

FORM G
Regulation 9

COMMONWEALTH OF AUSTRALIA

Trade Practices Act 1974 – Sub-section 93(1)

EXCLUSIVE DEALING

NOTIFICATION

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with sub-section 93(1) of the *Trade Practices Act 1974*, of particulars of conduct or of proposed conduct of a kind referred to in sub-section 47(6) or (7) of that Act in which the person giving notice engages or proposes to engage.

1. (a) **Name of person giving notice:**

AGL Retail Energy Limited ABN 21 074 839 464 (**AGL**).

(b) **Short description of business carried on by that person:**

Supply of energy products and services.

(c) **Address in Australia for service of documents on that person:**

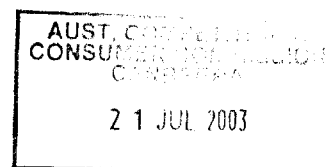
AGL Centre, 111 Pacific Highway, North Sydney, NSW, 2060.

2. (a) **Description of the goods or services in relation to the supply or acquisition of which this notice relates:**

In conjunction with the Notifying Parties as set out in Attachment A, the supply of energy appliances, natural gas and electricity.

(c) **Description of the conduct or proposed conduct:**

See Attachment A.



3. (a) **Class or classes of persons to which the conduct relates:**

Residential customers and potential residential customers in New South Wales who acquire an energy appliance (being a heating, cooling, cooking or hot water appliance of any brand) from AGL's Retail Partners and are offered or enter into a fixed term contract of up to three years with:

- AGL to provide natural gas; or
- A "dual fuel" contract with AGL to provide natural gas and AGL Electricity Limited (ABN 82 064 651 083) (AGL Electricity) to provide electricity.

(b) **Number of those persons:**

(i) **At present time:** up to approximately 13,195 per annum

(ii) **Estimated within the next year:** as in (i) above

(c) **Where number of persons stated in item 3(b)(i) is less than 50, their names and addresses:**

Not applicable.

4. **Name and address of person authorised by the person giving this notice to provide additional information in relation to this notice:**

Mr Neil Campbell, Corporate Solicitor, The Australian Gas Light Company, AGL Centre, 111 Pacific Highway, North Sydney, NSW 2060.

Date:

Signed by/on behalf of the applicant giving notice:


(Signature)
David Meagher
Partner
Cutler, Hughes & Harris

ATTACHMENT A

1. NOTIFYING PARTIES

1.1 AGL

AGL is a wholly owned subsidiary of The Australian Gas Light Company ABN 95 052 167 405, an energy company supplying energy products and services including natural gas, electricity and liquid petroleum gas (**LPG**) to customers in Australia and overseas through various subsidiaries. AGL is authorised to supply natural gas to customers in New South Wales.

1.2 AGL Retail Partners

AGL markets and supplies its services in New South Wales with the assistance of retail partners and agents, including franchised AGL Energy Shops and other independent licensed retailers (collectively, **AGL Retail Partners**). AGL does not have any ownership interest in any AGL Retail Partners. AGL Retail Partners typically sell a range of energy appliances, which they can install and connect to gas and electricity supplies and may also repair and maintain.

In New South Wales, AGL has franchised energy shops in Auburn, Balgowlah, Bankstown, Blacktown, Bondi Junction, Camperdown, Caringbah, Chatswood, Katara, Hornsby, Liverpool Penrith and Warrawong.

It also has independent Retail Partners in Bathurst, Bowral, Cootamundra, Corrimall, Cowra, Dubbo, Forbes, Gosford, Goulburn, Griffith, Junee, Lakehaven, Katoomba, Leeton, Lithgow, Maitland, Narrandera, Orange, Parkes, West Wyalong and Young.

AGL owns Essential Energy Services Pty Ltd (**EES**). EES coordinates licensed repair and maintenance providers, who will participate in the same way as other Retail Partners.

1.3 AGL Electricity

AGL Electricity is a wholly owned subsidiary of The Australian Gas Light Company. It has been licensed to retail electricity in New South Wales since 1997.

2. PROPOSED CONDUCT

2.1 Summary of Promotions

AGL proposes to offer residential customers or potential residential customers in New South Wales who purchase a selected energy appliance from an AGL Retail Partner and enter into a fixed term contract of up to three-years with:

- AGL to provide natural gas; or
- A “dual fuel” contract with AGL to provide natural gas and AGL Electricity to provide electricity

a discount, allowance, rebate or credit (**Rebate**) off the customer’s residential natural gas account with AGL.

AGL proposes to offer different promotions at different times. The Rebate may be offered in respect to contracts for natural gas only or electricity only. At other times the Rebate may be offered in relation to contracts for dual electricity and natural gas only.

Details of the amount of the Rebate are set out in the Confidential Annexure to this notification. AGL proposes to engage in this conduct until further notice.

2.2 Similar Promotions submitted for Notification

AGL submitted an exclusive dealing notification to the ACCC in 2001, which involved AGL offering a rebate to NSW residential customers who entered into dual fuel contracts. We have attached a copy of this notification for your convenience as it involves similar conduct to this notification and similar submissions were made (**Attachment A(1)**). The reference number for the notification is N90878, registered 26 July 2001. The immunity under the attached notification has not been revoked.

