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Australian Energy Markets Commission
Lodged electronically

AEMC Directions Paper – RoLR review into the arrangements for Failed Retailer's electricity and gas contracts

EnergyAustralia is one of Australia's largest energy companies with around 2.4 million electricity and gas accounts in NSW, Victoria, Queensland, South Australia, and the Australian Capital Territory. EnergyAustralia owns, contracts, and operates a diversified energy generation portfolio that includes coal, gas, battery storage, demand response, solar, and wind assets. Combined, these assets comprise more than 5,000MW of generation capacity.

EnergyAustralia appreciates the opportunity to provide a submission to the AEMC's Directions Paper on its review into the arrangement for failed retailer's electricity and gas contracts. EnergyAustralia is a default electricity Retailer of Last Resort (RoLR) for both gas and electricity in a couple of jurisdictions and was the designated electricity RoLR for Ausgrid NSW in the retailer failures last year. Most recently, EnergyAustralia was a designated RoLR when two more electricity retailers failed this month (Mojo Power Pty Ltd and QEnergy Limited). This review is therefore important and timely given the recent retailer failures and last year's unprecedent events that saw several retailer failures in a short period and the gas directions framework used by the AER for the first time.

EnergyAustralia is pleased to see that the AEMC has considered feedback from Stage 1 of this review, and this is reflected in the revised options in the Directions Paper. We support the AEMC's decision to not further explore the options of a matchmaking service or intervening in the contract market.

Regarding electricity, we largely support the AEMC's proposed improvements to the electricity cost recovery framework. In summary, we:

- support the RoLR being able to claim the total cost of providing RoLR services and clarifying the costs that can be claimed.
- support establishing cash flow improvement processes with preference for an option that results in timely payment at the date of customer transfer, or close to.
- support the AER issuing the failed retailer a bill for the costs of its failure, which can help deter retailers from choosing to use RoLR to exit the market if it is commercially attractive.

- do not support registering security interests in favour of the AER on the Personal Property Securities Register (PPSR). The legal framework of the *Personal Property Securities Act 2009* (Cth) (PPSA) is very complex. It is imperative that the implications of granting and registering security interests on the PPSR are well understood. We have strong concerns that this option could have adverse impacts on retailer operations – such as access to finance and other serious unintended consequences.
- recommend the designated RoLR have access to timely, comprehensive, and standardised information at the start of a RoLR event on the failed retailer's customers. This can provide the RoLR the ability to better manage the transfer of customers and improve the experience of impacted customers with the RoLR.

Regarding gas, overall, we recommend that the cost recovery framework proposed for electricity should also be considered for gas. This includes the mechanism to bill the failed retailer the cost of its failure. These measures can improve outcomes for impacted customers and managing the financial risks to the RoLR. Further, a cost recovery provision for gas can be an important backstop should additional costs of providing RoLR services arise outside of, or even with the use of, gas directions. This approach could result in better customer outcomes as it does not strictly rely on increasing customer tariffs to recover costs.

On the AEMC's proposed changes to the gas direction framework, based on the poor reported outcomes from the gas RoLR event last year, we:

- suggest automating the gas directions trigger in a RoLR event (at least as the default position and exceptions can be carved out for complex scenarios). This provides certainty that the designated RoLR will be able to service transferred customers.
- support expanding the scope of gas directions to include all necessary gas contracts to physically supply customers. This includes storage contracts, pipeline capacity contracts and DWGM Entry and Exit capacity certificates.
- support extending gas directions to be 6 to 12 months, with 6 months minimum and the flexibility for the AER to extend.
- support introducing negotiation principles for all parties to negotiate in good faith and best endeavours to reflect the original price terms of the contract between the gas producer and the failed retailer.
- are comfortable with the AEMC's view on clarifying what happens to contracts that begin or end during directions.
- support an obligation to share the benefits of RoLR direction with customers in good faith and on a reasonable basis with a requirement for the RoLR to let the AER know how this obligation was met.

If the gas direction framework is clear and set right, reflecting the outcomes above, then there may not be a need for mandatory negotiation between gas producers, the failed retailer and the RoLR. Consistent with electricity, the designated gas RoLR should have access to timely, comprehensive, and standardised information at the start of a RoLR event on the failed retailer's customers.

Our full submission to the questions in the Discussion Paper is divided into discussion about electricity and gas below.

Further to the comments we make in response to the Discussion Paper, we believe critical concerns with the RoLR framework to be:

- the RoLR event definition, which allows a retailer to choose to trigger a RoLR event if it is commercially attractive, as discussed in our previous submission;
- that there is currently no prescribed backstop in place if a large retailer or a designated RoLR fails.

We recognise this review does not specifically examine these issues, but we emphasise the importance of considering these further in the future to establish a more robust and fit for purpose RoLR framework.

ELECTRICITY QUESTIONS

Question 1: What improvements should be made to the RoLR cost recovery framework?

