COMPETITION POLICY REVIEW

SUBMISSION BY
VODAFONE HUTCHISON AUSTRALIA

10 June 2014

EXECUTIVE SUMMARY

Vodafone Hutchison Australia Pty Limited (**VHA**) makes this submission in response to the issues paper released on 14 April 2014 (**Issues Paper**) by the Competition Policy Review Panel (**Panel**) for the Competition Policy Review (**Review**). We would be interested to meet with the Panel to discuss the content of this submission.

VHA welcomes the Review and the opportunity it presents

VHA welcomes the Review and strongly supports the Review's objectives, namely to inquire into and make recommendations on appropriate microeconomic reforms to improve the Australian economy and the welfare of Australians. From VHA's perspective, further improvements to the competition regulation framework will deliver improved outcomes not only for the telecommunications sector, but throughout Australia's economy, for the benefit of all Australians.

The historic context is important. The National Competition Policy Review of 1993 (**Hilmer Review**) promoted the development of Australia's National Competition Policy. That Policy facilitated world-leading economic reforms that substantially increased Australian productivity. However, it is now over 20 years since the Hilmer Review and Australia's productivity growth has stagnated. Key sectors such as telecommunications that should be driving productivity growth are not realising their full potential. This due in large part to regulatory and policy decisions have assisted those with market dominance to be protected from competition. The current Review provides a welcome opportunity to reinvigorate competition policy in Australia and drive productivity growth across all sectors of the economy.

VHA has three specific proposals based on insights from the telecommunications sector

The market structure and appropriate level of regulation for the Australian telecommunications sector is currently the subject of an independent review titled *Cost-Benefit Analysis and Review of Regulation* (**Vertigan Review**) instigated by the Commonwealth Department of Communications. Many of the issues raised in the context of the Vertigan Review overlap with the current Review. However, a number of insights from the approach adopted in the telecommunications sector have more general application throughout the economy.

VHA therefore makes this more general submission, which is focussed on three key concerns, as follows:

Issue from Issues Paper	**VHA's concern**	**VHA's proposal**
Are competition-related institutions functioning effectively and promoting efficient outcomes for consumers and the maximum scope for industry participation? What institutional arrangements would best support a self-sustaining process for continual competition policy reform and review?	**Insufficient attention is currently being given to competition policy**: The level of attention given by government institutions to ensuring that policies are developed within a robust competition policy framework has declined over the last decade. Over the years merits review of decisions has been removed from some parts of the regulatory regime. This was intended to speed up the decision making but it has also resulted in the reduction in the independent oversight of regulatory decisions. Existing institutional arrangements do not adequately support a self-sustaining process for continued competition policy reform and review. There is a lack of an overarching assessment of how specific decisions are delivering a level competitive playing field.	**Create a high-powered competition policy review and development entity:** Australia's competition policy institutions require reinvigoration. A high-powered competition policy review and development entity should be created ("**CPR Entity**") to independently advise the various State and Commonwealth governments and to formally review all regulation against competition principles. One option would be that the CPR Entity should be created by merging the National Competition Council (**NCC**) with the Productivity Commission and giving that new entity expanded functions and powers. The CPR Entity should be empowered to encourage and implement continued competition policy reform and review.

Issue from Issues Paper	VHA's concern	VHA's proposal
Are the current competition laws working effectively to promote competitive markets , given increasing globalisation, changing market and social structures, and technological change?	**Australia adopts an *ad hoc* approach to sectoral regulation**: Australia's approach to sectoral regulation has been *ad hoc* across sectors, increasing the risk of rent seeking and unwarranted political intervention. There is a lack of ongoing assessment of the overall market structure and how individual regulatory decisions are limiting competition. This *ad hoc* approach has undermined the ability of sectoral regulation to effectively promote competition in more concentrated sectors of the Australian economy. A more principled approach to sectoral regulation is required, consistent with competition policy objectives.	**Apply stricter competition laws in certain sectors under a principled-based approach:** Insights are provided by the telecoms sector in which the generic Part IV regime was supplemented by the sector-specific rules in the Part XIB regime. We believe that Part IV of the Competition and Consumer Act (CCA) should more closely align the XIB approach. In particular greater focus should be on the *effects* of market behaviour rather than assessing the intent (or 'purpose') of market agents. The ability to apply such a regime would improve the focus of competition law to be about poor market outcomes as opposed to seeking to determine the motivations of commercial players. It would also reduce the risk of *ad hoc* regulatory intervention while providing greater powers to the ACCC to take effective steps to address anti-competitive conduct in those sectors where the risk of such conduct is most acute. The CPR Entity should play the role of assessing whether allegations of misuse of market power are appropriately being assessed by the ACCC to ensure that competition and investment are maximised.
What institutional arrangements would best support a self-sustaining process for continual competition policy reform and review? Are competition-related institutions functioning effectively and promoting efficient outcomes for consumers and the maximum scope for industry participation?	**Quality of ACCC decision-making in Concentrated Sectors is critical:** The quality of decision-making by the Australian Competition and Consumer Commission (**ACCC**) is particularly important in Concentrated Sectors. Effective ACCC oversight in such Concentrated Sectors is critical in ensuring that market failures are not exploited and that markets continue to operate efficiently. The accuracy of ACCC decisions should be enhanced for the Concentrated Sectors by ensuring that the ACCC is accountable for its decisions and subject to effective and independent oversight.	**Increase ACCC accountability and scrutiny for all decisions in Concentrated Sectors:** The ACCC should be required to develop an annual report setting out its objectives for each Concentrated Sector. It should also report how individual decisions are consistent with their overall objectives. Each year, the CPR Entity should review the outcomes for that Concentrated Sector against the ACCC's annual report. As part of its annual review, the CPR Entity should have the power to independently review and audit any key ACCC decisions in that Concentrated Sector to ensure they conform with regulatory best practice. The report of the CPR Entity should be public and the ACCC should be required to formally respond to any recommendations. A similar approach was historically adopted, for example, in relation to the competition policy payments from the Commonwealth to the States with the NCC performing an annual competition policy audit role.

