

12 February 2016

Mr Scott Rogers
Manager
Competition Policy Unit
The Treasury
Langton Crescent
PARKES ACT 2600

Submitted online: competition@treasury.gov.au

Dear Mr Rogers

Treasury Discussion Paper – Options for strengthening misuse of market power laws

AGL Energy Limited (**AGL**) welcomes the opportunity to make a submission on the Treasury Discussion Paper – Options for strengthening misuse of market power laws (Discussion Paper).

AGL strongly supports Option A in the Discussion paper and opposes Options B, C, D and E proposing changes to the misuse of market power test in s 46 of the *Competition and Consumer Act 2010*.

AGL is well-placed to comment on the misuse of market power provisions. We are one of the largest energy retailers and generators of electricity in Australia. We have investments in coal-fired, gas-fired, and renewable electricity generation and upstream gas exploration and production projects. On the retail side, AGL provides energy to over 3.8 million electricity and gas customers in Victoria, New South Wales, South Australia and Queensland.

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. Market structures characterised by competition and innovation, alongside efficiency in investment and expenditure, will best deliver these gains.

The key requirements for competition policy in the energy industry are:

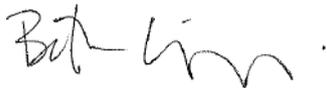
- a principled and stable regulatory framework;
- specific and well-targeted regulation with the main purpose of preventing or rectifying sustained market failure;

- minimising the regulatory burden by eliminating unnecessary government and regulatory intervention in competitive, commercial processes;
- allowing free and fair market structures to evolve;
- requiring timely and transparent decision-making by regulatory bodies; and
- enabling due process for review of government and regulatory decisions.

Good regulation should be able to stand on its own, without the need for mandatory considerations for the courts, guidelines for implementation for the regulators and authorisation processes for what must be acknowledged exemptions. The proposals which require development of these instruments in order to make the regulation workable, would indicate that the proposed changes are not good regulation.

AGL is happy to provide further information on any issue raised in its submission. Please contact Kate Stoeckel on kstoeckel@agl.com.au or on (03) 8633 7816 or Angela Gregory on angela.gregory@agl.com.au or on (03) 8633 6817 if you have any questions in relation to AGL's position on these issues.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Beth Griggs".

Beth Griggs
Head of Energy Market Regulation

Enclosures: Attachment 1

Attachment 1

AGL strongly supports Option A in the Discussion Paper – that is, making no amendment to the current provision.

“Taking advantage”

The current test only prohibits conduct which involves a "taking advantage" of market power – it does not prohibit conduct simply based on the co-existence of conduct that may substantially lessen competition and market power.

As the current test requires a company with market power to have an anti-competitive purpose directed at a competitor, if conduct is therefore engaged in for valid commercial reasons, and not for anti-competitive reasons, then a corporation is not at risk of contravening the provision.

For this reason, AGL does not agree with Option B in the Discussion Paper.

“Effects” test

The Discussion Paper’s Options C, D and E propose to introduce an “effects” test for the prohibition on misuse of market power. AGL considers this approach is misguided and AGL strongly opposes any proposed amendment which includes an “effects” test.

Throughout the discussion relating to changing section 46 no concrete legal or economic evidence which demonstrates a need for the proposed amendments has been identified. Despite the overwhelming majority of previous reviews of this issue rejecting an “effects” test, proponents for change have adopted largely theoretical legal arguments in order to make an unjustified and radical case for change. This is not best-practice policy analysis.

The significance of the introduction of an “effects” test and its detrimental impact on business cannot be understated. The proposed reformulation of the test substantially broadens the scope for potential allegations of misuse of market power against large companies, based on the alleged effect on competition of the company’s conduct – even where the conduct does not have any anti-competitive purpose.

The proposed “effects” test effectively reverses the onus of proof – any conduct with the ultimate effect of substantially lessening competition would be prohibited unless both limbs of the proposed defence were established. Rather than precisely identifying the harmful conduct that the regulation seeks to prohibit, the proposed change prohibits *any* conduct by companies that ultimately has the effect of substantially lessening competition, but requires companies accused of having breached this prohibition to demonstrate:

- that their conduct would be a rational business decision or strategy by a corporation that did not have a substantial degree of market power; and
- that the likely effect of the conduct was to benefit the long-term interests of consumers.

Any company is likely to find it extremely difficult to establish to the required level of proof one, let alone both, of these proposed limbs.

The impact of the proposed amendments on large businesses and the broader economy is huge. On a day-to-day basis, this change would make it much more difficult for AGL to assess its risk of contravening the provision, as having a legitimate commercial purpose will no longer suffice. Instead, AGL would be required to consider the likely effect of its conduct not only on competition, but also on the interests of consumers. In some cases this analysis would be highly artificial, particularly in relation to AGL's upstream or

wholesale activities, which are by definition remote from the end "consumers" of gas and electricity.

In order to comply with the proposed "effects" test provisions, AGL would need to either:

- undertake detailed and costly analysis of the likely effect of proposed conduct; or
- engage only in conduct which clearly raises no prospect of lessening competition.

In either case, the impact to AGL's operations would be profound and widespread, with the likely result being either substantially increased compliance costs, or reduced pro-competitive conduct, including:

- reduced investment;
- more limited offers for customers (large and small) with consequent higher costs; and
- significant curtailment of innovation.

These would be industry- and economy-wide consequences, they would not be unique to AGL.

Under the proposed "effects" test amendments, AGL would also be exposed to a higher risk of investigation and allegation of misuse of market power by the ACCC. This is because, if the ACCC took the view that AGL might have market power in a particular context, *any* substantial lessening of competition which might be said to have a connection with AGL's behaviour could be the subject of allegation or investigation. This is particularly so given that the two limbs of the defence will require complex analysis, and in most cases will not be readily observable by the ACCC.

While the proposed "effects" test focuses on the effect on competition rather than on a single competitor, this does not solve AGL's concern, since it is clear from the ACCC's approach to mergers and other activity in the energy industry that it may well consider that harm to an individual competitor could constitute a substantial lessening of competition. ACCC investigations based on theoretical concerns that are not substantiated in practice impose unnecessary and significant costs for all parties involved, and can entail unfounded reputational damage for companies along the way.

By proposing a prohibition that is unjustifiably broad, and a defence that will be extremely difficult to establish, a change involving an "effects" test would effectively encourage such investigations.

The current test provides the day-to-day certainty required for efficient and competitive operations by allowing a business to assess its conduct by considering its purpose in undertaking the conduct, without requiring the business to undertake the complex, contentious and in many cases artificial analysis that Options B, C, D, or E in the Discussion Paper would require.

For the reasons outlined above, AGL rejects Options B, C, D and E in the Discussion Paper and supports Option A.