

Email: **[withheld]**

Attention: Clare O'Reilly

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Dear Clare

**Vodafone Hutchison Australia Pty Ltd v Australian Competition and Consumer Commission
NSD868/2017**

As you are aware, we act for Vodafone Hutchison Australia Pty Ltd (**VHA**).

We refer to the above proceedings regarding the conduct of the Australian Competition and Consumer Commission (**ACCC**) in relation to its purported "Domestic Mobile Roaming Declaration Inquiry 2016" (**Challenged Inquiry**).

As you know, VHA requested on 7 June 2017 that the ACCC immediately pause the Challenged Inquiry, including by suspending the 16 June 2017 submission deadline (and any publication of submissions), until the Court's determination of VHA's application.

Our client considered that this proposal was a pragmatic and prudent step that was appropriate and would ensure regulatory certainty for all parties participating in the Challenged Inquiry. It would also place all entities wishing to make a submission in the same position. On 14 June, the ACCC indicated that it is making no changes to the current inquiry process, including submission deadlines.

Reservation of position

As you will appreciate, the ACCC's response places our client in a difficult position, particularly as the response was received from the ACCC only 48 hours before the ACCC's deadline for submissions in the Challenged Inquiry. The ACCC is continuing to seek submissions from VHA (and other stakeholders) on a draft decision that VHA considers is infected by an error of law in circumstances where VHA is being denied procedural fairness. This matter will be determined by the court in due course.

We reiterate the points made by our client in our letter of 7 June 2017:

- 1 VHA contends the ACCC has engaged in, is engaging in, and proposes to engage in conduct for the purposes of making a decision, which involves the ACCC making an error of law. VHA considers that the error of law identified in its application should be resolved before the ACCC receives and considers any further submissions, particularly as the content of the submissions sought by the ACCC is materially affected by the subject-matter of the review application.
- 2 VHA considers that it has been deprived of the opportunity to make meaningful submissions on the extent to which a declaration that a "specified eligible service" is a declared service is likely to result in the achievement of the objectives referred to in s 152AB(2)(c)–(e). This raises issues of procedural fairness. In VHA's view, continuing the Challenged Inquiry, by receiving or considering

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further submissions, is contrary to the requirements of natural justice and prejudicial to VHA's ability to be heard in relation to a fundamental matter covered thereby.

However, in good faith (and subject to our client's concerns regarding error of law and procedural fairness), our client has made this limited submission on certain key points that it considers are so fundamental to the declaration of domestic mobile inter-carrier roaming in regional Australia that they should be considered by the ACCC irrespective.

Current submission

This letter comprises and attaches the limited submission of VHA, the various elements of which are set out in **Attachment A**.

Various parts of VHA's submission contain confidential and commercially sensitive information of VHA and its shareholders and subsidiaries. As with the previous submissions, VHA has therefore provided a public domain version and a confidential version of the documents comprising its submission to the ACCC (including this covering letter). Any information contained in the confidential versions that is not contained in the public version is given by VHA in confidence and comprises 'protected information' under section 155AAA of the *Competition and Consumer Act 2010 (Cth)* (**Confidential Information**).

VHA requests that any Confidential Information is not disclosed by the ACCC to any person (other than confidentially to the ACCC's external advisors) without first obtaining the written consent of VHA, unless required by section 155AAA. Our client is happy to discuss this issue further with the ACCC as necessary.

Again, our client remains happy to meet with the ACCC team at any stage to discuss any aspect of this submission, subject to the current proceedings.

