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# **TVSN Channel Pty Ltd**

## Exclusive dealing notification

TVSN submission and response to interested parties

**30 April 2020**

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## Executive Summary

### 1.1 The notification should not be revoked

TVSN Channel Pty Ltd (**TVSN**) is a retailer of a range of widely available consumer products, including fashion, health and fitness, beauty, kitchen and food, electronics, homewares, jewellery, travel and garden and leisure . TVSN's sales of products in each of the categories listed above would only represent a fraction of one percent of those products sold in Australia.<sup>1</sup>

The format that TVSN uses to retail products is a dedicated television sales channel with the ability to purchase products over the phone or online. There are many other channels or formats for the retail sale of the same product categories as retailed by TVSN. These include online or in-store options whether that be directly from the supplier or from other online or bricks and mortar style retailers (eg, David Jones, Myer, Kogan, eBay, Amazon, Catch.com.au, Chemist Warehouse, Adore Beauty, Bing Lee, Harvey Norman, JB HiFi, The Good Guys, Michael Hill, Prouds The Jewellers etc.).

Within any product category sold by TVSN, there is nothing particularly distinct from a competition perspective in the types of products that TVSN sells. However, the products that TVSN looks to retail are ones that are well suited to presentation through live television demonstration.<sup>2</sup>

TVSN's skill is in sourcing, developing and presenting products through its television sales channel in a compelling, or "eye catching", way. TVSN invests its capital and skills in bringing the products it has purchased or developed to consumers through its own television channel in order to generate sales.<sup>3</sup>

It is self-evident that TVSN, like any other retailer, has finite business, financial and retail space (in TVSN's case – viewing time) resources available to promote and sell the products it acquires from suppliers. As with any retailer, it is fundamental that it have the commercial freedom to choose which suppliers to deal with, including the commercial freedom not to invest its scarce resources purchasing products from suppliers selling to other direct format competitors. Like other retailers, it is also the case that where TVSN invests in the development, support and promotion of a supplier's products, including through substantial forward commitment in terms of purchases and program or event scheduling, it would seek reciprocal term exclusivity commitments from suppliers to underpin those commitments and investments.<sup>4</sup>

With this submission, TVSN has filed revised and separate notifications to more clearly delineate the narrow and limited scope of its proposed exclusive dealing conduct. In particular:

- a notification for exclusive dealing conduct in respect of the refusal to acquire from a supplier 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 dedicated television shopping channel retailer (**DTSCR**); and
- a notification for exclusive dealing conduct in respect of the proposed acquisition of products or services from a supplier on condition that the supplier (or related body

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<sup>1</sup> This is evidenced by TVSN sales figures, ABS data and Statistica.

<sup>2</sup> See CEG Report and Confidential Attachment B – Confidential response to ACCC request for information and documents.

<sup>3</sup> See Confidential Attachment B for further information on the proprietary know-how and training involved in the TVSN marketing and sales process.

<sup>4</sup> See CEG Report and sections 2 and 4 of this submission which detail the volume and financial risks undertaken by TVSN and the forward planning and commitments made in the process.

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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.

The essential pre-requisites for the notified conduct to give rise to a risk of a substantial lessening of competition do not exist.<sup>5</sup> It is uncontroversial as a matter of well recognised competition law that the pre-requisites for an anti-competitive effect would, in this case, require that TVSN have substantial market power in the retail sale of the relevant consumer product categories or that it holds substantial market power over access to consumers of such products. Patently, neither situation exists.

The evidence submitted by TVSN and set out in this submission manifestly establishes that:

- TVSN invests heavily in sourcing, developing and presenting the products it retails through live presentation or demonstration on its television sales channel;<sup>6</sup>
- The products retailed by TVSN through live presentation or demonstration on its television sales channel are manifestly sold in the context of the broader retail market for each relevant product category;<sup>7</sup>
- The distinctiveness of TVSN's presentation investments is critical to its consumer offering and consumer loyalty and will be damaged if the same product or brand is presented through, sold by, or associated with another live television format retailer (ie, a DTSCR);<sup>8</sup>
- It is a reasonable and appropriate response to this magnitude of risk to TVSN's investment in its brand and offering, (which is core to TVSN's ability to compete in the retail space), that TVSN seeks to engage in the notified conduct which is narrow in both scope and application;<sup>9</sup>

<sup>5</sup> See the findings of the CEG Report.

<sup>6</sup> See the Suppliers Guide 2013 which provides information on the facilities and process; Confidential Attachment B which provides further information on the TVSN business model and investment in proprietary processes, know-how and training; and Confidential Attachment C which provides an example P&L report and balance sheet from TVSN's December 2019 management accounts. [Restriction of Publication of Part Claimed].

<sup>7</sup> For example, [Restriction of Publication of Part Claimed]. The Philips Airfryer XXL Digital Premium is available for purchase by consumers via TVSN or online and in store at JB Hi-Fi, The Good Guys, Harvey Norman, Bing Lee, David Jones, Myer, Amazon and Catch.com.au. When choosing an airfryer consumers will likely also look at other brand options such as the airfryer from Westinghouse available on Hyundai-Openshop and presented by ex-TVSN guest Jo Richardson.

<sup>8</sup> See the Suppliers Guide 2013, 2018 New Supplier presentation and TVSN Brand Guide and information in Confidential Attachment B .

<sup>9</sup> See the findings of the CEG Report.

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- Such conduct is no different to that of many retailers (such as department stores like David Jones and Myer and product category specialists like MECCA cosmetics and Bunnings) seeking to engage particular suppliers on an exclusive basis in circumstances particularly where they are investing heavily in the development and sale of that product.<sup>10</sup>

These conclusions are consistent with, and bolstered by, the expert economic report prepared by Dr Tom Hird (CEG Global) and filed in support of this submission (**CEG Report**).

An exclusive dealing notification is a low cost, administratively simple mechanism to obtain an exemption from the exclusive dealing prohibitions in the *Competition and Consumer Act 2010 (Cth)* (**the Act**). The availability of such a mechanism reflects the fact that:

- such conduct is common, ordinary commercial conduct; and
- there is a well-established accepted competition jurisprudence that such conduct is unlikely to result in a substantial lessening of competition.

TVSN has acted as any business in its position is entitled to do and indeed, has acted in accordance with the ACCC's own guidance in relation to exclusive dealing notifications. There is no presumption that lodging an exclusive dealing notification means the conduct would otherwise be anti-competitive in breach of the exclusive dealing prohibitions. To proceed on that basis would be a complete perversion of the underlying rationale for providing what is intended to be a low cost, administratively simple mechanism to provide business certainty.

The Act does not require any notifying party to establish that other options for commercial protection were undertaken and found wanting or to incur substantial costs and expense in positively establishing to the Commission's satisfaction that its conduct does not substantially lessen competition. As noted in the ACCC's Exclusive Dealing Notification Guidelines, November 2017, the legal test in section 93(3) of the Act requires that for the ACCC **to revoke a notification it must be satisfied** that the notified conduct:

- has the purpose, effect or likely effect of substantially lessening competition, and
- in all the circumstances, will not result in likely public benefit which would outweigh the likely public detriment.

This must be a conclusion reached on available evidence and be supported by cogent economic analysis, having regard to well-established and accepted competition law principles. Based on the information and evidence available and the interested party submissions disclosed on the public register, the ACCC simply could not be satisfied that either of these requirements are met.

The self-serving, rhetorical and misleading assertions contained in submissions filed on behalf of Hyundai-Openshop do not provide any basis for being satisfied that either requirement is met. Further, the continued agitation by Hyundai-Openshop would appear

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<sup>10</sup> It is well known that exclusivity is key to the competition between David Jones and Myer to differentiate themselves and remain relevant to consumers. As an example, David Jones is currently advertising and selling their "Exclusively Yours collections – the brands and styles you won't find at any other department store" across women's and men's fashion, kids' fashion and toys, beauty and home. See: <https://www.davidjones.com/exclusively-yours>.

to be part of a strategy to disrupt or de-stabilise TVSN's business rather than compete on the merits.<sup>11</sup>

The other submissions of interested parties disclosed on the public register are readily addressed, and support the overall conclusion that, together with the many online and retail store formats available, there is a wide range of options for television presentation of the types of consumer products retailed by TVSN. They most certainly do not establish any basis for a conclusion that TVSN is somehow in a position to foreclose suppliers' access to consumers.