VHA believes that the adoption of these proposals will progress a long way towards ensuring a consistent and high quality framework for the competition regulation in Australia in the 21st century, particularly in those sectors deserving of more focused, principled and accountable approach to regulation, such as telecommunications.

VHA would be happy to meet with the Panel to discuss this submission and to provide any insights into the particular issues that VHA has faced in competition regulation in the telecommunications sector.

10 June 2014

VHA'S DETAILED SUBMISSION TO THE REVIEW

1. Opportunities to enhance productivity in telecoms are being impeded

An important point that VHA wishes to highlight in this submission is that key sectors of the Australian economy, such as telecommunications, that should be driving Australian productivity growth are not currently realising their full potential.

While commentators have blamed the mining boom and other sectoral shifts as key determinants of the recent decline in Australian productivity, VHA submits that is important to consider those sectors of the economy that should have stimulated greater productivity growth than has in fact occurred. Telecommunications is such a sector.

The market distortions and failures in telecommunications have had a direct adverse impact on productivity. Australia is now suffering from:

- **the highest prices for fixed telecommunications in the OECD**: This is the product of serious structural problems in fixed telecommunications markets in Australia and is a significant policy failure.

- **fixed line broadband penetration rates that are below the OECD average**: We are at comparable levels to Spain and Slovenia and are close to Greece, all below the OECD average.

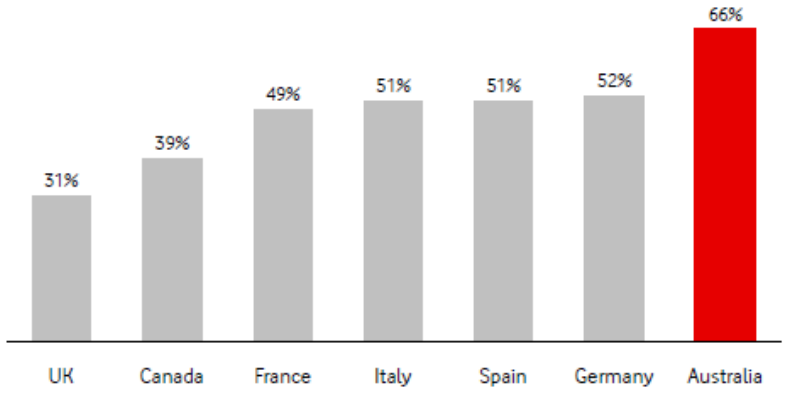
- **virtually no effective fixed and mobile competition exists in regional Australia**: This is of significant benefit to Telstra, positively reinforcing Telstra's enduring, pervasive, and unprecedented market dominance.

This dissatisfactory state of affairs reflects a series of major failures in competition laws and policy in the Australian telecommunications sector. The primary problem is the fact that a series of regulatory and policy decisions have ensured that the incumbent is protected from the forces of effective competition. The Australian telecommunications sector is badly in need of regulatory reform.

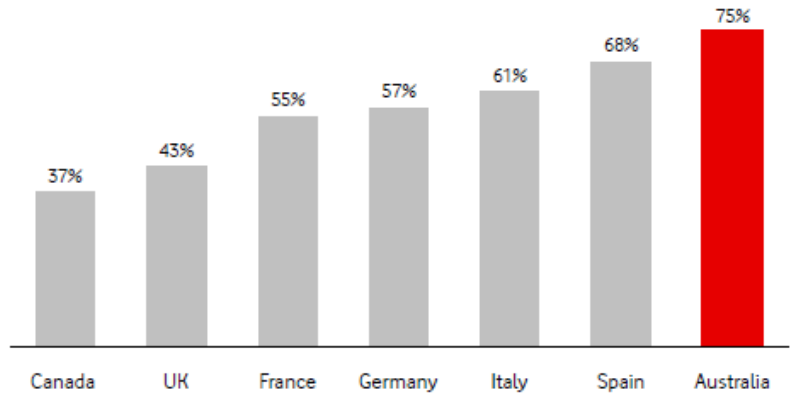
As VHA identified to the Vertigan Review, notwithstanding over 20 years of market liberalisation and regulation, Australian telecommunications markets remain highly concentrated by global standards. Telstra Corporation Limited (**Telstra**) also operates the most profitable telecommunications business in the OECD, to the detriment of Australian businesses, consumers and overall economic productivity and welfare.