2.3 Details of Promotions

(a) Offer Terms currently available for the promotions

Attached to the notification are confidential “Offer Terms” and an “Offer and Acceptance Form” that provide an example of the conduct the Notifying Parties propose to engage in (**Attachment A(2)**). The attached documents are specific to the Rebate offered with the purchase of a natural gas hot water appliance from an AGL Retail Partner. AGL also proposes to offer the promotions in relation to other energy appliances, for different

rebate amounts (within the range identified in the Confidential Annexure) on the same terms.

(b) Variation in AGL Retail Partners

AGL may enter into other arrangements with other Retail Partners to support the promotions, but this will not affect the terms offered to customers.

(c) Energy Appliances

The Rebate is offered during the sale process whereby the customer purchases an energy appliance from an AGL Retail Partner. Energy appliances are any brand of heating, cooling, cooking or hot water appliance offered by AGL's Retail Partners. AGL proposes to offer the Rebate in relation to certain selected energy appliances at any one time.

(d) Fixed Term Up To Three Years

The promotions are based on the customer entering into a fixed term contract of up to three years for natural gas or dual electricity and natural gas.

The customer can terminate any fixed term contract they enter into as part of the promotions, prior to the end of the fixed term. The customer will only have to pay an administration fee of \$100.00 upon termination. The customer is then free to enter into a new contract to acquire natural gas, electricity or both from AGL or any of AGL's competitors.

The administration fee is likely to be less than the Rebate offered in most cases. This is because it is an administration fee and not intended as a repayment of the Rebate or a penalty for terminating the fixed term contract.

(e) AGL and the energy appliances

AGL does not have any title to the energy appliances or ownership interest in its Retail Partners. As part of the promotions it will only receive the standard franchise fees and royalties from the sale of energy appliances by AGL franchisees. AGL does not receive royalties from independent licensed retailers from the sale of energy appliances. There is an incentive provided to AGL from AGL Gas Networks (another subsidiary of The Australian Gas Light Company) to encourage the sale of natural gas appliances by its Retail Partners. This incentive is offered to all Retailers in the industry and is not exclusive to AGL.

(f) Customer is not restricted in choice

The promotions are designed for Customers to benefit from a Rebate on their natural gas account with AGL if they purchase an energy appliance. Although an increased Rebate is offered to those customers who purchase “dual fuel”, the Customer is still able to benefit from the Rebate if they chose only to purchase natural gas from AGL. In addition, Customers can purchase an energy appliance and are not compelled to use either AGL or AGL Electricity for their natural gas or electricity needs. Customers are at all times free to purchase an energy appliance and use another provider for natural gas and/or electricity. AGL simply wants to offer its customers the opportunity to benefit from a reduction if they chose AGL for natural gas and a further benefit if they chose a dual fuel contract. Customers may cease to acquire natural gas from AGL or electricity from AGL Electricity at any time during the fixed term period provided they pay the administration fee.

3. PUBLIC BENEFIT/PUBLIC DETRIMENT

3.1 Summary

The proposed conduct will significantly benefit consumers and the industry generally as well as AGL customers specifically.

The promotions will mean customers who purchase an energy appliance in New South Wales will be able to receive a direct Rebate on their natural gas account with AGL. “Dual Fuel” contracts will allow AGL to pass to customers the economies of scale they derive from offering a combination of natural gas and electricity services. AGL is not looking to limit the Rebate to Customers who enter into dual fuel contracts and for this reason has also extended the Rebate to Customers who enter into contracts for the supply of natural gas only.

The Rebate is likely to stimulate a response from other competitors who through the deregulation of these industries are able to offer similar services and reductions. In reality, competitors are already offering “dual fuel” contracts over fixed term periods to their residential customers and AGL is reacting to these offers in order to stay competitive. While AGL already has a strong presence in the natural gas market in NSW, it is losing customers as a result of deregulation. AGL wants to work with AGL Electricity to provide dual fuel contracts in order to stay competitive and to begin establishing a presence and increase competition in the electricity market in NSW. This is not unlike AGL’s competitors (such as Energy Australia) who are utilising dual fuel contracts to extend into the natural gas market. The proposed conduct is pro-competitive and therefore will

promote the natural gas and electricity industries generally and this is a benefit that will be realised by all participants in the industry.

In summary the impact of the proposed conduct is not such that, under the test laid down in section 93(3A)(b) of the Act, the likely benefit to the public will be outweighed by the likely detriment to the public.

3.2 Public benefits for customers, potential customers and the industry

(a) The Rebate

The most significant direct public benefit associated with the proposed conduct is the reduction, by way of a Rebate, on the customer's natural gas account with AGL, whether or not the customer contracts for natural gas only or for dual natural gas and electricity. Residential customers who are purchasing an energy appliance will require natural gas and/or electricity. Offering customers the chance to receive a reduction on their natural gas bill is a significant public benefit. The amount of the Rebate is particularly significant in view of the average costs incurred by residential customers annually for natural gas and electricity. The Confidential Annexure includes details of the estimated average annual costs incurred by residential customers for natural gas and electricity. The range in which we are offering the Rebate (set out in the Confidential Annexure) represents a considerable reduction on the average residential customer's natural gas bill.