Yours faithfully

[withheld]

Dr Martyn Taylor
Partner
Norton Rose Fulbright Australia

ATTACHMENT A INDEX OF SUBMISSION ELEMENTS

The following documents comprise VHA's submission to the ACCC in response to the purported Draft Decision of the ACCC in the Challenged Inquiry:

Covering letter	<p>Letter dated 16 June 2017</p> <ul style="list-style-type: none"> The letter contains a reservation of VHA's position by Norton Rose Fulbright in relation to the current litigation <i>Vodafone Hutchison Australia Pty Ltd v Australian Competition and Consumer Commission</i> (NSD868/2017). As the ACCC will appreciate, this reservation of position is necessary because of the ACCC's decision to continue with its processes in circumstances where VHA had proposed a pause.
Attachment A	<p>Index of submission elements</p> <ul style="list-style-type: none"> VHA has set out in this Attachment A an overview of the different elements of VHA's submission and their relevance to the Draft Decision and statutory criteria in Part XIB.
Attachment B	<p>General comments on the Draft Decision</p> <ul style="list-style-type: none"> VHA has provided general comments on the Draft Decision and has indicated that if the ACCC corrects various key errors that VHA has identified (as set out in Attachments C, D and F), then the declaration criteria are satisfied VHA has also highlighted the new evidence that it has provided (as set out in Attachments E, F, G, H and I) that the welfare benefits of declaration are substantial, therefore the ACCC can no longer claim it does not have sufficient evidence.
Attachment C	<p>Specific errors in the Draft Decision</p> <ul style="list-style-type: none"> VHA has tabulated the various key errors in the Draft Decision and has identified the manner in which these errors affect the ACCC's analysis, including a detailed commentary explaining the nature and consequences of each error. VHA notes each of the errors it has identified raise serious concerns regarding the Draft Decision that, if carried into any final decision (or presently), would be reviewable either on grounds of error of law or procedural fairness. VHA notes that there are also many errors of logic, evidence and substance in the Draft Decision that is has not raised in Attachment C and that would be the subject of any more extensive submission, if they were maintained by the ACCC.
Attachment D	<p>Errors in mobile retail market definition</p> <ul style="list-style-type: none"> VHA identifies that the ACCC has defined the mobile retail markets without properly applying the legal requirements of substitutability, as reiterated by the High Court in its decision <i>Air New Zealand v ACCC</i> published on 14 June 2017. VHA has also identified that the ACCC's apparent focus on population coverage and metropolitan areas has masked a substantial market failure caused by fundamental differences in geographic coverage in regional areas. VHA provides further evidence that the retail mobile markets are local, not national, including evidence of the manner in which VHA targets advertising on a local basis. VHA has provided a full copy of the key historic United States decision by the FCC on geographic market definition in retail mobile markets that informs the local approach to geographic market definition in retail mobile markets in the United States. VHA has also provided a full copy of the most recent United States decision by the

	FCC on geographic market definition in retail mobile markets which illustrates how this concept is still applied in the United States today.
Attachment E	<p>Quantification of welfare benefits of declaration</p> <ul style="list-style-type: none"> • Dr George Houpis of Frontier Economics (London) has been engaged as an independent expert witness under the Federal Court rules to provide an independent expert quantification of the welfare benefits to end users arising from declaration. • Dr George Houpis has quantified the net welfare benefits of declaration of wholesale mobile domestic intercarrier roaming in regional Australia of at least \$3.9 billion (net present value) over a 10-year period, comprising a net welfare gain to Australian mobile consumers of at least \$658 million per annum. • Dr George Houpis has undertaken a sophisticated analysis utilising a differentiated Bertrand model, which has been used by the European Commission to estimate the impact on retail prices of regulatory decisions in Austria, Italy, UK, Denmark, Ireland and Germany. He estimates a range of likely outcomes, including those contemplated by the ACCC. He has taken a conservative approach, by, for example, assuming that it takes 4 years for the new pricing structures to flow through to the market. • Dr George Houpis also considers analyst reports in the public domain by Goldman Sachs and Macquarie Bank (both of which are attached in Attachment E) that quantify the likely net EBITDA loss to Telstra from the declaration of roaming in regional Australia at \$546 million per annum and \$590 million per annum respectively; involving welfare transfers to Australian mobile consumers. • Dr George Houpis not only undertakes the differentiated Bertrand analysis, but also cross-checks and confirms that its range of estimates is consistent not only with the CIE Report, the Goldman Sachs report and the Macquarie report, but also with the real-world evidence of the stock market reaction to the ACCC's Draft Decision. • [CIC starts] [CIC ends]
Attachment F	<p>Response by independent experts to Draft Decision</p> <ul style="list-style-type: none"> • Richard Feasey has provided a report as an independent expert witness which critiques the Draft Decision of the ACCC in light of his previous expert evidence with a particular focus on the manner in which declaration of roaming would promote competition and the manner in which mobile consumers would benefit • Dr Derek Ritzmann of Compass Lexecon (Hong Kong & Brussels) has provided a report as an independent expert witness which critiques the Draft Decision of the ACCC in light of his previous independent expert evidence with a particular focus on uniform national pricing, coverage differences, access pricing and the manner in which declaration could promote greater coverage
Attachment G	<p>Roaming is an interconnection service</p> <ul style="list-style-type: none"> • Second statement by Easwaren Siva identifying that a wholesale domestic mobile roaming service is inherently an interconnection service, contrary to the conclusion of the ACCC in its Draft Decision, therefore declaration of roaming would promote the achievement of any-to-any connectivity in regional Australia. • Easwaren Silva has explained the manner in which interconnection works from a technical and commercial perspective in a domestic mobile roaming arrangement.
Attachment H	<p>Declaration can promote regional coverage</p> <ul style="list-style-type: none"> • VHA has identified that declaration has the potential to promote increased regional coverage and investment • VHA has provided its slide pack of 24 May 2017 in which VHA has identified the manner in which declaration of roaming in regional Australia can promote regional

