

12 February 2016

Paul McCullough  
General Manager  
Market and Competition Policy Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

## **ENA response to Australian Government's Discussion Paper - Options to strengthen the misuse of market power law**

Dear Mr McCullough,

The Energy Networks Association (ENA) welcomes the opportunity to provide this submission in relation to the Australian Government's Discussion Paper *Options to strengthen the misuse of market law* which was released in December 2015.

The ENA is the national industry association representing the businesses operating Australia's electricity transmission and distribution and gas distribution networks. Member businesses provide energy to virtually every household and business in Australia. The ENA's members own assets valued at over \$100 billion in energy network infrastructure.

### ***Scope of proposed changes to Section 46***

The ENA's member businesses are subject to the broad provisions contained within the Competition and Consumer Act 2010 (CCA). Section 46 includes a general prohibition of misuse of market power. The Independent Competition Policy Review chaired by Professor Ian Harper proposed to reform section 46 of the CCA with the aim of improving its clarity and strengthening its effectiveness.

In principle, the ENA supports the simplification objective as outlined in the Competition Policy Review Final Report. However, it is essential that the Government is satisfied that any amendments to section 46 do not unintentionally discourage conduct that promotes vigorous competition. Should the policy intent and scope of the revised provisions not be sufficiently clear, uncertainty over the practical operation and enforcement of the changes has the potential to have an unintentional 'chilling' effect on otherwise vigorous pro-competitive conduct by firms which directly benefits consumers.

### ***Implications of emerging technologies and competition in energy services***

The ENA would like to use this opportunity and provide its comments in relation to several other critical matters arising from the Competition Policy Review Final Report and the Government's response to this review.

The energy network sector is undergoing a transformation as a result of the emergence of competitive new technologies, government policy and customer preferences. In this regard, it is crucial that Australia's competition policy, laws and institutions are capable of supporting and facilitating these changes.

The purpose of the traditional framework for economic regulation of network businesses is to avoid the consumer harm and inefficiency that can arise from exercise of market power, and provide network service providers with incentives for efficient investment in, and operation of infrastructure assets. The existing regulatory framework has been designed to promote the long-term interest of consumers, objectives enshrined in the relevant National Energy Laws.

However, some elements of the existing regulatory regime may become of less relevance over time with changes to market, technology, asset mixes and business models. This means that the regulatory framework will need to evolve to be sufficiently flexible so that network businesses can effectively respond to a range of changed market, competitive and technological circumstances. For example, it is important as technology evolves that the scope of regulation covering new contestable services is subject to an explicit and rigorous consideration. It is likely that there will be less need for prescriptive economic regulatory frameworks, as competition emerges more strongly in the future. The changes will also have implications for the best means of providing appropriate consumer protection frameworks into the future.

These considerations led ENA, in its submissions to the COAG Energy Council's Review of Governance Arrangements for Australian Energy Markets, to argue that there is a strong need for a managed process for evaluating strategic, nationally significant issues in the scope of energy regulation. In particular, the ENA suggested that it may be appropriate to amend the National Energy Laws and Rules to explicitly limit the extent to which the Australian Energy Regulator should assess the scope of economic regulation as part of its regulatory processes. Instead, this role could be undertaken by the Australian Energy Market Commission or another body. This is because significant market and regulatory design issues, such as the introduction of contestability in existing monopoly energy services, should be rigorously evaluated and resolved by an agency independent of the economic regulator tasked with applying the regulatory framework.

### ***Harper Competition Policy Review recommendations on institutions and governance***

The ENA further notes that the Competition Policy Review Final Report proposed the establishment of the Access and Pricing Regulator which would assume responsibility for economic regulation of telecommunications, water, gas and electricity. In this regard, the Government response to the review states the Commonwealth remains open to this recommendation, subject to further discussions with States and Territories on institutional architecture to support reform.

The key priority of the energy networks sector in considering the issue of the structure and form of the economic regulator is ensuring an independent, effective and credible regulatory body with resources to carry out its functions and specialist expertise in the economic regulation of energy networks. The ENA considers that timely implementation of the Review of Governance Arrangements for Australian Energy Markets recommendations relating to the Australian Energy Regulator will allow it to effectively achieve this objective. As such, the ENA strongly supports the role of the Australian Energy Regulator in the economic regulation of electricity and gas transmission and distribution networks and enforcing of the Rules for the National Electricity Market.

Finally, the ENA would like to re-emphasise the importance that any Federal, State and Territory governments' policy interventions which may impact on competitive markets or network efficiency happens in a coordinated way. However, the ENA considers that nationally agreed arrangements should be pursued where possible. To this end, the ENA has been a strong supporter of the transfer of regulatory functions from the Economic Regulation Authority in Western Australia, and the Utilities Commission in the Northern Territory to the Australian Energy Regulator and the application of a

common rules framework across all jurisdictions. These reforms are currently underway and are expected to strengthen the national character of governance of energy reforms and streamline and improve the quality of economic regulation.

The ENA appreciates the opportunity to provide these comments to the Australia's Government. If you have any questions, please contact Mr Garth Crawford, Executive Director – Economic Regulation on 02 6272 1555.

Yours sincerely,



John Bradley

**Chief Executive Officer**