(b) Efficient Energy Consumption

Encouraging consumers to buy energy appliances and making natural gas more affordable to them will stimulate the energy market and promote the efficient use of natural resources. Innovations in heating, cooling and hot water systems have resulted in the development of new appliances that are much more energy efficient than their predecessors. Customers are becoming aware of the economic and environmental savings of these new appliances, particularly through energy efficiency rating systems and advertising campaigns. Promoting the use of efficient energy appliances is a benefit that will be realised by the community and the industry as a whole.

(c) Savings derived from Dual Fuel contracts

AGL will be able to pass on the savings they make in relation to customers who enter into dual fuel contracts. Dual Fuel contracts allows AGL to increase efficiencies and reduce the costs associated with administrative transactions. AGL systems can recognise customers as a single entity and provide a single point of contact for enquires. These

reductions will enable AGL to compete better in the marketplace through more competitive pricing and enhance the quality and efficiency of its customer service.

3.3 Competition

(a) Consumer Choice

The natural gas and electricity industries across Australia have been systematically deregulated. Both industries, traditionally regarded as natural monopolies characterised by a single supplier in each geographic area, have been opened to competition. New regimes allowing access to infrastructure and duplication of facilities have exposed industry participants to an increasing level of competition and potential competition. Customers are now able to choose from competing suppliers of most services.

As of 1 January 2002 all NSW retail customers can make choices about who to buy electricity and natural gas from. Retail customers in NSW are now contestable and a number of new companies (including interstate companies) are now licensed to compete with traditional suppliers for these residential customers. In addition to these new suppliers, the traditional regional suppliers are expanding into national operations and specialised natural gas or electricity suppliers are diversifying into general energy suppliers to realise the benefits of economies of scale.

While not all suppliers licensed to retail electricity and natural gas in NSW hold competitive market share, their existence and number is indicative of the future competitive climate that is being stimulated as a result of deregulation. The number and variety of suppliers currently licensed to sell electricity and natural gas is provided below.

Companies currently holding retail licenses for Electricity in NSW	Companies currently holding retail licenses for natural gas in NSW
<ul style="list-style-type: none"> • ACTEW Retail Ltd and AGL ACT Retail Investments as partners in ActewAGL Retail • AGL Electricity Limited • AGL Victoria Limited (formerly Pulse Energy) • Aurora Energy • Australian Energy Services Pty Ltd • Australian Inland Energy and Water Infrastructure • Country Energy • Citipower Pty • Country Energy • Delta Electricity 	<ul style="list-style-type: none"> • ACTEW Retail Ltd and AGL ACT Retail Investments as partners in ActewAGL Retail • AGL Energy Sales and Marketing Ltd • AGL Retail Energy Limited • Allgas Retail Energy Limited • BHP Billiton Petroleum (Bass Strait) Pty Ltd • BPH Billiton Petroleum Pty Ltd • Citipower Pty • Country Energy • Energy Australia • Esso Australia Resources Pty Ltd • Multinet Gas (IE) Pty Ltd

<ul style="list-style-type: none"> • Energex Retail Pty Ltd • Energy Australia • Eraring Energy • Ergon Energy (Victoria) • Ferrier Hodgson Electricity Pty Limited • Integral Energy Australia • Jackgreen (International) Pty Ltd • Origin Energy Electricity Limited • Powercor Australia Limited • TXU Electricity Limited • Yallourn Energy Ltd 	<ul style="list-style-type: none"> • Origin Energy LPG Ltd • TXU Electricity Ltd • Westfarmers Kleenheat Gas Pty Ltd
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(b) AGL's Place in the Competitive Environment

AGL's figures indicate that there are approximately 2.1 million households in NSW, all of which require electricity. Natural gas is a discretionary fuel that is utilised by approximately 800,000 households in NSW. AGL's estimates of the customer numbers (it has available) for AGL and its primary competitors for natural gas and electricity are contained in the Confidential Annexure. This Confidential Annexure includes details of the number of customers lost by AGL since deregulation.

For AGL to stay competitive, these statistics indicate that it must react to what the market is offering in NSW and look to expand its presence in other markets by promoting the dual supply of fuels. AGL has traditionally held a presence in the natural gas market in NSW. AGL is working with AGL Electricity to stay competitive in the natural gas market and start building a stronger presence in the electricity industry through utilising existing customer relationships with AGL. The promotions try to respond to a realisation in the marketplace that significant reductions can be achieved through dual fuel contracts and economies of scale.

(c) Current competition in Dual Services and Fixed Term contracts

As a result of industry deregulation a number of competitors are now able to service residential customer's natural gas and electricity requirements as well as supply other products and services. Electricity and natural gas customers are now open to new offers including cheaper energy prices or extra services more efficient and catered to their needs.

Residential customers can now make a choice between:

- (i) entering into a more competitively-priced electricity/natural gas supply contract negotiated with their current provider;
- (ii) entering into an electricity/natural gas supply contract with another licensed energy supplier, or
- (iii) continuing to receive electricity at regulated prices.