## **1.2 Submission structure**

**Part A** of this submission sets out the positive case for notification. In particular, the notified conduct does not have the purpose, effect, or likely effect of substantially lessening competition in any relevant market.

**Part B** of this submission responds to interested party submissions. Nothing in the interested party submissions changes the positive case for notification. Most of the concerns relate to a misinterpretation of the scope and application of the conduct as originally notified. In fact, these submissions demonstrate the competition and options available for suppliers to market their products and access consumers and further highlight the complete inability of TVSN to foreclose supply of marketing and promotional channels (whether that be through television or any other medium).

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## **PART A: Positive case for the notified conduct**

### **1 TVSN**

#### **1.1 TVSN**

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

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

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

#### **1.2 TVSN differentiates itself by providing consumers with "the thrill of the find" or "the unique or curated choice" within the live presentation television format**

TVSN is a retailer selling a broad range of products across fashion, health and fitness, beauty, kitchen and food, electronics, homewares, jewellery, travel and garden and

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<sup>11</sup> See Confidential Attachment B for further information [**Restriction of Publication of Part Claimed**].



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leisure. Its television channel operates 24 hours a day, seven days a week, with up to 13 hours of live broadcasting per day from the TVSN Studio.

To viably compete for consumer interest, trust and sales, TVSN looks to offer shoppers:

- unusual or 'unique finds' within the live presentation format;
- entertaining and informative content that demonstrates product features and benefits in a way that is interesting and fun to watch; and
- a great customer experience incorporating;
  - the thrill of the find;
  - ease of purchase (over the phone or via the website);
  - the assurance of knowing that the carefully curated selection of products have passed TVSN's high quality standards;
  - fast delivery;
  - a 30-day money back guarantee; and
  - great after purchase care.

TVSN invests heavily in the identification and sourcing of products to distinguish itself in this way and has often taken the risk on the ability to market and sell the products of that brand via the live presentation format to Australian and New Zealand consumers.<sup>12</sup>

In using its dedicated television shopping channel to sell the stock it acquires or the products it helps develop, TVSN works with suppliers to launch, build or nurture their brand and customer base to tell their brand story and bring their products to life through engaging and informative live product demonstration.

Through the process, TVSN transfers confidential and proprietary information to the supplier, building their skill-set in how to most profitably present their products in the live television shopping format by optimising the conversion of minutes of television air time into sales dollars. [Restriction of Publication of Part Claimed]. While TVSN does not sell air-time minutes, the retail space it has available for its sales is the limited air-time available to present and sell products to consumers. This metric would be equivalent to a bricks and mortar retailer using a metric of sales per unit of shelf space.<sup>13</sup>

TVSN buys products from suppliers via purchase orders and uses its dedicated television channel and website to reach consumers and sell those products. As a by-product or consequence of using this sales format to retail products purchased from suppliers, TVSN also provides suppliers with marketing and promotional services.<sup>14</sup> While the supplier contributes to some of the costs relating to the promotion and sale of products via TVSN's

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<sup>12</sup> See footnote 6 above and examples provided in CEG Report and in section 4 of this submission.

<sup>13</sup> See Confidential Attachment B for further information on the proprietary know-how and training involved in the TVSN marketing and sales process.

<sup>14</sup> See Suppliers Guide 2013 and Suppliers Agreement.

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distribution channels, TVSN is a retailer rather than a seller of advertising space or content:

- [Restriction of Publication of Part Claimed]<sup>15</sup>
- TVSN's core revenues are overwhelmingly derived from the sale of goods it has acquired from suppliers. For calendar year 2019, the equivalent of [Restriction of Publication of Part Claimed]% of revenues related to [Restriction of Publication of Part Claimed] the promotion and marketing of their products (eg, costs relating to air time and the production of promotional and marketing content).
- TVSN buys, owns and warehouses the stock promoted through its distribution channels. As a result, TVSN takes the volume and financial risk of purchasing and warehousing stock that it cannot sell through its distribution channels.
- TVSN does not provide promotion via the live presentation format to suppliers where it is not the retailer.

TVSN has limited or finite "retail space" in terms of the limited programming time available. This in turn, limits the number of products that can be presented to consumers [Restriction of Publication of Part Claimed]. This impacts the ability and time taken to sell products due to the constraints on being able to put them in front of the customer through the live television format. This is very different to the retail space available and the number of products that can be presented to the customer via a department store that sells both online and through bricks and mortar outlets.

As a result, TVSN needs to direct the finite amount of live programming that can be created and broadcast per day from its Studio to selling the products it has acquired and invested in and which fit the TVSN brand offering.

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## 2 Notified conduct

### 2.1 Revised scope of notified conduct

The intended application of the notified conduct has always been narrow and relates to the marketing, sale and association of products and suppliers or brands within a particular medium or format.

Nonetheless, due to a misinterpretation of TVSN's intended scope of the notified conduct there have been complaints from parties that will be completely unaffected by the notified conduct. As a result, the impact of conduct on competition has been mischaracterised and misunderstood. In recognition of this feedback from interested parties and to aid proper consideration of this matter, TVSN have lodged revised notifications with the ACCC which further narrow and clarify the scope of the notified conduct and split the conduct into two parts, so that each element can be properly considered:

- a notification relating to the freedom to refuse to acquire from a supplier; and
- a notification relating to the freedom to impose a limited term exclusivity.

(a) Freedom to refuse to acquire from a supplier

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<sup>15</sup> See Confidential Attachment B and the spreadsheet titled "TVSN Net Sales by Department 2017 to 2019".

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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.

(b) Freedom to impose a limited term exclusivity.

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 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.

### 2.2 Narrow application of the notified conduct

It is up to a supplier to determine an overall marketing and distribution strategy and to choose how to market, promote and sell its products within that strategy. That may include, amongst other distribution channels, selling products to a DTSCR.

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

- the supplier's own direct channels;
- other online retail outlet options;
- a bricks and mortar outlet; or

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

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

Nor does it actually prevent the supplier from:

- choosing to use another DTSCR to feature its products; or
- having commenced sales through TVSN, subsequently switching to another DTSCR, upon termination of the supplier agreement and subject to the exclusivity period.

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

### 2.3 Rationale or context for notification

In order to viably compete against the myriad of options available to consumers for the purchase of consumer goods (including online, mobile, bricks and mortar and other DTSCRs), TVSN seeks to differentiate itself by providing consumers with “the thrill of the find” or “the unique or curated choice” within the live presentation television format.

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

This involves:

- the use of confidential TVSN know-how and proprietary information which has been developed over time and through experience of what [Restriction of Publication of Part Claimed] has worked in terms of generating sales and what has not;<sup>16</sup>
- TVSN taking the volume and financial risk on the ability to sell the stock it has purchased via its television shopping channel format; and
- Forward planning in terms of programming, scheduling, production, promotion of future events and campaigns and the purchasing of stock. Depending on the

<sup>16</sup> See Confidential Attachment B for further information on the proprietary know-how and training involved in the TVSN marketing and sales process.

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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.<sup>17</sup>

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

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

The notified conduct provides TVSN with a level of commitment and certainty that it can pursue its business model and undertake the substantial investments described above without them being effectively expropriated by another DTSCR. Further, it protects the investment TVSN has made in its own brand and the expectation from customers that TVSN will offer them a unique find within the live presentation format and programming content that is different from what can be seen on other DTSCRs. It also reduces the risk of TVSN's brand positioning suffering the negative consequences of another DTSCR providing a poor customer experience (in terms of quality, terms of trade and after sales support) or positioning a brand or product and its features and attributes in a way that conflicts or tarnishes the trust relationship between TVSN and its customers.

These risks and the need for protection are particularly acute where Australian Shopping Network Pty Ltd (**Hyundai-Openshop**) appears to be relying on attracting TVSN's producers, presenters, contractors or other employees, guests and suppliers to undermine and free-ride off the TVSN business rather than drawing on their own experience and expertise to invest and source products to compete on the merits. The format of the presentation that Hyundai-Openshop uses also appears to be different to the South Korean format but very similar to the TVSN format. Against this backdrop, TVSN has elevated concerns over the protection of its investments, its IP and the clarity to consumers of its brand and offering.<sup>18</sup>

The limited exclusivity period allows:

- the commitment from suppliers to cover some of the lead times involved in the required forward purchasing and planning for promotions, campaigns, events and television programs.
- a short period of time for the readjustment of inventories or sale of stock following the acquired stock being available for sale by TVSN and TVSN's promotion and presentation of the products to consumers - a presentation which may have to occur without the benefit of the supplier's guest.