The magnitude of the market failure in the Australian telecommunication sector is evidenced by several key indicators (sourced from Annual Reports), as depicted below:

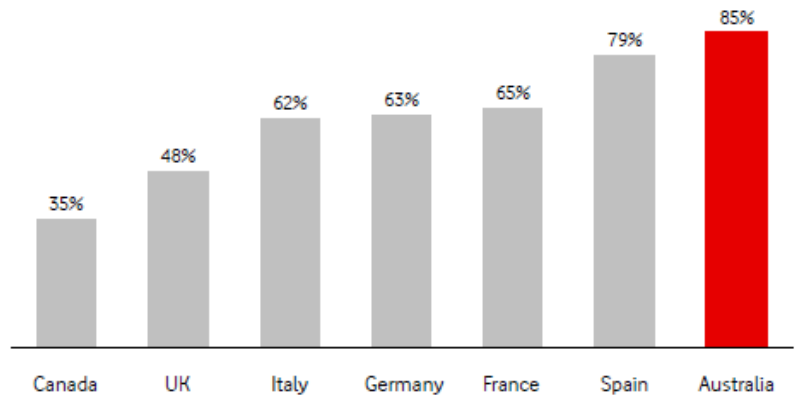
- Telstra's share of Total Telecoms Revenue in Australia is 66%:



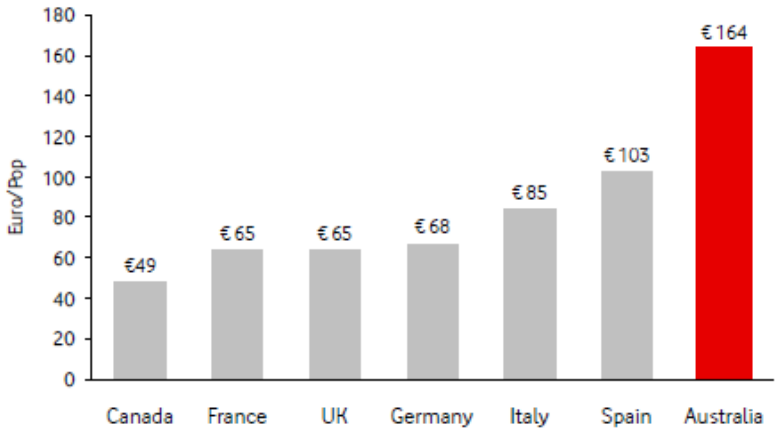
- Telstra's share of industry EBITDA is 75%:



- Telstra's share of industry Operating Free Cash Flow is 85%:



- Telstra's Operating Free Cash Flow per capita is the highest in the OECD by a substantial margin:



As discussed above, the effect of this level of market dominance is a telecommunications sector that is not delivering the productivity improvement it should. Prices in the fixed sector are high and investment is more limited than it should be. This has a direct impact on Australia's ability to benefit from the 'digital revolution'.

To be clear, VHA is not seeking new regulatory interventions to give challenger Telco's a handout. Quite the contrary. It is our view that policy makers and regulators in Australia have tolerated a telecommunications market where the incumbent has been protected from effective competition. Internationally, Vodafone Group and Hutchison have proud histories of thriving in vigorously competitive markets. What is unacceptable is a regulatory regime that so comprehensively protects the incumbent.

For example over the last decade more than $1.4bn worth of Government funds have been provided to Telstra. Further a range of regulatory decisions have increased Telstra's margin at the expense of the rest of the industry's profitability. Australia need a reinvigorated competition regime that indentifies and overcomes what we consider to be significant regulatory and policy complacency – complacency that is holding Australia back.

2. Australia's competition policy institutions should be reinvigorated

VHA's first submission responds to the following question in the Issues Paper:

- What institutional arrangements would best support a self-sustaining process for continual competition policy reform and review?

As outlined above, urgent reforms are needed in many concentrated sectors including the telecommunications industry, but reforms alone are not enough – they must be supported by an effective regulatory regime that yields real choice, efficient pricing, greater innovation and large-scale investment. We are hopeful that this Review, in conjunction with the Vertigan Review, represents the start of a new era in competition policy in Australia; an era that will see telecommunications markets become more competitive –and therefore, more productive – than ever before.

As the Panel will be aware, the Terms of Reference of the Review requires the Panel to consider whether the institutional framework that supports competition law and policy in Australia is working effectively. The Issues Paper (at paras 6.1-6.2) points to the National Competition Policy (**NCP**) institutional framework within the Council of Australian Governments (**COAG**), including the establishment of the National Competition Council (**NCC**) and the ACCC.

The Issues Paper (at paras 6.3-6.4) also points to the historic existence of the competition policy payments from the Commonwealth Government to the States and Territories and notes that these ended in 2006. The Issues Paper highlights that the future institutional structure will be as important as the policy itself in creating a self-sustaining process of continual reform and reassessment.

In this context, VHA considers that:

- insufficient attention is currently being given to competition policy and overall competitive outcomes in Australia; and

- the Government should create a high-powered competition policy review and development entity to ensure that sufficient attention is given to competition policy.

In effect, the Government should take the opportunity to reinvigorate Australia's competition policy institutions in the manner originally contemplated by the Hilmer Review in 1995.

(a) Insufficient attention is currently being given to competition policy

There are three distinct tiers to the institutional framework for competition policy in Australia:

- First, the entities with the political responsibility for implementing and updating competition policy, namely the relevant Ministers, Ministries and Departments at the Commonwealth, State and Territory levels.

- Second, the competition policy review advisors to the relevant Ministers and Australian governments, namely the NCC, Office of Best Practice Regulation (OBPR) and the Productivity Commission.

