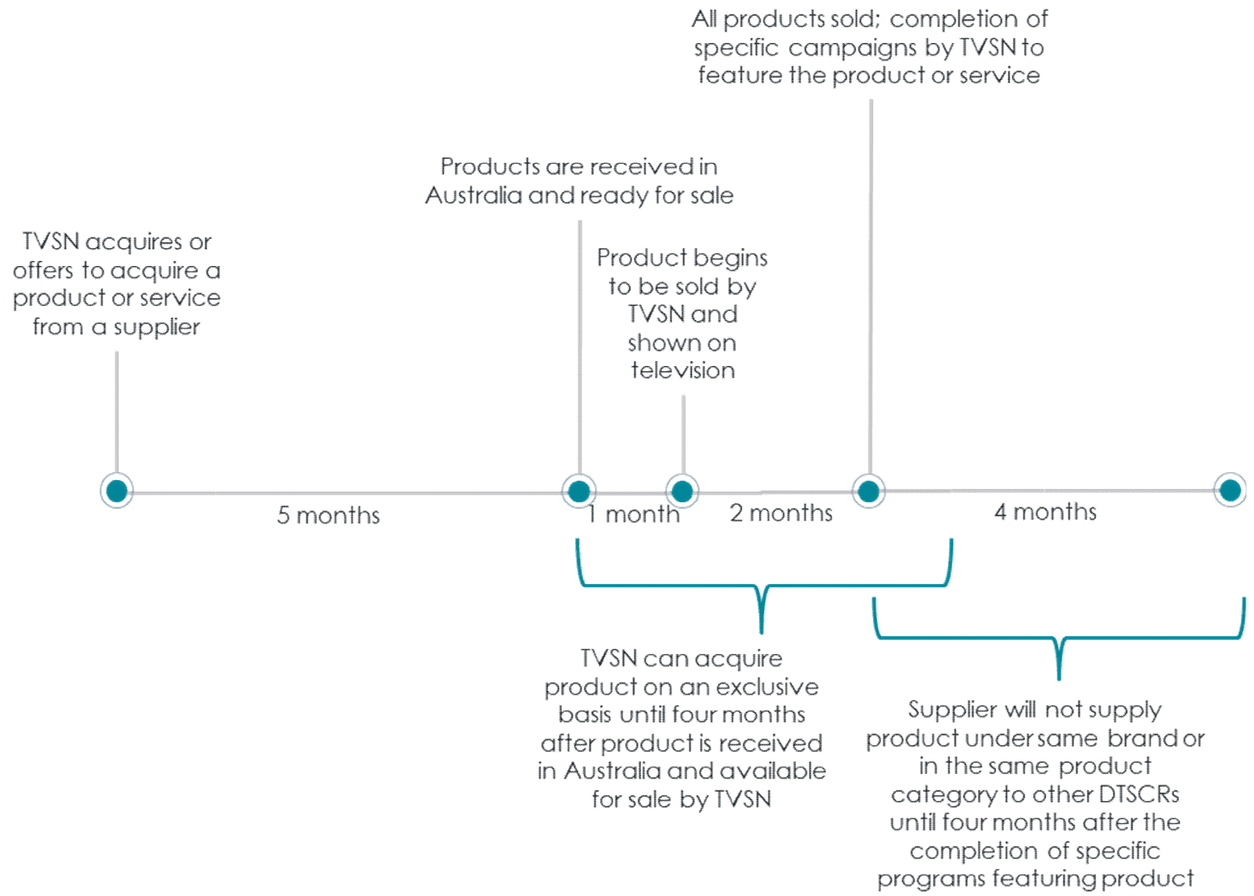
[23] Gilbert + Tobin, *TVSN Channel Pty Ltd Exclusive dealing notification*, April 2020, pp 8-9.

[24] Gilbert + Tobin, *TVSN Channel Pty Ltd Exclusive dealing notification*, April 2020, p 11.

[25] See paragraph 68.

[26] See paragraph 69.

Figure 2.1: Estimated period of exclusivity



72. The exclusionary period will last longer if TVSN purchases a different product from the same supplier (in the same brand or product category) during the 12 month period shown in figure 2.1. It would last forever if TVSN was to purchase one or more products in the same brand or product category from a supplier every 12 months or less.[27]

73. The refusal to acquire conduct has no time limit.

74. CEG describes the notified conduct as exclusive dealing, but describes the exclusivity as limited because '…TVSN is not seeking to contract with suppliers for an extended period.'[28] CEG also states that:[29]

> This means that suppliers may switch supplying products from TVSN to alternative DTSCRs, with a short delay, even if this involves utilising the investments made by TVSN.

75. We agree that it would be possible to switch from supplying TVSN to openshop, but the delay may not be short, and it could be very costly for some suppliers, reducing the likelihood that they will switch.

76. Drawing on the example in figure 2.1 and assuming that a supplier usually sells one product in a product category or brand every three months by means of DTSCR, such a supplier would not be able to switch from TVSN to openshop because of the exclusionary period of the notified conduct. This is

[27] Under the assumptions given in paragraph 70.

[28] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 17.

[29] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 18.

because the supplier would usually sell a new product every three, six and nine months after the initial product is sold to TVSN. This implies that the cost of switching from TVSN to openshop would be very high for this supplier.[30]

77. In summary, the overall effect of the notified conduct is that TVSN would be allowed to undertake conduct such that suppliers selling regularly through DTSCRs will choose either:

a. to supply TVSN indefinitely; or

b. to supply openshop indefinitely.

78. Once a supplier has chosen either of these options, it would be very costly and so highly unlikely that it would switch to supplying a new DTSCR, because the new entrant would presumably have low and uncertain sales and there would be a lengthy time period not selling any products.

2.3 Exclusive dealing in the economic literature

79. Exclusive dealing is a type of vertical restraint, ie, a restriction imposed by one member of a vertical relationship on another.[31] This type of conduct can have a range of different pro- and anti-competitive effects, depending upon the circumstances and the conduct.[32] The best way to examine the overall effect of the notified conduct is therefore to assess both the anti and pro-competitive effects it will have, which we set out in sections 3 and 4.

80. A common type of exclusive dealing is a franchise relationship, with the traditional form being one in which there is an upstream manufacturer and a downstream retailer, such as a car dealership.[33] The manufacturer may want the dealer to invest in facilities or human capital in order to provide better services to customers. Unless the dealer can be assured that its investments are fully protected, the dealer may underinvest. Offering a dealer an exclusive territory can encourage the dealer to make the investments that the manufacturer wishes it to make.[34] The exclusivity may give the dealer a degree of geographic market power, but the increased investment means that the conduct can have a net positive effect on welfare, depending on how much competition and investment are affected.

