

Dated 16 June 2017

ATTACHMENT C

Re:

**Vodafone Hutchison Australia Pty Ltd submission to the Australian
Competition and Consumer Commission**

SPECIFIC ERRORS IN DRAFT DECISION

All mentions of 'reviewable errors' in the table below are intended to refer to potential grounds for judicial review if the ACCC were to maintain its current approach in any final decision. This list is not exhaustive and is without prejudice to any subsequent litigation.

	Headline point	Detailed concern
A. PROCEDURAL ISSUES		
A1	FAILURE TO DEFINE SERVICE OR INCLUDE ANY SERVICE SPECIFICATION	<p>VHA has not addressed any procedural concerns in this Attachment D. Rather, procedural concerns have been (or will be) raised separately with the ACCC. The pending proceeding commenced by VHA in the Federal Court raises issues that overlap with or are related to procedural concerns.</p> <p>Please refer to the covering letter from Norton Rose Fulbright.</p>
A2	FAILURE OF ACCC TO SEEK EVIDENCE TO ADDRESS QUESTIONS RAISED IN INQUIRY	
A3	UNREASONABLE TIME FRAMES PROVIDED FOR SUBMISSION OF EVIDENCE TO ACCC	
B. ACHIEVEMENT OF PROMOTION OF COMPETITION		
B1	ANALYSIS HAS BEEN INFECTED BY ONE OR MORE ANTECEDENT QUESTIONS	<p>Error:</p> <ul style="list-style-type: none"> By asking one or more antecedent questions before the statutory question, the ACCC has made an error of law. The ACCC's antecedent questions have infected its approach, resulting in an analysis that is inconsistent with the proper application of the statutory criteria. <p>Explanation:</p> <ul style="list-style-type: none"> The ACCC states (p2, Draft Decision (DD)): "<i>At issue is whether the difference in geographic coverage between the mobile networks has led to reduced competition or inefficient outcomes in mobiles markets, and whether declaration of a mobile roaming service would address such concerns</i>". The ACCC later states: "<i>the ACCC does not consider that there is currently evidence to support a finding that extensive geographic coverage is essential for a service provider to compete in the national mobile service market.</i>" It is not a prerequisite for declaration that the ACCC make a finding that differences in geographic coverage currently lead to reduced

	Headline point	Detailed concern
		<p>competition or efficient outcomes, or that there is a market failure, or that coverage is essential, or that declaration address those concerns.</p> <ul style="list-style-type: none"> Section 152AB(3) states the ACCC must only have regard to specified matters. While the Guidelines refer to the “Australian Government Guide to Regulation”, this is not the legal test required by Part XIC of the Act. A finding of a market failure is not required for s152AB. Because the ACCC asks one or more antecedent questions, the ACCC predetermines its conclusion by looking at current market conditions. The ACCC’s draft decision is therefore flawed in its focus on current issues, rather than adopting a forward-looking approach. Clearly, differences in geographic coverage have created a zone of duopoly and a zone of monopoly, so there is reduced competition in regional Australia. Declaration of a mobile roaming service would address those concerns by delivering competition. The real question that the ACCC is considering is whether declaration would deliver welfare benefits to end users, being the question asked by Part XIC. <p>Evidence:</p> <ul style="list-style-type: none"> The ACCC articulates this at p36 DD as <i>“the key issue is not whether such variations exist but whether they are leading to consumer detriment and whether declaration could address any such outcomes”</i>. The ACCC therefore acknowledges it asked the wrong question. <p>Consequence:</p> <ul style="list-style-type: none"> The ACCC’s analysis should focus less on struggling to evidence its apparent view that there is no market failure (which view is incorrect on the evidence when looking at regional Australia in any case) – and more on identifying the forward-looking consequences of the declaration of roaming, assessed against the statutory criteria in Part XIC.
B2	<p>REGIONAL VARIATIONS HAVE NOT BEEN APPROPRIATELY RECOGNISED</p>	<p>Error:</p> <ul style="list-style-type: none"> The ACCC has made a reviewable error by incorrectly interpreting and applying (or failing to apply) the case law relating to geographic market definition and/or by considering irrelevant factors. The ACCC has also not followed its own Guidelines on substitutability. In doing so, the ACCC has not correctly applied the definition of “market” from s4E of the CCA, interpreted in light of case law. <p>Explanation:</p> <ul style="list-style-type: none"> The ACCC’s model of a national retail market may work from a metropolitan perspective, but it misses the nuances of competition in regional Australia (or, for that matter, differences in competitive dynamics in different geographic areas). These different competitive dynamics lead to different market shares in different geographic areas – which is a clear indication that the market is not homogenous. The ACCC itself recognises this (p25,DD): <i>“These market share figures support submissions that describe metropolitan competition as more effective than regional competition.”</i> The ACCC also comments at p16 of the DD: <i>“This does not preclude the ACCC from taking any geographic variations in competition into account when assessing the state of competition”</i>. The ACCC also recognises this (p51,DD): <i>“we consider that it would promote competition for mobile services in regional Australia, which we currently consider is less effective than in the national market, it would increase the choice of services available to regional consumers who value or require coverage in the Telstra only area.”</i> The ACCC applies the law on substitutability: <i>“There are some factors that indicate there are regional markets. For example, for consumers who live in some regional areas, a service offered by one MNO cannot be substituted with a service from another MNO unless that other MNO can offer the required coverage. On the supply side, a service provider cannot offer services in regional areas where it does not have network coverage”</i> (p17, DD). However, the ACCC subordinates this key legal conclusion to a range of irrelevant factors. VHA has evidenced as a practical reality that it must and does analyse and approach retail mobile market competition through a localised lens of different cities and different regions, as we suspect does each of Telstra, Optus and TPG. VHA’s investment decisions in terms of network, retail stores and advertising are based on forecast local market shares in particular regions – and VHA competes as much by

	Headline point	Detailed concern
		<p>investment as it does by price. The mobile network operators themselves clearly engage in competitive rivalry from a local perspective.</p> <p>Evidence:</p> <ul style="list-style-type: none"> The ACCC correctly identifies in Appendix A of the DD that: <i>“Section 4E of the CCA provides that a market includes any goods or services that are substitutable for, or otherwise competitive with, the goods or services under analysis. Accordingly, substitution is key to market definition.”</i> Expert report from Richard Feasey in Attachment F of this submission, as well as the previous Feasey and Ritzmann expert reports. Submission on market definition in Attachment D of this submission as well as the evidence provided in VHA’s earlier submissions. Approach to mobile market definition adopted by the Federal Communications Commission (FCC) in the United States, which recognises that mobile markets are regional, rather than national, even though mobile pricing may be nationally uniform, as set out in Attachment D. <p>Consequence:</p> <ul style="list-style-type: none"> The ACCC has diluted any consideration of effects on regional Australia (estimated 30% of mobile services) by considering those effects in the light of competition in metropolitan Australia in a wider national market (estimated 70% of mobile services). The ACCC has largely disregarded material competition concerns in regional Australia that would be resolved by declaration.
B3	<p>MARKET STRUCTURE HAS NOT BEEN ANALYSED FOR REGIONAL AUSTRALIA</p>	<p>Error:</p> <ul style="list-style-type: none"> The ACCC has made a reviewable error by omitting to undertake a structural analysis to identify the impact of natural monopoly on competitive dynamics in regional Australia, therefore it has made an error of law and has not had regard to a relevant consideration. In doing so, the ACCC has failed to apply s152AB(4) which requires regard to be had to the <i>“extent to which a particular thing will remove obstacles to end-users gaining access to listed services”</i>. The ACCC has also not applied the case law on <i>“promotion of competition”</i> in which competition is promoted when structural conditions are created such that the exercise of market power becomes more difficult. <p>Explanation:</p> <ul style="list-style-type: none"> VHA considers that each network has economic limits to coverage derived of the economics of density; creating a hierarchy of networks in descending size (i.e., a cascade). This means that natural (structural) barriers to expansion lead to market failure in the outer regions, derived of network economics (and natural monopoly). A key focus of Part XIC is <i>“access regulation should control those features of the network that have natural monopoly elements, thereby creating scope for efficient competition at the retail level”</i> (p24, Vertigan Review). The particularly low population density in Australia, in conjunction with first-mover advantages and extensive subsidies, has enabled a single network to dominate regional Australia in a way that cannot be challenged. Simply put, geographic areas with low population density are not contestable, so are susceptible to natural monopoly and first-mover capture. ACCC has relevantly commented (p44, DD): <i>“it is logically plausible that in many remote areas of Australia, it may not be viable for there to be more than one mobile network”</i>. However, the ACCC undertakes no meaningful analysis of these structural factors and instead focusses on market outcomes. In doing so, the ACCC focusses on competition in metro as a proxy for the national market. However, the ACCC then reaches a structural conclusion in the absence of a full market structure analysis, namely: <i>“the ACCC does not consider that there is currently evidence to support a finding that extensive geographic coverage is essential for a service provider to compete in the national mobile service market”</i>. Consequently, the ACCC has not appropriately focussed on the key structural concerns (that give rise to market failure) at the heart of the declaration inquiry – namely the natural monopoly in regional Australia. Specifically, ACCC has not recognised the way these structural barriers to expansion create a vertically-integrated natural monopoly in regional markets. ACCC rather concludes it is a: <i>“rational, and an</i>

