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20 December 2013

BY EMAIL

General Manager
Adjudication Branch
Australian Competition and Consumer
Commission
GPO Box 3131
Canberra ACT 2601

ashurst

By email to: adjudication@acc.gov.au

Dear Sir/Madam

AGL - Notification of third line forcing conduct

We act for AGL Energy Limited, and its related entities (together, **AGL**).

We enclose:

- a notification of exclusive dealing (Form G), in relation to conduct which may raise issues under the third line forcing provisions of the *Competition and Consumer Act (Cth) 2010*; and
- an EFTPOS receipt for \$800 being the relevant fee for lodgement of AGL's third line forcing notification (\$100 for each of the eight entities listed in paragraph 1(a) of the enclosed Form G).

Please contact Alice Muhlebach (+61 3 9679 3492) or David Fleming (+61 2 9258 6510) if you require any further information or would like to discuss this matter.

Yours faithfully

Alice Muhlebach
Partner

David Fleming
Senior Associate

AUSTRALIA BELGIUM CHINA FRANCE GERMANY HONG KONG SAR INDONESIA (ASSOCIATED OFFICE) ITALY JAPAN PAPUA NEW GUINEA
SAUDI ARABIA SINGAPORE SPAIN SWEDEN UNITED ARAB EMIRATES UNITED KINGDOM UNITED STATES OF AMERICA

Ashurst Australia (ABN 75 304 286 095) is a general partnership constituted under the laws of the Australian Capital Territory and is part of the Ashurst Group. The Ashurst Group has an office in each of the places listed above.

227943284.01

Form G

Commonwealth of Australia
Competition and Consumer Act 2010 — subsection 93 (1)
NOTIFICATION OF EXCLUSIVE DEALING

To the Australian Competition and Consumer Commission:

Notice is hereby given, in accordance with subsection 93 (1) of the *Competition and Consumer Act 2010*, of particulars of conduct or of proposed conduct of a kind referred to subsections 47 (2), (3), (4), (5), (6), (7), (8) or (9) of that Act in which the person giving notice engages or proposes to engage.

1. Applicant

(a) Name of person giving notice:

N97165 *AGL Energy Limited (ABN 74 115 061 375)*
N97166 *AGL Retail Energy Ltd (ABN 21 074 839 464)*
N97167 *AGL Sales Pty Ltd (ABN 88 090 538 337)*
N97168 *AGL South Australia Pty Ltd (ABN 49 091 105 092)*
N97169 *AGL Sales (Queensland) Pty Ltd (ABN 85 121 177 740)*
N97170 *AGL Sales (Queensland Electricity) Pty Ltd (ABN 66 078 875 902)*
N97171 *AGL Energy Sales & Marketing Ltd (ABN 18 076 092 067)*
N97172 *AGL Energy Services Pty Ltd (ABN 57 074 821 720)*
(collectively, the AGL Group).

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

The principal business of each of the entities listed in 1(a) is the retailing of electricity or gas.

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

*c/o Alice Muhlebach
Ashurst Australia
Level 21, 181 William Street
Melbourne VIC 3000
Phone : +61 3 9769 3492*

2. Notified arrangement

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

This notice concerns the supply of, or acquisition by persons of:

- (i) *loyalty program services (as described in section 2.4 of Annexure A) supplied by the AGL Group;*
- (ii) *retail gas and electricity, and other related products and services, supplied by the AGL Group and related entities;*
- (iii) *a range of goods or services including energy efficiency appliances and services supplied by AGL Smarter Living franchisees, as described in section 2.10 of Annexure A; and*
- (iii) *FlyBuys membership services supplied by Loyalty Pacific Pty Ltd ("Loyalty Pacific").*

- (b) Description of the conduct or proposed conduct:

The proposed conduct could be characterised as:

1. *The AGL Group supplying or offering to supply loyalty program services:*

- (i) *to persons who acquire eligible goods or services from the AGL Group or a related entity, on the condition that they have acquired or will acquire "FlyBuys" membership services from Loyalty Pacific; and*
- (ii) *to persons on the cumulative conditions that:*
 - (A) *they acquire eligible goods or services from a current or future AGL Smarter Living franchisee (which is not a related AGL Group entity); and*
 - (B) *they have acquired or will acquire "FlyBuys" membership services from Loyalty Pacific; and*