- Third, the administrative structure that applies competition law and market regulation, namely the ACCC, Australian Energy Regulator, Australian Competition Tribunal, and State-based competition agencies.

This structure was created by COAG in the context of the NCP in the period following the Hilmer Review. At first, this tripartite structure proved extremely effective. Australia led the world in the implementation of competition policy reforms in the period following the Hilmer Review.

One of the key reasons for the effectiveness of this structure was that the NCC, at the second tier, was able to use the "carrots and sticks" of the Commonwealth's annual competition payments to the States. Such payments ensured that regulation review was taken seriously by the relevant Ministers and governments at the first tier.

However, the role and effectiveness of the second tier of these institutions, particularly the NCC, has subsequently declined. As a result, VHA considers that the role of the competition review advisors at the second tier is now ineffective. Consequently, the level of attention given by the government to competition policy has notably declined over the last decade. Australian competition policy has suffered as a result and *ad hoc* sectoral regulation has been reimposed.

VHA is not alone in expressing these views. As the Panel will no doubt be aware, these views are shared widely by those experienced in competition and regulatory matters in Australia.

By way of example, Professor Frederick G Hilmer AO gave a speech to the Annual Baxt Lecture in Competition Law, titled "National Competition Policy: Coming of Age", on 19 September 2013.[1] That speech was, presumably, partly intended to influence the agenda for this current Review. In that speech, Professor Hilmer noted:

[1] See http://www.law.unimelb.edu.au/files/dmfile/130919-Sp-AnnualBaxtLectureInCompetitionLaw-FGH12Sept20132.pdf

- Having a policy review structure which provides ongoing advice to the Federal Minister responsible for competition policy is an essential part of the institutional framework for competition law and policy in Australia.

- During the course of the Hilmer Review in 1995, it became clear that "*keeping track of the progress and impact of competition policy… was a complex and demanding task*". Consequently, the Hilmer Review called for the formation of the NCC, which it was suggested would "*provide a high level and independent analytical and advisory body in which all governments would have confidence*".

- While the NCC was established following the release of the Hilmer Review, it was not empowered to be "*a key player in monitoring and updating the overall competition policy*" in the manner contemplated by the Hilmer Review. Rather:

  > "[The NCC's] role was restricted to recommending on access declarations for essential facilities. It has not been a significant voice on the failures of regulation review which are at the heart of current concerns with "red tape". Nor has it driven the debate with respect to public monopolies where pricing, ownership and structural issues remain, for example, in electricity."

- Professor Hilmer reiterated his view that there is "*an acute need for an independent, highly capable policy review and development group*". Professor Hilmer proposed that this could be achieved either by reconstituting the NCC, or via a widening of the scope and modus operandi of the Productivity Commission.

VHA agrees with these comments, but considers that the NCC and Productivity Commission could, in fact, be merged in the manner recently recommended by the National Commission of Audit, as identified below.

Ensuring that Regulatory Impact Statements are properly embedded in the policy making process

Moreover, in VHA's view, the lack of a competition policy focus has started to become endemic within the various branches of the Australian government. This is illustrated by the role of Regulation Impact Statements (**RIS**):

- The Office of Best Practice Regulation (OBPR) plays a central role in assisting Australian Commonwealth Government departments and agencies to meet the Australian Government's requirements for best practice regulatory impact analysis and in monitoring and reporting on their performance. The OBPR is required to assess whether a RIS is required. The OBPR conducts training programs to assist agencies to prepare RIS and fulfil other regulatory review and reform obligations.

- The RIS process is meant to ensure the quality of new regulation through a rigorous, evidence-based process for decision-making. In doing so, the OBPR and agencies are intended to apply the *Best Practice Regulation Handbook (2013)* and the *COAG Best Practice Regulation Guide*.

- However, in VHA's view, the preparation of a RIS is too often treated as a mere compliance exercise, rather than an integral part of policy development. In order for the process to work effectively, the principles of regulatory best practice should be influential in the formation of the regulation itself. In particular the RIS should be undertaken **before** decisions are made, not after decisions are locked in. VHA's observation is that it is very rare that this occurs.

These concerns are not unique to the Commonwealth. By way of example, a 2010 report on the effectiveness of the RIS process in the State of Victoria determined that the RIS process:[2]

[2] Report prepared by Access Economics Pty Ltd for the Victorian Department of Treasury and Finance, "Reviewing the effectiveness of the Regulatory Impact Statement (RIS) process in Victoria", 23 December 2010.

- does not allow not sufficient time for policy development;
- places too much emphasis on the technical elements of the RIS;
- is undertaken with a predetermined regulatory outcome in mind, and that too little consideration is given to viable alternative options, particularly non-regulatory options; and
- places too little emphasis on stakeholder engagement, with stakeholders typically not being involved in the development of options.

More broadly, VHA submits that government regulation in the last decade (once the role of the NCC declined) has often been imposed on an *ad hoc* basis, often as a result of political imperatives and often without proper regard to potential costs. Bureaucratic red tape has stifled the operation of markets. These factors all suggest that existing institutional arrangements do not adequately support a self-sustaining process for continual competition policy reform and review.

VHA would urge the Panel to consider ways that the RIS process is better used by all policy makers in developing (or forbearing) new regulation.

(b) The Government should create a high-powered competition policy review and development entity

The question arises as to how these issues and concerns should now be addressed.