	Headline point	Detailed concern
		<p><i>outcome of these competitive forces, that an MNO would not offer a wholesale product that would affect a source of its ability to compete".</i></p> <ul style="list-style-type: none"> In this manner, the ACCC's market analysis misses many critical nuances and dynamics of competition in regional areas. The ACCC has extrapolated the competitive dynamic in less than 5% of the coverage area (being metropolitan area) across the remaining 95% of the coverage area without recognising that the structural features of the market in regional Australia are very different. <p>Evidence:</p> <ul style="list-style-type: none"> The ACCC correctly identifies in Appendix A of the DD that: "<i>Competition may be inhibited where the structure of the market gives rise to market power.</i>" and "<i>An access regime such as Part XIC addresses the structure of a market, limiting or reducing the sources of market power, by allowing third parties to negotiate access to certain services on reasonable terms and conditions. Competition is promoted when market structures are altered such that the exercise of market power becomes more difficult. For example, barriers to entry may have been lowered (permitting more efficient competitors to enter a market and thereby constraining the pricing behaviour of the incumbents) or because the ability of firms to raise rivals' costs is restricted</i>". Appendix A of the DD lists a range of structural considerations that the ACCC will consider, but these are not addressed in the main body. Expert report from Richard Feasey in Attachment F of this submission, as well as the previous Feasey and Ritzmann expert reports. Submission on market definition in Attachment E of this submission as well as the evidence provided in VHA's earlier submissions. The ACCC has reached a range of conclusions in relation to the structural characteristics of mobile networks in the context of recent declaration inquiries in relation to the mobile terminating access service and the domestic transmission capacity service that apply equally to any declaration of a domestic mobile roaming service in regional Australia. <p>Consequence:</p> <ul style="list-style-type: none"> The requirements for 'effective competition' identified in Appendix A of the DD are not met in relation to regional Australia. The ACCC has diluted any consideration of effects on regional Australia (30% of mobile services) by considering those effects in the light of competition in metropolitan Australia (70% of mobile services). The ACCC has largely disregarded material competition concerns in regional Australia that would be resolved by the supply of roaming.
B4	WHOLESALE MARKET FLOW-THROUGH HAS NOT BEEN RECOGNISED	<p>Error:</p> <ul style="list-style-type: none"> The ACCC has made a reviewable error by concluding that: "<i>the market which is more important for the declaration inquiry into the LTIE will usually be the downstream or retail market and not the upstream or wholesale market in which the service is supplied</i>", hence appearing to conclude that competitive consequences in the wholesale market are not relevant. <p>Explanation:</p> <ul style="list-style-type: none"> VHA's ability to supply services into the retail market is partly determined by the availability of wholesale services. Assuming such services are available, the prices at which VHA supplies mobile services into the retail markets are partly determined by VHA's wholesale costs, which are determined by the reasonableness of the terms of wholesale supply. In the Telstra only areas, the declaration of roaming will give VHA the <u>ability</u> to supply mobile service in circumstances where it could not otherwise do so. This is a relevant consideration for the application of the statutory criteria. For example, s152AB(4) provides that "<i>regard must be had to the extent to which the thing will remove obstacles to end-users of listed services gaining access to listed services</i>". In the Telstra/Optus only areas, the declaration of mobile roaming will also ensure that the standard access obligations apply so that VHA can continue to access a roaming service and that VHA has real competitive choice between Telstra and Optus as both must supply. [CIC]

	Headline point	Detailed concern
		<p>[CIC]</p> <ul style="list-style-type: none"> • More importantly (and a key point that the ACCC misses), the declaration of roaming will ensure that wholesale supply of roaming occurs on reasonable terms. Therefore, not only will VHA get access to a roaming service, it will get access on reasonable commercial terms. In turn, this should reduce VHA's wholesale costs of supply (particularly as [CIC] [CIC]). Lower costs of wholesale supply will pass through to retail consumers in the form of lower retail prices and/or better value under mobile call plans, leading to an intensification of competition. • VHA notes the equivalent analysis in the ACCC's decision for MTAS in 2014 which commented: "Therefore, high termination charges can lead to significant costs to an operator if it makes retail offers that encourage its subscribers to make more calls to mobiles. This restrains the operator from making such competitive offers. As a result, because continued declaration of mobile voice termination services will encourage cost based pricing of such services, it will enable operators to compete on price more freely than they would be able to in the absence of declaration. This includes competing on included value plans and call rates, as well as encouraging innovative pricing structures." Therefore, access to roaming on reasonable pricing is itself a key reason why declaration should occur. <p>Evidence:</p> <ul style="list-style-type: none"> • The ACCC correctly identifies in Appendix A of the DD that: "Denying service providers access to necessary wholesale services on reasonable terms is a significant obstacle to end-users gaining access to services. Declaration can remove such obstacles by facilitating the entry of service providers, which promotes competition in markets supplying end-users." • See the various evidence provided by VHA as to [CIC] [CIC] • Also refer to the ACCC's previous analysis in relation to MTAS, noting roaming services are analogous to MTAS. <p>Consequence:</p> <ul style="list-style-type: none"> • Irrespective of the retail market definition and dynamics, the declaration criteria are met because of wholesale market effects alone, namely the flow-through consequences of VHA having the ability to acquire wholesale roaming on reasonable commercial pricing.
B5	VHA IS A MARKET ENTRANT INTO REGIONAL AUSTRALIA	<p>Error:</p> <ul style="list-style-type: none"> • Related to and derivative from the reviewable errors identified above, the ACCC has made a reviewable error by characterising VHA as a mature competitor in a national market, rather than appropriately recognising VHA as a market entrant into new regional areas. • Again, in doing so, the ACCC has again failed to apply s152AB(4) which requires regard to be had to the "extent to which a particular thing will remove obstacles to end-users gaining access to listed services" and has not applied the case law on "promotion of competition". <p>Explanation:</p> <ul style="list-style-type: none"> • The ACCC states that it "would be concerned if MNOs chose not to provide a roaming service to TPG in areas where there should be effective competition in the wholesale roaming market in order to protect existing market shares" (p4, DD). However, [CIC] [CIC] • VHA is currently focussed on the metropolitan market. It would be a fair comment that VHA is currently a metropolitan market competitor. VHA has not been successful to date in winning significant regional market share. VHA's regional market share has continued to decline, notwithstanding VHA has continued to substitute Optus roaming coverage with full VHA network coverage. VHA's investments into regional Australia are made largely to compete in the metropolitan market, particularly with a focus on holiday destinations, major travel routes, and to ensure suitable coverage overall. • By seeking access to roaming from Telstra, VHA is seeking to compete beyond the metropolitan market – into the regional market as well.