2. *The AGL Group refusing to supply loyalty program services:*

- (i) *to persons who acquire eligible goods or services from the AGL Group or a related entity for the reason that they have not acquired or agreed to acquire "FlyBuys" membership services from Loyalty Pacific; and*
- (ii) *to persons for the reason that:*
 - (A) *they have not acquired or agreed to acquire "FlyBuy" membership services from Loyalty Pacific; and/or*
 - (B) *they have not acquired or will not acquire eligible goods or services from a current or future AGL Smarter Living franchisee (which is not a related AGL Group entity).¹*

(To the extent that persons described in circumstances 1(i) and 2(i) above are AGL-linked FlyBuys Members as described in section 2.3 of Annexure A, this conduct is already the

¹ *For the avoidance of doubt, the fact that a person in circumstance 2(ii)(B) has not acquired or agreed to acquire eligible goods or services from a current or future AGL Smarter Living franchisee, will not preclude that same person from receiving loyalty program services from AGL to which they may otherwise be entitled in respect of other eligible purchases (ie, from the AGL Group or a related entity in circumstance 1(i)).*

subject of existing Notifications N95794 - N95801 lodged on 5 April 2012 ("Existing Notification"), which is to be read together with the current notification).

3. Persons, or classes of persons, affected or likely to be affected by the notified conduct

- (a) Class or classes of persons to which the conduct relates:

Current and future FlyBuys Members (of which AGL-linked FlyBuys Members are a subset) who acquire eligible goods or services from the AGL Group or a related entity, or AGL Smarter Living franchisees.

- (b) Number of those persons:

- (i) At present time:

There are currently around 450,000 AGL-linked FlyBuys Members.

The total number of FlyBuys Members is not known by the AGL Group, but is estimated to be significantly greater than the number of AGL-linked FlyBuys Members set out above.

- (ii) Estimated within the next year:

It is estimated that there could potentially be up to 580,000 AGL-linked FlyBuys Members within the next year.

The likely total number of FlyBuys Members within the next year is not known by the AGL Group, but is estimated to be significantly greater than the number of AGL-linked FlyBuys Members set out above.

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

Not applicable.

4. Public benefit claims

- (a) Arguments in support of notification:

The notified conduct will generate a number of public benefits.

Please see Annexure A for further information.

- (b) Facts and evidence relied upon in support of these claims:

Please see Annexure A.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (a) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

Please see Annexure A.

6. Public detriments

- (a) Detriments to the public resulting or likely to result from the notification, in particular the likely effect of the notified conduct on the prices of the goods or services described at 2 (a) above and the prices of goods or services in other affected markets:

The notified conduct will not cause any identifiable detriment to the public.

Please see Annexure A for further information.

- (b) Facts and evidence relevant to these detriments:

Please see Annexure A.

7. Further information

- (a) Name, postal address and contact telephone details of the person authorised to provide additional information in relation to this notification:

*c/o Alice Muhlebach
Ashurst Australia
Level 21, 181 William Street
Melbourne VIC 3000
Phone : +61 3 9769 3492*

Dated: 20 December 2013

Signed by/on behalf of the applicant



(Signature)

Alice Muhlebach

(Full Name)

Ashurst Australia

(Organisation)

Partner

(Position in Organisation)

Annexure A

2. Background

Existing notification by the AGL Group relating to FlyBuys arrangements

- 2.1 The AGL Group has previously notified the Commission of its arrangements with Loyalty Pacific ("**Existing Notification**")², pursuant to which the AGL Group:
- (a) supplies (or offers to supply) loyalty program services to eligible AGL account holders (being natural persons who hold either a gas or electricity account, or both, with an AGL entity in relation to a premises that is used for residential purposes), on condition that the AGL account holder acquires membership services from Loyalty Pacific; or
 - (b) refuses to supply loyalty program services to eligible AGL account holders on the condition that they have not acquired or not agreed to acquire membership services from Loyalty Pacific.
- 2.2 The loyalty program offered by the AGL Group, using the associated membership services provided by Loyalty Pacific, is commonly known as the "**FlyBuys**" loyalty program. The "FlyBuys" loyalty program is free for persons to join, however they are not compelled to join. Persons who have acquired relevant membership services provided by Loyalty Pacific are referred to in this notification as "**FlyBuys Members**".
- 2.3 Eligible AGL account holders who are also FlyBuys Members and who have met any other requirements to receive loyalty program services from AGL under the Existing Notification, including linking their Flybuys membership and AGL accounts, are referred to in this notification as "**AGL-linked FlyBuys Members**".