81. In the circumstance of a car dealership, an exclusive dealing relationship is in the interests of the manufacturer, because it encourages the dealer to put in more effort to sell the manufacturer's product, without involving any investment by the manufacturer.[35] Manufacturers often seek these kinds of restraints – as set out by Lafontaine and Slade:[36]

> Vertical restraints most often arise in retail settings, with the upstream firm or manufacturer typically restricting its downstream retailers' choices.

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[30] This cost of switching would be much lower for firms than only rarely sell through DTSCRs.

[31] Lafontaine, F and Slade, M, *Exclusive contracts and vertical restraints: empirical evidence and public policy*, in Buccirossi, P (ed), *Handbook of antitrust economics*, MIT Press, Cambridge, MA, 2008, p 392.

[32] Rey, P and Verge, T, *Economics of vertical restraints*, in Buccirossi, P (ed), *Handbook of antitrust economics*, MIT Press, Cambridge, MA, 2008, pp 384-386.

[33] Lafontaine, F and Slade, M, *Exclusive contracts and vertical restraints: empirical evidence and public policy*, in Buccirossi, P (ed), *Handbook of antitrust economics*, MIT Press, Cambridge, MA, 2008, p 392.

[34] Lafontaine, F and Slade, M, *Exclusive contracts and vertical restraints: empirical evidence and public policy*, in Buccirossi, P (ed), *Handbook of antitrust economics*, MIT Press, Cambridge, MA, 2008, p 395.

[35] For example, see: Comanor, W S, *The two economics of vertical restraints*, Review of Industrial Organization, 5, 2, 1990, p 102 and 110. Motta, M, *Competition policy: theory and practice*, Cambridge University Press, New York, 2009, p 335; Lafontaine, F and Slade, M, *Exclusive contracts and vertical restraints: empirical evidence and public policy*, in Buccirossi, P (ed), *Handbook of antitrust economics*, MIT Press, Cambridge, MA, 2008, p 395; and International Competition Network, Unilateral, Conduct Working Group, *Unilateral conduct workbook chapter 5: exclusive dealing*, April, 2013, paras 100-102.

[36] Lafontaine, F and Slade, M, *Exclusive contracts and vertical restraints: empirical evidence and public policy*, in Buccirossi, P (ed), *Handbook of antitrust economics*, MIT Press, Cambridge, MA, 2008, p 392.

82. In contrast, TVSN's notification is being made by the retailing or downstream party to the proposed vertical relationship. This circumstance in which the retailing party is seeking an exclusive dealing relationship has not been examined nearly as much in the economic literature.[37] One instance in which this was examined found that retailers with market power may want to impose vertical restraints to increase prices and restrict output.[38]

83. Given the underlying theory as to the circumstances in which exclusive dealing may be competition and welfare enhancing, it is more difficult to see why the notified conduct would be in the interest of TVSN, as opposed to its suppliers, absent any increase in market power. TVSN has said that it would invest more with the notified conduct than will otherwise be the case, but this means that its costs will be higher. In order to earn sufficiently greater profits to compensate for this increased investment, TVSN would need either to charge higher prices or to increase its sales volumes, presumably by taking market share from openshop.

84. It would be in the interest of openshop to also undertake the notified conduct if it was profitable for TVSN because it led to higher sales or greater margins. However, we understand that openshop has no interest in engaging in similar conduct, because it does not expect there to be any meaningful benefit. Consistent with this, we understand that openshop has no exclusive contracts with its suppliers.

[37] Lafontaine, F and Slade, M, *Exclusive contracts and vertical restraints: empirical evidence and public policy*, in Buccirossi, P (ed), *Handbook of antitrust economics*, MIT Press, Cambridge, MA, 2008, p 392.

[38] Comanor, W S, *The two economics of vertical restraints*, Review of Industrial Organization, 5, 2, 1990, pp 110-114.

3. Anti-competitive effects

85. In this section we examine the main anti-competitive effects of the notified conduct and provide an assessment of CEG's analysis of these effects.

86. The effect of the notified conduct can be examined by comparing competition in two states of the world, ie:

    a. one in which the notified conduct takes place; and

    b. one in which the notified conduct does not take place.

87. TVSN and openshop compete against each other in a number of ways, including:

    a. to attract viewers to their television shopping channels;

    b. to acquire products from suppliers;

    c. to sell products to DTSCR viewers, and online;

    d. to hire staff; and

    e. to acquire the rights to transmit television shopping channels.

88. There are separate markets for the wholesale supply of products that are particularly suited for sale through the DTSCR format, and the wholesale supply of other products because:

    a. other channels do not offer the same benefits as DTSCRs for products that are particularly suited for sale through the DTSCR format; and

    b. DTSCRs are able to identify those products that are particularly suited for sale through the DTSCR format.

89. Competition between DTSCRs to acquire products will be reduced by the conduct because many suppliers will be left with a choice between using only TVSN or only openshop. Most suppliers are likely to choose TVSN because it is the much larger incumbent. This will have its greatest effect on competition for suppliers offering products that are particularly suited for sale through the DTSCR format. Such competition could be lessened substantially because those suppliers may be left with TVSN as their only realistic choice.

90. The notified conduct limits competition between TVSN and openshop for viewers because TVSN is able to secure the suppliers of its choice, whereas the availability of suppliers to openshop is limited.

91. The differentiation between DTSCRs caused by the notified conduct also weakens competition between suppliers. By way of illustration, consider a simple example with two suppliers and two retailers. When there is no exclusive dealing and no differentiation at the retail level, the retailers will set their prices close to their long run marginal costs. An increase in the price of one supplier will cause both retailers to raise their retail prices for that product, but the retailers will not increase their margin on the other product.

92. With exclusive dealing and the resulting differentiation between retailers, an increase in the price set by one supplier would be more likely to cause the retailer of that product to raise its price, and the other retailer to respond by increasing its margin on the competing product because the retailers are differentiated. The supplier considering raising its price therefore has a greater incentive to do so because it expects the rival retailer to raise the price of the competing product.

93. The reduction in competition for viewers and limit on who can be a supplier has the effect of restricting the ability of openshop to expand and to compete against TVSN to hire staff. These weaken the competitive constraints on TVSN.

94. Last, openshop will not be able to compete as vigorously with TVSN for broadcasting rights if its ability to grow and expand is restricted.

95. Any reduction in competition between DTSCRs could have a substantial effect given that it is difficult, costly and takes a substantial amount of time to become a DTSCR in Australia.

96. We conclude that there are a number of ways in which the notified conduct lessens the competitive constraints faced by TVSN.

3.1 With and without test

97. In order to examine the effect of the notifications, we compare the likely state of competition in:

   a. a situation in which the notified conduct stands, and TVSN uses the full extent of the permitted exclusive dealing (we call this situation 'with the conduct' or 'the factual'); and

   b. a situation in which the notified conduct is not allowed to stand, and TVSN does not undertake any exclusive dealing conduct (we call this situation 'without the conduct' or 'the counterfactual').

98. We understand that openshop has [Restriction of Publication of Part Claimed].[39] It follows that the counterfactual is not the status quo, it is a situation with no exclusive dealing.