VHA submits that a high-powered policy review and development entity should be created to independently advise the various State and Commonwealth governments (and their agencies such as the ACCC and ACMA), and to formally review all regulation and regulatory decisions against competition principles. Such an entity should be created by broadening the role of the NCC and merging it with the Productivity Commission, to create a new "Competition Policy Review Entity" (**CPR Entity**) with the joint functions of the NCC, OBPR and Productivity Commission. VHA also believes that the creation of such a Policy Entity would support a self-sustaining process for continual competition policy reform and review.

In analysing the roles of the Productivity Commission and the NCC it is useful to compare the entities in a side-by-side analysis, as follows:

	Productivity Commission (PC)	**National Competition Council (NCC)**
History	The PC is the Commonwealth Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. It has maintained an excellent reputation for high quality advice. The PC was created as an independent authority pursuant to the *Productivity Commission Act 1998* (**PCA**), to consolidate and replace the Industry Commission, the Bureau of Industry Economics and the Economic Planning Advisory Commission. However its roots go deeper, to the establishment of the Industries Assistance Commission in 1974 (which itself replaced the Australian Tariff Board) and, later, the Industry Commission in 1989.	The NCC is an independent statutory agency established under Part IIA of the Competition and Consumer Act 2010 (**CCA**). The NCC was introduced as a result of the Hilmer Review and is comprised of a President and three other members, having the primary roles of advising about competition law matters and making recommendations in relation to access declarations. The NCC's objective is to provide advice to governments and make decisions on infrastructure access issues that accord with statutory requirements (including time limits) and good regulatory practice.

	Productivity Commission (PC)	National Competition Council (NCC)
Functions	The PC is an agency of the Commonwealth Government, located within the Treasury portfolio. The core function of the PC is to conduct public inquiries at the request of the Commonwealth Government on key policy or regulatory issues bearing on Australia's economic performance and community wellbeing. However, the PC is empowered to undertake, on its own initiative, research about matters relating to industry, industry development and productivity. The PC also has a role in advising on the competitive neutrality of Commonwealth Government business activities.	The NCC makes recommendations under the National Access Regime in Part IIIA of the CCA and recommendations and decisions under the National Gas Law (NGL). The National Access Regime promotes competition, efficiency and productivity in markets that depend on the use of services provided by monopoly infrastructure facilities. The NCC must ensure that advice meets requirements of decision making Ministers, such that Australia achieves a consistent approach to access regulation that promotes the efficient operation of, use of and investment in infrastructure thereby promoting effective competition.
Powers	The PC operates under the powers, protection and guidance of its own legislation. The PC's independence is formally exercised under the PCA through the Chairman, Deputy Chairman and Commissioners, who are appointed by the Governor-General for fixed periods. The PC has its own budgetary allocation and permanent staff, operating at arm's length from other government agencies.	Under the National Access Regime the NCC may recommend the declaration of a service provided by a monopoly facility but only if all of the 'declaration criteria' specified in the CCA are met. Where a service is declared, the ACCC is empowered to arbitrate access disputes if the parties seeking access and the facility owner are unable to agree on access arrangements and prices

This side-by-side analysis reveals five key factors that support the consolidation of the PC and NCC to create a new CPR Entity:

- First, the Productivity Commission is a respected and well-resourced body that already has functions very similar to that of any new CPR Entity. The NCC has functions that overlap with the Productivity Commission in the area of infrastructure regulation and access.

- Second, the Productivity Commission is already required (under the PCA) to have regard to the need to improve the overall economic performance of the economy through higher productivity, and to encourage the development and growth of Australian industries that are efficient and internationally competitive. These functions are consistent with those for any new CPR Entity that would have oversight of the review and development of Australian competition policy.

- Third, the Productivity Commission's existing powers are already closely aligned with the requirements of a highly capable CPR Entity. The Productivity Commission is empowered to initiate research about matters relating to industry, industry development and productivity. This authority to conduct independent research could easily be expanded to include a mandate to review and develop Australia's competition policy. Only relatively minor amendments to the PCA would be needed in order to effect such a change.

- Fourth, both the Productivity Commission and the NCC retain a high degree of independence from Government. The Productivity Commission is entirely independent of the ACCC. The NCC will start to use the ACCC as a secretariat following a recent announcement in the Commonwealth Budget, but

ideally the NCC should instead use Productivity Commission staff rather than ACCC staff for that role in order to ensure a clear separation of the second and third tiers identified above.

- Fifth, much of the framework and responsibilities of the NCC could be merged into the Productivity Commission and similar governance structure created.

VHA also notes that the recent report of the National Commission of Audit similarly recommended the consolidation of the NCC and the Productivity Commission (in section 9.1) as follows:

> "The Commission recommends merging the NCC into the Productivity Commission, noting the NCC has a small number of staff and its role is somewhat complementary to that of the Productivity Commission, in respect of carrying out research and providing advice on matters referred to it by government. The continuation of its regulatory functions on access issues will need careful handling."

3. Australia should adopt a principled approach to sectoral competition regulation

VHA's second submission responds to the following question in the Issues Paper:

- Are the current competition laws working effectively to promote competitive markets, given increasing globalisation, changing market and social structures, and technological change?