<sup>17</sup> See CEG Report and further information on forward planning and attached documents referred to later in this submission.

<sup>18</sup> See Confidential Attachment B for further information [[Restriction of Publication of Part Claimed](#)].

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The application of the notified conduct is narrow and specifically directed to:

- allowing TVSN to compete as a retailer by freely being able to choose which suppliers it deals with;
- TVSN being able to seek to differentiate itself and its product range and offer consumers interesting and different live format content;
- protecting or preventing damage to returns on TVSN's investment in nurturing and promoting the brands of suppliers (including developing new and unknown brands) and encouraging other DTSCRs to invest and provide consumers access to other interesting products rather than "free-riding" off the resources and investments that TVSN has placed into brand development and presentation;
- preventing customer confusion as to how the brands are being positioned and what customers are getting in terms of the product, the terms of trade and the after sales support; and
- protecting the investment in TVSN's own brand, TVSN's IP and the trust relationship and expected experience TVSN has developed with retail customers.

As described above, the enhanced protection of proprietary and confidential information is only one component of the rationale for the notified conduct and the ability to monitor, rely on, and enforce other contractual obligations in relation to this information does not remove the availability of the notification regime or the pro-competitive effects of the notified conduct on investment incentives.

### (a) Customer confusion and brand positioning

Customers now expect more; more value, more engagement, and more from their shopping experience. They expect a seamless experience across the physical and digital world, and they will vote with their wallets when they don't get it. Changing consumer demands and increasing competition have created a generation of "serial switchers" and research indicates that nearly half of shoppers are likely to abandon a brand after just one bad experience.<sup>19</sup> For this reason, it is critical to TVSN that customers are clear as to who they are buying from and on what terms so that feedback from the experience genuinely relates to TVSN not another channel and there is no negative impact on the trust relationship with TVSN due to an experience with another channel.

With the switching of certain presenters, guests and products to Hyundai-Openshop there has been some evidence of customer confusion in terms of calls to the TVSN customer call centre regarding products purchased from Hyundai-Openshop. There has also been some evidence of brand confusion where products were promoted on one channel in a way which conflicted with the way they were promoted on TVSN.<sup>20</sup>

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<sup>19</sup> Inside Retail, Australian Retail Outlook 2020, powered by KPMG, at page 51.

<sup>20</sup> See Confidential Attachment B for further information.

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### (b) Forward planning for programming and featured brand events

The notified conduct is not only important to the clarity of TVSN's brand positioning and its offering to customers, but also to TVSN's ability to forward plan and best utilise its resources in line with that brand positioning (eg, forward planning for programming production and featured brand events). As noted above, TVSN's limited "retail space" [Restriction of Publication of Part Claimed], impacts the ability and time taken to sell products due to the constraints on TVSN's ability to put the products in front of the customer through the live television format.

If the product is to be featured on another DTSCR:

- TVSN will no longer want to use its resources to promote that product and will need to adjust its programming (product development, promotional rotation and placement planning) and scheduling ([Restriction of Publication of Part Claimed]) accordingly. Programming, production and purchasing the relevant product has lead times of anywhere between 3-18 months. [Restriction of Publication of Part Claimed].<sup>21</sup>

In addition to the substantial investment of resources and time in the identification, sourcing and testing of products and the training of guests and presenters, for every one hour show there is a minimum of [Restriction of Publication of Part Claimed] hours preparation time involved for producers (trained skilled colleagues who "drive" the show from the control room in the studio ensuring that each product is sold within guidelines [Restriction of Publication of Part Claimed] to optimise sales), presenters and crew. Significant resources and time also go into developing the collateral/assets for each brand and how it will best be promoted on air.

While programming can be adjusted, this involves lost promotion of the replacement product prior to the feature (or live sell), may have a ripple effect in terms of the impact on other brands and more importantly can create a stock problem. Depending on the timing, these adjustments will also need to be reflected in the TVSN Shopper's Guide<sup>22</sup> which is produced every month, posted on the website and sent out in print. TVSN also produces a Christmas<sup>23</sup> and Mothers' Day catalogue<sup>24</sup> for the website and print which has a lead time of around 6 months.

- This will impact confidence around any planning of featured brand events involving that supplier and its products. In addition to producing live television programming, TVSN creates and promotes upcoming featured brand events such as Beauty

<sup>21</sup> As an illustrative example, please see the following: Spreadsheet titled, "Year View of Events 2020"; setting out a calendar of events for 2020; email correspondence [Restriction of Publication of Part Claimed] showing the forward booking of live broadcast shows for 2020 [Restriction of Publication of Part Claimed]; and spreadsheet titled "Fashion Accessories Year Plan 2020-2021", [Restriction of Publication of Part Claimed].

<sup>22</sup> See: [https://www.itvsn.com.au/community/shoppers\\_guide](https://www.itvsn.com.au/community/shoppers_guide).

<sup>23</sup> See: [https://www.itvsn.com.au/community/shoppers\\_guide/christmas](https://www.itvsn.com.au/community/shoppers_guide/christmas).

<sup>24</sup> See [https://www.itvsn.com.au/community/shoppers\\_guide/mothersday](https://www.itvsn.com.au/community/shoppers_guide/mothersday).

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Month and its Live from LA - Red Carpet Ready Event to generate customer interest. These events require time to organise and promote and TVSN needs to know that they can rely on those brands to still be on TVSN and aligned with the TVSN business model when the event takes place. These events and the featured brands are also incorporated in the TVSN Shopper's Guide.<sup>25</sup> As an example, the Live from LA - Red Carpet Ready Event was held on 8 February 2020 and planning was started in [Restriction of Publication of Part Claimed]. The Live from Thailand event took [Restriction of Publication of Part Claimed] to prepare and decisions were made in [Restriction of Publication of Part Claimed].

- The bigger issue is the impact on the confidence with which TVSN's buyers can plan and commit to purchase stock. Depending on the product category and size of the order, some [Restriction of Publication of Part Claimed] purchase orders are made quite far in advance. For example, buyers are already placing purchase orders for stock that will be presented in November this year and in relation to fashion, orders are being made now for February next year. [Restriction of Publication of Part Claimed].<sup>26</sup>
- TVSN will also wish to clear the stock that it has purchased (without being forced to immediately resort to a 'fire sale') in order to prevent customer confusion and damage to product/brand perception when the product is featured and presented on another DTSCR. As noted below in response to the submission of the Australian Shopping Network Pty Ltd (**ASN**), operator of Hyundai-Openshop, when TVSN moved to clear its stock of Django & Juliette and Diana Ferrari shoes it did so at clearance prices of only around [Restriction of Publication of Part Claimed]% of the original TVSN price (or in other words it incurred the cost of a sale at a [Restriction of Publication of Part Claimed]% discount, compared to what it had expected when committing to purchase those products).

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### 2.4 Exclusivity in retailer-supplier relationships is common both in Australia and overseas

Consumers have more paths to purchasing goods than ever before, with a virtually unlimited landscape to search for new and fresh product where ever it exists - on a global scale. The increased competition has forced retailers in Australia and New Zealand to improve their value proposition to keep pace.

<sup>25</sup> See: [https://www.itvsn.com.au/community/shoppers\\_guide](https://www.itvsn.com.au/community/shoppers_guide) and also <https://www.itvsn.com.au/community/events>.

<sup>26</sup> See Confidential Attachment D which provides the purchase order and approval for [Restriction of Publication of Part Claimed].



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Consumers can buy identical or substitute products from a myriad of options (online<sup>27</sup>, mobile<sup>28</sup> or in-store). To compete for consumer interest and sales, exclusivity is used by:

- suppliers to:
  - have more control over the way in which their brand is presented to consumers;
  - differentiate their product and brand (in-line with a particular outlet’s brand strategy or perception – creating a sense of quality based on scarcity and the brand positioning of the outlet);
  - prevent a company’s brand from deteriorating or losing value;
  - enable the launch, development and expansion of products or brands that would otherwise be less likely to occur without access to investment and risk sharing by the retailer; and
- retailers to:
  - differentiate their particular retail channel, develop customer loyalty and protect the investments made in relation to the product/brand.

