

## TREASURY EXECUTIVE MINUTE

Minute No.

12 June 2009

Treasurer

### MEETING WITH TELSTRA

**Timing:** You are scheduled to meet with Mr David Thodey (CEO), Ms Catherine Livingstone (Chairman), and Mr James Shaw (Director, Government Relations), Telstra on 15 June 2009 at 6pm.

#### Issue:

- The National Broadband Network (NBN) and Telstra's possible involvement are likely to be the key focal points of the meeting. Possible talking points are provided at **Attachment E**.
- Since his appointment as Telstra's CEO, Mr Thodey has made positive statements about Telstra's willingness to work with the Government on the NBN.

Noted

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### KEY POINTS

- On 19 May 2009, David Thodey became the new Chief Executive Officer of Telstra, replacing Solomon Trujillo.
  - Catherine Livingstone has also been appointed as the new Chairman of Telstra following the departure of Donald McGauchie (biographies for Mr Thodey and Ms Livingstone, as well as for Mr Shaw are provided at **Attachment A**).
- The key issues likely to be raised include the progress of the implementation planning for the National Broadband Network (NBN) and Telstra's involvement in both the NBN and the telecommunications regulatory review process (further information is provided at **Additional Information**).
- The Government has released a discussion paper seeking public comment on ways to improve the telecommunications regulatory regime.
  - Over 120 submissions, including a submission from Telstra, have been received. Key issues raised in the discussion paper are summarised at **Attachment B**.
  - Key recommendations in Telstra's submission include:
    - : no forced divestment of its hybrid fibre-coaxial (HFC) network and no imposition of any cross-media restrictions;
    - : the establishment of an independent technical Telecommunications Adjudicator to enable access providers and access seekers to resolve equivalence and service level disputes in timely fashion;
    - : replacement of the existing Price Equivalence Framework (PEF) with an enhanced price monitoring safety net; and

: changes to the competition notice regime.

- Further information on Telstra’s regulatory submission is contained at **Attachment C**.
- There are also a number of current telecommunications regulation matters involving Telstra and the ACCC. Further information on these matters is provided at **Attachment D**.
- Telstra has also indicated a willingness to discuss ‘vending in’ of some of its telecommunications infrastructure assets into NBN Co.
  - The parameters for any ‘vending in’ are likely to be informed by the implementation study.
  - In particular, the implementation study will advise on appropriate level of ownership caps for private sector involvement in NBN Co.

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Contact Officer:

Senior Adviser  
Energy, Transport and Communications Unit

## **ADDITIONAL INFORMATION**

### **Update on the National Broadband Network (NBN)**

- Progress with implementing the NBN is being made in a number of areas, including:
  - the establishment of NBN Company (NBN Co);
    - : NBN Co currently operates with an interim chair and board of directors. The interim directors are David Martine, General Manager, Financial Systems Division, Treasury; James Cameron, First Assistant Secretary, Department of Broadband, Communications and the Digital Economy; and David Yarra, Chief Audit Executive, Department of Finance and Deregulation.
    - : An executive search firm has been engaged to prepare a shortlist of names for the NBN Company chair and directors for Ministerial consideration in July.
  - DBCDE is seeking expressions of interest for a lead adviser to commence the NBN implementation study;
    - : The implementation study will be a key input into determining the operating arrangements, detailed network design and ways to attract private sector investment for the NBN;
  - consultation on the Government's \$250 million broadband backbone initiative;
    - : The Government has released a regional backbone blackspots consultation paper, for which submissions were due on 12 May 2009.
  - progressing negotiations with the Tasmanian Government;
  - consultation aimed at ensuring that all greenfield properties deploy fibre to the premises (FTTP) technology from mid-2010; and
  - commencement of a consultative process on necessary changes to the existing telecommunications regime, particularly during the roll-out of the NBN.
    - : The Government is aiming to introduce the relevant legislation before the end of this year.

