COMPETITION POLICY REVIEW

SUBMISSION ON DRAFT REPORT BY VODAFONE HUTCHISON AUSTRALIA

November 2014

EXECUTIVE SUMMAPRY

Vodafone Hutchison Australia Pty Limited (**VHA**) makes this submission in response to the Draft Report released on 22 September 2014 (**Draft Report**) by the Review Panel (**Panel**) for the Competition Policy Review (**Review**).

VHA welcomes the Draft Report and its recommendations

VHA welcomes the Draft Report and its recommendations. We welcome the Panel's vision to reinvigorate and enhance the institutional framework conceived by the Hilmer report over 20 years ago. We agree that this is the most important priority in any competition review at this time. The Hilmer framework proved to be an authoritative and effective regime for ongoing competition reform. However, after 20 years lessons have been learned about how to improve and refresh the competition regulation framework.

VHA is delighted that the Harper Panel has embraced the need to reinvigorate Australia's competition policy and regulatory making regime. We consider the draft recommendations to be well reasoned and pragmatic. If refined, finalised and implemented, the draft recommendations would provide an important basis for reinvigorating competition policy in Australia and driving much needed productivity growth.

VHA believes that the Panel's proposed reforms would ensure an enhanced focus on improving the competitive outcomes in many sectors of the Australian economy, including telecommunications. The importance on ongoing improvement to the market structures of all sectors of the Australian economy cannot be understated. Australian policy makers traditionally have had an unfortunate tendency to tolerate highly concentrated markets in many important industries. This results in high prices, less investment and less innovation. The Hilmer framework broke with Australia's traditional approach to market regulation, putting competition and efficiency at the heart of a comprehensive, principled regulatory regime and policy reform agenda. The productivity improvements and dynamic efficiency this the Hilmer programme delivered is an important reason why Australia has had such an unprecedented, unbroken period of economic growth.

However, in recent years the discipline and focus of policy makers to concentrate on fostering competitive forces (rather than imposing new regulatory interventions) has faltered. This has meant that Australia is continuing to see regulatory structures that are protecting market incumbents from competition. The sector that VHA participates in is no exception. Australia has one of the most distorted telecommunications markets in the world with an incumbent that dominates virtually all aspects of the industry. Over the years missteps in access regulation and government policy have contributed greatly to this situation. Improved oversight of the decisions of the access regulator - and a framework that ensures that regulatory and policy decisions have a strategic, pro-competition focus - is essential for Australia in the decades ahead.

VHA proposes three practical refinements to enhance the draft recommendations

As with VHA's first submission, we have focussed this submission on three key issues. While VHA agrees with the overall approach adopted by the Panel, VHA suggests that further refinement to the recommendations of the Draft Report is desirable on these three issues:

Issue	VHA comments	VHA proposal
The role of Australian Council for Competition Policy (**ACCP**) should include independent oversight of the ACCC. *[Draft recommendations 40, 43 and 47]*	VHA previously submitted that a high-powered competition policy review and development entity should be created. VHA proposed that this entity should be empowered to encourage and implement continued competition policy reform and review. VHA therefore welcomes and endorses the Panel's recommendations in relation to the establishment of the ACCP with its proposed powers. We see this as a crucial improvement to the regulatory framework. To ensure that it plays an influential and effective role, the ACCP must be empowered to be an active and embedded part of a regime that ensures greater ACCC accountability and oversight. If the ACCP had such a role, there would be less of a need to radically overhaul the current ACCC's governance structure.	VHA proposes: • The current ACCC governance structure works effectively and has been integral in ensuring the ACCC's independence. However, as outlined in the discussion below, we see merit in improving access and pricing regulatory governance and oversight. • Most importantly we believe the ACCP should be given a key additional independent oversight role in reviewing the annual performance of the ACCC, including by receiving submissions on the ACCC's performance. • The ACCP should have the ability to make public recommendations regarding steps that the ACCC should take to improve ACCC processes and the quality of ACCC decision-making.