For example, Christine Eyre, CEO of Silk Islands chooses to sell her products exclusively through TVSN rather than using e-commerce or a store network.

*“I want our customers to know they are buying something special, something you can’t buy anywhere else, something that was made with love and care just for them.”<sup>29</sup>*

Exclusivity has also become a cornerstone of the competition between David Jones and Myer to differentiate themselves and remain relevant to consumers. (eg, David Jones is currently advertising and selling their “Exclusively Yours collections – the brands and styles you won’t find at any other department store” across women’s and men’s fashion, kids’ fashion and toys, beauty and home).<sup>30</sup>

Specifically, in relation to television home shopping channels, exclusivity has been a key part of the business model and strategy. This is the case across many jurisdictions including the United States (where television home shopping was born), the United Kingdom, Japan, Italy and China. For example, Qurate and Shop HQ both use exclusivity arrangements to compete with other television shopping channels by providing customers with curated collections of unique products.

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<sup>27</sup> Today 70-80 per cent of Australian households shop online and over time more of the shopping wallet continues to shift online. However, perhaps the most positive sign of where e-commerce is headed is the scale of Australia Post’s investments in parcel capacity and capability. These include striking a \$1 billion deal with Qantas to purchase three dedicated air freighters and secure priority access to cargo space. The postal corporation is also investing \$900 million in parcel automation initiatives and has recently launched a new flat rate parcel product, If It Packs It Posts, that takes the guess work out of the cost of delivery.

<sup>28</sup> According to Ebay ANZ Managing Director Tim MacKinnon, “More than 70 per cent of our shoppers access Ebay via their mobile phone – either Mweb or via the Ebay app. It’s a quick and convenient way to shop on the go”.

<sup>29</sup> See: <https://www.mybusiness.com.au/sales/6254-while-retail-is-suffering-my-brand-is-still-strong>

<sup>30</sup> See: <https://www.davidjones.com/exclusively-yours>

## **2.5 Exclusivity arrangements are not per se illegal**

Not only are such arrangements common they can confer substantial pro-competitive benefits. For example, exclusive contracts can protect relationship-specific investments and prevent underinvestment in efficient activities (ie, avoid hold-up).

As a result, exclusive dealing will only break the law if it can be demonstrated that the conduct has the purpose, effect or likely effect of substantially lessening competition in the relevant market.

This is not the case here.

In this case, the proposed exclusivity will not have the purpose, effect or likely effect of substantially lessening competition in any relevant market and, may increase the incentives to engage in competitive rivalry through differentiation and providing consumers with access to a greater range of products.

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## **3 No Substantial lessening of competition**

### **3.1 Overview**

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

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

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

The exclusivity under the notified conduct is narrow in application and not long in duration. It flows from trying to prevent customer and brand confusion whilst allowing TVSN some level of commitment and certainty to undertake investment in identifying, sourcing and promoting products (including in situations where it takes the risk on buying product stock well in advance of planned featured content on its television channel).

There is no specific product or supplier that is essential to the viability of a DTSCR such that without that specific product or supplier the channel would be prevented from achieving minimum efficient scale. There are plenty of products available to compete for within categories of goods suitable for sale and promotion by the dedicated television shopping channel format and it is open to other DTSCRs to source and invest in suppliers that are not already on TVSN.

### **3.2 Relevant Market**

TVSN is a retailer selling a wide range of consumer products across fashion, health and fitness, beauty, kitchen and food, electronics, homewares, jewellery, travel and garden and leisure to Australian and New Zealand consumers. These products or their substitutes are available to consumers through a range of online and traditional bricks and mortar style retail competitors (including, Hyundai-Openshop, department stores eg,

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David Jones and Myer, product specialists eg, Chemist Warehouse, Priceline, Adore Beauty, Bing Lee and JB HiFi, supplier's direct channels and online market places like eBay and Amazon). TVSN also competes with other broadcasters for consumer interest and viewership.

For example:

- The Philips Airfryer XXL Digital Premium is available for purchase by consumers via TVSN or online and in store at JB Hi-Fi, The Good Guys, Harvey Norman, Bing Lee, David Jones, Myer, Amazon and Catch.com.au.
- Lancer skin care products are available via TVSN or online and in-store at Myer, lancerskincare.com, Net-A-Porter, Beauty Expert and eBay.
- The Vitamix E310 Explorian Series Blender is available for purchase from TVSN, Myer, Amazon, Blenders Online, Kitchen Warehouse, Catch.com.au, House, Robins Kitchen, Appliances Online, ebay.com.au and Your Home Depot.

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

TVSN has no ability to monopolise the sale of these products and is constrained in setting prices and determining the service/quality offering to consumers by the easy availability of identical products or close substitutes from numerous competing retail outlets. Competition is a click away, and consumers can and do search the web to compare offers.

Suppliers that utilise dedicated shopping channels as a form of distribution could cease supplying such channels or reduce the quantity of products they supply to such channels in response to a worsening of their terms of trade. TVSN has no ability to foreclose such choices. While certain products will lean more towards distribution channels that allow for their demonstration this could be done via infomercials or other formats which are substitutable and not affected by the notified conduct.

Further, the consumer that might be more likely to buy from a DTSCR will not only buy from this channel and can be reached or targeted via other distribution channels.

Given these facts, 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.

This conclusion is supported by the CEG Report and the overwhelming evidence from interested party submissions that at the very least the other free to air channels are, and view themselves as, competing "distribution" channels. While TVSN sees clear direct format competition from Hyundai-Openshop as the only other current DTSCR from the perspective of both promotion and sale of products through live presentation on a dedicated television shopping channel format, many other options than just TVSN and Hyundai-Openshop are available to both consumers and suppliers and any other conclusion would be ignoring the submissions of Nine Entertainment Co. Holdings Limited, Seven West Media Limited and Prime Media Group and Southern Cross Austereo.<sup>31</sup>

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<sup>31</sup> See the responses provided in relation to these submissions in Part B of this submission.

### 3.3 The notified conduct is not a barrier to new entry but instead allows competition through differentiation

TVSN's sales in relation to each of the product categories it supplies only represent a fraction of one percent of those products sold in Australia.

It cannot be said that there is any credible evidence that TVSN has a 'must have' product/brand that Hyundai-Openshop or another DTSCR needs to co-present to compete on the merits and achieve minimum efficient scale. TVSN sells product categories that are very commonly supplied around the world and are supplied on Hyundai-Openshop.<sup>32</sup>

TVSN is continually sourcing new suppliers and has actively gone and sourced products including convincing overseas suppliers to come and supply into Australia.<sup>33</sup> It has a large and diverse range of suppliers of different sizes. Based on calendar year 2019, there are [Restriction of Publication of Part Claimed] suppliers whose product sales to TVSN customers were in excess of \$[Restriction of Publication of Part Claimed]. The Top 10 suppliers only accounted for [Restriction of Publication of Part Claimed]% of product sales and the Top 20 suppliers [Restriction of Publication of Part Claimed]% with the rest split up amongst a large range of suppliers.<sup>34</sup>

The universe of possible products that can be sold and promoted via dedicated television shopping channels is not limited to what is on TVSN. To retain consumer interest and prevent product mix fatigue, TVSN itself looks to add around [Restriction of Publication of Part Claimed] products across all product categories per month including beauty, home, kitchen, jewellery, electrical and fashion. TVSN has a finite amount of programming content that it can create per day to sell these products and there is nothing stopping Hyundai-Openshop or another DTSCR from investing, sourcing and developing its own products and suppliers. In fact, the notified conduct would encourage such behaviour.

The spreadsheet provided to the ACCC on 20 February showing an indication of the products offered by TVSN and Hyundai-Openshop as at 3 February (but by no means all the brands featured by both DTSCRs) demonstrates that Hyundai-Openshop already has a broad range of suppliers across a full range of product categories including Women's Fashion; Men's Fashion; Beauty; Health and Fitness; Shoes; Accessories; Jewellery; Home; Home Appliances; Electronics; Pets; Toys; Kids & Baby.