3.2 Market definition

99. The emphasis of our analysis is on the various means by which openshop and TVSN compete, to allow an assessment of how this competition changes as a result of the conduct. We do not reach firm conclusions as to the definition of the relevant markets because there is insufficient information to do so. However, this does not prevent the drawing of conclusions as to whether competition is likely to be lessened by the notified conduct.

100. First, DTSCRs supply television shopping programming for free to air viewers. DTSCRs compete to attract viewers to their television channels because they can expect greater sales if they have more viewers, all else equal.

101. DTSCRs are likely to compete for people's attention with other providers of free content, such as other providers of television programming. However, we expect that openshop and TVSN are each other's closest competitors in this market because they are providing the most similar forms of content.

102. openshop seeks to attract viewers by offering, amongst other things:[40]

   a. a more 'unique or curated choice' than TVSN by focusing on a smaller range of products, giving a longer period of time per product on a television program compared to TVSN;

   b. a different style of television program, as compared to TVSN;[41]

   c. a balanced mix of products; and

   d. more favourable terms of sale compared to TVSN.

[39] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 2.30.

[40] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 2.26.

[41] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 3.31.

103. We conclude that there is a market in which DTSCRs compete for the attention of viewers, but we do draw a precise conclusion as to the boundaries of this market.

104. Second, TVSN and openshop compete to acquire products to sell through their websites and television channels. We describe in section 2.1 that the products being acquired can be split into:

    a. those that are particularly suited for sale through the DTSCR format; and

    b. all other products sold on the DTSCR format, which can be sold using that format or through other sales channels.

105. Competition to acquire the former type of product is primarily between DTSCRs alone. DTSCRs are able to identify those products that are particularly suited for sale through their format. We therefore conclude that there is likely to be:

    a. a market for the wholesale supply of products that are particularly suited to the DTSCR format; and

    b. a market for the wholesale supply of products that can be sold through multiple retail channels.

106. Third, TVSN and openshop compete to sell products to their viewers and on their websites. Depending upon the products, they also compete against a range of other retail channels for these sales.

107. In commenting on this form of competition, CEG says that:[42]

> The markets in which TVSN supplies its products and services are broader and include more competitors than just DTSCRs.

108. CEG does not provide any information to support this statement. It states that:[43]

> An assessment of whether home shopping via DTSCRs is in a separate market to other retail sales platforms requires an understanding of the extent to which customers would substitute between platforms and the margin that is earned on retail sales.

109. However, CEG does not provide any such assessment.

110. In our opinion TVSN and openshop compete in markets to supply products to consumers. Other sales channels may well be part of these markets, but this could vary depending on the type of product in question. There is insufficient information available to us to draw a firm conclusion as to whether other retail channels would be part of the same market.

111. Fourth, TVSN and openshop compete to hire staff with expertise and experience in DTSCR.[44] They are likely to be each other's closest competitor for staff with relevant experience of DTSCR because they are the only two DTSCRs in Australia. They compete against other firms to an extent, such as other retailers to hire buyers, and other content generators for television presenters.

112. Fifth, DTSCRs compete for the rights to show and transmit television shopping programming. This occurs intermittently because DTSCRs tend to have long term contracts with television channels. Other forms of content may also compete with DTSCRs for the rights to show their content on televisions channels.

[42] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 82.

[43] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 85.

[44] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, paras 2.24-2.25.

3.3 Conduct weakens competition to acquire products

113. Suppliers must choose between TVSN and openshop in the situation with the notified conduct, perhaps indefinitely.[45] On the other hand, suppliers are able to supply both at the same time in the situation in which the notification is revoked.

114. We understand that TVSN has a much greater revenue than openshop. This may be due to the greater reach of TVSN[46] and the fact that openshop is relatively new. It follows that, all else equal, TVSN would purchase a much greater quantity of products from a supplier than openshop. In such circumstances, it is very unlikely that any supplier will choose openshop over TVSN with the notified conduct taking place.[47] This will prevent openshop from acquiring products from many suppliers.

115. To offer a sense of the differences in scale, TVSN broadcasts live for up to 13 hours per day, seven days per week, giving 91 hours per week.[48] On the other hand, the openshop channel has up to 12 hours of live broadcast per week.[49] TVSN therefore broadcasts live for about seven and a half times more than openshop.

116. openshop may be able to overcome some of this difference in scale by agreeing to purchase a larger proportion of a supplier's range of products, and by showing these products more often than average on its television programming. However, openshop is limited in the number of products that it shows on its television channel, so it could only do so with a small number of suppliers.

117. Without the conduct, openshop would be able to compete to purchase products from any supplier. For many suppliers that use a variety of retail channels, this competition between openshop and TVSN will have a relatively small effect because the proportion of sales through DTSCRs is likely to be low. In particular, that is likely to be the case for the large well-known brands that are sold through a number of other routes, including bricks and mortar stores and online.[50]

118. However, the loss of competition between openshop and TVSN could be substantial for captive suppliers selling products that are particularly suited to the DTSCR format. In other words, for suppliers that can only choose TVSN or openshop in order to sell their products in Australia, the conduct may leave them with TVSN as the only realistic choice.

3.4 Conduct limits competition for viewers

119. The notified conduct will prevent openshop from acquiring goods from many suppliers who will choose the much larger TVSN over openshop if they are effectively only able to choose one DTSCR. This would have a significant effect on the availability of suppliers for openshop and potential DTSCR entrants because:[51]

    a. there is a limited number of well-known, high-quality brands in Australia willing to sell to DTSCRs in each product category;[52]

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[45] See section 2.2.

[46] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 3.64.

[47] In addition to openshop's smaller size, suppliers may also be concerned that openshop may not be able to survive, especially if it is unable to acquire products from a number of important suppliers.

[48] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop),* October 2020, para 2.5.

[49] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop),* October 2020, para 2.3.

[50] For example, CEG say that sales via TVSN represents only a small fraction of total retail sales in the segments that it operates. See: CEG, *TVSN exclusive supplier arrangements*, April 2020, para 84.

[51] We note that CEG states that it could be true that competition is reduced if there was a limited number of suppliers. See: CEG, *TVSN exclusive supplier arrangements,* April 2020, para 69.

[52] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, paras 3.59-3.60.

b. the exclusivity applies not only to the products being purchased by TVSN, but all products in the same brand or product category as those supplied to TVSN – this further reduces the number of suppliers that openshop will be able to use for each product;

c. TVSN would be able to choose the best suppliers and brands;[53] and

d. it is likely to be more profitable to offer well-known brands to consumers in Australia than those that are unknown and are not currently supplied to Australia.

120. In contrast, CEG assumed that it is '…extremely unlikely that there are a limited number of alternative quality suppliers available to DTSCRs.'[54] CEG also states that:[55]

> As such, it would reasonable [sic] to conclude that there is effectively an unlimited number of alternative quality suppliers that could be used by competing DTSCRs.