Issue	VHA comments	VHA proposal
The new access and pricing regulator should have sufficient sectoral expertise and should be subject to sufficient accountability. *[Draft recommendations 38, 46 and 47]*	In its initial submission, VHA outlined that the efficacy of ACCC decisions should be enhanced for the more concentrated (and therefore more regulated) sectors of the economy by ensuring that the ACCC is accountable for its decisions and subject to effective and independent oversight. VHA therefore welcomes the proposed creation of an access and pricing governance framework as a means to reinvigorate the ACCC's approach to the regulation of more concentrated sectors, such as telecoms. We note that this could stay within the ACCC organisation (but with better governance arrangements discussed in this submission). While the ACCC's current generalist consumer and competition regulation framework has its merits (and as such a separate access and pricing regulator is not as crucial as improved oversight of the ACCC), VHA considers it important that access and pricing regulation should have sufficient sectoral expertise to fulfil its role. The access and pricing regulator should also be subject to a high level of accountability to promote high quality decision-making.	VHA proposes: • The access and pricing regulatory functions (in or outside the ACCC organisation) should have an independent commission structure with a commissioner appointed for each key access sector – e.g. telecommunications, energy, water, transport. • That commissioner should be a subject-matter expert, ensuring that the access and pricing regulator has sufficient expertise at the highest level. They must articulate a set of strategic objectives to which ACCC decisions must be judged. • All decisions of the access and pricing regulator should be subject to independent assessment of overall performance. As well as a general oversight we also believe that there should be merits review by the Australian Competition Tribunal of access and pricing decisions including all decisions under the Part XIC access regime in telecommunications.

Issue	VHA comments	VHA proposal
Two of the Panel's draft recommendations may have unintended implications and hence require further refinement. *[Draft recommendations 8 and 25]*	VHA considers that two of the Panel's recommendations may have unintended results: • A decision whether to repeal the IP exemption in section 51(3) requires further thought and should be informed by the proposed IP review. • The proposed formulation of the new section 46 seems problematic and ignores the effects test successfully used in section 151AJ (2)(b) for the last 17 years.	VHA proposes: • Draft recommendation 8 relating to the repeal of section 51(3) should be a matter that is considered further in the IP review contemplated by draft recommendation 7, rather than being a separate current recommendation. • The drafting of s 46(1) and its purpose test should be retained without change. (The proposed changes to section 46 create uncertainty and may cause more problems than they resolve). • However, a new subsection should be added into section 46 that replicates the existing effects test in s 151AJ (2)(b).

VHA would be happy to meet with the Panel to discuss the content of this submission.

November 2014

VHA'S DETAILED SUBMISSION

1. VHA welcomes the draft report and the draft recommendations

VHA welcomes the Harper Competition 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 would deliver improved outcomes not only for the telecommunications sector, but throughout the economy, for the benefit of all Australians.

(a) Draft recommendations address most of VHA's previous submissions

As identified in VHA's initial submission, 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 review facilitated world-leading economic reforms that substantially increased Australian productivity. However, it is now over 20 years since the Hilmer Review and the time is right for a comprehensive review.

The importance of this review should not be understated. Key sectors such as telecommunications that should be driving productivity growth, but they are not realising their full potential. This is due in large part to regulatory and policy decisions that 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.

Within this context, VHA considers that the draft recommendations are well reasoned and pragmatic. VHA has set out a table in the **Appendix** to this submission that identifies VHA's response to each of the recommendations. As identified in the Appendix, VHA is supportive of almost all of the recommendations that affect VHA's business in Australia.

If finalised and implemented, the draft recommendations will provide an important basis for reinvigorating competition policy in Australia and driving much needed productivity growth. The draft recommendations also address most of the key points identified by VHA in its initial submission, so are welcomed by VHA in almost all cases.

(b) VHA has proposed refinements to several recommendations

In a few cases, VHA has proposed some refinements to the Panel's recommendations to address additional issues.

These refinements are identified in the remainder of this submission and are not intended to detract from VHA's support and endorsement of the draft recommendations of the Panel.

VHA would be happy to provide any further information to the Panel, as required, to support any points identified by VHA in this submission.