Hyundai-Openshop is also a subsidiary of one of South Korea's leading home shopping channel operators, Hyundai Home Shopping Network Corp (**HHSN**). HHSN is listed on the Korean Stock Exchange, has a market capitalisation in excess of \$A1 billion and can provide Hyundai-Openshop with access to significant resources, customers and suppliers. As noted in the submission of the Australian Shopping Network Pty Ltd, Hyundai-Openshop, unlike TVSN, is also able to offer Australian suppliers "access to the South Korean home shopping market" which it notes was estimated to be in excess of \$A6.5 billion annually.

In any event, the notified conduct does not prevent the supplier from choosing to use another DTSCR instead of TVSN or switching from TVSN to another DTSCR after the limited exclusivity period.

<sup>32</sup> See the spreadsheet provided to the ACCC on 20 February 2020 (and now resubmitted on a confidential basis) which provides an indication of the range of products that were offered by TVSN and Hyundai-Openshop by category and brand as at 3 February 2020 (noting that both channels have many more brands than those covered in the spreadsheet, as shown on their respective websites).

<sup>33</sup> See spreadsheet titled, "New Show List June 2019 to March 2020".

<sup>34</sup> See spreadsheet titled, "Top [Restriction of Publication of Part Claimed] vendors 2019". [Restriction of Publication of Part Claimed].

As noted in the CEG Report:

*Importantly, the exclusive dealing provisions proposed by TVSN do not “lock up” products or suppliers for an extended period. As we understand the arrangements, the proposal is that products could not simultaneously be distributed through TVSN and another DTSCRs (with some time lags involved to deal with inventories and forward planning).*

*In effect, this means that suppliers would enjoy competition between DTSCRs. This would imply a process of competition in which DTSCRs compete to have the product exclusively distributed on their channel. The DTSCR offering the most attractive proposition and terms (including margin) to suppliers would be successful.<sup>35</sup>*

### 3.4 No Substantial lessening of competition in any relevant market

From a supplier perspective, there are a range of marketing and distribution outlets available (which are unaffected by the notified conduct) and the supplier can still choose to use another DTSCR instead of TVSN or switch following the exclusivity period. In relation to the supplier’s specific choice to use a DTSCR to market and sell its products, it may be their choice to only deal with one dedicated shopping channel rather than two – given their distribution and marketing strategy, the signal it sends to customers about the product being a special find, its nature and the connection created with customers through a particular channel.

From a consumer perspective the range of options available for supply make it hard to see where the competitive detriment would arise.

As noted in the CEG Report:

*It is true that the effect of product exclusivity arrangements is that customers would no longer be able to acquire the same product through two DTSCRs at the same time. This is, however, offset by the competition to have the product that is exclusively distributed by the relevant DTSCR. That is, competition between DTSCRs selling the same products in the market would be substituted for competition between DTSCRs to be the sole DTSCR of that product for the market at each point in time.*

*Putting aside the investment incentive differences outlined above, competition to be the exclusive DTSCR at each point in time is likely to have similar competitive outcomes to competition by DTSCRs of the same products. This is because the exclusivity period is only for a limited period (i.e., products being marketed at the same time), the same number and types of suppliers would participate in competition for the market as they would in competition in the market, and there would be limited incumbency advantage in the market at any point in time (i.e., there would be limited advantage in distributing a product first).<sup>36</sup>*

TVSN simply does not have the ability to foreclose another DTSCR or prevent it from achieving minimum efficient scale and the notified conduct does not change that.

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<sup>35</sup> CEG Report at paragraphs 54 and 55.

<sup>36</sup> CEG Report at paragraphs 52 and 53.

As noted in the CEG Report:

*In order for TVSN's exclusivity requirement to substantially lessen competition, it must result in an increase in its pricing power sufficient for TVSN to be able to increase the price of its products by a substantial amount for consumers.*

*That is, even assuming that exclusive dealing might damage a particular competitor (i.e., another DTSCR), a lessening of competition would only occur if the loss of that competitor freed TVSN to increase prices by a substantial amount. However, if there are other competitors in the market or forces that constrain TVSN from raising prices, then a substantial lessening of competition will not occur.<sup>37</sup>*

As noted above, there are other competitors in the market or forces that constrain TVSN from raising prices.

There will be no substantial lessening of competition as a result of the notified conduct.

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## 4 Net Public Benefit

### 4.1 Overview

The notified conduct will not result in a substantial lessening of competition. However, it will result in net public benefits.

As set out in the CEG Report, the public benefits from TVSN's proposed conduct fall into three main categories:

- encouraging investments in product development, marketing and the sales process;
- facilitating investments in brand positioning; and
- reducing the cost of supplying products on dedicated television shopping channels, including planning programming, purchasing inventory and developing collateral for product campaigns.

### 4.2 Encouraging investment in product development, marketing and the sales process - Avoiding the hold-up problem

The ACCC's Guidelines for Authorisation (which sets out information on the interpretation and consideration of public benefits) notes that:

- avoiding the hold-up problem<sup>38</sup> and reducing information asymmetry form some of the more common public benefits resulting from efficiency improvements through addressing market failure or market imperfection.
- to avoid the hold-up problem, it may be necessary for the buyer and seller to cooperate, for example through long term contracts and/or exclusive dealing arrangements. Such arrangements give the parties to the transaction a level of

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<sup>37</sup> CEG Report at paragraphs 79 and 80.

<sup>38</sup> The ACCC's , Guidelines for Authorisation of Conduct (non-merger), March 2019, at page 48 describe the hold-up problem as follows: "...where assets are specific to a particular commercial relationship and have little value outside the relationship, the investor in the asset may be at risk. Hold-up occurs if the other party to the transaction is able to change the terms on which the parties transact after the investment has been made and the investor is not able to earn an appropriate return. This may lead to less investment than is required for the efficient operation of the market."

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commitment and certainty that provides sufficient incentive to undertake the specific investment.

As noted in the CEG Report:

- the exclusivity arrangements proposed by TVSN will help ensure that it has a strong incentive to continue to invest and work closely with suppliers to develop products for sale through the live presentation and demonstration format of the dedicated television shopping channel. The work that TVSN engages in with suppliers is inherently risky. Some products and campaigns will be a success, whilst others will be a failure. The ability to earn a margin on successful products and campaigns is needed to compensate for the cost of failed products and campaigns.
- Without the proposed exclusivity arrangements, TVSN is unable to secure its margins on successful campaigns. This is because, once developed, the products and campaigns are eminently transferrable to competing DTSCRs. If a supplier does this, it can earn a higher margin (as the competing DTSCR will know the product or campaign is a success and will be willing to pay for the successful product as opposed to taking the risk on a product or brand whose sales potential is unknown or untested in the live presentation dedicated television shopping channel format). The potential for competing DTSCRs to take the upside without the downside (which might be described as free riding) means TVSN has less incentive to work and invest with suppliers.
- This comes at a cost to TVSN, but it is also ultimately a cost to consumers as they miss out on the benefits of this effort and investment in product development and selection; and improvements in sales processes, including better ordering, delivery and return arrangements.

To viably compete as a retailer TVSN invests heavily in identifying and sourcing new, unique and quality brands/products that their customers will love. This involves keeping an eye on emerging brands and consumer trends and not only assessing the quality and suitability of products discovered by a supplier directly approaching TVSN but also traveling Australia and the world to approach suppliers to buy product where TVSN thinks that product could be of interest to its customers. In some cases, this may involve:

- Taking the risk on a new product or brand (eg, [Restriction of Publication of Part Claimed]);
- Taking the risk on a product or brand that is new to Australia (eg, [Restriction of Publication of Part Claimed]);
- Taking the risk on a product or brand that is new to the live presentation/demonstration format of the DTSCR (eg, [Restriction of Publication of Part Claimed]);
- Taking the risk on the manufacturing production and sale process where TVSN develops products directly with designers or personalities and then engages manufacturers to develop and manufacture the designs (eg, [Restriction of Publication of Part Claimed]); or
- Taking the risk of being the owner of the registered trade mark or brand name (eg, [Restriction of Publication of Part Claimed]).

