

TREASURY EXECUTIVE MINUTE

Minute No.

22 October 2010

Parliamentary Secretary to the Treasurer cc: Deputy Prime Minister and Treasurer

MEETING WITH MACQUARIE TELECOM (MT)

Timing: You are scheduled to meet with representatives of MT at 10am on 26 October 2010.

Recommendation:

- That you note the contents of this minute for your meeting with MT, and in particular that:
 - the Government has reintroduced legislation for the structural separation of Telstra, and is committed to reform of the telecommunications sector; and
 - MT is generally supportive of these reforms.

Noted

Signature: /...../2010

KEY POINTS

- Your Office has advised that you are to meet with Mr David Tudehope, CEO of MT, and Mr Matt Healy, MT Regulatory and Government National Executive.
 - Background on Messrs Tudehope and Healy are in **Additional Information**.
 - MT has indicated it is particularly interested in discussing the state of reform in the telecommunications sector.
- On 20 October 2010, the Government introduced the Telecommunications Amendment (Competition and Consumer Safeguards) Bill 2010 (the CCS Bill) into Parliament.
 - The CCS Bill is intended to introduce a number of reforms to the telecommunications sector, but its principal focus is the structural separation of Telstra.
 - : The Bill includes provisions excepting a limited range of conduct by NBN Co and Telstra from the application of the anti-competitive conduct provisions of the *Trade Practices Act 1974*. These exceptions are necessary to ensure the transition to structural separation in the telecommunications sector.
 - The CCS Bill was first introduced into Parliament on 15 September 2009. However, it failed to receive the support of the Coalition and minor parties, and lapsed in the Senate.
 - See Attachment A for further details about the CCS Bill.
- MT has made a number of submissions in support of the CCS Bill and other NBN-related legislation.

- MT's submission to the Senate inquiry into the CCS Bill as introduced into the previous Parliament supported the Bill, but proposed minor amendments seeking clarity and consultation on the various separation arrangements and new access arrangements.
- None of MT's proposals are incorporated directly in the CCS Bill. However, there have been some changes to introduce more consultation into the migration plan and functional separation processes.
- Talking points for your meeting are at Attachment B.

Contact Officer:

Manager
Communications and Infrastructure Access Unit

ADDITIONAL INFORMATION

Macquarie Telecom

- MT was founded in 1992, shortly after the deregulation of the telecommunications sector. It is a telecommunications company providing services solely to business and government customers.
- MT has offices in each State capital and in Canberra. Its turnover in the year ended 30 June 2009 was \$253.8 million.

Mr David Tudehope

- Mr Tudehope is Chief Executive and co-founder of Macquarie Telecom and has been a director since 1992.
 - Mr Tudehope takes an active interest in regulatory issues.
- Mr Tudehope was a member of the former Telecommunications Minister's Australian Information Economy Advisory Council, and a director of the Service Providers' Industry Association.



Mr Matt Healy

- Mr Healy joined MT as Regulatory and Government National Executive in 2003.
- Previously, Mr Healy was a Director in the Australian Competition and Consumer Commission's Telecommunications Group, administering the telecommunications-specific competition provisions in the Trade Practices Act.
- Prior to joining the ACCC in July 1999 he held corporate and regulatory positions in public companies involved in the aviation and energy sectors.



MT submission on the CCS Bill 2009

- MT indicated that the CCS Bill as introduced during the last Parliament 'will achieve the Government's objectives of enhancing competitive outcomes in the Australian telecommunications industry and strengthening consumer safeguards'.