2. The role of Australian Council for Competition Policy (ACCP) should include independent oversight of the ACCC

(a) ***VHA endorses the recommended establishment of the ACCP***

VHA initially submitted to the Panel that a high-powered competition policy review and development entity should be created. VHA submitted that this entity should be empowered to encourage and implement continued competition policy reform and review.

In contrast to the principled and structured Hilmer vision, Government regulation in recent years (particularly after 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. This is why we welcome the Federal Government's decision to set up this comprehensive review.

Moreover, there is also lack of an overarching assessment of how effectively specific decisions are delivering a level competitive playing field. Over the years merits review of decisions has also been removed from some parts of the regulatory regime (including telecommunication specific regulation). This was intended to speed up the decision-making but it has also resulted in the reduction in the independent oversight of regulatory decisions.

VHA therefore welcomes and endorses the Panel's recommendations in relation to the establishment of the ACCP with its proposed powers. VHA agrees with draft recommendations 39 to 44 of the Draft Report regarding the manner in which the ACCP could be created and the various powers that it could have.

VHA notes that the Panel's draft recommendations would solve a number of current issues, so represent a pragmatic and well-crafted solution to these issues. Some of the issues that would be solved by the Panel's draft recommendations include:

- The need for a high-powered competition review entity to identify and advocate potential areas of competition reform across all levels of government in Australia.

- The need for reinvigoration of Australian competition policy, including the adoption of a self-sustaining and institutionalised process for continued competition policy scrutiny, monitoring and reform.

- The current ineffectiveness and limited role of the National Competition Council in the absence of a competition payments regime, including the need for a bipartisan approach that has the full support of the States and the Commonwealth.

- The need for incentives towards a nationally harmonised approach to regulation that avoids potentially costly divergences between States in regulatory approach.

(b) The ACCP can provide an oversight role, avoiding radical reforms to ACCC governance

While VHA is supportive of the creation of the ACCP, VHA submits that the Panel has missed an important opportunity to give the ACCP an important role in ensuring greater ACCC accountability and oversight.

Moreover, if the ACCP had such a role, there would be less need to completely restructure the current ACCC's governance structure. Specifically, VHA submits:

- There is no need to change the current governance structure of the ACCC in the manner proposed by draft recommendation 47. The current ACCC governance structure works effectively and has been integral in ensuring the ACCC's independence. The calibre of Commissioner's that have been appointed to the ACCC has been high and has contributed to the quality of ACCC decision-making. Having said this the ACCC commissioners are responsible for such a wide range of issues there is a risk of a loss of strategic focus.

VHA submits that the key issue is not so much the structure of ACCC governance, but rather the need for independent oversight of ACCC processes and operations to increase accountability and promote higher quality decision-making.

VHA identified the rationale for greater ACCC oversight in its initial submission in the following terms:

- 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 spill over 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 regulated 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). Importantly, if there are not self-correcting mechanisms (i.e. independent review and oversight) then regulators can resist the reality that their past decisions are limiting competitive outcomes.
- The ACCC has a very significant influence over business activity in Australia. That influence is greater in regulated sectors given that greater ACCC oversight and intervention occurs. VHA therefore submits that some enhanced level of ACCC oversight is desirable in regulated sectors to ensure that regulatory errors are minimised for those sectors and any mistakes are quickly identified and not repeated.

(c) Nature of the oversight of the ACCC that should be provided by the ACCP

Given the above, VHA submits that the ACCP should be given a key additional independent oversight role in reviewing the annual performance of the ACCC, including by receiving submissions on the ACCC's performance. The ACCP should also have the ability to make public recommendations regarding steps that the ACCC should take to improve ACCC processes and the quality of ACCC decision-making.