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In all cases, it involves taking the volume and financial risk on stock purchased that cannot be sold. Further, as noted above, depending on the product type TVSN may have to commit to purchasing product well in advance of it featuring on the TVSN channel without any reciprocal commitment or certainty that the supplier will not then try to simultaneously sell the product through another DTSCR.<sup>39</sup>

Significant resources are spent on marketing and promoting brand/products including developing the collateral/assets for each brand and how it will best be promoted, [Restriction of Publication of Part Claimed]. In using its dedicated television shopping channel to sell the stock it acquires, TVSN works with suppliers to launch, build or nurture their brand and customer base to tell their brand story and bring their products to life through engaging and informative live product demonstration. Through the process TVSN also transfers confidential and proprietary information to the supplier and builds their skill-set in how their products should best be presented in the live television shopping format to optimise the conversion of minutes of television air time into sales dollars.<sup>40</sup>

Under the notified conduct, the interests of TVSN will be more aligned with the supplier to promote the brand and the products to the best of its ability so that it can recover its investment and sell purchased stock.

Without the notified conduct, TVSN will have less incentive to invest and take or share in the risk if all of the successful products can quickly migrate to a similar platform.

The notified conduct will also potentially encourage other DTSCRs to invest, source and develop other products and substitutes which will provide consumers with more choice and increase competition between brands.

### 4.3 Reducing information asymmetry

In relation to reducing information asymmetry<sup>41</sup>, the notified conduct provides the incentive to more confidently invest in the presentation of products and explain their features and uses. This investment also has the potential to increase interbrand competition. A product that a consumer may have walked past on the shelf (because they did not know what it was or how it could be used) may now be considered by the consumer as something which he/she could buy following the live demonstration. That process may involve the customer considering all the alternative brands of that product type.

As noted in the submission of Nine Entertainment Co. Holdings Limited: “...the presentation and demonstration of the goods by highly trained professionals who also provide detailed information about the advertised goods, provides considerable benefit to the public who are in the market for those goods.”

### 4.4 Facilitating investments in brand positioning

Exclusive access to brands or products for a period allows TVSN to control its overall brand positioning in relation to the products it sells in each product category of consumer goods as well as the brand positioning of the products themselves. For example, it may

<sup>39</sup> See also section 4 of the CEG Report.

<sup>40</sup> See Suppliers Guide 2013 and Confidential Attachment B for further information on the proprietary know-how and training involved in the TVSN marketing and sales process.

<sup>41</sup> The ACCC's , Guidelines for Authorisation of Conduct (non-merger), March 2019, at page 46 notes that information asymmetry occurs when one side of the transaction has less information about the price and quality of the good or service than the other and that in such cases, the buyer (or seller) is not fully informed and is unable to make rational decisions on price, quantity and quality.



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position itself as having 'high-end' jewellery. Alternatively, it might position itself as having 'budget' cosmetics.

The ability to exclusively control the brands in these sales categories is necessary to achieve this positioning (and would be undermined if a competing DTSCR chose a different position for the same brand). The ability to differentiate its market position provides a broader public benefit as it leads to increased choice for consumers in the marketplace.<sup>42</sup> It is also common place in the retail industry. For example, the strategy of David Jones in the selection of brands it stocks and MECCA cosmetics.

### 4.5 Reducing the cost of supplying products on dedicated television shopping channels

Finally, the conduct will provide a public benefit as it will be likely to result in a reduction in the cost of supplying services on dedicated television shopping channels. The supply of products on dedicated television shopping channels involves substantial lead times (in excess of six months). In the run-up to a campaign, TVSN will plan its programming schedule, develop collateral materials (including magazines and catalogues), forecast volumes and purchase inventories.<sup>43</sup>

If a supplier was to seek to market its product on a competing DTSCR in the midst of its campaign, it would increase the cost to TVSN of supplying the product as it would require re-planning of programming, require amendments to materials and increase the risk of being able to sell inventories. The proposed exclusivity provisions allow TVSN to avoid these costs, some of which could be passed through to final customers in the form of lower prices.<sup>44</sup>

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## PART B: Response to interested party submissions

Nothing in these submissions changes the positive case for notification.

In fact, these submissions instead demonstrate the competition and constraints on TVSN that will still be in place under the notified conduct and provide further support for the relevant market definition to be broader than supply or acquisition of products in relation to dedicated television shopping channels alone.

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## 5 Response to Australian Shopping Network Pty Ltd (ASN) (operator of Hyundai-Openshop)

### 5.1 ASN's submission relies on misguided assumptions

ASN's submission is founded on the following misguided assumptions:

- The relevant market is the market for the sale and promotion of goods by means of a television shopping format.
- Hyundai-Openshop is the only competitor to TVSN.
- The fact of notification is, in and of itself, evidence that the conduct would breach of s47 of the Act.

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<sup>42</sup> See section 5 of the CEG Report.

<sup>43</sup> See information provided in section 2 of this submission and 7 of the CEG Report.

<sup>44</sup> See section 7 of the CEG Report.

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- Competition between television shopping networks would be destroyed if TVSN was allowed to acquire products on the condition that suppliers not feature those products on another DTSCR for the exclusivity period.
- The notified conduct prevents competition between the channels in relation to payment method and delivery fees and TVSN's ceased promotion and clearance of stock in relation to Samsung, Trophy Skin, Django & Juliette and Diana Ferrari demonstrates the competition that flows from suppliers being able to market the same goods on two simultaneous television shopping networks.

### **5.2 The relevant market is not a market for the sale and promotion of goods by means of a television shopping format nor is Hyundai-Openshop, TVSN's only competitor**

A market definition this narrow does not accord with:

- the principles for defining the relevant market for the purposes of s47 of the Act;
- the submissions of other third parties; or even
- Hyundai-Openshop's own assessment of the market in which they operate.

Section 47 conduct must be engaged in for the purpose, or must have the effect or likely effect, of "substantially lessening competition" (s 47(10)(a)) in a "market" (s 47(13)(b)); and the market must be one in which the corporation engaging in the conduct (or a related body corporate) competes, or a market in which the person constrained by the conduct supplies or acquires goods or services (s 47(13)(b)).

Section 4E of the Act provides that a market includes goods or services that are substitutable for, or otherwise competitive with, the goods or services under analysis. Accordingly, substitution is key to market definition and the market should capture not only participants affected by the notified conduct but those providing potential constraint on TVSN.

A market for the sale and promotion of goods by means of a television shopping format does not properly take into account the ability of consumers to easily buy identical or substitutable products from various sources other than or instead of TVSN or Hyundai-Openshop or the ability of suppliers to easily access or market to customers via various sources other than or instead of TVSN or Hyundai-Openshop including direct channels and other television formats such as those mentioned in the submissions of other third parties amongst other channels.

Therefore, the relevant market for the purposes of section 47 and the analysis of the notified conduct cannot properly be defined to be as narrow as a market for the sale and promotion of goods by means of a television shopping format. Given the alternative sources of supply available to, and used by, suppliers and customers, such a narrow definition simply does not cover the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive: *Queensland Co-Operative Milling Association Ltd: Re Defiance Holdings (1976) 8 ALR 481 at 517*.

Further, such a narrow definition does not accord with how other participants view the market. This is highlighted in the other third-party submissions which note the various alternatives for suppliers to market their goods to customers and in the statements of Hyundai-Openshop itself.

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Just prior to launching, Hyundai-Openshop's Managing Director Jason Kim told TV Blackbox the following: "We are so excited to be launching. It's an advanced, digital ready economy, that is showing huge growth in online shopping. **We look forward to making an impact in a very competitive market.**" This statement:

- highlights that Hyundai-Openshop, itself, views the relevant market as broader than a market of two participants (TVSN and Hyundai-Openshop) competing for the sale and promotion of goods by means of a television shopping format; and
- directly contradicts the following fundamental contentions on which Hyundai-Openshop's opposition is based:
  - the relevant market is so narrow as to be one in which TVSN had a monopoly; and
  - there is only now "...competition in this market as a result of [Hyundai-Openshop's] commencement of operations".

### 5.3 Notification does not equate to breach

Section 93(1)(b) of the Act allows a business to obtain legal protection to engage in exclusive dealing conduct. The Act does not require:

- a business to show that the proposed conduct would breach section 47 in order to lodge a notification and obtain that protection; or
- the ACCC to form a view that the proposed conduct would breach section 47 in order to consider the notification.