	Headline point	Detailed concern
		<p>This would mean that VHA would become a fully-fledged national provider of mobile services, inclusive of regional Australia. Accordingly, VHA is a market entrant. VHA is seeking to move from the metropolitan market into regional areas, hence becoming a full regional supplier and a fully-fledged national provider of mobile services.</p> <ul style="list-style-type: none"> This situation is no different to TPG, which is a market entrant into the metropolitan market. Moreover, the key difference is that TPG is entering a market where the market shares are relatively balanced, but VHA is entering a regional market in which the market shares are overwhelmingly in favour of Telstra. VHA is concerned that the ACCC's focus on a 'national market' has not recognised the reality that VHA is a metropolitan competitor and is not currently an effective regional competitor. Declaration of roaming would change that. VHA therefore disagrees with the ACCC's comment (p50, DD) that "<i>declaration of a mobile roaming service in regional Australia is unlikely to significantly reduce barriers to entry for a new MNO</i>". With respect, that new MNO is VHA. <p>Evidence:</p> <ul style="list-style-type: none"> VHA has provided evidence of the disparity in market shares between regional Australia and metropolitan Australia. Submission on market definition in Attachment D of this submission. <p>Consequence:</p> <ul style="list-style-type: none"> The ACCC's concerns expressed in relation to TPG are equally relevant to VHA, but in relation to market access to regional Australia.
B6	<p>METRO COMPETITION IS NOT A CONSTRAINT ON TELSTRA REGIONAL MARKET POWER</p>	<p>Error:</p> <ul style="list-style-type: none"> The ACCC has made a reviewable error in its conclusion that Telstra's regional market power is constrained by metropolitan competition because the ACCC has considered irrelevant considerations and failed to consider relevant considerations. The ACCC's reviewable error is compounded by the previous reviewable errors identified above. <p>Explanation:</p> <ul style="list-style-type: none"> The ACCC states at p21 of the DD: "<i>The ACCC considers that each network has some degree of market power in the retail market</i>". The ACCC then concludes that Telstra's ability to set higher prices in regional Australia is constrained by uniform national pricing. However, the ACCC has failed to recognise that national uniform pricing is not required by law and hence Telstra could de-average its pricing at any time (including by metro-only discounts). The ACCC has also failed to recognise many of the nuances of this issue. VHA considers that nationally uniform prices are disguising Telstra's excess profits. There exists a myriad of price points that are each (ostensibly) nationally uniform. Price discrimination is occurring because Telstra has market power and can therefore set higher 'nationally uniform' price points than other MNOs. Because of Telstra's market power, Telstra can choose not to offer a set of lower price points, knowing that many consumers are captive to higher price points. Telstra may tactically choose to lose metro market share in cheaper market segments, knowing that in doing so Telstra will force other consumers in metro and regional areas to pay higher prices as their coverage preference means that they will not substitute a full coverage product from Telstra with a reduced coverage product from competing MNOs. In this manner, Telstra is optimising 'lost metro profits' in the cheaper market segment against 'excess regional profits'. This view is consistent with the ACCC's conclusions in its MTAS declaration final decision in 2014 (p22) that: "<i>the ACCC considers that each has some flexibility to adjust retail offerings in order to maximise profit</i>". While 'price' can be argued to be nationally averaged, quality is not. It is the combination of price and quality that determines 'value' to consumers. The 'value' that metro consumers receive is far greater than regional consumers for the same price - reflecting underlying differences in quality between regional and metro areas. For example, much of regional Australia is still receiving 3G in many areas, not 4G, but paying the same price as metro consumers.

	Headline point	Detailed concern
		<ul style="list-style-type: none"> • VHA considers that while all consumers value “quality”, the concept of quality in metro is conceived differently than in regional Australia. In metro, ‘quality’ is interpreted in terms of cellular density and spectrum capacity, but in regions ‘quality’ is conceived in terms of coverage. This means that superior coverage can confer market power in regional Australia. Barriers to expansion mean that this market power is not contestable and is enduring. It also means that regional market power will lead to reduced regional coverage. <p>Evidence:</p> <ul style="list-style-type: none"> • A detailed quantification of Telstra’s pricing and monopoly rent is set out in Attachment E of this submission, including Goldman Sachs and Macquarie forecasted reduction in Telstra EBITDA (hence transfer to consumers) of \$546 million and \$590 million per annum. • Please see also the email from Norton Rose Fulbright (Martyn Taylor) of Friday, 26 May 2017 which is attached as Attachment H. • All MNOs currently have regionally-focussed marketing and advertising campaigns. All MNOs also offer below-the-line discounts that enable regional differentiation. There are substantial regional differences in ‘value’, as explained in VHA’s evidence. <p>Consequence:</p> <ul style="list-style-type: none"> • ACCC’s reliance on uniform national pricing has led it to reach a conclusion that there is no competition concern. However, the evidence is that Telstra is capturing a substantial monopoly rent and that declaration of roaming would introduce competition to erode this rent.
B7	<p>IMPORTANCE OF COVERAGE TO REGIONAL AUSTRALIA IS UNDERSTATED</p>	<p>Error:</p> <ul style="list-style-type: none"> • The ACCC has made a reviewable error in its conclusion that Telstra’s dominance in regional Australia is caused by reasons other than Telstra’s superior coverage, because the ACCC has considered irrelevant considerations and failed to consider relevant considerations. <p>Explanation:</p> <ul style="list-style-type: none"> • The ACCC comments (p37, DD): “<i>While market share information shows that Telstra is preferred by regional consumers (in areas where other networks provide coverage), we do not consider that this is attributable only to its wide geographic coverage</i>”. The ACCC also comments that (p42 DD): “<i>regional consumers’ perception that Telstra is a premium service provider such that consumers are willing to pay higher prices to acquire a perceived superior service</i>” and (p50 DD): “<i>Telstra is likely to maintain its strong position, due to the perception that it offers high quality and reliable services</i>”. • VHA submits that the ACCC’s conclusion is inconsistent with the market evidence that in areas of three mobile coverage, the three networks deliver similarly high levels of quality. In some areas, VHA’s and Optus’ networks are better than Telstra’s. The differences in quality between the networks are practically very low. Telstra has also had major mobile network outages that have demonstrated its mobile network is not as high quality as it would have consumers believe. • VHA submits that Telstra’s dominance in regional Australia is, indeed, caused by coverage issues. As identified above, VHA considers that while all consumers value “quality”, the concept of quality in metro is conceived differently than in regional Australia. In metro, ‘quality’ is interpreted in terms of cellular density and spectrum capacity, but in regions ‘quality’ is conceived in terms of coverage. We think the ACCC’s analysis incorrectly takes a metropolitan view of ‘quality’ and imposes this view on regional consumers, then incorrectly conflates different consumer and technical views of quality in its analysis. • All the evidence that VHA has presented is that regional consumers give overwhelming weight to coverage. VHA considers that this conclusion is supported by all other evidence that it has seen. Indeed, this is the market reality. If this were not the case, then Optus and VHA would have comparable market shares in metropolitan Australia and regional Australia, which they clearly do not. • The real question for the ACCC is why, in the three network areas in regional Australia, in which the networks offer the same level of speed and call quality, Telstra has an overwhelming market share. The answer to that question is that Telstra leverages from its coverage in