This review role should apply not only to the ACCC, but also (if it is created) to the new access and pricing regulator (**APR**) as well. For example:

- The ACCC and APR should be required to develop an annual report setting out their respective objectives for each regulated sector and outlining the expected (and measureable) competition improvements that will flow from the decisions that they have made over the previous 12 months.
- For example, at least one month prior to the start of a new financial year, the ACCC and APR could be required to lodge their respective annual reports for the relevant regulated sector. Assume, for example, that the telecommunications sector had been declared to be a regulated sector.
- The ACCC and APR's respective annual plans for the relevant regulated 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, to reducing the cost of regulatory intervention, to delivering a reduction in monopoly rents. The ACCP might choose to endorse or adjust these objectives.
- At the end of the financial year, the ACCP would conduct a review of the ACCC and APR's outcomes in the regulated sector, in this case telecommunications, against the objectives set out in the ACCC's and APR's respective annual reports. This review would include a public consultation process (and also allow for commercial in confidence submissions).
- As part of its review, the ACCP may identify that particular concerns have been expressed by industry participants and consumers about, say, a particular price set by the ACCC or APR for access to a particular telecoms service under the Part XIC access regime. The ACCP should have the power to independently review and audit any key ACCC or APR decisions in that regulated sector to ensure they conform to regulatory best practice. In doing so, the ACCP could receive submissions highlighting any concerns with the ACCC or APR's decision.
- The ACCP would release a public report on the ACCC's and APR's performance in the regulated sector, as measured against the ACCC's and APR's annual plan and Government policy. The ACCP would include in the report the outcome of its audit of any ACCC or APR decisions that it considered it should audit. The ACCP would include a set of recommendations in its report, if necessary, to improve the ACCC or APR's decision-making process, particularly if deficiencies were identified.
- The ACCC or APR would be required to respond in public to each of the recommendations set out in the ACCP's report identifying the steps that would be taken by the ACCC or APR to address the recommendations.

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

(d) Precedents for the provision of oversight by the ACCP

As identified in VHA's initial submission, 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 submits that the historic monitoring role played by the NCC in relation to the implementation of the National Competition Policy should be applied more generally by the ACCP (as the entity replacing the NCC) to those ACCC and APR decisions that are particularly important to the Australian economy, namely decisions relating to the regulated sectors.

4. Access and pricing regulator should have sufficient sectoral expertise and should be subject to sufficient accountability

(a) Proposed new access and pricing regulator could reinvigorate access regulation

VHA welcomes the Panel's identification that the regulation of the more concentrated, 'network' orientated sectors (such as telecommunications) requires reinvigoration. After 20 years, the operation of the current framework, and the application of competition policy principles, across many sectors has become inconsistent and detached from the core economic objectives it was designed to address.

The Panel proposes the creation of an access and pricing regulator as a means of achieving improved assessment processes and outcomes. While we see merit in this proposal, we believe the most crucial area for policy reform is the need for improved accountability and oversight arrangements to ensure that access regulation is focused on delivering overall pro-competition outcomes in particular markets.

In its initial submission to the this review, VHA outlined that the efficacy of ACCC decisions should be enhanced for more concentrated sectors by ensuring that the ACCC is accountable for its decisions and subject to effective and independent oversight. VHA therefore welcomes the Panel's proposal to create an access and pricing governance framework as a means to reinvigorate the ACCC's approach to the regulation of more concentrated sectors, such as telecoms.

In our previous submission, VHA expressed concern that Australia's approach to sectoral regulation has been *ad hoc* across sectors, increasing the risk of rent seeking, unwarranted political intervention and inefficient outcomes. Moreover, VHA identified that there is a lack of ongoing assessment of the overall market structure and how individual regulatory decisions are limiting competition. Further, there is an oversight and regulatory gap between the specific decisions of the ACCC and how fit into the overall policy decisions of Government.

VHA submitted that this *ad hoc* approach has undermined the ability of sectoral regulation to effectively promote competition in more concentrated sectors of the Australian economy. We are particularly concerned that this is the case for telecommunications. Australia has one of the most distorted telecommunications markets in the world. Missteps in access regulation have contributed greatly to this situation. VHA believes that a more principled approach to sectoral regulation is required, consistent with competition policy objectives. Improved oversight of the decisions of the access regulator and a framework that ensures that there is outcomes focus is essential for Australia in the decades ahead.