As noted above, TVSN was reviewing its Supplier Agreement and wanted to be more explicit to suppliers (by including a provision in its Supplier Agreement) that TVSN's choice to acquire and invest in the promotion of their products is based on it having qualities that align with the TVSN business model and customer experience of discovering a 'unique find' in the dedicated television shopping channel live format medium.

TVSN viewed it prudent to lodge the notification prior to formally implementing the notified conduct not because it thought it would breach section 47 but because it was making a change to its Supplier Agreement, the protection is available, and the narrow exclusivity is fundamental to TVSN's ability to compete as a retailer in line with its business model.

### 5.4 The notified conduct does not prevent competition between dedicated television shopping networks or from any other retail channel. Nor does it prevent competition between advertisers

The notified conduct does not prevent consumers or suppliers from choosing to use Hyundai-Openshop or any other dedicated television shopping network to buy, feature or sell their products. Nor does it prevent them from switching between dedicated television shopping networks after the exclusivity period. Further, it does not prevent, and in fact encourages competition between dedicated television shopping networks through investment in sourcing and developing substitutable products and content.

While it may be true that there are some categories of goods which are inherently more suitable for sale and promotion by the television shopping network format, there are plenty of products available within those categories to compete for (including convincing overseas suppliers to supply into Australia as TVSN has done with [**Restriction of Publication of Part Claimed**]). There is a finite amount of live content that can be created per day and the universe of products suitable for sale and promotion via a television shopping network format is not confined to those suppliers already on TVSN or that

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TVSN is able to persuade to join TVSN.

There is no specific product or supplier that is essential to the viability of a television shopping network such that without that specific product or supplier the network would be prevented from achieving minimum efficient scale. In calendar year 2019, TVSN's top 20 suppliers only made up [Restriction of Publication of Part Claimed]% of product sales with the rest split up amongst a large range of suppliers, noting that in that year there are [Restriction of Publication of Part Claimed] suppliers whose product sales to TVSN customers were in excess of \$[Restriction of Publication of Part Claimed].<sup>45</sup> Hyundai-Openshop already has a range of products from a range of different suppliers across all of the main categories of consumer goods which TVSN sells in Australia as well as suppliers in categories that TVSN does not sell. Hyundai-Openshop also has access to a range of suppliers in Korea which may wish to sell in Australia, and it is open to Hyundai-Openshop to source and invest in suppliers that are not already on TVSN.

Promotion and sale of their products simultaneously via multiple television shopping networks is not the norm for suppliers and brands, and while having a choice of networks maybe beneficial, (a choice which is not removed by the notified conduct) it is not clear that suppliers would choose to simultaneously promote a particular product across more than one DTSCR as this in fact may produce a weaker outcome for suppliers.

Attachment A of the Hyundai-Openshop submission provides a number of examples of TVSN selling products at clearance prices in response to a supplier switching that product to Hyundai-Openshop. For example, Trophy Skin MiniMD Handheld Microderm System; Django & Juliette shoes and Diana Ferrari shoes. The submission holds those examples out to be reflective of competition due to the ability to promote and sell the same products simultaneously on both channels, competition that would be lost under the notified conduct. These examples actually reflect TVSN acting in accordance with its business model of wanting to provide customers a 'unique find' and not wanting to use its resources promoting or warehousing purchased stock of a product that no longer fits that criteria because the supplier has switched sale and promotion of that product to another dedicated television shopping channel.

The ability of suppliers to switch dedicated television shopping channels will remain under the notified conduct following the exclusivity period and customers will still be able to price compare and buy from a range of outlets other than dedicated television shopping channels. The notified conduct will just remove or minimise the potential for: customer confusion (in relation to the retailer, the terms of trade and the aftersales support); brand confusion (depending on how the products are promoted on the different channels); and a reduction in investment incentives (including taking volume and financial risk) that may occur without such exclusivity.

In Attachment B of the Hyundai-Openshop submission, the Legmaster is cited as an example of 'competition' in action where a supplier chooses to supply the same product on both channels – competition it asserts would be entirely foreclosed under the notified conduct. However, Rockin Direct, the supplier of this product and Trophy Skin did not choose to supply the same products on both channels. They chose instead to supply these products for promotion and sale on Hyundai-Openshop and not on TVSN and any cross-over on both DTSCRs relates to TVSN's associated readjustment of inventories.

However, the 'competition' referred to in this example relates to the different channels offering different payment methods and delivery fees. These features tend to be standard across products for a dedicated shopping channel. The notified conduct does

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<sup>45</sup> See spreadsheet titled, "Top [Restriction of Publication of Part Claimed] vendors 2019". [Restriction of Publication of Part Claimed].

not prevent dedicated television shopping channels from competing for suppliers in relation to these features or for exclusive supply of products.

In Attachment C of the Hyundai-Openshop submission, screenshots are provided of a number of different South Korean shopping channels simultaneously offering goods manufactured by the same manufacturer (Samsung, Dr Jart+ and Dyson). These examples relate to large suppliers of already well-known brands and products. They do not negate the fact that exclusivity arrangements are common in relation to retail in Australia and in-home shopping in other parts of the world including the UK and the US. Nor do they change the competition assessment relevant to the notified conduct.

In response to the submission's comments regarding public benefits see section 4 above.

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## 6 Response to Seven West Media Limited (broadcaster of Hyundai-Openshop)

The key concerns set out in this submission are that the notified conduct will:

- make it more difficult for a new entrant channel such as Hyundai-Openshop to compete.
- foreclose the opportunity for programmes such as Seven's The Morning Show to promote products contrary to the interests of the supplier.

In response to the submission's comments regarding public benefits see section 4 above.

### 6.1 Hyundai-Openshop's ability to compete is not prevented or impeded by the notified conduct

Hyundai-Openshop is a subsidiary of Hyundai one of South Korea's leading home shopping channel operators and as such has access to significant resources, customers and suppliers including suppliers in South Korea which may wish to sell their products into Australia and the ability to offer suppliers in Australia access to South Korean home shoppers.

It already has a broad range of products from a range of different suppliers across all of the main categories of consumer goods which TVSN sells in Australia as well as products in categories that TVSN does not supply.

The proposed exclusivity is narrow and directed at preventing customer and brand confusion and protecting investments made in sourcing, developing, purchasing and warehousing products in relation to promotion via a particular format.

There is no specific product or supplier that is essential to the viability of a television shopping network such that without that specific product or supplier the network would be prevented from achieving minimum efficient scale. There are plenty of products available to compete for within categories of goods suitable for sale and promotion by the television shopping network format and it is open to Hyundai-Openshop to source and invest in suppliers that are not already on TVSN.

The submission makes note of the fact that the notification was only lodged following Hyundai-Openshop's entry. As noted above, the notification was lodged because on reviewing its Supplier Agreements, TVSN wanted to make more explicit that TVSN's choice to acquire and invest in the promotion of products is based on it having qualities that align with the TVSN model of offering customers a reason to shop with them such as

it being a 'unique find' in the dedicated television shopping channel live demonstration format.

The timing of the notification also reflects a response to the Hyundai-Openshop strategy of entry and engagement which appears to be relying on attracting TVSN's producers, presenters, contractors, other employees, guests and suppliers to undermine and free-ride off the TVSN business rather than drawing on their own experience and expertise to compete on the merits. Notably, the format of the presentation that Hyundai-Openshop uses appears to be different to the South Korean format but very similar to the TVSN format. Hence TVSN's elevated concern over IP and the clarity to consumers of its brand and offering.

## 6.2 The notified conduct will not foreclose the opportunity for programmes such as Seven's The Morning Show to promote products

Under the notified conduct, the exclusivity will not apply to programmes such as Seven's The Morning Show. Suppliers can still choose from a range of distribution and marketing channels including television based and other formats. Suppliers can also still choose between TVSN and another dedicated shopping channel and retailer or to switch between them after the exclusivity period.

The reference to programmes such as Seven's The Morning Show as alternative television presentation formats available to suppliers is supportive of the competition case for the revised notified conduct.

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## 7 Response to Prime Media Group and Southern Cross Austero

The submission on behalf of Prime Media Group (Prime) and Southern Cross Austero (SCA) highlights the competitive constraints on TVSN within home shopping alone.