	<p>coverage, as well as providing initial feedback on the Draft Decision</p> <ul style="list-style-type: none"> VHA has also provided email from Norton Rose Fulbright (Dr Martyn Taylor) of 26 May 2017 providing various responses to questions asked by the ACCC during a meeting with the ACCC of 24 May 2017. VHA has also provided [CIC starts] [CIC ends] by the three mobile operators in New Zealand to the government of New Zealand that would provide an increase in regional coverage by 25%
Attachment I	<p>Dependent markets include supply of M2M/IOT in regional areas</p> <ul style="list-style-type: none"> VHA has provided evidence that dependent retail markets for the purposes of this declaration inquiry include a range of regional services that are provided by means of mobile services using ‘machine to machine’ (M2M) and ‘internet of things’ (IOT). VHA has provided further material to evidence the existence of regional markets for various “services supplied by means of carriage services” that must be considered by the ACCC under section 152AB of the CCA as part of any declaration inquiry. [CIC starts] [CIC ends]
Attachment J <i>(Please note that this is already held by the ACCC so has not been physically resubmitted)</i>	<p>Previous submissions by VHA to the ACCC</p> <ul style="list-style-type: none"> As the ACCC will appreciate, VHA is concerned that the ACCC has implied in its Draft Decision that the ACCC has not had full regard to VHA’s supplementary submission of 13 March 2017, even though the ACCC formally invited VHA to make that submission and expressly said in its letter of 10 February 2017 that the submission would be considered. As the ACCC will appreciate, VHA included substantial evidence in its supplementary submission following feedback that the ACCC was seeking further evidence. VHA had identified to the ACCC the nature of the evidence that it was submitting. To avoid doubt, VHA resubmits its supplementary submission of 13 March 2017 and requests the ACCC to have full regard to it, as well as VHA’s original submission of 5 December 2016. [CIC starts] [CIC ends] A copy of this various material is already held by the ACCC so has not been physically resubmitted by VHA, but should be regarded as comprising Attachment J to this submission.
Attachment K <i>(Please note that this is already held by the ACCC so has not been physically resubmitted)</i>	<p>Future without declaration – Statement by Iñaki Borroeta and other evidence</p> <ul style="list-style-type: none"> [CIC starts] [CIC ends] A copy of this various material is already held by the ACCC so has not been physically resubmitted by VHA, but should be regarded as comprising Attachment K to this submission.

All references in this material to the Draft Decision are references to the purported Draft Decision issued by the ACCC. All references in this material to the declaration inquiry are references to the Challenged Inquiry. VHA makes no admission that the purported Draft Decision or the Challenged Inquiry have any legal effect.

VHA reserves it right to submit further evidence and submissions to the ACCC once the current legal proceedings have concluded. This submission is not intended to derogate from or replace that right.