For example, after 20 years of Telco access regulation, the ACCC still has not undertaken a comprehensive cost based assessment of monopoly backhaul services. These services are the foundation for facilitating market entry into regional Australia for fixed and mobile services and yet the ACCC has not determined whether Telstra significant self-supply advantages are an impediment for regional telecommunications competition. An independent body who could determine whether this issue warrants closer examination would be a useful part of the regulatory framework.

In establishing the optimal regulatory framework it is difficult to balance consistent application of competition principles and ensuring that there is deep understanding of each industry sector. Based on the Hilmer Report recommendations Australia has chosen to have a broad competition access and consumer regulator. Internationally this is not the typical institutional design but it does have the merit of a general competition perspective and consistent decision-making.

While Australia's generalist consumer and competition regulator approach has its merits, VHA considers it important that access and pricing regulation should have sufficient strategic focus. Moreover the regulator responsible for access and pricing regulation should also be subject to a high level of accountability to promote high quality decision-making. With this need to strike the right balance in mind, in our view the improved access and pricing regulatory function could stay within the ACCC organisation but with better governance and oversight arrangements.

VHA submits that what is most important is that:

- The access and pricing regulatory functions (in, or outside, the ACCC organisation) should have an independent commission structure with a commissioner appointed for each key access sector – e.g. telecommunications, energy, water, transport.
- Provided independence is established, the sector specific commissioner should be a subject-matter expert, ensuring that the access and pricing regulator has sufficient expertise at the highest level.
- All decisions of the access and pricing regulator should be subject to independent merits review by the Australian Competition Tribunal, including all decisions under the Part XIC access regime in telecommunications.
- The sector specific commissioner should establish a strategic framework for their decisions. They should establish measureable performance metrics about how the totality of their decisions are improving the market relative to international benchmarks.

(b) Proposed access and pricing regulator should have sufficient sectoral expertise

In VHA's view, if a new access and pricing regulator is to be established, structural safeguards should be put in place to ensure it retains a strong, principled consistent and industry-focused approach to regulation. We recognise the benefit of consistent principles across sectors (and this is the benefit of the ACCC generalist model) but VHA considers it important that the access and pricing regulator should have sufficient sectoral expertise to fulfil its role.

VHA submits that the access and pricing regulator (whether it is in or outside the ACCC organisation) should have an independent commission structure with a commissioner appointed for each key access sector – e.g. telecommunications, energy, water, transport. Each commissioner should be a subject-matter expert, ensuring that the access and pricing regulator has sufficient expertise at the highest level.

As the Panel itself notes in the Draft Report, an industry access and pricing regulator "*is required to have an ongoing and collaborative relationship with the industry it regulates...*[1] However, VHA is concerned that the industry relationships fostered by the ACCC, the NCC and the Australian Energy Regulator in the course of carrying out their current access and pricing roles may be lost or damaged in the transition to a new regulatory body. That transition would also need to be carefully managed to avoid the loss of the body of industry knowledge and expertise accumulated by these three entities, both at an institutional level, and in respect to individual staff members.

1 Draft Report, Section 24.2, page 295.

In order to address these concerns, VHA submits that the new access and pricing regulator should also be established with a structure that comprises a number of internal divisions, each dedicated to the oversight of a particular industry. For example, the new regulator could have an "Energy Division", an "Infrastructure Division", a "Telecommunications Division" and a "Water Division". Whilst these divisions could share some resources (such as legal and economic staff), it is important that each industry division have separate investigative and decision-making capabilities.

VHA believes that if a new access and pricing regulator is established, these structural safeguards will be necessary in order to ensure that it develops the necessary relationships with the industries it regulates. In turn, this should help to produce regulatory decisions that are of a high quality.

(c) Proposed access and pricing regulator should have sufficient accountability

The access and pricing regulator should also be subject to a high level of accountability to promote high quality decision-making. As identified above, VHA has proposed that the access and pricing regulator entity (in or outside the ACCC organisation) should be subject to oversight by the ACCP.