	Headline point	Detailed concern
		<p>regional Australia and that regional consumers give overwhelming weight to coverage in their network choice.</p> <p>Evidence:</p> <ul style="list-style-type: none"> Expert report from Richard Feasey in Attachment F of this submission, as well as the previous Feasey and Ritzmann expert reports. See submission on market definition in Attachment D of this submission as well as the evidence provided in VHA's earlier submissions. <p>Consequence:</p> <ul style="list-style-type: none"> The ACCC has not recognised the 'spillover effect' that Telstra's control over a natural monopoly in coverage has for competition throughout regional Australia (and back into the metro market for those consumers that value coverage).
B8	MARKET FAILURE IS MORE NUANCED THAN ACCC APPRECIATES	<p>Error:</p> <ul style="list-style-type: none"> As a consequence of one or more of the above errors (or those errors compounded), the ACCC has apparently determined that there is no 'market failure'. However, the conclusion that there is no 'market failure' is not a relevant conclusion to the Part XIC analysis and infects the ACCC's reasoning. The conclusion is also incorrect on the ACCC's own analysis of regional Australia. <p>Explanation:</p> <ul style="list-style-type: none"> The ACCC comments (p72, DD): "<i>Generally, the ACCC considers that where there is a clear market failure to deliver efficient outcomes, declaration coupled with an appropriate regulated price is likely to promote economically efficient investment. However, as discussed earlier, there is no evidence that there is market failure in the national mobile services market.</i>" The ACCC appears to be searching for a 'market failure' from a philosophical and theoretical perspective, when it is already self-evident (and the conclusion of multiple previous inquiries) that the market is practically not working to deliver competition and coverage to regional Australia. The conceptual difficulty with the ACCC's analysis is that the ACCC has disregarded structural evidence of market failure in regional Australia, diluted its consideration of regional effects, and focussed purely on behavioural outcomes in a wider national market. Consequently, the ACCC has reached a theoretical conclusion that is not consistent with the underlying regional market reality. The ACCC's comments that the market is working effectively because prices have reduced, does not recognise that prices have reduced because data volumes have increased, therefore the per unit cost of data has fallen. The key point is that prices in Australia have not fallen as fast as prices in other countries or as much as they would have fallen in the absence of Telstra market power. The ACCC's analysis of pricing appears to be incorrect, and at odds with the market reality of a substantial Telstra price premium. Moreover, market power is manifested in a reduction in value (by a reduction in quality and investment), rather than simply an increase in price. Accordingly, market power has led to under-investment in regional Australia. VHA considers that the absence of competition contributes to reduced cellular density, reduced coverage, and inferior technologies in low density areas where Telstra has market power. The ACCC has concluded (p33, DD) that "<i>the superior network coverage of Telstra and, to a lesser extent, Optus, is as much the outcome of competition</i>" and (p58, DD): "<i>declaration has the potential to have some pro-competitive effects, but that it is unlikely to significantly promote competition in the national mobile services market.</i>" However, these conclusions are based on an analysis of market conditions that has missed many critical market nuances and that flies in the face of clear evidence that regional competition is failing. <p>Evidence:</p> <ul style="list-style-type: none"> Expert report from Richard Feasey in Attachment F of this submission, as well as the previous Feasey and Ritzmann expert reports. Submission on market definition in Attachment D of this submission as well as the evidence provided in VHA's earlier submissions. See also VHA's critique of the ACCC's analysis of Telstra's pricing in the slide pack presented to the ACCC in 24 May 2017, as provided

	Headline point	Detailed concern
		<p>equivalent MTAS services. The key issue is therefore the recovery of the incremental costs of establishing a roaming arrangement. VHA considers that these costs are low and incidental relative to network costs, as recovered in an MTAS charge. Therefore, the ACCC has a price range for wholesale charges for roaming between MTAS (as a lower bound) and current retail prices (as an upper bound).</p> <p>Consequence:</p> <ul style="list-style-type: none"> A proper consideration of the likely wholesale charges for roaming would indicate that there is no risk of price rises; rather retail prices would fall and deliver substantial welfare gains.
B10	<p>ACCC HAS OVERSTATED THE COMPETITIVE RELEVANCE OF BOOST</p>	<p>Error:</p> <ul style="list-style-type: none"> ACCC has made a reviewable error by failing to consider a relevant consideration, namely that Boost is beholden to Telstra and hence exercises no competitive constraint on Telstra’s market power in regional Australia <p>Explanation:</p> <ul style="list-style-type: none"> ACCC has concluded that MVNOs such as Boost are competitively irrelevant, commenting (p23, DD): “<i>We do not yet see evidence of MVNOs placing significant competitive constraints on the MNOs.</i>” However, Boost is relied on very heavily by the ACCC in its competition analysis to evidence that regional consumers can acquire full coverage services at a lower price point. With respect, the ACCC has missed a key point. Boost is beholden to Telstra as a reseller of Telstra’s network services, so there is no guarantee that Boost will continue to offer full coverage at lower price points – or, for that matter, continue to offer full coverage at all. The Boost product could be removed at any time. In the same manner that Telstra has denied roaming to VHA, Telstra could equally deny resale to Boost. Moreover, Boost does not provide any constraint on Telstra’s market power and is competitively irrelevant in practice with a <i>de minimus</i> market share and presence. In essence, Boost is <u>is</u> Telstra – so is a symptom of the regional competition problem, not a cure. There is no meaningful constraint on Telstra’s market power in regional Australia. Any lower price points for full coverage are only available on a limited basis and are under Telstra’s competitive control. Boost could be subject to restraints from Telstra that preclude Boost advertising its network coverage – an issue that warrants thorough investigation by the ACCC before it makes claims on whether Boost provides an effective competitive constraint to Telstra. VHA considers that Boost’s coverage availability is not known to consumers and, in any event, the continued availability of Boost is not assured. [CIC] [REDACTED] [CIC] <p>Evidence:</p> <ul style="list-style-type: none"> Comment in the following article that Telstra has influence over the pricing of Boost: “<i>Telstra said pricing decisions for Boost Mobile were made and agreed to by both companies</i>” See https://www.itnews.com.au/news/telstra-pressures-boost-to-cut-data-allowance-369600 See the slide pack presented to the ACCC on 24 May 2017, attached as Attachment H to this submission. <p>Consequence:</p> <ul style="list-style-type: none"> The ACCC has based its conclusion, that regional consumers favour Telstra for reasons other than coverage (and that competitive retail pricing is available in regional Australia), almost entirely on the existence of Boost. The ACCC’s conclusion is flawed, contradicted by a range of evidence, and therefore cannot stand.

	Headline point	Detailed concern
B11	<p>ACCC HAS NOT CONSIDERED DEPENDENT REGIONAL MARKETS</p>	<p>Error:</p> <ul style="list-style-type: none"> We recognise that the ACCC has sought further submissions on the retail markets for the supply of machine-to-machine (M2M) services and the Internet of Things (IoT) mobile services. Notwithstanding this request, the ACCC has made a reviewable error by not considering “services supplied by means of carriage services” as required by s152AB(2)(b) or by identifying the implications of declaration for the supply of those services. <p>Explanation:</p> <ul style="list-style-type: none"> The concept of “services supplied by means of carriage services” includes innovative M2M and IoT services that are supplied to end users that rely on underlying telecommunications carriage services. The words “services supplied by means of” indicates that the focus of the ACCC should not be on carriage services alone, but also on services that rely on telecommunications services for their delivery. VHA has a range of innovative M2M and IoT solutions that have been developed as part of the global offerings of Vodafone Group and that are intended for supply into the agricultural and mining sectors in Australia, being sectors of the economy that are inherently regional. VHA provided extensive evidence of these services and their nature in VHA’s last submission. In order to deliver M2M and IoT solutions to regional Australia, it is currently necessary to use the Telstra network. VHA does not have the level of coverage in regional Australia that would allow the effective supply of such services. Accordingly, Telstra has bottleneck market power in the supply of M2M and IoT solutions to regional Australia. [CIC] [REDACTED] [REDACTED] [REDACTED] [CIC] VHA’s inability to supply M2M and IoT solutions to regional Australia is adversely impacting on competition in downstream markets for the supply of such services, given that Telstra is then the monopoly supplier of such services. [CIC] [REDACTED] [REDACTED] [CIC] <p>Evidence:</p> <ul style="list-style-type: none"> See Attachment I of this submission and VHA’s supplementary submission as copy of which is provided in Attachment J. [CIC] [REDACTED] [CIC] <p>Consequence:</p> <ul style="list-style-type: none"> The declaration criteria are met in relation to “services supplied by means of carriage services”, even if they are not met for retail mobile services alone.
B12	<p>ACCC HAS SELECTIVELY QUOTED MATERIAL AND THERE ARE LOGICAL INCONSISTENCIES</p>	<p>Error:</p> <ul style="list-style-type: none"> ACCC has made a series of reviewable errors that arise from the selective quoting of material and logical inconsistencies (even direct contradictions) within the ACCC’s analysis set out in the draft decision. <p>Examples:</p> <ul style="list-style-type: none"> The ACCC states in the DD: “This has meant that Australians benefit from high quality mobile networks while paying retail prices below the OECD average.” Yet the OECD stated in its analysis of the Australian market in 2015: “While price is only one element in assessing the

