TREASURY EXECUTIVE MINUTE

Minute No.

15 October 2010

Deputy Prime Minister and Treasurer

REINTRODUCTION OF THE TELECOMMUNICATIONS LEGISLATION AMENDMENT (COMPETITION AND CONSUMER SAFEGUARDS) BILL 2010

Timing: Urgent. Minister Conroy intends to reintroduce the Bill in the week beginning 18 October 2010.

Issue:

- The Minister for Broadband, Communications and the Digital Economy, Senator the Hon Stephen Conroy, has sought your agreement to the reintroduction of the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 (CCS Bill), which now contains revised provisions relating to the *Trade Practices Act 1974* (TPA).

Recommendation:

- We recommend that you **sign the letter** (at Attachment A) to Minister Conroy, agreeing to the changes to the CCS Bill, but requesting that you be consulted before key Ministerial determination are made.

Signed/Not Signed Signature: ..../...../2010

KEY POINTS

- On 14 October 2010, Minister Conroy wrote to you concerning the reintroduction of the CCS Bill. Minister Conroy's letter is at Attachment B.
- Minister Conroy seeks your approval to include in the CCS Bill provisions excepting certain conduct of Telstra and NBN Co from the application of Part IV of the TPA.
  - Section 51 of the TPA allows conduct that would otherwise breach the anti-competitive conduct provisions of Part IV of the TPA to be specifically authorised.

  [s.47C]

  - The CCS Bill also provides that conduct excepted under section 51 is also excepted from the application of the telecommunications-specific anti-competitive conduct provisions in Part XIB of the TPA.
- The Government introduced the CCS Bill into Parliament on 15 September 2009. However, the Bill (without the exception provisions) lapsed at the end of the 42nd Parliament.

- Minister Conroy proposes to reintroduce the CCS Bill on 19 October 2010. The CCS Bill has been amended in a number of material respects.
  - The key amendments arise out of the Financial Heads of Agreement between Telstra and NBN Co. The agreement has provided some clarity to the scope of the conduct for which the exception is sought. It is intended that introducing the exceptions will provide certainty to Telstra and NBN Co as to the scope of the excepted conduct.
  - The conduct to be excepted is conduct which the parties are expected to engage in in the course of making or giving effect to a separation undertaking.
    - : The excepted conduct is more detailed than in previous iterations of the CCS Bill. See **Additional Information** for further details.

[s.47C]

- The draft letter at Attachment A agrees to the introduction of the CCS Bill, [s.47C] and asks that you be consulted on particular decisions to exempt conduct from the TPA under the terms of the CCS Bill.

Contact Officer:

Manager
Communications and Infrastructure Access Unit

ADDITIONAL INFORMATION

Outline of the CCS Bill

- The CCS Bill is intended to introduce structural change into the telecommunications industry, by requiring the functional separation of Telstra if it does not voluntarily undertake structural separation.
  - It also aims to streamline the operation of the telecommunications Parts of the TPA, and introduced further 'consumer safeguards'.
- ***Separation of Telstra.*** Telstra's high level of vertical and horizontal integration, as well as its incumbent status, have allowed it to maintain a high degree of dominance in the telecommunications sector, hindering the development of competition in the sector.
  - The introduction of the NBN as a wholesale-only, open access network will transform the structure of the sector. However, the Government indicated it would legislate to improve competitive outcomes during the rollout of the NBN, rather than wait for the new sectoral structure to eventuate.
  - The CCS Bill provides a number of incentives to structurally separate, including denying Telstra the opportunity to acquire specified valuable bands of telecommunications spectrum.
    - : If Telstra does not structurally separate, the Bill provides for the imposition of functional separation.
    - : However, the deal with Telstra, if finalised, is likely to result in Telstra submitting of a structural separation undertaking (SSU) to the ACCC.
- ***Streamlining Parts XIB and XIC.*** The telecommunications-related anti-competitive conduct and access provisions of the TPA have been seen as ineffective and open to 'gaming' by parties to delay or damage new entrants.
  - The CCS Bill streamlines these provisions by replacing the 'negotiate-arbitrate' model with new arrangements where regulators set up-front terms and conditions of access, and improves the ACCC's enforcement process.
- ***Consumer safeguards.*** The CCS Bill aims to enhance the standard of services under the Universal Service Obligation and the Customer Service Guarantee. It would allow the Minister to set certain minimum standards of service.

Conduct to be excepted from Part IV of the TPA

- The CCS Bill authorises seven matters for the purposes of section 51 of the TPA:
  - Telstra providing to the ACCC an SSU, a plan for migrating customers to the NBN, or a variation on those documents;
  - Telstra and an NBN corporation entering into an agreement that is contingent on an SSU coming into force, and the giving effect to such an agreement;

: This exception applies after an SSU comes into force only if the parties provided the ACCC with a copy of the agreement before entry into force, so that the ACCC can scrutinise the agreement and consider it when deciding whether to accept the SSU.

- Telstra and NBN Co entering into an agreement that includes provision for the migration of customers to the NBN, and the giving effect to such a provision;
- conduct engaged in by Telstra in order to comply with an SSU;
- the acquisition of an asset from Telstra, where Telstra is required to divest that asset in order to comply with an SSU;
- any agreement between Telstra and NBN Co required for Telstra's compliance with a SSU, and any conduct pursuant to such an agreement; and

  : The Minister would be able to determine, by legislative instrument, whether any particular agreement was required for Telstra's compliance.

- conduct engaged in by Telstra and NBN Co in order to determine a timetable for migration of customers under a migration plan.

• The latest draft of the excepting provisions of the CCS Bill is at Attachment C.

[s.47C]

[s.47C]

ATTACHMENT A

Draft letter to Minister Conroy

DEPUTY PRIME MINISTER
TREASURER

PO BOX 6022
PARLIAMENT HOUSE
CANBERRA ACT 2600

Telephone: 02 6277 7340
Facsimile: 02 6273 3420

www.treasurer.gov.au

Senator the Hon Stephen Conroy
Minister for Broadband, Communications
and the Digital Economy
Parliament House
CANBERRA ACT 2600

Dear Minister

Thank you for your letter of 14 October 2010 concerning the reintroduction of the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010 (CCS Bill), seeking my agreement to changes to the provisions that except certain conduct under section 51 of the *Trade Practices Act 1974* (TPA).

[s.47C]

Subject to the matters set out below, I agree to the inclusion of these provisions in the CCS Bill for introduction into Parliament.

[s.47C]

Further, I note that proposed subsection 577BA(9) of the *Telecommunications Act 1997* would allow the relevant Minister to determine, by legislative instrument, that an agreement between Telstra and an NBN corporation was necessary in order for Telstra to comply with a structural separation undertaking. Since this determination would effectively – and potentially retrospectively – authorise on a case-by-case basis conduct that may otherwise breach Part IV of the TPA, I ask that you consult with me before such determinations are made.

I also ask that I be consulted on the impact of any Ministerial instrument made under proposed subsection 577A(7) of the *Telecommunications Act 1997* on the conduct to be authorised by virtue of subsection 577BA(3).

[s.47C]

[s.47C]

Yours sincerely

WAYNE SWAN

ATTACHMENT B

Letter from Minister Conroy

[Pages 10-12 have been redacted under s.22]

ATTACHMENT C

Draft provisions excepting conduct from Part IV of the TPA

[Pages 14-20 have been redacted under s.22]