121. CEG states that it is better for a competing DTSCR to sell products that are already sold by TVSN, but claims this is because TVSN has made some investment to find the most successful products:[56]

> However, it is the case that competing DTSCRs may find it lower cost to sell products and brands that TVSN has already proven can be successfully sold on a DTSCR. However, this is simply because the competing DTSCR gets to "free ride" on the investment in trial and error made by TVSN in developing its portfolio – as well as the investment in developing successful product specific marketing strategies.

122. In our opinion, this claim is out of proportion to the notified conduct, which excludes openshop from every product made by a supplier, including those that TVSN has tried and failed to sell. To the extent the claim is true, it would be relevant if the notified conduct was focused only on those products where TVSN could show that it made some significant investment to discover what products would be successful. It is quite possible that openshop could successfully sell a product that TVSN failed to sell.

123. An alternative reason why openshop and other potential entrants may want to use some of the brands supplied by TVSN is that these are the well-known brands supplied in Australia, and so lead to substantial volumes of sales.[57]

124. Many of the brands sold by TVSN are large Australian and global brands like Bose, Garmin, HP, Nikon, Nokia, Pentax, Sandisk, Tefal, Tom Tom, TP-Link, Breville, Delonghi, KitchenAid, Magimix, Morphy Richards, Scanpan, Smeg, Tefla and Weber BBQs.[58] It is difficult to imagine that there would be a great deal of investment required by TVSN to discover that Australian consumers will purchase products from these well-known brands.

125. Most suppliers that supply brands substantially through DTSCRs, and certainly any with previous experience supplying to DTSCRs in Australia, have an existing or previous relationship with TVSN.[59] It is very difficult for openshop to identify reputable suppliers of this kind that do not have any connection to TVSN, unless openshop sources the supplier from overseas, which involves significantly increased time, complexity, such as more complex supply chains, and cost on the part of openshop.[60]

[53] See section 3.3 and Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 3.59.

[54] CEG, *TVSN exclusive supplier arrangements,* April 2020, para 69.

[55] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 69.

[56] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 71.

[57] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 2.31.

[58] See https://www.itvsn.com.au/, accessed 16 September 2020.

[59] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 2.32.

[60] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 2.32.

126. We also understand that it is essential for openshop to be able to supply a wide range of quality and reputable brands and products across the product categories, in order to be able to offer an attractive and competitive alternative to TVSN for customers.[61] The notified conduct would most likely prevent this from taking place.

127. Supplying products that are particularly suited to DTSCRs is critical to the ongoing financial viability of DTSCRs.[62] Most suppliers of such products would choose TVSN over openshop given the former's size, leaving openshop with few options for supplying a key product category.

128. It follows that the attractiveness of openshop to viewers would be reduced, relative to TVSN, if openshop was not able to have a wide range of brands. This would reduce the competitive constraint of openshop on the quality of TVSN's television programs.

129. For example, TVSN listed 36 brands on its website in September 2020 under the kitchen and food category.[63] The suppliers of some of those brands are likely to also sell other brands too, meaning that more than 36 brands would be affected by the notified conduct.[64] If TVSN is able to choose the best brands, it will be able to have exclusive arrangements more than the top 36 brands in Australia for the kitchen and food category. This would limit the number of high quality brands available to other DTSCRs.

130. We understand that openshop has arrangements in place to purchase goods from [Restriction of Publication of Part Claimed].[65] In other words, openshop has already been substantially affected without the conduct being notified. We expect the effect of the notified conduct would be greater given that the exclusive dealing would be explicitly allowed to take place.

131. Any reduction in competition between DTSCRs could have a substantial effect given that it is difficult, costly and takes a substantial amount of time to become a DTSCR in Australia.[66] A number of steps need to be taken in order to become a DTSCR in Australia.[67] The anticipated cost to establish openshop was approximately [Restriction of Publication of Part Claimed] in initial capital investment.[68] This includes a cost of approximately [Restriction of Publication of Part Claimed].[69] Most of the costs of entry are sunk.[70] Only the security deposits and some of the equipment cost could be recovered if openshop exited.[71]

132. The main challenges faced by openshop when trying to enter were to locate and contract with suitable network and production companies to host a brand new home shopping channel, a process that took over two years to reach a final agreement.[72]

[61] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 2.16.

[62] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 3.45.

[63] See https://www.itvsn.com.au/, accessed 16 September 2020.

[64] For example, we understand that DeLonghi Australia supplies the DeLonghi brand in addition to Kenwood and Braun. See https://www.delonghi.com/en-au/about-delonghi/partner-links, accessed 6 October 2020.

[65] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 2.30.

[66] This is consistent with the lack of entry in Australia over the past 23 years. Apart from ASN, we are only aware of one other entrant, which was called YESSHOP and briefly traded in Australia in 2016. See: Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, footnote 4.

[67] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 3.36.

[68] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop),* October 2020, para 2.8.

[69] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop),* October 2020, para 2.8.

[70] Ashurst, *Submissions by Australian Shopping Network Pty Ltd (openshop),* October 2020, para 2.9.

[71] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 2.9.

[72] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 2.10.

3.4.1 Conduct increases product differentiation

133. CEG states that '[e]xclusive dealing arrangements are therefore a tool for firms to differentiate themselves.'[73] It also says that one of the benefits of the notified conduct is that there will be:[74]

> …exclusivity in relation to products and know-how in selling its products will allow TVSN to differentiate itself from its retail competitors. It will allow TVSN to invest more in creating differentiation in its market position relative to its competitors. Whilst the exclusivity arrangements means the same products will not compete with themselves on different DTSCRs, this will be replaced by competition between DTSCRs to supply the product in question at any given point in time which should be as effective

134. We agree that there will be increased differentiation if the notified conduct is allowed to go ahead, eg, because TVSN and openshop will not sell the same brands. This will weaken competition between TVSN and openshop, leading to lower quality and higher prices.[75] As described by CEG, by creating differentiation, 'firms are able to charge a price in excess of their marginal costs which allows them to recover their fixed costs.'[76]

135. The differentiation between DTSCRs caused by the notified conduct also weakens competition between suppliers. By way of illustration, consider a simple example with two suppliers and two retailers.[77] When there is no exclusive dealing and no differentiation at the retail level, the retailers will set their prices close to their marginal costs. An increase in the price of one supplier will cause both retailers to raise their prices for that product, but the retailers will not increase their margin on the other product.

136. With exclusive dealing and the resulting differentiation between retailers, an increase in the price set by one supplier would most likely cause the retailer of that product to raise its price, and the other retailer to respond by increasing its margin on the competing product because the retailers are differentiated. The supplier considering raising its price therefore has a greater incentive to do so because it expects the rival retailer to raise the price of the competing product.