In this environment profit margins are tightening and efficiency is increasing for the benefit of all consumers. To stay competitive in this marketplace suppliers are recognising the substantial synergies available through rationalising customer relationships and transaction cost savings. The synergies available through rationalising customer relationships are particularly significant for retail customers because setting up, administering and closing accounts forms a higher proportion of the costs of servicing those customers when compared with buyers of large quantities of energy.

The move by Australian natural gas and electricity companies towards bundled energy offerings is consistent with experience in other industries as well as with energy markets overseas. A clear example of the trend in energy markets towards bundling can be seen in the United Kingdom. A wide range of suppliers bundle gas and electricity in the United Kingdom, either through arrangements with other suppliers, or by acquiring gas and electricity businesses

AGL's research into the marketplace suggests that AGL's key competitors are aggressively marketing customers by offering savings through dual fuel and/or fixed term contracts. Energy Australia are currently offering discounts and credits to potential customers who enter into fixed term contracts for dual fuel, natural gas or electricity over three year periods. Energy Australia has long held a solid market share in the electricity industry and has recently focussed its marketing strategy on increasing its presence in the natural gas industry through the promotion of dual fuel contracts. Other suppliers offering discounts on fixed term contracts and/or dual fuel contracts include Country Energy and Integral Energy.

Since energy is a commodity product, competition to attract customers has largely been driven by price. The proposed conduct would allow AGL and AGL Electricity to pass on to customers the economies of scale and scope they derive from offering a combination of natural gas and electricity services. These economies are achieved through various aspects of the proposed conduct including rationalised administration, reduced billing and credit costs, reduced customer relationship costs and simple economies of scale. In this competitive environment, any complementary effort between AGL and AGL Electricity that can bring down prices and pass these savings on to consumers is necessary for the companies to compete with other energy suppliers, benefits the competitive process and the consumers themselves.

(d) Competitive Responses

The proposed conduct in providing a Rebate on a residential customer's natural gas bill, and promoting dual fuel contracts can be expected to impel competitive responses from other suppliers of natural gas, electricity or both. These responses would take the form of lower prices and increased levels of service and convenience. The increasing number of suppliers who can provide both natural gas and electricity can be expected to respond with a similar opportunity to pass on the savings achieved by a combined supply. In this sense the proposed conduct is pro-competitive. Even customers who elect to have their natural gas supplied from another supplier will benefit from these promotions because competitive retailers are likely to seek to match, or better the promotions offered by AGL.

(e) No lessening of Competition in Energy Supply

The proposed conduct is not designed to, and does not, fetter the customer's choice in the acquisition of either natural gas or electricity. Concerns about possible anti-competitive effects of bundling do not arise where the products bundled remain independently available because the consumer is free to select the best bargain without the need to purchase a second product. Under the terms of the proposed conduct, customer is at all times free to acquire from AGL natural gas and/or electricity from AGL Electricity at published or negotiated rates. The customer is also free to acquire an energy appliance from an AGL retailer and choose another supplier for their natural gas and electricity. At all times the independent prices for natural gas, electricity and energy services will be made clear to the customer, as well as the Rebate available if the customer chooses to acquire natural gas or natural gas and electricity for a fixed term of up to three years .

These circumstances resonate with the position under the antitrust law of the United States of America. The legal position under sections 47(6) and (7) of the *Trade Practices Act 1974* is clearly different from the position in the United States, since it prescribes a per se rule rather than applying the competition test. However, the US antitrust law indicates the situations in which such conduct will constitute a public detriment and when it may provide a public benefit, and as such are useful in the context of a notification.

In the United States, concerns about the possible anti-competitive effects of bundling do not arise where both the tied and tying products are independently available: that is, "... where the buyer is free to take either product by itself there is no tying problem".¹ Where the products may be purchased separately, the consumer is free to select the best bargain without the need to purchase any tied or tying product. Where the products are made

¹ *Northern Pacific Railway* 356 US at 6 n 4

available separately they will of course be separately prices, so the consumer will be able to ascertain simply the true cost of either product. In the USA, the separate offering of the separate products removes the core of the objection to bundling: the forced purchase of a second commodity. In *Jefferson Parish* the Supreme Court stated:

“Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller’s exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms. When such ‘forcing’ is present, competition on the merits of the market for the tied item is restrained and the Sherman Act is violated.”²

Hence, in US law,

“... if the tying product is separately available, no violation will be found unless the seller’s pricing policy makes purchase of the tying and tied products together the only viable option.”³

AGL’s proposed conduct falls into this category, providing a tangible benefit, and no detriment, to the consumer. It further causes no detriment to any competitor of AGL or AGL Electricity beyond legitimate competitive conduct.

In its February 1998 *Guide to Authorisation and Notification for Third Line Forcing Conduct*, the ACCC considers that:

“In the absence of misleading information about prices-and provided purchasers are not in fact forced to purchase both products and have enough information to make an informed decision on the supplier’s offer-the conduct would have little anti-competitive effect...”

Moreover, there is inherent public benefit in the conduct when customers can buy the package of products A and B at a genuine saving on the total price of the products bought separately in competitive markets. In such circumstances, the conduct would result in lower prices for customers and would serve to increase competition in the markets for both products and immunity under the authorization or notification process would likely be obtained.”