### **Telstra's involvement in the NBN**

- New Telstra CEO David Thodey has recently pledged Telstra's commitment to engaging in dialogue with the government on NBN issues, including those relating to the telecommunications regulatory reform process.
  - Mr Thodey has not committed to nor ruled out any of Telstra's options in relation to its participation in the NBN.

## BIOGRAPHIES

### David Thodey

David Thodey became Chief Executive Officer of Telstra on 19 May 2009.

David joined Telstra in April 2001 as Group Managing Director of Telstra Mobiles. He was appointed to the position of Group Managing Director Telstra Enterprise and Government in December 2002 and was responsible for the company's corporate, government and large business customers in Australia, TelstraClear in New Zealand and Telstra's International sales division.

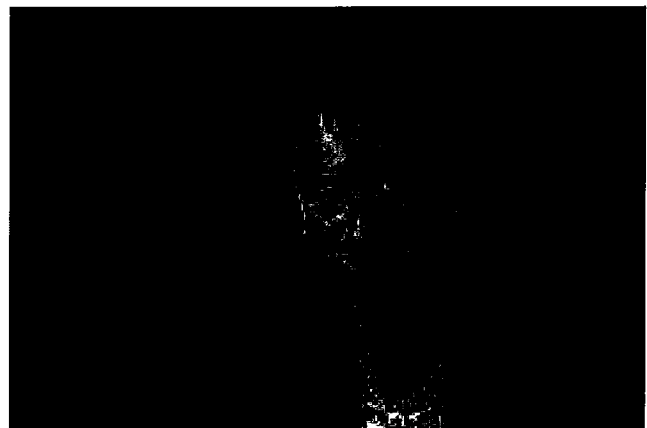
Before joining Telstra, David was Chief Executive Officer of IBM Australia/New Zealand and previously held several senior executive positions in marketing and sales with IBM across Asia Pacific.



### Catherine Livingstone

Ms Livingstone joined Telstra as non-executive Director in November 2000. She was appointed as Chairman on 8 May 2009. She is the Chairman of the Nomination Committee and a member of the Audit and Remuneration Committees.

Ms Livingstone has a degree in accounting and has held several finance and general management roles predominantly in the medical devices sector. Ms Livingstone was the Chief Executive of Cochlear Limited (1994 - 2000).



**James Shaw**

James joined Telstra in September 2008 as Director Government Relations.

Prior to joining Telstra, James served in a number of senior executive positions in the Australian Public Service, including in the Australian Communications and Media Authority, the Department of Communications, Information Technology and the Arts, the Australian Government Information Management Office and the National Office for the Information Economy.



## NBN REGULATORY REFORM ISSUES – SUMMARY

- On 7 April 2009, Minister Conroy released a discussion paper, *National Broadband network: Regulatory Reform for 21<sup>st</sup> Century Broadband*. Key issues raised in the discussion paper are summarised below.

### Market structure

- Vertical separation – Telstra remains one of the most vertically integrated telecommunications companies in the world in that it provides both wholesale and retail services over multiple telecommunications networks. It is generally considered that operational and accounting separation measures imposed to date have not promoted genuine equivalence of access for access seekers.
- Horizontal separation – Telstra owns the largest hybrid fibre coaxial (HFC) network in Australia, and 50 per cent of Foxtel, Australia’s largest subscription television provider.
  - The discussion paper raises a concern that a provider with control of key platforms may seek to exploit their control in negotiating arrangements with content providers. This may limit consumer choice over which network the services are provided and content.
- The discussion paper canvasses both vertical separation of Telstra’s retail and wholesale business as well as forced divestiture of its HFC network.

### Part XIC – access arrangements

- Part XIC provides the ACCC with the power to ‘declare’ specific telecommunications services. Once a service is declared, the access provider is obliged to supply that service to other telecommunications service providers, subject to certain exceptions.
  - If access seekers cannot obtain a negotiated agreement with the access provider, the access terms are as set out in an access undertaking accepted by the ACCC, or determined by the ACCC following arbitration.
- The negotiate-arbitrate model has been subject to extensive criticism. Main concerns are that the process is slow, cumbersome, open to gaming, and does not provide sufficient certainty for investment. Participants have also been highly litigious.
  - Telstra currently has around 35 access disputes before the ACCC, and 14 ACCC arbitration decisions are pending Federal Court judgements.
- The discussion paper canvasses options to reduce delays in regulatory processes, and to replace the negotiate-arbitrate model with a streamlined regulatory process.