Should the costs that can be claimed by a designated RoLR be defined specifically? Please specify what costs should be claimable and how they would be identified. Please also comment on whether these costs should be in reference to the DMO for small customers and not available for customers not subject to the DMO?

Yes, currently the law is not explicit in what costs can be claimed by the designated RoLR and we fully support clarifying these costs; preferring broad drafting in the legislation to ensure the total cost of the RoLR event can be claimed (i.e. not restrictive in reference to DMO language). Without limiting the costs that can be claimed, these should include:

- Wholesale and hedging costs after notification of the RoLR event:
    - Initial costs at spot market pricing for the first 24 hours (unhedged)
    - After this, cost of buying at spot market prices up to when the RoLR is able to complete a hedged position.
    - After the additional load is hedged: higher wholesale energy costs secured under short term hedging should also be recoverable, where this is not covered by the retail tariff.
- Recovery of green costs with the same approach as above. This is not mentioned in the discussion paper. A large increase of new customers may require retailers to buy green certificates that are tied to total energy sales and these green costs may be at a higher market rate.
- Operational and administrative costs associated with onboarding transferred customers after the notification of the RoLR event.
- A provision for bad debts associated with onboarding transferred customers after the notification of the RoLR event.

What period after the RoLR event should market costs be able to be recovered by the designated RoLR?

We consider a period of 9 months at the date of transfer sufficient.

How beneficial would progressive or estimated payments be to reducing cash flow issues for the designated RoLR? B) Are these benefits reduced or removed if the market costs that can be claimed are clarified?

It would be very beneficial for the designated RoLR to have access to payments in a RoLR event to reduce cash flow pressures. Timely payment at the date of customer transfer, or close to is key. Wholesale obligations to manage additional and unexpected customer load resulting from a RoLR event was challenging in our experience as retailer failures typically occur during a period of extreme market volatility. We consider timely access to funds not only safeguards the financial stability of the designated RoLR, but also minimises the risk of cascading retailer failures.

We prefer the option of an estimated initial payment followed by a true-up process based on actual costs is better than the option of allowing multiple cost claims by the RoLR, if this means timelier payment. Above all, we agree with AFMA's view and support a flexible multi-stage process where the RoLR can recover an initial amount based on their early estimates, with limited

supporting evidence, and further amounts as costs become clearer. We support a reconciliation process after costs and revenue from the transferred customers are fully known, to mitigate the risk of over recovery. At this stage the RoLR should substantiate its costs and return any over-recovered amounts.

B) Clarifying the costs that can be claimed will assist the RoLR in calculating early estimated payments required to reduce short term cash flow issues. There are clear and distinct benefits for clarifying costs and implementing cash flow improvement processes so both measures should be adopted.

Question 2: Should we issue the failed retailer with a bill for the costs of its failure?

Yes, we support the AER issuing the failed retailer a bill for the costs of its failure. This can help deter retailers from choosing to use RoLR to exit the market if it is commercially attractive. If the retailer is solvent, the provision to bill the failed retailer helps allocate the cost of the RoLR more appropriately.

If the retailer is insolvent, the question of whether retailers registering security interests in favour of AER on the PPSR will improve overall outcomes is unlikely. We therefore cannot support this proposal.

While the concept of this option is well intended, we consider the legal framework of the PPSA to be very complex, and it is arguably not the appropriate mechanism for the type of regulatory intervention being considered by the AEMC. This approach could adversely affect a retailer's operations and ordinary course of business, even when a retailer is solvent. For example, a lender, having notice of a security interest registered on the PPSR in favour of the AER, may not be willing to lend to the retailer because the retailer may be deemed as having insufficient security to secure the transaction, thereby making it more difficult for the retailer to access funding. This may have the unintended impacts of decreasing competition and making the barriers to entry too high, as AFMA also noted in its submission.

Further and more broadly, freedom of contract and the consensual grant of security interests are fundamental to commercial law and the operation of the PPSA. To obligate retailers by law to grant an 'all assets security interest' in favour of the AER, arguably does not accord with those principles and could have serious unintended consequences.

We note that it may not be just a simple matter of registering an 'all assets security interest' on the PPSR, there are other legal complexities and implications that must be well understood. For example, the complexities surrounding 'perfection' of security interests, and how different methods of perfection for different types of personal property can impact on priorities between perfected security interests, and the eventual payment a creditor may receive.

Question 3: What information is necessary for the AER and electricity RoLRs to fulfil their duties, and how should it be collected?

Retailer failure creates significant operational challenges for the designated RoLR in managing transferred customers as these events happen quickly and unexpectedly. While the RoLR may receive some information sourced from the failed retailer, in our experience it has been insufficient and not timely enough to provide an adequate level of customer experience for transferred customers. As a result, these new customers churn quickly, and this is a poor outcome for the designated RoLR as it incurs costs to hedge for the additional and unexpected customer load.