As explained above, AGL’s proposed conduct falls within the category described by the ACCC. AGL’s customers will have a genuine choice about the services they will acquire, and AGL’s pricing structures will be transparent and allow informed decisions to be made.

(f) AGL is dedicated to Customer Protection

² 466 US 2, 12 (1984)

³ ABA Antitrust Section, *Antitrust Law Developments* (3Ed. 1992) p 143.

AGL is committed to ensuring that all customers and potential customers are provided with all information relevant to the decision to purchase natural gas, electricity and associated appliances. AGL ensures that its managers, representatives and Retail Partners are aware of their responsibilities under Part IV and Part V of the *Trade Practices Act 1974* and their obligations to protect both the competitive process and the interests of consumers. AGL considers this commitment is particularly important in a climate that is newly open to competition.

AGL holds regular trade practices training sessions for its staff, and also for its retail energy shop franchisees, at which issues of consumer protection, particularly the prevention of misleading or deceptive conduct and the resolution of third-line forcing issues, are paramount. AGL also provides a trade practices compliance guide to employees emphasising these issues and is developing an electronic trade practices compliance program that conforms to *AS3806 – Compliance Programs* (1998).

ANNEXURE A(1)

COPY

(of previous judgement
N90874)

FORM G
Regulation 9

COMMONWEALTH OF AUSTRALIA

Trade Practices Act 1974 – Sub-section 93(1)

NOTIFICATION OF EXCLUSIVE DEALING

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with sub-section 93(1) of the *Trade Practices Act 1974*, of particulars of conduct or of proposed conduct of a kind referred to in sub-section 47(6) or (7) of that Act in which the person giving notice engages or proposes to engage.

(1) (a) Name of person giving notice:

AGL Retail Energy Limited ABN 21 074 839 464 (**AGL Retail Energy**)

(b) Short description of business carried on by that person:

In conjunction with the other Notifying Parties set out in Attachment A, the supply of gas, electricity, ancillary energy services and telecommunications services throughout south-east Australia.

(c) Address in Australia for service of documents for that person:

Liza Carver
Partner
Gilbert & Tobin
Level 37
2 Park Street
SYDNEY NSW 1042

(2) (a) Description of the goods or services in relation to the supply or acquisition of which this notice relates:

Natural gas, electricity and telecommunications services.

(b) **Description of the conduct or proposed conduct**

See Attachment A.

3. (a) **Class or classes of persons to which the conduct relates:**

The class of persons who acquire, will acquire or will be offered any combination of:

- natural gas and ancillary services;
- electricity and ancillary services; and
- telecommunications services

by one or more of the Notifying Parties.

Ancillary services are those services which are complementary and incidental to the supply of gas and electricity including:

- programmed maintenance services;
- power factor services;
- environmental services; and
- energy audit services.

(b) **Number of those persons:**

- (i) at present: up to 100,000 to 150,000
- (ii) estimated within the next year: as in (i) above.

(c) **Where number of persons stated in item 3(b)(i) is less than 50, their names and addresses:**

Not applicable.

4. **Name and address of person authorised by the person giving this notice to provide additional information in relation to this notice:**

Liza Carver
Partner
Gilbert & Tobin
Level 37
2 Park Street
SYDNEY NSW 1042

Dated:

Signed by/on behalf of the persons giving this notice:

(Signature)

Name in Print

Title

ATTACHMENT A

SUBMISSION IN SUPPORT OF NOTIFICATION

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1. BACKGROUND: MOVEMENT TOWARDS MULTI-UTILITIES

Competition to supply gas and electricity on a retail basis to customers has historically been precluded by State and Territory ownership and regulatory structures. Deregulation and partial privatisation commenced in the 1990's and has already brought significant increased competition, particularly for large customers.

Such competition has primarily come from each of the formerly single-utility, regulated monopolies expanding into adjacent product and geographic market segments. Since energy is a commodity product, competition to attract customers has largely been driven by price. The AGL Group, Pulse, Energy Australia, Citipower, Energex and TXU are all examples of companies competing to supply energy types or to supply regions in former monopoly franchise areas. This has involved winning many new customers in their capacities as entrants to adjacent segments and losing many customers in their capacities as former monopolies. Over the same period, there have been many new entrants to the supply of telecommunications services who compete with the incumbent providers, Telstra and Optus.

The increased pressure on prices through the introduction of competition has required utilities to improve the efficiency of their business. In doing so, multi-utilities such as the ActewAGL retail partnership have recognised the substantial synergies through rationalising customer relationships

and transaction cost savings. Through the emerging competition, a significant proportion of these synergies have been returned to customers through competitive pressure on prices.

As the remaining regulated tariffs are progressively dismantled over the next two years, taking advantage of synergies available to multi-utilities through rationalising customer relationships will become increasingly important to energy and telecommunications providers. The synergies available through rationalising customer relationships are particularly significant for small customers because setting up, administering and closing accounts forms a higher proportion of the costs of servicing those customers when compared with buyers of large quantities of energy.

The proposed conduct will position the Notifying Parties to compete in this new energy and telecommunications environment by offer multi-utility service packages consisting of gas, electricity and telecommunications services.