- MT also noted that the CCS Bill would address many of the issues it identified during the Government’s previous consultation on ‘Regulatory Reform for 21st Century Broadband’.
- While supporting the substance of the CCS Bill, MT suggested a number of possible amendments. None of these proposals are reflected in the current version of the CCS Bill.
 - MT sought additional public consultation in relation to the requirements the Minister for Broadband will set out for assessing Telstra’s various undertakings.
 - : Under the CCS Bill, the ACCC would assess these undertakings against matters determined by the Minister. The Bill does not provide any indication of what the Minister’s determination might be.
 - : MT also sought a requirement that any structural separation undertaking (SSU) submitted by Telstra be released for public consultation as part of the ACCC’s consideration process.
 - : While the CCS Bill does not include this measure, migration plans submitted by Telstra (in association with an SSU) would be subject to public consultation requirements.
 - MT considered that the Minister’s ‘function separation requirements determination’, which would set out the matters a Telstra functional separation undertaking must address, should be included in the legislation rather than be subject to Ministerial discretion.
 - : While this proposal is not reflected in the CCS Bill, the current version of the Bill does require that the Minister’s decision to accept, vary or decline a functional separation undertaking is subject to consultation requirements.
 - MT sought additional protection for parties that may be forced into accepting unfair access agreements, such that if the ACCC makes a more favourable access determination, the party may accept the benefit of that determination rather than remaining bound by the agreement.

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

- The Telecommunications Amendment (Competition and Consumer Safeguards) Bill 2010 (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 *Trade Practices Act 1974* (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 a structural separation undertaking (SSU) to the ACCC.
 - Structural separation would involve the legal separation of Telstra’s assets and activities into separate corporate entities with different and separate owners.
 - : The CCS Bill does not prescribe a particular means for Telstra to achieve structural separation. It could involve the creation of a new company to own and operate Telstra’s fixed-line assets. Alternatively, it may involve Telstra migrating its fixed-line traffic to the NBN, as envisaged by the Financial Heads of Agreement with NBN Co.
 - : Functional separation would not entail formal legal separation, but would require Telstra to establish a single wholesale unit, separate from its retail business units, and maintain an Oversight and Equivalence Board
 - For the purposes of complying with an SSU, various conduct that may otherwise contravene Part IV of the TPA is to be authorised (see below).
- **Authorising conduct.** As part of the structural separation provisions, the CCS Bill would provide that any conduct that Telstra and NBN Co would have to engage in to give effect to structural separation and any customer migration plan would be authorised and therefore exempt from the anti-competitive conduct provisions of the TPA.

- The provisions would provide some clarity on what conduct is required for this purpose, and would provide that the Minister for Broadband may determine, by legislative instrument, that certain conduct was required and therefore authorised.
- The CCS Bill would authorise:
 - : 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 (as long as the parties provided copies of the agreement to the ACCC for scrutiny);
 - : 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 that is required for Telstra’s compliance with a SSU, and any conduct pursuant to such an agreement; and
 - : conduct engaged in by Telstra and NBN Co in order to determine a timetable for migration of customers under a migration plan.
- ***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.

TALKING POINTS

- The Government has moved quickly to reintroduce the Competition and Consumer Safeguards Bill into Parliament.
- The Bill sets up a procedural framework that enables a transformation of the structure of the telecommunications sector. It will provide valuable regulatory certainty for the rollout of the National Broadband Network.
 - I understand that Macquarie Telecom has been a key supporter of the reform process, and the Government is grateful for this support.
- I note that MT has made proposals for amendments to this Bill and the other legislation underpinning the NBN.
 - The legislation is primarily the responsibility of Minister Conroy.
 - However, I can assure you that the Government's approach to the matters still to be determined surrounding the separation of Telstra will be as open and consultative as commercial sensitivities allow.
 - : I note that the CCS Bill does include requirements for public consultation in certain circumstances, particularly in relation to decisions about migration plans and functional separation.
 - : It is expected that the ACCC will engage in public consultation when it is considering the various undertakings to be provided by Telstra.
- While the CCS Bill includes provisions exempting certain conduct from the application of the Trade Practices Act, these exemptions are limited in scope, and only go as far as is necessary to ensure a smooth transition to a structurally separated telecommunications sector.
- I encourage you to continue your active involvement in the public debate about the value of the NBN and structural reform in the telecommunications sector.