	Headline point	Detailed concern
		<p><i>value provided to a customer, others being quality of service, coverage and so forth, <u>the clear trend in Australia has been for consumers to receive less included data in their mobile bundles</u></i> and in its recent economic survey of Australian in 2017: <i>“In addition, ensuring that policy measures regarding broadband and mobile services improve services in areas with indigenous communities in particular would lessen disadvantage arising from digital divides.”</i> The ACCC is selectively quoting OECD data out of context.</p> <ul style="list-style-type: none"> • By way of example, the ACCC concludes that Telstra’s coverage in regional Australia is <i>“as much the result of competition”</i>. However, the ACCC also concludes that Telstra’s regional coverage results from <i>“multiple reasons”</i>, generally other than competition. • By way of example, the ACCC concludes: <i>“However, the ACCC does not consider that a mobile roaming service is an essential input into retail mobile services as a network operator can extend its own network into an area in order to provide a mobile service”</i>. But this contradicts a later ACCC finding that there are natural monopoly areas into which a mobile network cannot be extended. • By way of example, Figure 1 of the DD demonstrates that the MNOs have had the same market ranking with similar market shares (moving within a 5% band) for the last decade. However, the ACCC concludes: <i>“Figure 1 also illustrates that the mobiles market is reasonably dynamic and that the position of the MNOs changes over time.”</i> The ACCC’s conclusion is inconsistent with its own graph. • There are numerous other examples, some of which have been identified elsewhere in this submission. <p>Consequence:</p> <ul style="list-style-type: none"> • In many instances, the ACCC’s conclusions are not consistent with the ACCC’s own analysis or the ACCC’s findings of fact that have been made based on the evidence presented to it. • In many instances, the ACCC directly contradicts itself, including on fundamental points to the application of the statutory criteria.
<p>C. OBJECTIVE OF ACHIEVING ANY-TO-ANY CONNECTIVITY</p>		
C1	<p>ROAMING WILL ENABLE GREATER COMMUNICATION BETWEEN MOBILE USERS</p>	<p>Error:</p> <ul style="list-style-type: none"> • The ACCC has made a reviewable error by adopting a <i>“narrower definition of any-to-any connectivity”</i> (p62, DD). <p>Explanation:</p> <ul style="list-style-type: none"> • Ss 152AB(2) and 152AB(8) are focused on retail mobile services, namely services involving communications between end users. Any to any connectivity is achieved under s152AB(8) only when all retail mobile end users that are <i>“supplied with”</i> a retail mobile service can communicate with each other. Section 152AB(2) focusses on whether declaration would promote the achievement of this objective. • In the absence of roaming, a VHA customer that is <i>“supplied with”</i> a retail mobile service from VHA will <u>not</u> be able to communicate with all other mobile end users when that VHA customer is outside the VHA network footprint. The definition of <i>“supply”</i> in the Act is given a broad meaning and, in a forward-looking with-and-without analysis is not limited to the physical ability of VHA to deliver supply absent declaration. Rather, <i>‘supply’</i> includes VHA’s ability to supply mobile services to end users where that is facilitated by a roaming service. • In the presence of roaming, a VHA customer that is <i>“supplied with”</i> a retail mobile service from VHA (now including roaming) <u>will</u> be able to communicate with other mobile end users when that VHA customer is outside the VHA network footprint, but on the footprint of the roaming network. In the absence of roaming, the VHA customer will not be able to communication in such circumstances. • Therefore, any-to-any (A2A) connectivity is clearly promoted by roaming by allowing communications between mobile end users in circumstances where this would otherwise not be possible.

	Headline point	Detailed concern
		<ul style="list-style-type: none"> VHA considers that this view is supported by case law and a proper legal construction of these sections. <p>Evidence:</p> <ul style="list-style-type: none"> See ACCC's comments in Section 5 of its December 2004 decision in which the ACCC concluded that A2A is relevant to roaming because roaming enables end-users to communicate with each other in circumstances when this otherwise would not be possible. <p>Consequence:</p> <ul style="list-style-type: none"> Declaration of domestic mobile inter-carrier roaming in regional Australia will promote any-to-any connectivity.
C2	ROAMING SERVICES INHERENTLY REQUIRE INTERCONNECTION BETWEEN NETWORKS	<p>Error:</p> <ul style="list-style-type: none"> ACCC has made a reviewable error by concluding "a mobile roaming service will not affect interconnection between networks" (p3, DD). <p>Explanation:</p> <ul style="list-style-type: none"> ACCC's Guidelines state (p40): "The achievement of any-to-any connectivity is particularly relevant when considering services that require interconnection between different networks." The DD reaches a conclusion that domestic mobile roaming is not an interconnection service, hence any-to-any connectivity is not relevant. However, mobile roaming is inherently a service that involves interconnection between different networks, the services are: (i) roaming originating access (roaming network is paid to originate a call from roaming customer and route it to POI with home network); and (ii) roaming terminating access (roaming network receives a call at POI from the home network and is paid to terminate call on roaming customer). Both services are interconnection services and inherently involve the interconnection of networks. Roaming services are therefore analogous to MTAS, which is a declared service – and which has been stated by the ACCC to promote any-to-any connectivity. Accordingly, the ACCC has apparently misunderstood the technical nature of a mobile roaming arrangement. <p>Evidence:</p> <ul style="list-style-type: none"> See <i>Second Statement of Easwaren Silva</i> provided as Attachment G of this submission, identifying that roaming is an interconnection service See ACCC's comments at p11 of its December 2004 decision in which the interconnection involved in roaming is explained. See Appendix A of the Draft Decision in which the ACCC states: "The any-to-any connectivity requirement is particularly relevant when considering services that require interconnection between different networks." <p>Consequence:</p> <ul style="list-style-type: none"> Declaration of domestic mobile inter-carrier roaming in regional Australia will promote A2A connectivity.
C3	DECLARATION WILL FACILITATE SUCH INTERCONNECTION	<p>Error:</p> <ul style="list-style-type: none"> The ACCC has made a reviewable error by failing to consider the ability of declaration to settle roaming interconnection arrangements more quickly and efficiency. <p>Explanation:</p> <ul style="list-style-type: none"> The ACCC's Guidelines state (p41): "In considering whether declaration is likely to achieve this objective, generally the ACCC will examine

	Headline point	Detailed concern
		<p><i>whether any-to-any connectivity will be agreed between service providers in the absence of declaration</i>".</p> <ul style="list-style-type: none"> The ACCC's Guidelines state (p41): "Where the arrangements are expected to involve negotiations between multiple parties, declaration may have the potential to settle interconnection arrangements more quickly and efficiently, through application of the SAOs". In the ACCC's final decision in relation to the MTAS declaration in 2014, the ACCC commented: "the ACCC considered that while interconnection between MNOs may occur in the absence of declaration, MNOs could potentially set unreasonable terms of, or high prices for, access to mobile voice termination services, so as to prevent the achievement of any-to-any connectivity... Therefore the ACCC was of the preliminary view that the continued declaration of the MTAS will promote the achievement of any-to-any connectivity." [CIC] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [CIC] <p>Evidence:</p> <ul style="list-style-type: none"> [CIC] [REDACTED] [REDACTED] [CIC] <p>Consequence:</p> <ul style="list-style-type: none"> Declaration of domestic mobile inter-carrier roaming in regional Australia will not only promote any-to-any connectivity, but it will also deliver material welfare gains to consumers by enabling VHA to offer more competitive pricing and value packages.
C4	<p>A2A WILL DELIVER MATERIAL WELFARE GAINS IN REGIONAL AUSTRALIA</p>	<p>Error:</p> <ul style="list-style-type: none"> Because of the errors identified above, the ACCC has made a reviewable error by failing to consider the way A2A will result in welfare gains in the LTIE by enabling more customers in regional Australia to gain full mobile connectivity. <p>Explanation:</p> <ul style="list-style-type: none"> A VHA customer that travels in regional Australia will lose connectivity and the ability to communicate when they are outside the coverage area of the VHA network. A roaming arrangement will allow that VHA customer to connect and communicate by interconnecting at the handset level with another network, providing a utility gain to that consumer via the connectivity provided, hence a consumer welfare gain. As a practical matter, that consumer will gain greater 'value' from a VHA mobile offering than they would otherwise receive. A potential VHA customer in regional Australia that cannot afford to pay for a Telstra service may have no mobile connectivity at all. VHA will be able to use roaming to enter new regional markets to supply mobile services to regional consumers at a lower price point than Telstra. Accordingly, mobile consumers in regional Australia will have more affordable telecommunications solutions. <p>Evidence:</p>