For example, the submission notes that in addition to Hyundai-Openshop, TVSN would face competition for suppliers and/or consumers from:

- iShop TV and Aspire TV each of which broadcast infomercials, opportunities for consumers to purchase products, demonstrations and special offers;  
  
iShop TV is owned and operated by Prime in partnership with Brand Developers Aust Pty Ltd. Aspire TV is owned and operated by Brand Developers Aust Pty Ltd with datacasting services licensed from SCA. We note that Brand Developers Aust Pty Ltd describe themselves on their website as the largest direct response marketing company in Australia and New Zealand using direct response television, digital, retail and live events to launch market and sell consumer products;
- breakfast and morning programs on free-to-air television stations also frequently include live product demonstrations and promotions that are very similar to the content on dedicated home shopping channels;
- other businesses involved in direct selling mediums such as live streaming the presentation or promotion of goods; and
- potential entrants.

While the submission raises concerns in respect of the notification, the basis for those concerns rests entirely on an assumption of a much broader exclusivity in terms of duration, scope and application. Properly understood this submission provides evidence in support of the revised notified conduct, as it clearly demonstrates the number of alternative television presentation opportunities for suppliers.

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The notified conduct will not:

- apply to the supplier's choice to use slots on channels such as iShop TV, Aspire TV or Spree TV which do not use "live" format presentation; or
- apply to any of the breakfast and morning programs on free-to-air television stations which include "*live product demonstrations and promotions that are similar to the content on dedicated home shopping channels*" but where the supplier remains the retailer in receipt of any product sales;
- prevent such channels, other mediums or Hyundai-Openshop from sourcing suppliers and advertisers. It only limits the supply of specific products or brands to a DTSCR for feature or sale by a supplier to TVSN whilst the exclusivity period applies to the supplier of those specific products or brands;
- prevent suppliers from choosing how and with whom they market and sell their products; or
- relevantly limit consumer choice.

The exclusivity is short in duration and specifically targeted to preventing confusion and protecting investment in relation to the live presentation format on a dedicated shopping channel and retailer.

There are plenty of products/suppliers available to compete for within categories of goods suitable for sale and promotion by home shopping channels. No particular product or supplier is essential to the viability of a channel.

Suppliers choose how they market and sell their products whether that be through their own direct channels, bricks and mortar style stores, website retailers, Hyundai-Openshop, TVSN, infomercial or advertorial segments on channels like iShop TV, Spree TV or Aspire TV or on any of the free-to-air breakfast shows, other mediums or any combination of the above.

If a supplier chooses to market and sell its products through TVSN, it can still market and sell its products via a range of other channels. It can also decide to switch from supplying TVSN to supplying another DTSCR following the exclusivity period.

Consumers can still choose how they purchase products whether that be through bricks and mortar style stores, website retailers such as Amazon, by telephone or online following a television infomercial or by telephone or online from a DTSCR such as Hyundai-Openshop or TVSN.

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## 8 Response to Nine Entertainment Co. Holdings Limited

The concerns raised in this submission are based on an exclusivity that is much broader in scope and application than the notified conduct. These concerns do not apply to the notified conduct.

The submission does highlight the inability of TVSN to foreclose access to television marketing services (should a supplier choose to promote its product that way) and in that regard properly understood provides evidential support for the TVSN notification not against it. Nine Entertainment Co notes that each of the broadcasters competes for the same categories of suppliers when looking for advertisers as TVSN competes for when it is looking to source products to promote and sell and sets out a range of avenues within the television platform alone that a supplier can choose from including:

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- Informercial or advertorial segments broadcast during television programs such as Nine's Today Extra, Channel 7's Morning Show and Daily Edition, and Channel 10's Studio Ten; and
- Informercial or advertorial advertisements on dedicated informercial channels such as Aspire TV and Spree TV and across the other free to air broadcast channels.

Even if Nine were to develop its own dedicated shopping channel and retailer, the exclusivity proposed under the notified conduct:

- is narrow;
- would not prevent suppliers from choosing Nine's channel or if they chose TVSN, switching to Nine's channel after the exclusivity period; and
- would not prevent the channel from reaching minimum efficient scale.

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## 9 Conclusion

### 9.1 The ACCC cannot be satisfied that the requirements for revocation are met

As noted in the ACCC's Exclusive Dealing Notification Guidelines, November 2017, the legal test in s 93(3) of the Act requires that for the ACCC to **revoke a notification it must be satisfied** that the notified conduct:

- has the purpose, effect or likely effect of substantially lessening competition, and
- in all the circumstances, will not result in likely public benefit which would outweigh the likely public detriment.

Based on the information and evidence available and the submissions of interested parties received, the ACCC cannot be satisfied that either of these requirements are met.

### 9.2 The purpose of the notified conduct is to protect and enable investment in brands and products so that TVSN can continue to compete in the retail space

The number one reason most retailers fail is because their brand, and by definition product proposition, loses relevance. In order to compete for customer interest, loyalty (and sales) in a world where competition is a click away, TVSN searches for quality, unusual or 'unique finds' within the live presentation format.

The notified conduct is about clarifying that TVSN's choice to acquire or refuse to acquire (and invest) in the promotion of a particular supplier's products is based on it having qualities that align with this strategy.

The application of the notified conduct is narrow and specifically directed to:

- allowing TVSN to viably compete as a retailer by being able to differentiate itself in this way and offer consumers interesting and different live format content;
- preventing customer confusion as to how the brands are being positioned and what customers are getting in terms of the product, the terms of trade and the after sales support;
- protecting or preventing damage to returns on TVSN's investment in nurturing and promoting the brands of suppliers (including developing new and unknown brands) and encouraging other DTSCRs to invest and provide consumers access to other



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interesting products rather than free-riding off the resources and investments that TVSN has placed into brand development and presentation; and

- protecting the investment in TVSN's own brand, TVSN's IP and the trust relationship and expected experience TVSN has developed with retail customers.

### 9.3 The economic conditions required for a substantial lessening of competition simply do not exist

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

The exclusivity under the notified conduct is narrow in application and not long in duration. It flows from trying to prevent customer and brand confusion whilst allowing TVSN some level of commitment and certainty to undertake investment in identifying, sourcing and promoting products (including in situations where it takes the risk on buying product stock well in advance of planned featured content).

There is no specific product or supplier that is essential to the viability of a DTSCR such that without that specific product or supplier the channel would be prevented from achieving minimum efficient scale. There are plenty of products available to compete for within categories of goods suitable for sale and promotion by the dedicated television shopping channel format and it is open to other DTSCRs to source and invest in suppliers that are not already on TVSN.

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

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

- the supplier's own direct channels;
- other online retail outlet options;
- a bricks and mortar outlet; or
- other televised options including any of the various choices for advertorial or informercial advertisements such as:
  - slots on Spree TV, Aspire TV or iShop TV; or
  - segments broadcast within or during other programming such as Nine's Today Extra, Channel Seven's Morning Show and Daily Edition and Channel Ten's Studio Ten; and
  - segments broadcast in-between programming or during advertorial breaks on the various television channels.

Nor does it actually prevent the supplier from:

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

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

**9.4 The notified conduct is required to achieve the public benefits of more efficient investment outcomes and enables a greater range of product-service options for consumers**

As set out in the CEG Report, the public benefits from TVSN's proposed conduct fall into three main categories:

- encouraging investments in product development, marketing and the sales process;
- facilitating investments in brand positioning; and
- reducing the cost of supplying products on dedicated television shopping channel retailers, including planning programming, purchasing inventory and developing collateral for product campaigns.

Without the notified conduct, TVSN does not have the level of commitment and certainty that provides sufficient incentive to undertake the same level of investment.

Further, the notified conduct enables a reduction in information asymmetry between supplier and consumer and will encourage other DTSCRs to invest, source and develop other products and substitutes which will provide consumers with more choice and increase competition between brands.

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**Confidential Attachment A – Requested information on top 50 suppliers**

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**Confidential Attachment B – Confidential response to ACCC request  
for information and documents**

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**Confidential Attachment C – Example TVSN P&L report and balance sheet for December 2019**

**Confidential Attachment D – [Restriction of Publication of Part Claimed]  
purchase order and purchase approval [Restriction of Publication of Part  
Claimed]**