In addition to ACCP oversight, VHA submits that oversight by the Australian Competition Tribunal will also be important in an access and pricing context. Decisions of the access and pricing regulator are likely to be heavily contested and subject to intense scrutiny. All decisions of the access and pricing regulator should therefore be subject to independent merits review by the Australian Competition Tribunal, including all decisions under the Part XIC access regime in telecommunications

In this regard, one element of the Panel's recommendation in relation to the National Access Regime (Recommendation 38) was that "*The Australian Competition Tribunal should be empowered to undertake merits review of access decisions while maintaining suitable statutory time limits for the review process.*"[2] In VHA's view, it is important that this recommendation be applied in a consistent manner. To this end, VHA submits that the Tribunal should be empowered to undertake merits review of *all* access decisions, including those under the Part XIC telecommunications access regime. In our view the 'experiment' of the last few years where Telco decisions were exempt from merits review has not enhanced regulatory decision making.

Part XIC of the CCA sets out the Telecommunications Access Regime, which differs from the National Access Regime in a number of ways. Prior to the introduction of the CCA, the previous incarnation of Telecommunications Access Regime allowed for merits review of access decisions by the Tribunal. However, the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* (Cth) removed the availability of merits review, in the hope that this might promote regulatory certainty and timely decision-making.

The Panel made a number of compelling points in relation to the need for merits review of access decisions, including that:

- the role of the Tribunal in reviewing access decisions has in recent years been largely confined to examining the information taken into account by the National Competition Council (NCCC) (in making a recommendation) or the ACCC (in making an arbitration decision), as the case may be, subject to the ability to request additional information the Tribunal considers reasonable and appropriate;
- access decisions are very significant economic decisions where the costs of getting the decision wrong are likely to be high;
- access decisions are expected to be rare;

2 Draft Report, Recommendation 38, page 55.

- in circumstances where access declarations and arbitrations are expected to be rare, and the costs of getting the decision wrong are likely to be high, there is much to be said for facilitating a thorough examination of the costs and benefits of the decision while avoiding unnecessary delays in decision making; and
- an appropriate balance can be achieved between empowering the Tribunal to undertake merits reviews of access decisions, including hearing directly from employees of the business concerned and relevant experts where that would assist, while maintaining suitable statutory time limits for the review process.

As mentioned above, VHA believes that the Panel's conclusions in relation to the need for merits review of access decisions made under the National Access Regime set out in Part IIIA of the CCA are equally applicable in the context of the Telecommunications Access Regime under Part XIC of the CCA. More broadly, a consistent approach to the availability of merits review for *all* access decisions should deliver more predictable outcomes for relevant stakeholders.

5. Two of the Panel's draft recommendations may have unintended implications and hence require further refinement

As identified in the Appendix, VHA supports almost all of those recommendations in which VHA has expressed a public view.

However, VHA considers that two of the Panel's recommendations may have unintended results:

- Draft recommendation 8 relating to the repeal of the intellectual property exemption in section 51(3) requires further thought and should be informed by the proposed intellectual property review contemplated by draft recommendation 7.
- The proposed formulation of the new section 46 seems problematic and ignores the effects test successfully used in section 151AJ(2)(b) for the last 17 years.

VHA understands that a number of key submissions are responding to these points, including submissions by the Law Council of Australia. These recommendations are both controversial. For this reason, VHA is not intending to make submissions on the specific detail raised by these recommendations, but summarises VHA's view below.

(a) Proposed repeal of section 51(3)

VHA notes that the proposed repeal of the intellectual property exemption in section 51(3) is controversial. For this reason, VHA would prefer that a recommendation is not made until such time as a more detailed examination of the nature and role of the exemption has occurred.

The Panel has already recognised the need for a more detailed review. Draft recommendation 7 is that an overarching review of intellectual property be undertaken by an independent body, such as the Productivity Commission. The Panel has stated that this review should focus on competition policy issues in intellectual property arising from new developments in technology and markets.

VHA submits that this review should also consider in greater detail the proposed repeal of section 51(3). Accordingly, the panel's proposed recommendation 8 relating to the repeal of section 51(3) would seem to be premature. Rather, the panel should be recommending that the further review contemplated by

recommendation 7 also undertake a more detailed consideration of whether or not the repeal of section 51(3) should occur.