	Headline point	Detailed concern
		<ul style="list-style-type: none"> VHA provided extensive evidence of the benefits of A2A for regional Australia in its original submission as set out in Attachment J. <p>Consequence:</p> <ul style="list-style-type: none"> Declaration of domestic mobile inter-carrier roaming in regional Australia will not only promote A2A connectivity, but it will also deliver material welfare gains to consumers by enabling VHA to offer more competitive pricing and value packages.
<p>D. OBJECTIVE OF PROMOTING EFFICIENT INVESTMENT AND USE</p>		
D1	<p>ACCESS PRICES CAN ENSURE EFFICIENT BUILD-BUY DECISIONS</p>	<p>Error:</p> <ul style="list-style-type: none"> The ACCC has made a reviewable error by considering an irrelevant consideration, namely its comment that “<i>setting appropriate access prices would be challenging</i>” (p4, DD). <p>Explanation:</p> <ul style="list-style-type: none"> The case law clearly indicates that efficient build-vs-buy decisions can be achieved by setting an appropriate access price. In the previous declaration inquiry (and in this one), the ACCC has correctly recognised that any investment concerns can be resolved by setting appropriate access pricing that balances the various considerations. The ACCC has significant discretion in setting pricing, so has substantial scope to optimise the access pricing to balance the considerations required by Part XIC in the LTIE. The ACCC is a competent and well-resourced regulator and has set access prices for comparable services, including MTAS. There are many countries that have set access prices for roaming. There are tried-and-tested methodologies. The ACCC is therefore over-stating the effort required, by suggesting it is ‘challenging’. The fact that it may require some effort and resourcing by the ACCC is not a reason against declaration. No reasonable regulator would decline to regulate simply because the task is ‘challenging’. The ACCC can investigate access pricing in detail in the context of it setting of an Access Determination, so there is ample scope for a detailed inquiry and investigation to determine appropriate and optimal pricing, consistent with the Part XIC objectives. The ACCC appears to have made no attempt to quantify the wholesale pricing or itself model ‘build vs buy’ decisions. The ACCC has also made a reviewable error by not making any attempt to model the access pricing to inform its decision, therefore omitting to consider a relevant consideration and committing a more general procedural error (see earlier concerns identified above). In undertaking such preliminary work, VHA assumes that the ACCC would find that this is not as ‘challenging’ as the ACCC currently seeks to believe – particularly as there are many similarities with MTAS (see earlier comments above). <p>Evidence:</p> <ul style="list-style-type: none"> VHA has provided evidence that other jurisdictions have set regulated prices for roaming services, therefore there is precedent. VHA has provided evidence that pricing models for roaming can be developed. The ACCC comments in Appendix A of the DD: “<i>Allowing for a normal commercial return on investment provides an appropriate incentive for the access provider to maintain, improve and invest in the efficient provision of the service.</i>” <p>Consequence:</p> <ul style="list-style-type: none"> ACCC has recognised that efficient access pricing is a complete cure to any perceived adverse effects on investment. The ACCC has substantial discretion as to the optimal pricing and has ample precedent, skills, experience and ability to determine such pricing.

	Headline point	Detailed concern
D2	<p>MAGNITUDE AND RELEVANCE OF OPTUS INVESTMENT HAS BEEN OVERSTATED</p>	<p>Error:</p> <ul style="list-style-type: none"> The ACCC has made a reviewable error by giving disproportionate evidential weight to potential investment by Optus that is trivial in nature and competitively irrelevant, therefore the ACCC has considered an irrelevant consideration and failed to consider relevant considerations. The ACCC's subsequent conclusion also seems to be overstated and in error, namely that <i>"declaration may distort Optus' efficient investment incentives and stifle the development of differentiated services, thus undermining dynamic efficiency"</i> (p4, p74, DD). <p>Explanation:</p> <ul style="list-style-type: none"> The ACCC has not recognised the trivial nature of the investment by Optus relative to the scale of the Telstra footprint, hence the trivial impact on Optus' ability to compete on coverage. The incremental benefits of extending coverage for a smaller MNO are marginal when there are such vast geographic disparities between the network sizes. ACCC has not recognised that Optus faces a natural monopoly so cannot make any meaningful impact on Telstra's coverage sufficient to have a material competitive impact, absence declaration. The ACCC's conclusions regarding the lack of credibility of public statements made by Telstra are inconsistent with the weight given by the ACCC to similar statements by Optus. Optus has been ambiguous, in the same manner as Telstra, as to precisely where investment will be directed. There is no binding commitment by Optus to investment, except to mobile black spot commitments. There is also no reason why Optus would not make investments following declaration, particularly given the lower barriers to doing so. The ACCC has also not recognised that Optus' investment would need to occur irrespective of declaration as Optus will need to upgrade to 4G to close 3G. The ACCC is also inconsistent in its analysis, as the ACCC also states (p44, DD): <i>"However, the ACCC has found that Optus is unlikely to invest to significantly expand its network into Telstra-only areas."</i> ACCC has also commented (p21, DD): <i>"We consider it is likely that Telstra will retain its coverage advantage in regional Australia, and that it is unlikely other MNOs will make significant network extensions into this area"</i>. The ACCC appears to be confusing Optus' investment to improve cellular density and quality in competitive areas, with Optus' investment to extend the reach of its network into the Telstra only areas. The ACCC appears to be confusing Optus' rollout of its 4G footprint in competitive areas, with Optus investment to extend the reach of its 3G network into the Telstra only areas. The ACCC has also commented (p32, DD): <i>"Similarly, comparing Optus' and VHA's regional investment against their metropolitan investment also indicates the focus is on improving network quality rather than expanding the coverage of their networks"</i>. The ACCC's conclusion that <i>"there is potential for Optus to differentiate its services on quality in the Telstra-only area"</i> is incorrect in practice. The ACCC has not recognised that Optus' retail services in such areas would be of substantially inferior quality to those of Telstra given coverage issues, whereas roaming enables Optus to immediately provide a matching quality service to Telstra. <p>Evidence:</p> <ul style="list-style-type: none"> See VHA's previous submissions to the ACCC identifying the nature of Optus' proposed investment as set out in Attachment J. Based on VHA's calculations, the amount that Optus has said that it will spend in CAPEX has exceeded the amount that Optus has subsequently spent on CAPEX; therefore, Optus' statements as to expected future CAPEX spend should be taken with a grain of salt. <p>Consequence:</p> <ul style="list-style-type: none"> The ACCC has greatly overstated any adverse effects of roaming on Optus and has not recognised that, in practice, Optus would receive significant investment benefits from the declaration of roaming that would facilitate greater regional investment.