137. CEG states that any loss of competition from differentiation will be replaced by competition to supply the product in question.[78] This does not accurately reflect the notified conduct, since CEG suggests that there will be competition to the sell 'the product' in question when the conduct will mean that openshop and TVSN are competing for suppliers, rather than products. A supplier already using a DTSCR that wishes to sell a new product will be much more likely to use the DTSCR that it is already using because of the time required to switch between DTSCRs.[79]

138. We describe in section 3.3 that there will be weak competition for new suppliers that greatly favours TVSN as a result of its size and track record in Australia.

139. Further, the evidence available shows that TVSN has not competed hard for suppliers against openshop since its entry. TVSN has not prepared compelling, competitive offers to hold on to existing suppliers or to attract new ones – it has simply refused (or threatened to refuse) to engage with

[73] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 49.

[74] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 8.

[75] A, Mas-Colell, M, D Whinston and J, R Green, *Microeconomic theory*, Oxford University Press, New York, 1995, pp 395-396. A, Goolsbee, S, Levitt and C, Syverson, *Microeconomics*, Worth Publishers, New York, 2013, p 466. Perloff, J M, *Microeconomics*, Addison-Wesley, Boston, 2012, p 456.

[76] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 48.

[77] This is a simplified description of that given in: Rey, P and Verge, T, *Economics of vertical restraints*, in Buccirossi, P (ed), *Handbook of antitrust economics*, MIT Press, Cambridge, MA, 2008, pp 370-372.

[78] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 8.

[79] See section 2.2. There will be some new suppliers that have never supplied through DTSCRs before.

suppliers who deal with openshop, or ceased (or threatened to cease) dealing with suppliers who deal with ooenshop.[80]

140. CEG says that competition to be the exclusive DTSCR at each point in time is likely to have similar competitive outcomes to competition by DTSCRs to supply the same products, in part because the exclusivity period is only for a limited period, and there would be limited incumbency advantage.[81] We do not agree with this conclusion. We indicate above that the time period for exclusivity could be lengthy and the cost of switching suppliers is significant, and so there would be a substantial incumbency advantage.

141. It follows that the notified conduct is very likely to lead to a loss of competition between TVSN and openshop to attract viewers, which would most likely also lead to a reduction in competition between suppliers. This competition will not be replaced by strong competition for suppliers' business between openshop and TVSN.

3.5 Conduct limits TVSN's rivals' ability to enter and expand

142. We understand that openshop would like to expand, including by broadcasting to more people, increasing its quantity of live filming per week and [Restriction of Publication of Part Claimed].[82]

143. We set out above that the notified conduct allows TVSN to act in a way that reduces the attractiveness of openshop (and potential entrants). It also restricts openshop's ability to find suppliers for products with well-known brands in Australia.

144. This makes it harder for openshop and potential entrants to grow and benefit from economies of scale.[83] This again makes it more difficult for openshop and potential entrants to attract viewers.

145. The experience of openshop since its entry into Australia demonstrates the likely effect of the notified conduct. We note in paragraph 130 that [Restriction of Publication of Part Claimed]. A lack of suppliers is likely to have constrained openshop's ability to grow.

3.6 Conduct weakens competition to hire and retain staff

146. openshop and TVSN compete to hire staff with expertise in DTSCR services, such as presenters, producers and buyers. By reducing openshop's ability to compete with TVSN for viewers and suppliers as set out above, the exclusive dealing conduct also lessen openshop's ability and incentive to compete with TVSN to hire and retain such skilled staff.

3.7 Conduct weakens competition for broadcasting rights

147. openshop has a contract with the Seven Network to broadcast the openshop channel, whereas TVSN has a contract with Network Ten and Foxtel.[84]

148. openshop and TVSN both require their channels to be broadcast on one of the television networks, and so they compete for that right, although this is intermittent competition for long term contracts.

[80] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 3.50.

[81] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 53.

[82] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, paras 2.2-2.3 and 2.19.

[83] We understand that '…openshop expects that its costs would be higher than TVSN's on a per product basis due to less efficient economies of scale in circumstances where openshop has only been operating for just over a year and TVSN has legacy production arrangements in place for over 23 years.' Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 4.9.

[84] Ashurst, *Submissions by Australian Shopping Network Pty Ltd (openshop),* October 2020, para 3.63.

149. openshop will not be able to compete as vigorously with TVSN for broadcasting rights if its ability to grow and expand is restricted in the manner described above.

4. Pro-competitive effects

150. In this section we examine the pro-competitive effects of the notified conduct described in CEG's report in this section, which are:

   a. increased investment by TVSN;

   b. greater product differentiation;

   c. better protection for TVSN's brand; and

   d. greater operational efficiencies for TVSN.

151. An increase in investment is a well-recognised benefit in the economic literature that can arise as a result of exclusive dealing. In contrast, we are not aware of any of the other benefits of exclusive dealing listed above as having been identified as such in the economic literature.

152. First, CEG says that the notified conduct would lead to increased investment by TVSN because there are horizontal and vertical externalities as a result of such investment. We disagree with CEG's conclusion that a vertical externality exists because TVSN undertakes efforts that confer an indirect benefit to suppliers in the form of increased profits.

153. It seems improbable that the amount of brand and product promotion being undertaken by TVSN could have a material effect on major brands such as Bose, HP, Nokia, KitchenAid or Tom Tom. Those brands have an existing suite of products and so it is also highly unlikely that their product development is being substantially affected by TVSN's investment. DTSCRs assist with marketing and promotional strategies, but well-known brands would have much of this material already prepared.

154. We understand from openshop that some investment is required to bring products to market, and that this investment is greater for smaller, less well-known brands. However, this investment does not appear to provide a substantial benefit to the supplier, other than the usual benefit from any situation in which a retailer sells a supplier's product.

155. It is not clear what TVSN would do differently without the notified conduct, ie, it would still need to find and buy products, make the best television programs it is able to in order to maximise its sales and provide the best customer service possible so that customers come back to TVSN.

156. CEG says that there is a horizontal externality because a rival DTSCR could benefit from substantial investments made by TVSN that are specific to the products and brands of its suppliers if the rival DTSCR supplies simultaneously with TVSN.

157. It is not clear how, as a practical matter, such an indirect benefit could arise. It seems highly unlikely that a significant number of viewers could see the same two products on TVSN and openshop, and that seeing the product on TVSN would lead to the viewer purchasing a product from openshop.

158. openshop does not benefit from any content that is created by TVSN. openshop cannot use content that is owned by TVSN. openshop seeks to create programs that are differentiated stylistically from TVSN's programs in order to attract viewers away from TVSN. Consistent with this, we understand that openshop does not use content that is owned by a supplier and was developed with TVSN. In which case, there is no significant horizontal externality.

159. We conclude that there is no apparent horizontal or vertical externality that would lead to significantly less investment by TVSN without the conduct, relative to with the conduct.