As the Panel will be aware, Part 3 of the Terms of Reference of the Review requires the Panel to conduct an examination of competition laws in Australia to ensure they are working effectively and fostering a competitive and innovative Australian marketplace. The Issues Paper (at paras 5.1-5.3) points to the CCA as Australia's single set of laws applying to most markets and businesses within Australia.

However, the Issues Paper also highlights in a number of places that there are limitations in the extent to which Australia's existing competition laws can regulate more concentrated markets, including in circumstances of a relatively high degree of concentration and/or vertical integration of large businesses through a supply chain (para 5.54)

The Issues Paper also notes that the Review is canvassing competition policy principles and issues that apply across the economy, allowing other reviews to recommend more detailed sector-specific proposals. The Issues Paper notes (at page 4), that the Review Panel favours a "*principles-based approach*" that "*can allow subsequent application to a wide range of sectors of the economy and provide greater flexibility at the implementation stage*".

The Issues Paper expressly recognises that there "*appears to be scope for further reform*" in the telecommunications sector, in additional to finalising reforms in the energy sector (para 3.9)

In this context, VHA considers that:

- Australia continues to adopt an *ad hoc* approach to sectoral competition regulation, including in relation to the telecommunications sector; and

- Australia should apply stricter competition laws to more concentrated sectors of the economy under a principled-based outcomes focused approach.

In effect, the Government should recognise that while most markets can be regulated by generic competition law alone, there are particular sectors where a stricter application of competition law is desirable. Any such stricter competition regulation should follow a pre-determined set of principles and, ideally, involve the application of a pre-determined regime that provides greater powers to the ACCC and contemplates stricter competition rules for that sector.

VHA notes that this approach is currently used in the telecommunications sector in Australia, as well as a number of other sectors (although we do believe that there needs to be improved oversight of regulatory decision makers). VHA is therefore taking a pre-existing policy approach from some concentrated sectors and suggesting it should be given generic application to all concentrated sectors.

(a) When does competition policy recognise the need for sectoral competition regulation?

The raison d'être of competition policy is to promote the efficient operation of markets in order to maximise economic welfare. At its most basic level, modern competition law may be perceived as a policy instrument premised on the idea that government should intervene in the market economy to enhance market efficiency and address the negative impacts of market dominance. Competition law is justified by policy-makers on the basis that if governments did not intervene, competition would be suboptimal and therefore markets would not operate as efficiently as they otherwise should. An important principle, often missed, is that these interventions (and the institutions making the decisions) must be constantly assessed to ensure that the intervention is appropriate and not causing more harm than good.

Competition law is specifically targeted at mitigating market failures associated with excessive market power. Competition law is recognised as a necessary safeguard against market power (whether unilateral or collective) in a deregulated market environment. What is sometimes forgotten is that the regulatory decisions can also create market distortions and result in *protecting* market dominance from competition.

The costs of excessive government intervention in markets are well known. Such costs arise where regulators attempt to correct market failures (or achieve other policy objectives) via a particular form of regulation, but either fail to do so optimally, create greater market failures in other markets, and/or impose significant further costs. In this manner, regulatory intervention may be suboptimal and may in fact cause more harm than it intends to correct. The economic "Theory of Second Best" suggests that the scope for suboptimal intervention is very considerable, given that any intervention in one market will typically affect the equilibrium conditions in a wide array of other markets.

In summary, therefore:

- Competition law may be viewed as the minimum necessary regulation of competition consistent with the correction of market failures associated with market power (i.e., imperfect competition) and the maximisation of economic efficiency. Competition law is the form of government intervention that most directly promotes the competitive process, so competition law is typically viewed as the optimal form of government regulation.

- Competition policy promotes deregulation on a comprehensive basis, such economic deregulation underpinned by the existence of competition law as a legislative 'safety net' to address underlying market failures associated with market power. Competition law is preferred over sectoral regulation as it is more direct, involves lower administrative costs and a lower risk of regulatory error. However,

sectoral regulation is still necessary for those market failures that cannot sufficiently be corrected by competition law alone, but any such regulation should be consistent with competition principles.

(b) Australia still adopts an ad hoc approach to sectoral competition regulation

Notwithstanding the creation of a National Competition Policy (NCP) and the recommendations of the Hilmer Review in 1995, VHA is concerned that Australia still adopts an *ad hoc* approach to sectoral competition regulation.

Specifically:

- The development of the NCP and its application was intended to provide a clear guide to Australian governments to as to when, or when not, to impose greater competition regulation in particular sectors of the economy (e.g. telecoms, electricity, supermarkets, petrol retailing). However, notwithstanding the NCP, sectoral regulation has still tended to be applied on an *ad hoc* basis to varying levels in the context of sectoral inquiries and political interventions. Issues are dealt with assessing the specific concerns of the day and the overall sectoral performance (and Australia's dire telecommunications market structure) is regularly forgotten. A much more disciplined approach is therefore now required.

- When sectoral regulation is imposed, different approaches tend to be adopted for different sectors that reflect different perceived issues and different degrees of political lobbying and influence. The sectoral competition regime adopted for telecommunications (Part XIB), for example, is very different than the sectoral competition regime adopted for concentrated banking sectors (price signalling provisions), which is, in turn, very different to the various amendments to the CCA that have been made or proposed to address issues arising in the context of supermarkets.