	Headline point	Detailed concern
D3	ROAMING WILL REDUCE BARRIERS TO EXPANSION	<p>Error:</p> <ul style="list-style-type: none"> • ACCC has made a reviewable error in relation to the benefits of roaming to investment by reaching conclusions that are inconsistent with its evidential findings, therefore considering irrelevant, considerations and failing to consider relevant considerations. • The ACCC has also failed to follow its own Guidelines to consider whether declaration would: <i>“create an environment in which participants have increased incentives to undertake efficient use of, and investment in, infrastructure”</i> (p42, Guidelines). <p>Explanation:</p> <ul style="list-style-type: none"> • Under the ACCC’s Guidelines (p42), the ACCC indicates it will consider the extent to which declaration will <i>“create an environment in which participants have increased incentives to undertake efficient use of, and investment in, infrastructure”</i>. However, the ACCC’s analysis is inconsistent and many conclusions are identified that are inconsistent with evidential findings. • The ACCC has made inconsistent findings, namely <i>“in areas where currently Telstra is the only MNO, declaration coupled with appropriate regulated pricing would provide Optus with incentives to make efficient build/buy decisions”</i> (p71, DD) but also concluding <i>“the ACCC does not consider that declaration would have a significant impact on VHA’s incentives to make efficient investments.”</i> (p72, DD). The ACCC also comments (p15, DD): <i>“However, a roaming service would allow an operator to offer retail mobile services in areas where it does not have coverage, as soon as it has access to that service, and would not require an MNO to make substantial capital expenditure”</i>. • The ACCC does not seem to have fully appreciated that investment decisions by carriers are based on an NPV of costs and revenues in a particular locality, based on market shares in that locality. Base stations built at the edge of a network footprint will normally start with zero market share, hence minimal revenues, unless they are catering for existing mobile customers that travel there (eg holiday destinations). • The practical barrier to investment is therefore financial. The time it takes to build market share from an investment in a locality acts as constraint on the economics of build, particularly if the market share in the locality is already low. A roaming service enables a MNO to build market share in a locality to a level where it can then invest. Accordingly, roaming provides a way to accelerate investment and overcomes a revenue-derived barrier to investment. <p>Evidence:</p> <ul style="list-style-type: none"> • VHA has provided evidence that the business case for incremental build in a location is based on the NPV of incremental costs and incremental revenues in that location. • VHA has provided extensive international evidence that roaming has promoted investment, rather than impeded it. • VHA has provide evidence that VHA’s investment decisions are underpinned by its current Optus roaming agreement. <p>Consequence:</p> <ul style="list-style-type: none"> • Declaration of roaming would materially reduce barriers to investment, enabling network build. Network build would still occur as the roaming price would preserve build vs but incentives. Accordingly, roaming would promote long-term efficient infrastructure-based competition in regional Australia.

	Headline point	Detailed concern
D4	INCENTIVES FOR SHARING CREATED BY DECLARATION	<p>Error:</p> <ul style="list-style-type: none"> The ACCC has made a reviewable error by not appropriately recognising that infrastructure-based competition may not be feasible in many areas of regional Australia, rather an economically efficient outcome would be achieved by greater infrastructure sharing by roaming. Accordingly, the ACCC has made an error of law in applying the statutory criteria and has also considered irrelevant considerations. <p>Explanation:</p> <ul style="list-style-type: none"> A key question that the ACCC has not addressed is whether further facilities-based competition in regional Australia, hence duplication of networks, would be efficient. The ACCC seems to give significant weight to promoting infrastructure build, but has not recognised that the mobile networks have generally reached maximum efficient scale in Australia. In areas that cannot support multiple networks, the ACCC should be seeking to deliver competition by implementing solutions that encourage network sharing. The ACCC comments in Appendix A of the DD, for example: <i>“Facilitating access plays an important role in ensuring that existing infrastructure is used efficiently where it is inefficient to duplicate the existing networks or network elements”</i>. The ACCC also comments in Appendix A that <i>“Access regulation may promote efficient investment in infrastructure by avoiding the need for access seekers to duplicate existing infrastructure where duplication would be inefficient”</i>. VHA submits that in areas of regional Australia with low population density, network sharing by roaming is the most efficient solution. This is illustrated clearly by the New Zealand experience. As the ACCC will be aware, the three MNOs in Australia proposed a joint network deployment in regional areas of 520 cell sites that will deliver a 25% increase in the mobile coverage area. The New Zealand solution was facilitated by mandated roaming because this removed the disincentive of the mobile operators to share. Therefore, in the presence of a regulatory obligation to share, the MNOs have explored alternative and more efficient forms of network sharing. VHA notes that its experience in Australia has confirmed the need for mandated roaming to promote greater network sharing. For example, the ACCC states in the DD: <i>“Optus also considered that infrastructure sharing could increase coverage in regional areas. While noting that MNOs face significant capital and operating costs to deploy new infrastructure, it submitted that these costs can be reduced if deployed and operated jointly with another MNO”</i>. [CIC] [REDACTED] [REDACTED] [CIC] <p>Evidence:</p> <ul style="list-style-type: none"> Slide pack provided by VHA to the ACCC on 24 May 2017 as attached as Attachment H to this submission. <p>Consequence:</p> <ul style="list-style-type: none"> Declaration of roaming is a policy instrument to promote greater infrastructure sharing to achieve greater network efficiencies in a way that best delivers increased retail competition. This, in and of itself, should deliver improved network coverage in regional Australia.
D5	ACCC HAS REAL ABILITY TO PROMOTE GREATER REGIONAL COVERAGE	<p>Error:</p> <ul style="list-style-type: none"> ACCC has made a reviewable error by not considering refinements to the service description (if, indeed, the ACCC had actually included a service description – which it has not) to address any concerns it has identified in regional Australia, particularly in relation to the promotion of greater regional coverage. <p>Explanation:</p> <ul style="list-style-type: none"> The declaration of roaming provides the ACCC with the ability to promote regional coverage. As identified above, a commercial roaming agreement itself promotes network build. Roaming reduces the barriers to network build. Roaming allows immediate market entry into any

	Headline point	Detailed concern
		<p>location, that can be followed by investment once market share has grown in that location.</p> <ul style="list-style-type: none"> Roaming is not a disincentive to network build, as asserted by Telstra. The price paid for roaming ensures that there are continued incentives to invest as the cost of building will remain lower than the cost of buying, as soon as market shares have reached a level to enable investment to occur. The existence of roaming gives VHA the option to build, by lowering the barriers to build. VHA would exercise that option as soon as it was economic to do so, namely that VHA's market share enabled it to avoid a roaming cost by building. However, if the ACCC had any reservations that declaration of roaming may impede investment, the ACCC still can declare a service that excludes roaming in relation to new investment. If the ACCC declared regional roaming, but carved out all new investment from roaming for a reasonable period, this would stimulate regional coverage by rewarding new investment. Ironically, ACCC can therefore deliver improved coverage by creating network competition in relation to new investment in coverage. <p>Evidence:</p> <ul style="list-style-type: none"> Experts reports of Richard Feasey and Derek Ritzmann provided with VHA's submission in Attachment F. Slide pack provided by VHA to the ACCC on 24 May 2017 as attached as Attachment H to this submission. <p>Consequence:</p> <ul style="list-style-type: none"> The concerns of some stakeholders that declaration may lead to reduced mobile coverage are misplaced. The ACCC can define a service description that strengthens investment incentives, while promoting competition, and this would deliver improved long-term coverage outcomes to regional Australia.