The loyalty program services

- 2.4 The types of loyalty program services offered by the AGL Group to AGL-linked FlyBuys Members under the Existing Notification include:
- (a) awarding loyalty points (ie, "FlyBuys" points) related to eligible transactions;
 - (b) notifying Loyalty Pacific of loyalty points earned;
 - (c) offering or awarding bonus loyalty points as a result of promotional or incentive programs initiated from time to time; and
 - (d) offering or awarding additional benefits or privileges including gift cards, invitations to events in store, special discounts and the ability to participate in competitions as a result of promotional or incentive programs initiated from time to time.

Extending loyalty program services to persons who are not AGL-linked FlyBuys Members

- 2.5 The AGL Group now proposes to also supply, or offer to supply, some or all of the loyalty program services to any person who acquires eligible goods or services, on the condition that they become a member of the "Flybuys" loyalty program operated by Loyalty Pacific. That is, it will no longer be necessary for a FlyBuys Member to also be an existing AGL gas and/or electricity account holder, and to have linked their AGL account with their FlyBuys membership, to receive loyalty program services from the AGL Group in respect of eligible purchases.

² Notifications N95794 - N95801 lodged on 5 April 2012. Loyalty Pacific has also notified the Commission that it supplies (or offers to supply) loyalty program services and benefits to members of the "FlyBuys" loyalty program on the condition that they acquire qualifying goods or services from retailers participating in the "FlyBuys" loyalty program (Notification N95793 lodged on 10 April 2012).

Extending "eligible purchases" to purchases from AGL Smarter Living Franchisees

- 2.6 Currently, AGL-linked FlyBuys Members receive loyalty program services from the AGL Group in relation to eligible purchases of goods or services from the AGL Group or a related entity.
- 2.7 The AGL Group proposes to also supply (or offer to supply) FlyBuys Members with additional "FlyBuys" points (or other additional loyalty services of the kind set out in subparagraphs 2.4 (b) to (d) above), on condition that they acquire eligible goods or services from an AGL Smarter Living franchisee, which is not a related entity of the AGL Group.
- 2.8 Consistent with the existing Flybuys arrangements under the Existing Notification, such persons:
- (a) may redeem the additional loyalty points for a wide variety of awards, including accommodation, tickets to shows, meals at restaurants, shopping vouchers, and many other goods and services.
 - (b) are not obliged to redeem any points or the associated promotional benefits or privileges that they have accrued.
- 2.9 For the avoidance of any doubt, the fact that a FlyBuys Member does not acquire eligible goods or service from an AGL Smarter Living franchisee will not preclude that person from receiving loyalty program services from the AGL Group to which they would otherwise be entitled in respect of other eligible purchases (ie, from the AGL Group or a related entity).

AGL Smarter Living franchisees

- 2.10 The AGL Smarter Living franchisees operate retail stores and networks of tradespeople across South Australia, Victoria, New South Wales and Queensland, and include all current and future franchisees. AGL Smarter Living franchisees offer a range of goods and services, including energy efficiency appliances (eg, cooking, cooling, heating and hot water systems) and services (eg, installation of appliances and other electrical, plumbing and gas, and emergency hot water services).
- 2.11 A list of current AGL Smarter Living franchisees is set out in the Schedule to this notification.
- 2.12 None of the AGL Smarter Living franchisees are related entities of the AGL Group.

3. Notified Conduct

- 3.1 The AGL Group proposes to supply, or offer to supply, some or all of the loyalty program services:
- (a) to persons who acquire eligible goods or services from an AGL Group or a related entity, on the condition that they are, or become, a member of the "Flybuys" loyalty program operated by Loyalty Pacific. (To the extent that such persons are AGL-linked FlyBuys Members, this conduct is already the subject of the Existing Notification); and
 - (b) to persons on two cumulative conditions:
 - (i) that they acquire eligible goods or services from a current or future AGL Smarter Living franchisee (which is not a related AGL Group entity); and
 - (ii) that they are, or become, a member of the "Flybuys" loyalty program operated by Loyalty Pacific.
- 3.2 Offers, benefits and rewards may be made available to FlyBuys Members in exchange for redemption of points that are accrued.

