



25 May 2015

Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

Submitted online: www.competitionpolicyreview.gov.au

Dear Secretariat

Competition Policy Review Draft Report

AGL Energy Limited (**AGL**) welcomes the opportunity to make a submission on the Competition Policy Review's Final Report (**Final Report**).

AGL is well-placed to comment on a number of issues raised in the Final Report, which touch many aspects of AGL's business. AGL is one of the largest energy retailers providing energy to over 3.8 million electricity and gas customers in Victoria, New South Wales, South Australia and Queensland. AGL is also one of the largest generators of electricity in Australia. AGL has investments in coal-fired, gas-fired, and renewable electricity generation and upstream gas exploration and production projects.

AGL believes in and supports vigorous and effective competition across all the markets in which it operates in order to benefit customers and market participants.

As AGL has previously stated, the "root and branch" review of Australia's competition laws and policies is timely and provides an opportunity to determine whether competition laws remain fit for purpose. However, AGL disagrees with several of the major reforms proposed in the Final Report.

In particular, AGL continues to strongly oppose the recommendations in the Final Report proposing changes to:

- the misuse of market power test in s 46 of the *Competition and Consumer Act 2010*; and
- the process by which merger authorisation matters are made directly to and heard by the Australian Competition Tribunal (**Tribunal**).

With regards to the merger authorisation process, AGL submits that:

- the Tribunal should retain the ability to hear, at first instance, applications for merger authorisation;
- The Tribunal should have the ability to review all merger clearance decisions made by the ACCC under section 50 of the *Competition and Consumer Act 2010*; and

- Any Tribunal merger clearance decision reviews or first instance merger authorisations should not be limited to a review on the papers before the Australian Competition and Consumer Commission (**ACCC**).

AGL is in a unique position to comment on the Final Report's recommendations regarding this Tribunal process because it is the only party to have had a merger authorisation matter determined by the Tribunal under the current process. AGL is the only organisation that understands first-hand the absolute imperative of the Tribunal being able to hear a merger authorisation at first instance.

Parties currently have three options for seeking comfort around their proposed mergers:

- informal clearance by the ACCC (with any injunctions or declarations reviewable by the Federal Court);
- formal clearance by the ACCC (decisions may be reviewed by the Tribunal on their merits); or
- direct authorisation by the Tribunal, such as sought by AGL with the Macquarie Generation purchase (review of a Tribunal decision is by the Federal Court).

The Panel recommends this last merger authorisation avenue be removed in an attempt to "streamline" the formal processes. AGL strongly opposes this change to make the Tribunal a "review-only" body.

The Panel's view of the role of the Tribunal in merger authorisations as a review only body has considered the "benefits" of making its recommended changes without considering the detriments to applicants. As so clearly demonstrated recently in the Macquarie Generation matter before the Tribunal, the detriments clearly outweigh the Panel's stated benefits.

In the Final Report, the Panel quotes from AGL's public submission on the Draft Report, and AGL restates here: it is critical to maintain the avenue of direct merger authorisation by the Tribunal so that a party challenging the ACCC's view can introduce new evidence to the Tribunal, as well as test the ACCC's evidence through cross-examination under oath. If the Tribunal becomes a review-only body, such as is being proposed, the Tribunal would only be able to consider those documents already created and previously submitted to the ACCC.

AGL's experience in merger clearances is that the ACCC does not always provide the applicant with complete information regarding the evidence it is relying upon or the issues that it considers may result in a competitive detriment. The current process does not compel the ACCC to provide such transparency. Without this level of transparency, the changes the Panel proposes would put the applicant at a significant disadvantage to the ACCC when seeking review of an ACCC decision by the Tribunal, as the applicant will have no knowledge of what "evidence" the ACCC has – it will only be able to rely on the ACCC's correspondence and public announcements to assess the grounds of dispute. Applicants do not have the opportunity to refute the ACCC's "evidence" unless they can directly put new evidence forward to the Tribunal and have the ACCC's evidence tested (including by the Tribunal itself).

AGL's success in the Macquarie Generation matter illustrates clearly how critical it is for applicants to be able to introduce new evidence before the Tribunal when dealing with a prejudicial case theory held by the ACCC. Examples of the Tribunal's findings of fact *vis a vis* the ACCC's theory of harm were set out in AGL's confidential submission to the Draft Report. Many of these issues would not have come to light if the Tribunal had only been able to review the documents on record before the ACCC.

In other matters raised in the Final Report, AGL supports the proposed creation of a separate national access and pricing regulator in order to ensure greater independence of energy regulatory matters. AGL also supports the establishment of the Australian Council for Competition Policy.

AGL supports the development of an ACCC media code of conduct to strengthen the perception of the ACCC's impartiality in enforcing the law.

Otherwise AGL refers to and reiterates its previous public and non-public submissions to the Competition Policy Reviews Draft Report.

AGL is happy to provide further information to the Secretariat on any issue raised in its submission. Please contact Sarah Greenstreet on (03) 8633 6680 if you have any questions in relation to AGL's position on these issues.

Yours sincerely,

A handwritten signature in blue ink that reads "N Wallis". The signature is written in a cursive, flowing style.

Nicole Wallis
Head of Energy Market Regulation