2. NOTIFYING PARTIES

The Notifying Parties are:

- AGL Retail Energy Limited ABN 21 074 839 464 (**AGL Retail Energy**);
- ACTEW Retail Limited ABN 23 074 371 207 (**ACTEW Retail**) and AGL ACT Retail Investments Pty Ltd ABN 53 093 631 586 (**AGL Retail**) trading as ActewAGL Retail (**ActewAGL Retail**);
- AGL Electricity Limited ABN 82 064 651 083 (**AGLE**);
- AGL Energy Sales and Marketing Limited ABN 18 076 092 067 (**ES&M**);
- AGL South Australia Pty Ltd ABN 49 091 105 092 (**AGLSA**); and
- Dingo Blue Pty Ltd ABN 26 086 565 862 (**Dingo Blue**)

Apart from ACTEW Retail, each of the Notifying Parties is a wholly owned subsidiary of The Australian Gas Light Company. The only activities of ACTEW Retail (the ultimate owner of which is the ACT Government) are the retail of services in partnership with AGL Retail in the ActewAGL Retail partnership.

3. PROPOSED CONDUCT

The Notifying Parties propose to offer gas, electricity, ancillary services or telecommunications services (the **First Service**) to customers at a discount, allowance, rebate or credit in relation on

the condition that the customers also acquire, have acquired or will acquire one or more additional gas, electricity, ancillary services or telecommunications services (the **Additional Services**).

Further detail of these discounts are provided in the Confidential Annexure to this notification. Notifying Parties propose to engage in this conduct until further notice.

4. PUBLIC BENEFIT

The proposed conduct will significantly benefit customers specifically by providing:

- real competition to other multi-utilities;
- expanded customer choice; and
- real savings through efficiency gains,

in relation to the supply of energy and telecommunications services.

Even purchasers of energy or telecommunications services who do not elect to purchase from the Notifying Parties will benefit because competing retailers are likely to seek to match, or better, the packages offered by the Notifying Parties.

Therefore, the impact of the proposed conduct is not such that, under the test laid down in section 93(3A)(b) of the Act, the likely benefit to the public will be outweighed by the likely detriment to the public.

4.1 Competitive Environment - Energy

The natural gas and electricity industries across Australia are being systematically deregulated. These industries have been traditionally regarded as natural monopolies and have been characterised by a single supplier in each geographic area or state. New regimes allowing access to infrastructure and some duplication of facilities are exposing industry participants to an increasing level of competition and potential competition. Each State has developed regulations to introduce competition in a staged timetable. In the next few years, most states shall allow full retail contestability in the gas and electricity markets.

The present timetable for the introduction of contestability in relation to natural gas customers across Australia is as follows:

TJ	>100	>10	>5	>1	All
NSW	Now				1 Jan 02
ACT	Now				1 Jan 02
Vic	Now			1 Sep 01	
Qld	Now	1 Sep 01			
SA	Now			1 Jul 01 ¹	
WA	Now	1 Jan 02			1 Jul 02

The present timetable for the introduction of contestability in relation to electricity customers across Australia is as follows:

MWh	>4,000	>750	>200	>160	>100	All
NSW	Now				Now ²	1 Jan 02
ACT	Now				1 Jan 02	
Vic	Now				1 Jan 02	
Qld	Now			TBA		
SA	Now				1 Jan 03	

As the contestability timetable progresses in the natural gas and electricity industries, these industries are becoming increasingly characterised by:

- regional suppliers expanding into national operations; and
- specialised natural gas or electricity suppliers diversifying into general energy suppliers.

As a result, the historical landscape involving one monopoly electricity supplier and one monopoly natural gas provider in each State or region is making way for a number of national and regional energy suppliers providing both natural gas and electricity to an increasingly wide range of customers. This has already occurred in the markets for large volume gas and electricity customers.

AGL considers that its major competitors in energy supply include the following:

Name	Natural Gas	Electricity
CitiPower	Vic, NSW	NSW, Vic, Qld
Energex	Qld, Vic	Qld, NSW
EnergyAustralia	NSW, Vic	NSW and Vic

¹ In South Australia, all non-domestic gas customers (regardless of consumption) became contestable on 1 July 2000, whereas all gas customers become contestable on 1 July 2001.

² Sites above 100 MWh may be aggregated by customers with total load of 160 MWh or above.

Great Southern Energy	NSW, ACT	NSW, ACT
Integral Energy	NSW	NSW, Vic
Origin Energy	NSW, Vic	NSW, Vic
PowerCor	NSW	NSW, Vic, Qld
Pulse Energy	Vic	Vic
TXU	NSW, Vic	NSW, Vic, Qld

Several of the Notifying Parties' competitors describe and market themselves as energy companies operating nationally with a similar suite of products and services. Many of these competitors are also beginning to market combined gas and electricity offerings to residential and small business customers in the lead up to full retail contestability. As with previous offerings of combined services to high volume gas and electricity customers, the ability to offer savings and incentives to customers who choose a single energy supplier will be a key component of competition in the residential and small business energy market.