(b) Proposed effects test in section 46(1)

As identified in VHA's original submission, VHA is supportive of the inclusion of an effects test in section 46. VHA identified in its previous submission that an effects test variant of section 46 has applied to the telecommunications industry in Australia for the last 17 years, via the Part XIC telecommunications competition regime in the CCA.

VHA's proposal for the amendment of section 46 was to replicate section 151AJ(2)(b) of the CCA so that it co-existed with the existing section 46. This approach has been demonstrated to work in the context of Part XIB and avoids any need to change the existing section 46, thereby preserving existing case law.

VHA is concerned that the Panel has not adopted this approach, but has rather attempted to redraft section 46 and adopt an entirely new approach. VHA notes that a range of concerns have been expressed regarding the proposed new drafting. More importantly, the adoption of a different formulation of section 46 will lead to uncertainty regarding the application of the new provision. Historic case law will no longer be relevant. In VHA's view, the potential costs and risks in changing section 46 in the manner proposed may outweigh any potential benefits.

VHA reiterates that an effects test can be adopted in section 46 without any need to amend the current formulation of section 46. A new subsection should be added into section 46 that replicates the existing effects test in s 151AJ(2)(b). The advantage of such an amendment is that it preserves the existing section 46 case law, while also adopting a statutory formulation that has already existed for some 17 years and so is 'tried and tested' in a telecommunications context.

Appendix - VHA response to the draft recommendations

Summary of VHA's response the Panel's draft recommendations			
No.	**Subject**	**VHA's response**	**Summary**
1.	Competition principles	VHA agrees that Australian competition policy should be guided by a set of core competition principles in the nature of those proposed.	Supported
2.	Human services	VHA agrees that an inter-governmental agreement establishing competition principles for human services would be desirable.	Supported
3.	Road transport	No comment.	
4.	Liner shipping	No comment.	
5.	Coastal shipping	No comment.	
6.	Taxis	No comment.	
7.	Intellectual property review	VHA agrees that a review of competition policy issues in intellectual property should be the subject of a separate independent review.	Supported
8.	Intellectual property exception	VHA believes that the review identified above should consider the nature of the intellectual property exception, rather than the current recommendation.	Alternative proposal
9.	Parallel imports	No comment.	
10.	Planning and zoning	VHA agrees that harmonisation and rationalisation of planning and zoning requirements is desirable given that such requirements do increase the costs to businesses of building important infrastructure.	Supported
11.	Regulation review	VHA agrees that all regulations should be subject to the proposed regulation review.	Supported
12.	Standards review	No comment.	
13.	Competitive neutrality policy	VHA agrees that the competitive neutrality principles should be strengthened, particular in relation to the potential activities of NBN Co in the telecommunications sector.	Supported
14.	Competitive neutrality complaints	VHA agrees that the competitive neutrality complaints process should be strengthened in the manner proposed.	Supported
15.	Competitive neutrality reporting	VHA agrees that the competitive neutrality reporting process should be strengthened in the manner proposed.	Supported
16.	Electricity, gas and water	No comment.	
17.	Competition law concepts	VHA agrees with the retention of the current competition law concepts, prohibitions and structure. Australia's current regime is consistent with international best practice and is regarded by other nations as a model for a high quality competition law.	Supported