4. **Competition issues**

4.1 The Commission should not object to the notified conduct because the conduct:

- (a) will not adversely affect competition in any relevant market;
- (b) will result in public benefits, including those described at paragraph 4.7 below; and
- (c) will not result in any identifiable public detriment (as outlined in paragraph 4.10 below).

Market definition

4.2 The AGL Group has not attempted to form a concluded view on the relevant market(s) or the precise geographic and product boundaries of the relevant markets for the purpose of this notification, because competition concerns are unlikely to arise regardless of the definitions adopted. However, the potentially relevant markets are those for:

- (a) the supply of gas and electricity to retail customers in Australia;
- (b) the supply of loyalty program services and rewards to retail customers in Australia; and
- (c) the other markets in which the AGL Group or a related entity and/or current and future AGL Smart Living franchisees supply goods and services to retail customers in Australia.

Effect on competition in the relevant markets

4.3 Each of the markets described in paragraph 4.2 is characterised by a high degree of competition between providers across Australian states and territories.

4.4 Offering attractive rewards and promotions to FlyBuys Members will:

- (a) increase competition between the many loyalty programs available to consumers in Australia;
- (b) enhance the complementary services offered to consumers of retail gas and electricity and other related products and services in Australia; and
- (c) increase competition between the many alternative providers of the types of goods and services provided by the AGL Group and/or the AGL Smarter Living franchisees.

4.5 In any case, there is no obligation under the notified conduct for FlyBuys Members (or any other person) to acquire goods or services from the AGL Group or a related entity, or an AGL Smarter Living franchisee as a condition of FlyBuys membership. Similarly, there is no obligation under the notified conduct for customers of the AGL Group or a related entity, or AGL Smarter Living franchisees, to become FlyBuys Members as a condition of acquiring energy or energy efficiency products from those entities.

4.6 The conduct will not create barriers to entry or otherwise harm competition in the relevant markets.

Public benefits

- 4.7 The notified conduct will provide a number of benefits to FlyBuys Members, namely the opportunity to earn loyalty points (or other loyalty program services) through eligible transactions, which may be redeemed for rewards.
- 4.8 Additionally, as outlined in section 4.4, the proposed conduct will increase competition in the relevant markets.
- 4.9 The benefit of the notified conduct above will outweigh any possible public detriment.

Public detriment

- 4.10 There is no conceivable detriment to the public that is likely to result from the notified conduct, including because:
- (a) persons continue to be free to choose whether to become FlyBuys Members;
 - (b) FlyBuys Members are free to choose whether they acquire goods or services from the AGL Group and/or an AGL Smarter Living franchisee (as the case may be), or from a large range of other providers;
 - (c) FlyBuys Members are free to choose whether they wish to take advantage of the associated promotional benefits or privileges that they may be entitled to as members; and
 - (d) persons who opt not to participate in the loyalty program will continue to benefit from the many offers and promotions offered to all customers of the AGL Group and/or Smarter Living franchisees.

5. Conclusion

- 5.1 As outlined above, the notified conduct is unlikely to cause any public detriment. Further, any public detriment that may be attributed to the notified conduct will be outweighed by the public benefits that will arise from the notified conduct.
- 5.2 Please contact Alice Muhlebach (+61 3 9679 3492) or David Fleming (+61 2 9258 6510) if you require any further information, or would like to discuss this matter.

Schedule

Current AGL Smarter Living Franchisees

Company	Trading as	Address	ABN
Guymin Pty Ltd	AGL Smarter Living	161-165 Grote Street Adelaide, SA, 5000	28 057 626 169
GHP (NSW) Pty Ltd	AGL Smarter Living	Unit 21/12A Loyalty Rd North Rocks, NSW, 2151	15 130 024 618
Energy Assist Pty Ltd	AGL Smarter Living	3/185 Beverley Street Morningside, QLD, 4170	29 126 234 713
R Mechanical Services Pty Ltd	AGL Smarter Living	Unit 18/52 Corporate Blvd Bayswater, VIC, 3153	21 136 539 583