160. CEG states that the investment problem is particularly acute because its effort with suppliers commonly involve a 'trial and error' process. We disagree that the existence of a trial and error process is a reasonable basis for an investment problem, not least since trial and error processes are a normal form of competition between retailers. Competition spurs firms to find the most successful products before their rivals.

161. Second, CEG states the notified conduct will allow TVSN to differentiate itself. As explained in section 3.4.1, this results in a weakening of competition, rather than a benefit. There are many other ways that DTSCRs can differentiate themselves without the notified conduct.

162. Third, CEG says that the notified conduct will protect TVSN from customer confusion and the negative consequences of competing DTSCRs providing a poor customer experience.

163. As a practical matter, it seems very unlikely that there could be a substantial problem with customers becoming confused about seeing the same product on openshop and TVSN – it is common for retailers of all types to sell the same products and brands and this does not usually appear to give rise to great consumer confusion. TVSN should not need to protect itself from the poor service of its rivals; rather, such a circumstance would usually represent an opportunity to out-compete rivals and win customers.

164. We conclude that it is highly unlikely that there will be a substantial pro-competitive effect as a result of reducing confusion about products or any harm to TVSN's brand.

165. Finally, CEG states that the notified conduct will result in operational efficiencies because planning becomes uncertain and more costly to TVSN without the conduct.

166. It is not clear from the CEG report why planning for TVSN becomes more uncertain or costly without the notified conduct. The most likely reason for the added uncertainty with openshop as a supplier is that this provides more competition leading to uncertainty as to the future level of sales. To the extent that this is the case, the benefits from such competition would outweigh any potential costs.

167. We conclude that it is very unlikely that there are substantial net benefits from TVSN being able to operate more efficiently with the notified conduct.

4.1 Investment by DTSCRs

4.1.1 Introduction

168. An increase in investment is a well-recognised benefit that can arise as a result of exclusive dealing. We describe in paragraph 80 that one of the common examples given for how this may occur is where a manufacturer encourages a retailer (or dealer) to increase its pre-sales investment by agreeing not to sell the product to other retailers. This allows the retailer to make the pre-sales investment with a lower risk that a customer enjoys the service but purchases the product more cheaply from a competing retailer. The effect of the exclusive dealing is greater investment in pre-sales service by the retailer.

169. CEG states that there are two types of externality that can be created through investment by a retailer, ie:[85]

    a. a vertical externality, where the efforts of the retailer lead to benefits to the *supplier* that are not fully captured by the retailer through contractual relationships – for example, a retailer may promote a new brand from a supplier to such an extent that it becomes well-known in Australia; and

[85] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 23.

b. a horizontal externality, where the efforts of a retailer lead to higher sales for a competing *retailer*, as in the example of the pre-sales investment described above.

170. Increased investment can occur as a result of exclusive dealing because it internalises these externalities to an extent. For example, the investment in pre-sales service leads to a greater benefit for the retailer making the investment if it is the only place to purchase the product in question.

171. Externalities can come from actions of the retailer or the supplier, and they can have positive or negative effects on the firm being affected. For example, there may be a positive vertical externality providing a benefit from a retailer to a supplier when the retailer promotes a supplier's brand. At the same time, there may be a positive vertical externality providing a benefit from the supplier to the retailer (ie, in the other direction). For instance, a customer may visit the retailer in order to purchase a product from a particular supplier, and subsequently purchase other products sold by the retailer from different suppliers. In this way, a supplier with an attractive product may boost the sales of the retailer in other products.

172. We note in paragraph 81 that a particularly unusual aspect of the notified conduct is that it is the retailer requesting the exclusive dealing. Usually, it is the supplier that would like the retailer to increase its investment in order to boost the sales of the supplier.

4.1.2 CEG's discussion of investment benefits

173. CEG states that there are horizontal and vertical externalities as a result of investment by TVSN, ie:[86,87]

> TVSN is making substantial investments that are specific to the products and brands of its suppliers. If suppliers simultaneously allow their products to be marketed and sold by a competing DTSCR, these TVSN investments can effectively be expropriated. Without some form of exclusivity arrangement, the risk that this will occur will deter TVSN from making these investments.
>
> …
>
> The efforts of TVSN to promote a product or brand provides it with direct benefits from increased sales. However, these efforts also confer an indirect benefit to the supplier of the products in the form of increased profits to the supplier. The inability of TVSN to capture all of the incremental benefits that accrue because of their actions creates what economists refer to as "vertical externality".

174. CEG states that the existence of such externalities can lead to sub-optimal investment by TVSN.[88]

Vertical externality

175. CEG states that TVSN undertakes efforts that confer an indirect benefit to the supplier in the form of increased profits.[89] However, the same could be said for all retailers because any effort by a retailer that leads to an increase in sales for that retailer also raises the profits of the product's supplier. This does not usually result in notifications by retailers of exclusive dealing conduct, because retailers already have an incentive to undertake activities that increase their own sales.

176. The investments that TVSN makes are described by CEG as effort by TVSN to support the brands and products marketed on TVSN, including to:[90]

[86] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 6.
[87] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 32.
[88] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 33.
[89] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 32.
[90] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 37.

a. identify, build and promote the brands of suppliers;

b. assist with product development and refinement;

c. develop market and promotional strategies and material relating to brands and products; and

d. work with suppliers to improve systems for sales and returns.

177. In relation to the first of these, TVSN has a large number of suppliers with many brands. Some of these are major brands such as Bose, HP, Nokia, KitchenAid or Tom Tom. It seems improbable that the amount of promotion being undertaken by TVSN could have a material effect on such well-known brands.[91]

178. Similarly, well-known brands will have an existing suite of products and sell through multiple other channels, and so it is highly unlikely that their product development is being substantially affected by TVSN.

179. In relation to the third type of investment made by TVSN, DTSCRs work with their suppliers to:[92]

a. prepare the promotional and marketing content for that product;

b. prepare product-specific content, such as images for the DTSCR's website - the DTSCR works with the supplier to create a content strategy for the product; and

c. organise and create the production for the live segment demonstrating the product.

180. It would appear to be inevitable that a DTSCR would have to prepare product-specific content and some strategy for selling a product on DTSCR, and so this would not be affected by the notified conduct. Further, the materials prepared by TVSN, including photos, videos and other promotional content are presumably owned by TVSN and so could not be expropriated.[93]

181. Last, TVSN purchases the products and stores them and sends them out to customers. Any benefits to sales and returns would therefore be a benefit to TVSN and could not be expropriated.

182. We understand that some investment is required to bring products to market, and that it is typically greater for small, less well-known brands.[94] However, this investment does not appear to provide a substantial benefit to the supplier, other than the usual benefit from any retail situation that the retailer sells the supplier's product.

183. There is also an externality that TVSN is benefitting from being associated with good brands. Customers may stay and watch TVSN for longer and purchase other items when TVSN is associated with a good brand. The supplier typically pays for show charges,[95] whilst the DTSCR benefits from sales from the program, from viewers enjoying the program and potentially watching another show. To the extent that a supplier benefits from any investment by TVSN, this may be part of the exchange where both parties know they are benefitting from investments by the other.