### Part XIB – anti-competitive conduct provisions

- Part XIB contains a telecommunications specific anti-competitive conduct regime with a broader test of misuse of market power than under the general anticompetitive conduct regime in Part IV. Under Part XIB the ACCC issues a competition notice if it believes a service provider has been engaging in anticompetitive conduct.

- Part XIB has been criticised on the grounds for taking too long and being procedurally cumbersome. Furthermore, to date there has not been any successful prosecutions of competition notices.
- The discussion paper canvasses options to streamline the competition notice regime and to empower the ACCC to issue binding rules of conduct when it considers a party is acting anti-competitively.

### **Universal Service Obligation (USO)**

- The objective of the USO is to ‘ensure that all people in Australia, wherever they reside or carry on business, should have reasonable access, on an equitable basis to standard telephone services and payphones’.
  - The Universal Service Subsidy is funded through an industry levy, based on revenue, to ensure that all carriers share the burden of supplying loss-making services under the USO. The levy is collected by ACMA and distributed to Telstra.
- The discussion paper canvasses options to include mobile and/or broadband services under the USO, in light of their increased importance in people’s everyday lives.
- The paper also discusses various funding options for the USO, including maintaining the current funding model, requiring Telstra to fund the USO itself and utilising multiple USO providers.

### **Retail price controls**

- Retail price controls currently apply to most telecommunications services (apart from broadband and mobile phone calls). Price control baskets are set so that prices for services within that basket cannot exceed a specified cap. In addition local calls are capped at 22 cents and Telstra must offer regional customers basic line rental and local calls at the same price it charges metro customers.
- There has been suggestion, most recently by the Productivity Commission, that price controls should be removed on the basis that these services are already fully congestible. However, access to services by regional customers and support for low-income customers still remains a concern to many.

## TELSTRA'S SUBMISSION TO THE TELECOMMUNICATIONS REGULATORY REVIEW DISCUSSION PAPER

### Telecommunications competition framework

- Telstra proposes the establishment of an independent technical Telecommunications Adjudicator to enable access providers and access seekers to resolve equivalence and service level disputes in timely fashion. This adjudicator would be able to make binding decisions.
- The submission also proposes the replacement of the Price Equivalence Framework (PEF) with a new process whereby a carrier with substantial market power, and which offers wholesale and retail services, is required to provide price notifications to the ACCC within 48 hours of any mass retail price change.
  - The PEF is used to determine whether Telstra's retail prices for mass market fixed voice and broadband services are consistent with prices that would be expected if Telstra Retail were a wholesale customer.
  - Telstra argues that this will allow the ACCC to assess whether mass price changes are consistent with price equivalence requirements.
- Telstra does not support any requirement for divestment of its hybrid fibre-coaxial (HFC) network or the imposition of any cross-media restrictions.
  - Telstra argues that there is already sufficient network competition in the telecommunications market. It also asserts that convergence of telecommunications companies into digital media and content has facilitated diversity and innovation in the delivery of content.
  - The issue of vertical separation is not discussed in the submission. However, Telstra supports continuation of the current operational separation arrangements until the NBN is rolled out.
- Telstra calls for streamlining of the telecommunications-specific regulation in Parts XIB and XIC of the *Trade Practices Act 1974* ('the TPA'), and for the facilities access regime to be moved from the *Telecommunications Act 1997* to Part IIIA of the TPA.
  - Telstra argues that regulatory processes in relation to Parts XIB and XIC have become cumbersome and that these regimes must facilitate more timely and efficient outcomes.