- Responses to particular issues arising in particular sectors have often involved actual or proposed amendments to the CCA that involve the stricter application of competition laws. However, such amendments have frequently been given stricter application to all sectors of the economy, not just the concentrated sector in question. In this manner, the CCA now contains provisions that have been added in an *ad hoc* manner and have a potentially distorting effect (e.g., the so-called "Birdsvile" amendments to section 46 of Part IV).

Such an *ad hoc* approach to sectoral competition regulation increases the risk of rent seeking and unwarranted political intervention. Moreover, if applied in a generic way to all markets, unwarranted stricter competition regulation can lead to more conservative behaviour in markets where aggressive competition is desirable, or impose excessive compliance costs.

In VHA's view, a more principled approach to sectoral regulation is required, consistent with competition policy objectives. Such a more principled approach could draw from the previous conclusions of the Hilmer Review and build upon the NCP framework. Such an approach could also draw from international best practice and key international policy documents, such as OECD recommendations.

(c) Australia should focus competition law on the effects of market dominant players on competition

The current *ad hoc* approach to deal with market dominance via often inconsistent sectoral regulation could potentially be addressed via reform of Part IV of the CCA. This should include enhanced powers given to the ACCC, including the use of competition notices, an 'effects test' in section 46. Such a regime could be modelled on the telecommunications-specific misuse of market power regime in Part XIB of the ACCC. We will discuss this further below.

(d) What are the features of the Part XIB regime that have assisted in telecommunications?

The CCA contains two specific regimes that apply only to the telecommunications industry:

- Part XIB of the CCA contains a mechanism to give the anti-competitive conduct provisions in Part IV of the CCA a stricter application to the telecommunications sector.

- Part XIC of the CCA contains an access regime, initially modelled on Part IIIA of the CCA, which has a stricter application to the telecommunications sector.

The stricter application of competition law via the Part XIB regime involves the following elements:

- Telecommunications carriers and carriage service providers (**CSPs**) are held to a rigorous competitive standard through the application of what is known as the "competition rule" in section 151AK of Part XIB. This rule states that a carrier or CSP must not engage in "anti-competitive conduct".

- A carrier or CSP may breach the competition rule if it contravenes any of the specified provisions of Part IV of the CCA in respect of a telecommunications market.

- A carrier or CSP may also breach the competition rule if it has a substantial degree of market power in a telecommunications market, and:

    - takes advantage of that power with the effect, or likely effect, of substantially lessening competition in any telecommunications market; or

    - takes advantage of that power and engages in other conduct (on one or more occasions) and the combined effect, or likely effect, is to substantially lessen competition in any telecommunications market

  In this manner, section 46 of the CCA is modified in relation to telecommunications only to include an "effects test". Given the high level of concentration in Australian telecommunications markets, the adoption of the effects test has subjected Telstra to a higher standard of care in its market conduct.

- The ACCC has the power to issue two types of "competition notices" if it has reason to believe that a carrier or CSP has contravened or is contravening the competition rule. These are known as "Part A" and "Part B" competition notices.

- If (and only if) a carrier or CSP to which a Part A notice has been issued continues to engage in the alleged anticompetitive conduct the subject of the notice, the ACCC may apply to the Federal Court of Australia for pecuniary penalties against the carrier or CSP. Part B competition notices are more detailed than Part A competition notices, and constitute *prima facie* evidence of the information within them in any court proceedings against the relevant carrier or CSP.

- Pecuniary penalties under Part XIB of the CCA are considerable. The maximum penalty per contravention is A$10 million, plus A$1 million for each day the contravention continues, or, if the contravention continues for more than 21 days, A$31 million, plus A$3 million for each day the contravention continues in excess of 21 days. Injunctions and compensatory damages are also available.

In this manner, VHA is submitting that not only should Part XIB be retained, but it should become an integral feature of the CCA for all market sectors. Moreover, aspects of the new Part XIB could potentially be strengthened drawing on the experience in other regulated sectors.

Many of the concerns in telecommunications exist in other sectors of the Australian economy. The Australian economy has many highly-concentrated industry sectors. Many of these sectors involve a high degree of vertical integration in which a supplier at one functional level can use its market power to impede competition at another functional level. The concerns are not limited to vertical integration alone, but also involve such issues as price signalling and bundling.

4. Oversight of ACCC decision-making should be enhanced in Concentrated Sectors

VHA's third submission responds to the following question in the Issues Paper:

- Are competition-related institutions functioning effectively and promoting efficient outcomes for consumers and the maximum scope for industry participation?

The context to that question is the same as the context to the question addressed in VHA's first submission above.

VHA considers that:

- the quality of ACCC decision-making in the Concentrated Sectors is particularly important and indeed critical in some sectors, including telecommunications; and

- there should be increased ACCC accountability and scrutiny for all decisions in Concentrated Sectors.

In effect, the CPR Entity should have sufficient powers to review the ACCC's performance and decisions and make recommendations to which the ACCC is required to publicly respond. Such a mechanism would improve the quality of decisions by ensuring that the ACCC was held to account for any poor decisions or poor performance – and, conversely, that high quality decisions were publicly recognised as such and hence reinforced.

(a) Ongoing assessment of the quality of ACCC decision-making in Concentrated Sectors is critical

High quality decision-making is absolutely critical in an environment where large and long-term investment decisions are being made, such as telecommunications. The potential costs of any regulatory error in the context of multi-billion dollar investment decisions can be very high indeed.