In the present environment and continuing into the future, the trends towards national expansion and diversification into full-service energy supply indicate an increasing level of competition between suppliers who may have considered themselves only loosely competitive in the past. In this environment profit margins are tightening and efficiency is increasing for the benefit of all consumers.

4.2 Competitive Environment – Telecommunications & Internet Services

The Australian telecommunications and Internet services markets are now open to a large number of service providers and there is strong competition in certain market areas. In particular, the segment of the market that AGL intends to operate within, namely Internet services and local, long distance and mobile communications, are fiercely competitive with several major new entrants in recent years. AGL's likely principal competitors in this area are:

- Telstra
- Vodafone
- C&W Optus
- Orange
- Primus Telecom
- OzEmail
- AOL
- B Digital
- AAPT

In the year 2000, the Australian telecommunications market grew by approximately 13%, well above international growth figures. The main reasons for this growth is that competition has finally arrived in the mobile market and data communications. Overall market growth in 2001 is expected to be around 9.7%.

Telstra's retail market share in basic voice services (both fixed and mobile) is expected to be approximately 63.4% in 2001 and Optus's wholesale share is 30% in mobile and 45% in fixed long-distance.

In the Internet sector, as well as the larger telecommunications providers, there are close to 1,000 very small ISPs operating in Australia, each with under 1,000 customers.

4.3 Competitive Environment – Emergence of Multiutilities

The proposed conduct will allow the Notifying Parties to bundle gas, electricity and telecommunications offerings to customers. This will enhance the ability of the Notifying Parties to compete against other energy companies who are offering, or are proposing to offer, customers multiple services.

The move by Australian gas and electricity companies towards bundled energy offerings is consistent with experience in other industries as well as with energy markets overseas. A clear example of the trend in energy markets towards bundling can be seen in the United Kingdom. A wide range of suppliers bundle gas and electricity in the United Kingdom, either through arrangements with other suppliers, or by acquiring gas and electricity businesses.

Under the proposed conduct, gas and electricity will remain separately available to the consumer. Concerns about possible anti-competitive effects of bundling do not arise where the products bundled remain independently available because the consumer is free to select the best bargain without the need to purchase a second product. Where the products are made available separately they will be separately priced, so the consumer will be able to ascertain the true cost of either product. In the United States, the Supreme Court has established that the separate offering of separate products removes the core of the objection to bundling: the forced purchase of a second commodity.

AGL estimates that there are at least 20 energy retailers in Australia providing energy to a combined base of approximately 6.2 million customers and over 100 telecommunications carriers and services providers providing telecommunications services to approximately 11 million customers.

Of these, the following companies have already emerged as gas, electricity and telecommunications multi-utilities:

- **Origin Energy**, an established explorer, producer and retailer of natural gas in Australia has now entered the electricity market and is becoming a significant participant in the national electricity market as a generator, trader and retailer;

- **Pulse Energy**, formed by incumbent electricity supplier United Energy, incumbent gas supplier Ikon and producers Shell and Woodside, now has 520,000 gas customers and 560,000 electricity customers in Victoria.
- **Energex**, one of Australia's first multi-utilities to emerge following the deregulation, retails gas and electricity products and services to more than one million customers. Energex has also partnered other Australian utilities and an international telecommunications organisation to enter the telecommunications arena;
- **Great Southern Energy** is involved in the purchase, distribution and retail sale of electricity and natural gas; and
- **TXU** was formed in 1995 to acquire Eastern Australia Ltd, the Victorian electricity distributor and electricity and gas retailer.

In addition, the following electricity suppliers have entered into arrangements to supply Bass Strait gas through the new Eastern Gas Pipeline to New South Wales and Victoria and are commencing gas supply as contestability progresses:

- **Integral Energy** has traditionally been an electricity distributor and retailer, but is taking steps to become a multi-utility, recently announcing its intention to retail gas;
- **EnergyAustralia**, a large electricity distributor and retailer, aims to become a multi-utility and has started ventures in telecommunications, gas and financial services; and
- **Citipower** is a national electricity retailer and distributor of electricity and has also signalled its intention to enter the NSW gas market.

4.4 Notifying Parties' place in the Competitive Environment

AGL's estimates of the Notifying Parties' and their competitors' customer numbers are set out in the Confidential Annexure to this submission.

In the national markets, the Notifying Parties will be competing against both existing suppliers with significant market shares and new entrants whose barriers to entry have been removed by market reforms. Even in regional segments where the Notifying Parties supply franchise customers, the Notifying Parties will face significant competition from incumbent suppliers of other energy products who will be offering combined gas and electricity supply to their established customers, and from new entrant retailers from other regions including gas suppliers using gas from existing transmission sources and from the new Duke pipeline from Victoria.

In this environment, the efficiencies available through the sale of packaged services will enable the Notifying Parties to compete effectively with suppliers of individual services and competing packages of services and the efficiency gains will be passed on to customers through the emerging vigorous inter-regional and inter-product competition.

