

Our Ref: AER24008627
Your Ref: RPR0016
Contact Officer: Neil Unantenne
Contact Phone: [REDACTED]
Date: 4 March 2024

Mr Ben Davis
Australian Energy Market Commission
PO Box A2449
Sydney South, NSW, 1235

Dear Ben

Review into the arrangements for failed retailers' electricity and gas contracts

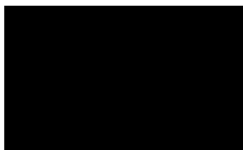
The AER welcomes the opportunity to comment on the recent draft report released by the AEMC regarding the review into the arrangements for failed retailers' electricity and gas contracts.

We consider that the recommendations are likely to simplify and improve the retailer of last resort (**RoLR**) scheme, better protect retailers who take on the failed retailer's customers and lower costs for consumers.

The AER has prepared a brief response against each recommendation in the draft report, in the **Attachment**. In summary, the AER is broadly supportive of recommendations 1 through to 8, and tentatively supportive of recommendations 9 and 10. In relation to the former, we highlight the need to ensure there is no positive obligation on the AER to pursue cost recovery where it is considered inefficient to do so. As for the latter, we note the difficulty of formulating a civil penalty in this context and have made some comments in this regard in the Attachment.

We thank the AEMC for the opportunity to provide input to this consultation. If you have any questions about our submission, please contact Neil Unantenne on [REDACTED].

Yours sincerely,



Rowena Park
General Manager, Compliance & Enforcement
Australian Energy Regulator

Attachment

AEMC's draft recommendations	AER staff view
<p>1) Require the AER to issue gas directions for all RoLR events, except if the AER reasonably considers that issuing the direction would not benefit the designated RoLR or consumers</p>	<ul style="list-style-type: none"> • The AER is supportive of this recommendation. • In terms of the timing of the issuing of the gas directions, the AER should be explicitly given a reasonable time to gather information necessary to issue a gas direction before putting the direction in the notice.
<p>2) Extend the RoLR gas directions period from three to six months.</p>	<ul style="list-style-type: none"> • The AER is supportive of this recommendation - extending directions period from 3 to 6 months provides extra protection of supply adequacy.
<p>3) Remove the mandatory negotiation process between the failed retailer and designated RoLR, and the subsequent auction process if negotiations are unsuccessful.</p>	<ul style="list-style-type: none"> • Having reflected on the draft report, the AER supports the removal of the mandatory negotiation requirement and auction and acknowledges that the six month direction period provides significant benefit.
<p>4) Clarify what happens to contracts that begin or end during the directions period. Specifically that gas directions:</p> <ul style="list-style-type: none"> • do not apply beyond the expiration of the directed contract; but, • do apply for contracts that are due to begin during the direction period and where there is an option to extend at the sole discretion of the retailer. 	<ul style="list-style-type: none"> • The AER supports this recommendation that it would be appropriate for the direction to continue to apply if a directed contract includes options to extend the contract within the period of the direction. • The AER supports the AEMC's proposal that directions should include contracts that are due to commence during the direction period. • The AER also suggests that the AEMC consider whether, if there is an option to extend the contract within the direction period that is exercised by the RoLR, there should be a positive obligation on the gas producer to agree to extend the option for the period of the gas direction to enable the use of the gas, if the gas producer has sufficient gas supply.
<p>5) Expand the RoLR gas directions framework to include storage contracts and gas held in storage.</p>	<ul style="list-style-type: none"> • The AER supports the AEMC extending the AER's directions powers to include gas storage contracts, as it could ensure adequate supply of gas by a designated RoLR during times of peak demand.
<p>6) Require RoLRs to pass on the benefits from RoLR gas directions with customers and provide evidence to the AER on how this obligation was met.</p>	<ul style="list-style-type: none"> • The AER agrees with the principle of mandating that any benefits from a gas RoLR event should be passed onto customers of the failed retailer. However, it is noted that there may be challenges in designing such a requirement through the regulatory framework in a form that is enforceable. The AEMC should consider recommending that a civil penalty be applicable to this obligation to encourage compliance. • In place of a specific requirement, designated RoLRs could be required to report to the AER on how the benefits have been passed onto customers. This would create transparency and visibility for stakeholders and provide assurance that the benefits are being passed on, without

Attachment

AEMC's draft recommendations	AER staff view
	<p>specifying a particular mechanism. Again the AEMC should consider recommending a civil penalty for the reporting obligation.</p>
<p>7) Improve cost recovery through changes to existing AER RoLR guidelines.</p>	<ul style="list-style-type: none"> The AER supports that the AER RoLR guidelines would be the most appropriate place for this cost recovery clarity.
<p>8) Expand the AER's RoLR information-gathering powers to include third parties to enable designated RoLRs to get the necessary information to service transferred customers.</p>	<ul style="list-style-type: none"> The AER supports this new avenue for gathering critical information from third parties to manage a RoLR event.
<p>9) Introduce a new framework that allows the AER to issue the failed retailer a bill for the costs associated with its failure.</p>	<ul style="list-style-type: none"> AEMC propose that the AER could issue a bill to the failed retailer placing them on notice that future cost recovery applications may be forthcoming – but allow the AER discretion on whether to pursue the debt. This would mean the AER would have an unsecured debt against the failed retailer. Assuming that the AER could exercise discretion around the issuance of a bill as informed by the utility of doing so in the facts and circumstances of each relevant RoLR event, the AER is tentatively supportive of such a recommendation.
<p>10) Introduce a civil penalty provision for improper use of the RoLR scheme.</p>	<ul style="list-style-type: none"> These proposals intend to create a stronger incentive not to cause a RoLR event, but (as noted by some other stakeholders) most businesses already face very strong incentives to avoid becoming insolvent. We note there are other RoLR event triggers outside of insolvency, which could be improperly used. Careful consideration should be given to how to frame an obligation of this type in order for it to be enforceable for the AER's purposes.