Poor regulatory decisions have a spillover effect beyond the immediate decision to create wider uncertainty and regulatory risk. Such risk may have an immediate effect on investment decisions by increasing the cost of capital and deterring potential investment.

The same conclusion applies to many Concentrated Sectors, not just telecommunications. In such sectors, the potential for anti-competitive behaviour is high. Any regulator needs to be careful that it takes appropriate action to address anti-competitive conduct, but does not take action that may deter legitimate competitive conduct.

VHA recognises that the ACCC is diligent in its impartial assessment processes and the ACCC has a reputation as one of the best competition regulators in the world. However, costly errors do occur from time to time. Such errors may take the form of under-regulation (i.e., permitting anti-competitive conduct) or over-regulation (i.e., prohibiting pro-competitive conduct).

The ACCC has a very significant influence over business activity in Australia. That influence is greater in concentrated sectors given that greater ACCC oversight and intervention occurs. VHA therefore submits that some enhanced level of ACCC oversight is desirable in concentrated sectors to ensure that regulatory errors are minimised for those sectors and any mistakes are quickly identified and not repeated.

(b) Increased accountability and scrutiny should be accorded to ACCC decisions in Concentrated Sectors

VHA submits that ACC accountability could be increased in Concentrated Mechanisms via a simple mechanism of annual planning and review.

Specifically:

- The ACCC should be required to develop an annual report setting out its objectives for each Concentrated Sector and outlining the expected competition improvements that will flow from the decisions that they have made over the previous 12 months.

- At the end of the year, the CPR Entity should be required to review the outcomes for that Concentrated Sector against the objectives set out in the ACCC's annual plan. In this manner, the ACCC would be held accountable for the achievement of its stated objectives.

- As part of its annual review, the CPR Entity should have the power to independently review and audit any key ACCC decisions in that Concentrated Sector to ensure they conform to regulatory best practice. Consideration should also be made as to whether the CPR Entity should be able to seek a reconsideration of an ACCC decision. The report of the Policy Entity should be public and the ACCC should be required to respond to any recommendations.

By way of example:

- At least one month prior to the start of a new financial year, the ACCC could be required to lodge its annual report for the relevant Concentrated Sector. Assume, for example, that the telecommunications sector had been declared to be a Concentrated Sector.

- The ACCC's annual plan for the relevant Concentrated Sector – in this case the telecommunications sector – would set out a range of regulatory objectives. Those objectives might range from taking a more pro-active enforcement approach, to monitoring particular developments, to conducting investigations into particular conduct.

- At the end of the financial year, the CPR Entity would conduct a review the ACCC's outcomes in the Regulated Sector, in this case telecommunications, against the objectives set out in the ACCC's annual report. This review would include a public consultation process (and also allow for commercial in confidence submissions).

- As part of its review, the CPR Entity may identify that particular concerns have been expressed by industry participants and consumers about, say, a particular price set by the ACCC for access to a particular telecoms service under the Part XIC access regime. The CPR Entity may audit that decision and analyse the quality of the ACCC's decision against regulatory best practice. In doing so, the CPR Entity may receive submissions highlighting any concerns with the ACCC's decision.

- The Policy Entity would release a public report on the ACCC's performance in the Concentrated Sector, as measured against the ACCC's annual plan and Government policy. The Policy Entity would include in the report the outcome of its audit of any ACCC decisions that it considered it should audit. The Policy Entity would include a set of recommendations in its report, if necessary, to improve the ACCC's decision-making process, particularly if deficiencies were identified.

- The ACCC would be required to respond in public to each of the recommendations set out in the Policy Entity's report identifying the steps that would be taken by the ACCC to address the recommendations.

If adopted, these arrangements will ensure that the ACCC is properly accountable for its decisions, and therefore functioning effectively and promoting efficient outcomes for consumers and the maximum scope for industry participation.

There are precedents for such an approach in a competition policy context:

- Australia's Federal and State governments, acting on the Hilmer Review recommendations, agreed to adopt a National Competition Policy on 11 April 1995. The legislative package comprised the *Competition Policy Reform Act 1995* (Cth) and associated State and Territory legislation. Three agreements were signed: the *Competition Principles Agreement*, the *Conduct Code Agreement* and the *Agreement to Implement the National Competition Policy and Related Reforms*.

- The *Agreement to Implement the National Competition Policy and Related Reforms* required the NCC to assess each government's progress with implementing their reform commitments under the National Competition Policy. At its meeting on 3 November 2000, the Council of Australian Governments further determined that the NCC should annually assess governments' progress with implementing reform from 2001 up to and including 2005.

- To ensure transparency and to assist the NCC, each government provided an annual report on its progress with implementing the National Competition Policy. The NCC provided its assessments of reform implementation progress to the Federal Treasurer.

VHA considers the monitoring role played by the NCC in relation to the implementation of the National Competition Policy should be applied more generally to those ACCC decisions that are particularly important to the Australian economy, namely decisions relating to concentrated sectors.

5. Conclusions

VHA believes that the adoption of these proposals will progress a long way towards ensuring a consistent and high quality framework for the competition regulation in Australia in the 21st century, particularly in those sectors deserving of more focused, principled and accountable approach to regulation, such as telecommunications.

VHA would be happy to meet with the Panel to discuss this submission and to provide any insights into the particular issues that VHA has faced in competition regulation in the telecommunications sector.

10 June 2014