4.5 Consumer Protection

The proposed conduct is directed towards passing on the savings achieved by the Notifying Parties in providing telecommunications, natural gas and electricity to one customer. It is not designed to, and does not, fetter the customer's choice in the acquisition of telecommunications, natural gas or electricity. The customer is at all times free to acquire one service or the other at published or negotiated rates. At all times the independent prices for telecommunications, natural gas, electricity and energy services will be made clear to the customer, as well as the savings available off each price in the event that the customer chooses to acquire a combination of services.

Under the proposed conduct a customer will have the following choices and be aware that the choices are available to them:

- acquire gas, electricity or telecommunications services independently at market prices;
- acquire combined gas, electricity and/or telecommunications services at market prices reduced by economies of scale; or
- in certain circumstances acquire gas or electricity services at regulated prices.

The Notifying Parties are committed to ensuring that all customers and potential customers are provided with all information relevant to the decision to purchase telecommunications services, natural gas, electricity and energy services. The Notifying Parties each ensure that their managers and representatives are aware of their responsibilities under Part IV and Part V of the *Trade Practices Act 1974* and their obligations to protect both the competitive process and the interests of consumers.

The Notifying Parties recognise that this commitment is particularly important in the move towards full retail contestability for gas and electricity, especially with regard to residential and small business customers. The Notifying Parties are currently working with industry and regulatory bodies to ensure that all customers are aware of the choices available to them in this new market environment. Whilst there shall inevitably be a period of adjustment, the increasing use of strategic alliances and customer loyalty schemes in various sectors such as banking and telecommunications has led to residential and small business customers becoming increasingly sophisticated in their buying habits in this regard. As such, the Notifying Parties believe that

residential and small business customers will be well placed to take advantage of the proposed conduct.

The Notifying Parties hold regular trade practices training sessions for its staff at which issues of consumer protection, particularly the prevention of misleading or deceptive conduct and the resolution of third-line forcing issues, are paramount. AGL provides a trade practices compliance guide to employees emphasising these issues and has developed an electronic trade practices compliance program that conforms to AS3806 – Compliance Programs (1998).

4.6 Public Benefit

In its February 1998 Guide to Authorisation and Notification for Third Line Forcing Conduct, the ACCC considers that:

“In the absence of misleading information about prices—and provided purchasers are not in fact forced to purchase both products and have enough information to make an informed decision on the supplier’s offer—the conduct would have little anti-competitive effect...

Moreover, there is inherent public benefit in the conduct when customers can buy the package of products A and B at a genuine saving on the total price of the products bought separately in competitive markets. In such circumstances, the conduct would result in lower prices for customers and would serve to increase competition in the markets for both products and immunity under the authorisation or notification process would likely be obtained.”

The Notifying Parties’ proposed conduct falls within the category described by the ACCC. The customers will have a genuine choice about the services they will acquire. Pricing structures will be transparent and allow informed decisions to be made. Given this, the proposed conduct shall provide a tangible benefit, and no detriment, to the consumer. It further causes no detriment to any competitor of the Notifying Parties beyond legitimate competitive conduct.

In the United States, concerns about the possible anti-competitive effects of bundling do not arise where both the tied and tying products are independently available: that is, “...where the buyer is free to take either product by itself there is no tying problem”.³ The legal position under sections 47(6) and (7) of the *Trade Practices Act 1974* is clearly different from the position in the United States, since it prescribes a per se rule rather than applying the competition test. However, the US antitrust law indicates the situations in which such conduct will constitute a public

³ *Northern Pacific Railway* 356 US at 6 n 4

detriment and when it may provide a public benefit, and as such are useful in the context of a notification.

The proposed conduct will allow the Notifying Parties to pass on to customers the economies of scale and scope they derive from offering a combination of telecommunications, natural gas, electricity and energy services to customers who may have diverse needs. These economies are achieved through various aspects of the proposed conduct including rationalised administration, reduced billing and credit costs, reduced customer relationship costs and simple economies of scale.

Where permitted by regulation, customers may also wish to enter into combined “dual fuel” contracts with the Notifying Parties, while still being given the option to enter into separate contracts at standard prices. Combined contracts would reduce overheads for the Notifying Parties and its customers and result in improved customer convenience and savings.

Passing these savings on to the customer will have clear financial benefits for the individual customer and may also reduce the customer’s administration costs and inconvenience by providing a single bill and single point of contact for that customer’s energy services.

The proposed conduct can also be expected to impel competitive responses from other suppliers of natural gas or electricity. These responses would take the form of lower prices and increased levels of service and convenience. The increasing number of suppliers who provide both natural gas and electricity can be expected to respond with a similar opportunity to pass on the savings achieved by a combined supply, as has occurred in the already contestable market of large volume gas and electricity customers.

Some of these competing suppliers may be entirely integrated such that the one corporate entity holds both gas authorisations and electricity supply licences. In these cases the supplier will be free to provide discounts on combined offerings without notifying conduct to which sections 47(6) or (7) of the *Trade Practices Act 1974* applies.

In this case the discounting of Additional Services is pro-competitive. It is likely to drive down prices, allow the Notifying Parties to compete with structurally integrated energy suppliers, and provide an opportunity for the Notifying Parties to compete with other suppliers of energy and telecommunications services across Australia.

Confidentiality has been granted for the Confidential Annexure

ANNEXURE A(2)

Confidentiality has been granted for Annexure A(2)