184. Finally, in both the situation with and without the conduct, it is in the interest of TVSN to make the best content it is able to for its television programming to sell products and attract viewers. It is not clear what TVSN would do differently without the notified conduct, ie, it would still need to find and buy

[91] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 4.6.

[92] See section 2.1.

[93] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 3.32.

[94] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, paras 2.33-2.35.

[95] See paragraph 58.

products, make the best television programs it is able to in order to maximise its sales and provide the best customer service possible so that customers come back to TVSN.

185. On the basis of this analysis, we conclude that there is no substantial vertical externality that would lead to significantly less investment by TVSN without the notified conduct, relative to with the notified conduct.

Horizontal externality

186. CEG says that a rival DTSCR could benefit from substantial investments made by TVSN that are specific to the products and brands of its suppliers if the rival DTSCR suppliers simultaneously with TVSN.[96] It says that:[97]

> …when TVSN engages in effort and investment to support a supplier's product this will indirectly benefit other DTSCRs that are simultaneously marketing the same products and brands.

187. We do not know how this indirect benefit would arise. One way in which it could arise is by:

   a. viewers of TVSN seeing a brand or product on TVSN;

   b. these viewers like the brand or product as a result of seeing them on TVSN; and

   c. the viewers subsequently see the product or brand on openshop, and purchase the item, in part because of what was seen on TVSN.

188. In our opinion, this involves a highly unlikely sequence of events. First, a viewer needs to see the same product or brand on both channels at a similar point in time. Given the number of products and brands on both channels, this is very unlikely. For example, we understand that openshop had approximately 744 slots of 56 minutes in August 2020, in which one to two products were sold.[98] It sold [Restriction of Publication of Part Claimed] products in August 2020.[99] Some of those products were aired only [Restriction of Publication of Part Claimed], whereas others were aired [Restriction of Publication of Part Claimed].[100] It follows that someone watching openshop for one hour would have seen at most [Restriction of Publication of Part Claimed] shown in August 2020, ie, the chance of seeing a particular product would be very low per hour of viewing. TVSN has fewer minutes per product than TVSN, so the probability of seeing a particular product on TVSN would also be very low.[101] It follows that the probability of seeing the same two products on both channels would be exceptionally low unless someone watched both channels for long periods.

189. Second, the viewer needs to like the product/brand somewhat when it is viewed on TVSN, but not enough to purchase the product, whilst liking it sufficiently to purchase it later when it is viewed on openshop. We conclude that this type of horizontal externality is unlikely to exist.

190. Another potential manner in which there could be a horizontal externality is if TVSN develops strategies or content for selling the product, which are subsequently used by openshop. Any content created by TVSN is owned by it, and so cannot be used by openshop, which leaves the potential for

[96] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 6.

[97] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 36.

[98] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 2.26 (d). openshop is broadcast 24 hours per day and seven days per week, giving 744 hours in August 2020. Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 2.3. We assume that there are breaks of four minutes in between programs.

[99] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 2.37.

[100] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 2.37.

[101] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 2.26 (d).

openshop to use the ideas or strategies developed by TVSN. There would seem to be little or no potential for this to occur because:

a. TVSN and openshop would be creating content at the same time if they were to sell the product simultaneously, which makes it difficult for openshop to copy TVSN; and

b. openshop has a different style to TVSN whereby it spends more time on each product,[102] so openshop could not present items in the same way as TVSN.

191. The key question is the substantiality of the benefit to openshop of any investment made by TVSN. As set out by Rey and Verge:[103]

> These efforts will not only generate vertical externalities between the producer and its retailers but also horizontal externalities among the different distributors of the same product. **The degree of appropriability of such services** will play a crucial role in our analysis. Providing pre-sale advice to customers can create horizontal externalities (giving rise to the well-known free-riding problem), but competing retailers are unlikely to benefit from an increase in the number of cashiers. [emphasis added]

192. We understand that openshop seeks to create programs that are differentiated stylistically from TVSN's programs in order to attract viewers away from TVSN.[104] It would therefore not be in openshop's interest to use content created by TVSN. Consistent with this, we understand that openshop does not use content that is owned by a supplier and was developed with TVSN.[105] It is therefore difficult to envisage there being any significant externality.

193. On the basis of this analysis, we conclude that there is no substantial horizontal externality that would lead to significantly less investment by TVSN without the conduct, relative to with the conduct.

4.1.3 Trial and error

194. CEG states that the investment problem is particularly acute because its effort with suppliers commonly involve a 'trial and error' process, ie:[106]

> TVSN tries a range of products and some are unsuccessful, and others are successful. It follows that every successful product embodies an investment at least equal to the average resources spent on unsuccessful products. If the successful products could, once TVSN has discovered, developed and proven them, all simply switch to a competing DTSCR, TVSN would be unable to recover its costs. This will lead to inefficient underinvestment in such activities that would be for the benefit of consumers.

195. We disagree with the conclusion and reasoning in this statement. First, the notified conduct is much wider than preventing openshop from selling products that have been successful on TVSN. The notified conduct applies to all products from a supplier within the same product category or brand as the product purchased from the supplier.

196. Second, many of the products that TVSN sells are from major international or Australian brands, and so it is unlikely that TVSN have discovered and developed them. For example, it is unlikely that TVSN discovered and developed Bose speakers, HP computers, Nokia phones or Tom Tom navigation systems.

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[102] See paragraph 102.

[103] Rey, P and Verge, T, *Economics of vertical restraints*, in Buccirossi, P (ed), *Handbook of antitrust economics*, MIT Press, Cambridge, MA, 2008, p 362.

[104] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 3.31.

[105] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 3.31.

[106] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 7.

197. Third, retailers everywhere have successful and unsuccessful products. This does mean that all retailers require exclusive dealing contracts.

198. Fourth, as with all retail channels, a degree of competitive advantage accrues to the retailer that finds a successful product first. Customer preferences change over time, and it may not be much help to a competing retailer to discover what was a successful product when it takes many months to purchase it and develop television programming. For example, we showed in figure 2.1 that there may be around six months from acquiring or offering to acquire a product to beginning to sell the product. For many products, it will not be useful to know what was successful in the last couple of months in order to make sales in six months' time.

199. By way of example, it would not be useful to know what summer clothing was popular when it would be winter by the time the goods arrived. Or it would not be useful to know that certain sporting goods were popular at the beginning of a lockdown when they would be available for sale after the lockdown had finished.

200. Last, it would still be in TVSN's interest to sell as many products as it is able to without the notified conduct. It will still have to find products to sell. Inevitably, some of them will be more successful than others.

201. On the basis of this analysis, we conclude that TVSN would not substantially reduce its investment as a result of openshop trying to sell its most popular products. Further, the notified conduct is much wider than required based on the logic set out in the CEG report.