### Universal Service Obligation

- Telstra considers that it should receive increased funding for the Universal Service Obligation (USO) in the case where NBN Company does not become the infrastructure provider for the USO, as the current subsidy is not sufficient to cover its costs.
  - The submission does not support the inclusion of mobile and broadband services under the USO due to the argument that such regulation would be costly and inflexible and would be superseded by the NBN.



**Retail pricing**

- Telstra considers that the obligation to provide untimed local calls at uniform prices across Australia should be retained, however all other retail price regulation should be removed.
  - The submission argues that prices tend to be set by competition rather than regulation, and hence there is little need for price regulation mechanisms.

**Other submissions**

- A number of Telstra's rivals, including Optus and mobile phone merger partners Vodafone and Hutchison have made calls for significant changes in their submissions to the regulatory review.
  - All three companies have called for full structural separation of Telstra's wholesale and retail arms. Optus has also argued for the regulator to set wholesale prices and the for the forced divestment of both Telstra's hybrid fibre coaxial (HFC) network and its 50 per cent share of Foxtel.

**ATTACHMENT D****TELECOMMUNICATIONS ACCESS REGULATION MATTERS INVOLVING TELSTRA AND THE ACCC**

- Telstra is engaged in wide-ranging disputation on a number of access regulation matters. Current matters involving the ACCC are summarised below.

**Access disputes**

- All of the 35 current telecommunications access disputes before the ACCC concern access to Telstra's services, including:
  - 26 disputes concerning its unbundled local loop (ULL) or line sharing service;
  - 2 disputes concerning its wholesale line rental; and
  - 5 disputes concerning its mobile terminating access service.

**Arbitrations**

- 14 ACCC arbitration decisions concerning Telstra are currently awaiting Federal Court judgements.

**Access undertakings**

- In April 2009 the ACCC rejected an access undertaking proposed by Telstra relating to the terms and conditions of supply of the ULL service. This decision is currently subject to merits review in the Australian Competition Tribunal.
  - Telstra proposed a monthly charge of \$30 to be paid by access seekers for access to the ULL in metropolitan areas, substantially above the currently regulated access price of \$16.75. The ACCC found that this charge exceeded the costs of providing access and was not in the long term interests of end users.

**Breach of access obligations/misleading conduct**

- The ACCC has taken action against Telstra for breaches of the access requirements in the *Trade Practices Act 1974* (TPA) and in the *Telecommunications Act 1997* concerning capacity in certain exchanges. This matter is currently before the Federal Court.
- The ACCC alleges that by claiming that exchanges were full (or "capped"), where there was space available or could be made available, Telstra:
  - breached its standard access obligations under the TPA which are also a condition of its carrier licence under the Telecommunications Act; and
  - engaged in misleading and deceptive conduct in contravention of section 52 of the TPA, through representations to access seekers individually and through lists of "capped" exchanges published on the Telstra Wholesale website.

## TALKING POINTS

### Update on the NBN

- The National Broadband Network will be the single largest nation-building infrastructure project in Australian history.
  - It will be Australia's first truly national wholesale-only communications network.
  - It will drive employment and business activity in the short-term, and help position the economy for our recovery from the global economic recession.
- The Government is committed to seeking private investment in the NBN, and to drawing on private sector capacity and expertise.
  - I am encouraged that Telstra has indicated a willingness to work with the Government on opportunities that will arise under the NBN.
- The Government is progressing its implementation planning for the NBN. This includes:
  - the establishment of the NBN Company;
  - progressing appointment of a lead adviser for the implementation study;
  - consultation on our \$250 million broadband backbone initiative;
  - progressing negotiations with the Tasmanian Government to facilitate early roll-out;
  - consultation in relation to greenfield developments; and
  - consultation on a telecommunications regulatory reform process.

### Telstra's involvement in the regulatory reform process

- I understand that Telstra has made a submission to Minister Conroy's regulatory reform discussion paper.
  - The Government has canvassed a number of regulatory changes, with the aim of making the existing telecommunications competition regime work more effectively.
  - The Government expects to make decisions on these matters in the next few months.