Summary of VHA's response the Panel's draft recommendations			
No.	**Subject**	**VHA's response**	**Summary**
18.	Competition law simplification	VHA agrees that simplification of the CCA is required in the manner proposed, including by removing redundant provisions.	Supported
19.	Application of the law to government	VHA agrees that the CCA should apply to government activities in the manner proposed.	Supported
20.	Definition of market	No comment.	
21.	Extra territorial reach	No comment.	
22.	Cartel conduct prohibition	VHA agrees that simplification of the current cartel provisions is required. The provisions are unnecessarily complex.	Supported
23.	Exclusionary provisions	VHA agrees that the prohibition against exclusionary provisions should be removed. The provision creates unnecessary complications in the structuring of supply arrangements.	Supported
24.	Price signalling	VHA agrees that the price signalling provisions (that only apply to banking) should be repealed because they do not strike the right balance in distinguishing between anti-competitive and pro-competitive conduct. The general anti-cartel provisions deliver a strong, less ambiguous regulatory regime, with significant penalties as a deterrent.	Supported
25.	Misuse of market power	VHA agrees with an effects test, but VHA does not consider that the panel's proposed drafting is appropriate as it may weaken rather than strengthen the current provision. The existing purpose test should be retained, but a new effects test provision equivalent to section 151AJ(2) should be added. This is the approach that has applied in the telecoms sector for the last 17 years.	Alternative proposal
26.	Price discrimination	VHA agrees that a prohibition on price discrimination is both unnecessary and inappropriate for the reasons identified.	Supported
27.	Third line forcing test	VHA agrees that the prohibition on third line forcing should be subject to a 'rule of reason' analysis.	Supported
28.	Exclusive dealing coverage	VHA agrees that simplification of the existing exclusive dealing provision is desirable.	Supported
29.	Resale price maintenance	VHA agrees that an exemption for related bodies corporate is both necessary and appropriate.	Supported
30.	Mergers	VHA agrees that the formal clearance process should be streamlined and should include a public benefit authorisation option. A key focus should be to ensure that the formal process is a practical alternative for merger clearances.	Alternative proposal

Summary of VHA's response the Panel's draft recommendations			
No.	**Subject**	**VHA's response**	**Summary**
31.	Secondary boycotts enforcement	No comment.	
32.	Secondary boycotts proceedings	No comment.	
33.	Restricting supply or acquisition	No comment.	
34.	Authorisation and notification	VHA agrees that the authorisation and notification procedures should be simplified.	Supported
35.	Block exemption power	VHA agrees that a block exemption power would be useful, provided that the ACCC was accountable for its decisions.	Supported
36.	Section 155 notices	VHA agrees that section 155 notices should be subject to requirements of reasonableness and proportionality.	Supported
37.	Facilitating private actions	No comment	
38.	National Access Regime	The Part XIC access regime for telecommunications should have the same appeal rights as the Part IIIA access regime.	Alternative proposal
39.	Establishment of the Australian Council for Competition Policy	VHA strongly supports the establishment of the ACCP. One of VHA's key submissions is that a high-powered competition policy review and development entity is now required.	Supported
40.	Role of the Australian Council for Competition Policy	VHA agrees with the proposed role of the ACCP, but also believes that the ACCP's role should be extended to include an independent oversight role in relation to the ACCC.	Alternative proposal
41.	Market studies power	VHA agrees that the ACCP should have such powers.	Supported
42.	Market studies requests	VHA agrees that the ACCP should have such powers.	Supported
43.	Annual competition analysis	VHA agrees that the ACCP should have such powers, but that the ACCC's role should also include annual ACCC oversight.	Alternative proposal
44.	Competition payments	VHA agrees with competition payments as proposed.	Supported
45.	ACCC functions	VHA agrees that the competition and consumer functions should be retained within a single regulatory agency.	Supported
46.	Access and pricing regulator	VHA agrees, but has made some comments in this submission.	Alternative proposal
47.	ACCC governance	VHA disagrees that radical reform to the Commission structure is required. The current structure works well and has resulted in high quality and independent leadership for the Commission. However, greater sectoral expertise and more effective oversight mechanisms are required on the Commission, including in the telecoms sector. See VHA's comments in this submission.	Alternative proposal

Summary of VHA's response the Panel's draft recommendations			
No.	**Subject**	**VHA's response**	**Summary**
48.	Media Code of Conduct	VHA agrees with this recommendation. VHA has serious reservations regarding some recent inaccuracies in ACCC press releases. The ACCC should be accountable for media releases.	Supported
49.	Small business remedies	No comment.	
50.	Collective bargaining	No comment.	
51.	Retail trading hours	No comment.	
52.	Pharmacy	No comment.