4.2 Differentiation

202. CEG says that the notified conduct will allow TVSN to differentiate itself, and that:[107]

> It will allow TVSN to invest more in creating differentiation in its market position relative to its competitors. Whilst the exclusivity arrangements means the same products will not compete with themselves on different DTSCRs, this will be replaced by competition between DTSCRs to supply the product in question at any given point in time which should be as effective

203. We are not aware of investment in creating differentiation having been identified as a benefit of exclusive dealing in the economic literature.

204. There are a number of alternative ways in which DTSCRs can and do differentiate themselves, including:[108]

   a. the types and quality of products;

   b. quality of production;

   c. style of production;[109] and

   d. how much live television programming they show.

205. It follows that DTSCRs can differentiate themselves with or without the notified conduct.

206. We set out in section 3.4.1 that there will be increased differentiation if the conduct is allowed to go ahead because TVSN and openshop will not sell the same brands. We explained that this would weaken competition between TVSN and openshop.

[107] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 8.

[108] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, paras 2.3-2.5 and 2.26.

[109] Ashurst, *Submission by Australian Shopping Network Pty Ltd (openshop)*, October 2020, para 3.31.

207. The quote at paragraph 202 above from CEG implies that a reduction in competition from greater differentiation will be replaced with competition between DTSCRs to supply particular products. We explained in section 3.4.1 that we do not agree with this because with the notified conduct in place:

a. there will be competition for suppliers rather than products;

b. a supplier already using TVSN that wishes to sell a new product will be much more likely to use TVSN because of the time required to switch to openshop; and

c. there will be weak competition for new suppliers that greatly favours TVSN as a result of its size and track record in Australia.

208. It follows that the notified conduct is likely to lead to a loss of competition from greater differentiation at the retail level, which may also reduce competition upstream. This competition will not be replaced by strong competition for suppliers' business between openshop and TVSN.

4.3 Brand protection

209. CEG states that the notified conduct will:[110]

> …allow TVSN to protect its product and brand positioning from the negative consequences of competing DTSCRs providing a poor customer experience. It would also avoid customer confusion in relation to the features and attributes of products.

210. Again, we are not aware of the protection of product and brand positioning having been identified as a benefit of exclusive dealing in the economic literature.

211. Some of the information in the CEG report is restricted as a result of confidentiality.[111] Although we have not seen that information, it seems very unlikely that there could be a substantial problem with customers becoming confused about seeing the same product on openshop and TVSN because:

a. openshop and TVSN are distinct because they have different television channels, styles, presenters and brands;

b. the suppliers work with the DTSCRs to develop the content, and we expect those suppliers would want their own brand story and products to be described in a similar manner, for example it seems unlikely that a supplier would be happy for a product to be described as 'no frills' and 'luxury' at the same time by two different DTSCRs;

c. given the large number of products sold by TVSN and openshop, it seems unlikely that many customers would see exactly the same product on both television channels;[112] and

d. it is common for retailers of all types to sell the same products and brands, and there does not usually appear to be great consumer confusion caused by this fact.

212. CEG also states there could also be a positive externality when one DTSCR presents a product or brand.[113] For example, customers may learn about some of the positive aspects of a product from one DTSCR and purchase it from another.[114] It follows that, to the extent that there are any negative

[110] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 9.

[111] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 58.

[112] See paragraph 188.

[113] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 56.

[114] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 56.

externalities caused by confusion or a poor customer experience, these may be counteracted by positive ones.

213. Finally, CEG says that when a rival provides a poor experience, this might damage TVSN.[115] Competition works in exactly the opposite manner. When two firms are competing, a rival providing a poor experience or a high price leads to customers switching to the firm with the better customer experience, all else equal. TVSN would be able to use and exploit the fact that openshop provides poor customer experience if that is the case. For example, TVSN could specifically advertise that it provides the best customer experience.

214. On the above analysis, we conclude that it is highly unlikely that there will be a substantial pro-competitive effect as a result of reducing confusion about products or any harm to TVSN's brand.

4.4 Efficient operations

215. CEG states that the notified conduct will result in operational efficiencies because planning becomes uncertain and more costly to TVSN without the conduct.[116] In particular, CEG says that:[117]

> The potential for suppliers to market with other DTSCRs creates costs for TVSN including:
>
> a. the cost of unsold inventory that must be purchased in advance by TVSN;
>
> b. the cost of making late adjustment to programming, with consequential effects on purchasing and promoting stocks for substitute campaigns;
>
> c. the cost of adjusting or having out-of-date collateral including catalogues and events.

216. We are not aware of the reduction of these costs having been identified as benefits of exclusive dealing in the economic literature.

217. It is not clear from the CEG report why planning for TVSN becomes more uncertain or costly without the notified conduct. For example, it is not clear why TVSN would have a greater cost of unsold inventory if openshop is able to sell products from the same supplier.

218. One potential reason for the costs identified by CEG being higher without the notified conduct is that competition from openshop will be greater, leading to more uncertainty about demand for TVSN's products and services. For example, TVSN may have a greater risk of having unsold inventory if TVSN and openshop compete to sell the same product at the same time. It is very unlikely that any inefficiency cost could outweigh the benefits of this competition because:

a. CEG has said that DTSCRs compete with a range of other retailers, in which case competition from openshop would not have much of an effect on TVSN's sales;[118]

b. as indicated above, it seems highly unlikely that customers would see the same product on TVSN and openshop;[119] and

c. greater uncertainty as to demand for TVSN goes hand in hand with increased competition. There would be little change to the uncertainty of demand if the increase in competition was small, and vice versa. Competition always leads to uncertainty as to customer demand for each firm, but the standard economic assumption is that the net benefit of competition is positive.

[115] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 9.

[116] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 10.

[117] CEG, *TVSN exclusive supplier arrangements*, April 2020, para 10.

[118] CEG, *TVSN exclusive supplier arrangements*, April 2020, paras 78-93.

[119] See paragraph 211.

219. Further, even without the notified conduct, there will be some demand uncertainty caused by competition from openshop.

220. Retailers take steps to reduce the cost of demand uncertainty, and we expect TVSN would be able to do the same. For example, if there is a substantial risk of having unsold inventory, then TVSN could purchase smaller volumes at one time.

221. Finally, openshop could benefit from exclusive dealing conduct if CEG is correct. However, we understand that openshop has no interest in engaging in the notified conduct, because it does not expect there to be any meaningful benefit. Consistent with this, we understand that openshop has no exclusive contracts with its suppliers.

222. Based on the above, we conclude that it is very unlikely that there are benefits from TVSN being able to operate more efficiently with the notified conduct that could outweigh the loss of competition required for those benefits to arise.

HOUSTONKEMP
Economists

Sydney
Level 40
161 Castlereagh Street
Sydney NSW 2000

Phone: +61 2 8880 4800