E. PROMOTING LONG-TERM INTERESTS OF END USERS

E1	<p>FAILURE TO QUANTIFY THE MAGNITUDE OF WELFARE GAINS</p>	<p>Error:</p> <ul style="list-style-type: none"> The ACCC has made a reviewable error by failing to quantify, or consider quantification, of the magnitude of welfare gains from declaration, but has rather relied on qualitative evidence. In doing so, the ACCC has not applied its own Guidelines. <p>Explanation:</p> <ul style="list-style-type: none"> The ACCC comments in its Guidelines (p23): "<i>The ACCC will generally adopt a mix of qualitative and quantitative analysis in its assessment of the net benefit, taking into account the circumstances of each declaration decision, the nature of the information available and the appropriate timing for the decision</i>". While the ACCC's analysis in the DD points to a finding of competitive harm, the ACCC ultimately dismisses any such harm as immaterial. The ACCC's conclusion seems to be entirely subjective and based on qualitative evidence, without any attempt at quantification and without any consideration of the quantification that VHA has provided in evidence. VHA finds that outcome highly implausible. All the evidence available (in conjunction with Telstra's own conduct and submissions) points to harm to consumers that is very material – in the order of magnitude of billions of dollars over the term of a service declaration. Given such large numbers, VHA considers that the ACCC is acting in error in not seeking to identify, or quantify even by way of general magnitude, the net benefits of declaration. The information is available. The ACCC can use its inquiry powers to gather further information and to create its own internal models to test that information. The failure of the ACCC to do so is a reviewable error. VHA also notes that the benefit to consumers is not purely arising in the context of price movements alone. Declaration of roaming has
----	--	---

	Headline point	Detailed concern
		<p>potential to deliver real improvements in value to regional consumers by delivering access to higher quality and coverage, as well as reduced prices. While price movements are capable of quantification, improvements in value and coverage are qualitative in nature.</p> <p>Evidence:</p> <ul style="list-style-type: none"> VHA has set out in Attachment E of this submission further detailed evidence of the quantification of the harm to consumers. See evidence provided in VHA's earlier submissions, including the reports by Feasey, Ritzmann and the CIE as set out in Attachment J. Evidence of the impact of declaration on Telstra's EBITDA is provided in analyst reports by Goldman Sachs and Macquarie, indicating figures of \$534 million and \$590 million per annum, which can be interpreted as a transfer to consumers, as provided in Attachment E. <p>Consequence:</p> <ul style="list-style-type: none"> A proper consideration of quantitative evidence would demonstrate that the welfare benefits to consumers of declaration are material and in the order of billions of dollars over the term of a service description.
E2	<p>ACCC'S ANALYSIS IS NOT FORWARD LOOKING TO THE EXTENT REQUIRED BY PART XIC</p>	<p>Error:</p> <ul style="list-style-type: none"> The ACCC has made a reviewable error by not appropriately applying a future-with-and-without analysis throughout its DD. Consequently, the ACCC has also treated the counterfactual to declaration (i.e., the 'future without') as the status quo, without recognising that the situation for regional Australia will become materially worse absent declaration of roaming. <p>Explanation:</p> <ul style="list-style-type: none"> The ACCC's analysis makes many conclusions based on the current state of the market and the competitive dynamics that have occurred in Australia to date. The ACCC has not taken the additional step of considering how the declaration of roaming would alter the state of the market going forward and alter the competitive dynamics. Therefore, the ACCC's analysis is not forward-looking By way of example, the ACCC appears to reach the conclusion that VHA and Optus have not invested significantly in increasing network coverage to date, hence the ACCC appears to have formed the view that Optus and VHA (and particularly VHA) are unlikely to continue to do so in the future. This conclusion fails to recognise that the declaration of roaming would reduce barriers to investment and hence enable such future investment to occur. [CIC] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [CIC] <p>Evidence:</p> <ul style="list-style-type: none"> [CIC] [REDACTED] [REDACTED] [REDACTED]

	Headline point	Detailed concern
		<p>[REDACTED]</p> <ul style="list-style-type: none"> [REDACTED] [REDACTED] [CIC] <p>Consequence:</p> <ul style="list-style-type: none"> The ACCC should be comparing a future in which VHA is crippled from competing in regional Australia (and VHA subscribers suffer a material loss in network coverage), as against a future where both Optus and VHA are able to compete effectively in regional Australia.
E3	<p>EVIDENTIAL THRESHOLD IS SET INAPPROPRIATELY HIGH</p>	<p>Error:</p> <ul style="list-style-type: none"> The ACCC has made a reviewable error by applying the evidential threshold specified by the Minister of Communications, namely that there be an “overwhelming case for declaration”. <p>Explanation:</p> <ul style="list-style-type: none"> As the ACCC will be aware, the Minister for Communications made a submission to the ACCC on 2 December 2016 in which the Minister asks that: <i>“I therefore ask that any finding in favour of declaration be based on an overwhelming case for declaration and not simply on the balance of probabilities.”</i> [CIC] [REDACTED] [CIC] The ACCC has included a statement in Appendix A of the DD that <i>“The subsection does not require the ACCC to be satisfied to a particular standard or require there to be an overwhelming case for declaration”</i>. Irrespective, there is a clear flavour throughout the Draft Decision that the ACCC has applied the higher evidential standard required by the Minister. The ACCC has repeatedly referred to “insufficient evidence” as a theme throughout its decision. Moreover, in many of the instances where the ACCC claims that it has not received sufficient evidence, there is ample evidence that has been provided by VHA. Given this, VHA considers that, even though the ACCC has not formally acknowledged it, the ACCC has applied the ‘overwhelming case for declaration’ standard required by the Minister. VHA also notes that, as a practical matter, VHA faces an information asymmetry so it is practically impossible to provide the type of information sought by the ACCC. That information is held by Telstra. The ACCC has not indicated whether it has attempted to seek that information from Telstra and whether the information has been provided. Therefore, the ACCC has set an evidential standard that it is impossible for VHA and other stakeholders to meet. In doing so, the ACCC has set up the declaration inquiry for failure, hence defeating the objective of Part XIC. <p>Evidence:</p> <ul style="list-style-type: none"> [CIC] [REDACTED] [CIC] as provided in Attachment J of this submission, <p>Consequence:</p> <ul style="list-style-type: none"> The ACCC has raised the evidential threshold at which it is prepared to declare a mobile roaming service to a level that is impossible for VHA to meet in circumstances of information asymmetry. The ACCC must apply the standard evidential threshold and seek sufficient evidence using, if necessary, its regulatory powers to compel provision of information.

	Headline point	Detailed concern
E4	<p>LTIE IS A KALDOR-HICKS STANDARD, NOT A PARETO STANDARD</p>	<p>Error:</p> <ul style="list-style-type: none"> The ACCC has made a reviewable error by having regard to an irrelevant consideration and has made an error of law by apparently seeking to base its decision on its comment that the <i>“the declaration has the potential to leave some consumers worse off”</i>, rather than considering the net effect across all relevant end users. <p>Explanation:</p> <ul style="list-style-type: none"> At p48 and 51 of the DD, the ACCC comments that one factor that has weighed against declaration is: <i>“the declaration has the potential to leave some consumers worse off”</i>. By adopting this approach, the ACCC is applying a ‘Pareto efficiency’ standard in which a regulatory measure would only be taken if no-one is left worse-off. This approach sets a much higher threshold for regulatory intervention than the usual Kaldor-Hicks (cost-benefit) standard in which the welfare detriments and benefits are weighed against each other and regulatory intervention only occurs if there is a net welfare benefit overall. The approach to the LTIE test in Part XIC is based on a weighing of the different interest, as is clear from the different statutory criteria and as recognised in various case law. Accordingly, the legal standard is a Kaldor-Hicks standard, not a Pareto standard. <p>Evidence:</p> <ul style="list-style-type: none"> The Guidelines state (at p41): <i>“The ACCC considers that it need not be satisfied that all end-users will benefit. In some instances, the benefits may be confined to a group of end-users, <u>while in other instances some end-users may be adversely affected</u>. Where this is the case, the ACCC is likely to group the end-users and identify the benefits and costs for each group of end-users. It will then determine whether there is a <u>net benefit across all end-users (i.e. whether benefits to one group of end-users are likely to be outweighed by harm to another group of end-users)</u>. For instance, the ACCC may consider whether benefits to end-users through increased competition are likely to be short-lived and outweighed by losses due to reduced innovation and investment by service providers building their own infrastructure. Forming a view about the <u>net impact on end-users</u> is likely to be a qualitative assessment involving judgments about the benefits and costs arising from declaration, and the spread of those costs and benefits. While this is an inherently difficult exercise, the ACCC will use available information, including any quantitative evidence, to assist it in making a decision on these matters.”</i> <p>Consequence:</p> <ul style="list-style-type: none"> The ACCC cannot find against declaration because some consumers are worse off, if the aggregate effect for all consumers is beneficial