Based on our experience, we believe the designated RoLR should have access to relevant, timely and standardised information at the start of a RoLR event. This includes comprehensive information on the failed retailer's customers, such as:

- the current offers customers are on – including whether they are on a fixed price contract
- their solar profile
- hardship program support details
- payment plan support details
- applicable concessions
- life support requirements
- other relevant customer indicators.

The failed retailer should be able to provide this information to the AER.

We suggest:

- the information provided to the designated RoLR be standardised and provided at the start of the RoLR event. The failed retailer should provide this information to the AER upon notifying of the RoLR event. This provides the RoLR the ability to better manage the transfer of customers and improves the experience of impacted customers with the RolR.
- the requirement to provide this standardised information can be made known to new retailers at the time of authorisation.
- further consultation with industry on the details of standardising this information.

Gas should have an equivalent cost recovery framework

We appreciate that the AEMC is looking to improve the current gas framework that allows the AER to direct gas contracts of the failed retailer to the designated RoLR. We do not have firsthand experience of how these gas directions work in practice, however we are concerned about the poor outcomes reported from the gas RoLR event last year under the existing framework.

Overall, we consider the ability for the RoLR to recover the cost of supplying transferred gas customers is paramount. For this reason, we consider the cost recovery framework and the mechanism to bill the failed retailer the cost of its failure proposed for electricity should also be considered for gas. We recognise that while there is currently no restriction on gas retail prices, recovery of costs in a RoLR event remains an important issue for gas retailers, particularly as RoLR events typically occur in extremely volatile market conditions where wholesale spot prices tend to be much higher.

An approach to bill the failed gas retailer the cost of its failure can improve outcomes for impacted customers (i.e. not strictly relying on recovering costs via higher retail tariffs) and managing the financial risks to the RoLR. As with electricity, cost recovery in gas should allow for the total cost from supplying RoLR services to be claimable. Gas directions that are required to physically supply the transferred customers would be complementary to the cost recovery measure.

GAS QUESTIONS

Question 4: Should we change the RoLR gas directions triggers?

Based on the gas RoLR event last year which resulted in reported poor outcomes from the existing gas direction triggers, we support:

- automating the gas direction trigger in a RoLR event which provides certainty that the designated RoLR will be able to service transferred customers. We recognise that automatically novating these contracts to the RoLR may not make sense in all scenarios (for example if there is a single gas contract and multiple designated RoLRs), however given the reported challenges and difficulties in the existing gas directions framework seen in the gas RoLR event last year, we support the automation of the trigger as the default position and specific exceptions can be carved out for more complex scenarios.

- expanding the gas direction triggers to consider prevailing market conditions and pricing. We prefer to base this on objective criteria such a materiality threshold, but a workable approach appears unclear. As such we are comfortable providing the AER discretion based on whether it considers there will be a material financial impact on the designated RoLR in supplying transferred customers. Overall, an automatic gas direction trigger in a RoLR event should mitigate the risk that the RoLR will be unable to supply the transferred customers on the same price terms as the failed retailer.

Importantly, the ability to recover costs of providing RoLR services can be an important backstop should the use of gas directions not be sufficient to physically supply transferred customers. If there are additional costs in providing RoLR services arising outside of, or even with the use gas directions, the RoLR should be able to claim these (for example, buying spot gas to supply transferred customers initially).

Question 5: Should we increase the length of time RoLR gas directions apply?

Yes, we consider the current 3-month period is insufficient and a period of 6 to 12-months is more appropriate, 6 months being a minimum. As described in our previous submission, this is because:

- A 3-month period does not reflect the time taken for a designated RoLR to negotiate a new contract/novation with the gas producer, where there is no express obligation for a gas producer to offer the original pricing that was in place for the failed retailer. Six months is a reasonable and necessary period, even if a new requirement to negotiate in good faith or best endeavours is introduced.

- From a customer tenure perspective, a 6-month period will also better reflect that Designated RoLRs must supply large customers for 6 months.[1] i.e., the direction on the gas producer to supply gas needs to last for 6 months. For mass market customers, Retailers generally buy gas for 12 months.

- 3 months is also inadequate given the gas directions power will likely be used at the time wholesale gas prices are high, the shorter coverage does not allow any chance for the market to restabilise before a new supply contract needs to be in place to supply RoLR customers. For example, if the RoLR event happened at the beginning of winter, the 3-month coverage would mean that Designated RoLRs will be in the market negotiating for gas for RoLR customers when prices are likely to be the highest.

Increasing the length of time for a RoLR direction can provide certainty to the designated RoLR that it can supply impacted customers with gas on the same price and terms.

Would there be benefits in a flexible direction period (e.g., a minimum timeframe with an ability to extend to a specified period)? If so, what criteria should apply to extensions?

Yes, an ability to extend the direction period can mitigate the risk that the RoLR will be unable to supply transferred customers. We support providing the AER with discretion to extend the direction period if it considers the RoLR will be unable to supply the transferred customers with gas on the same or better price and terms.

[1] Section 168 of the NERL provides that a Designated RoLR may, at any time, serve a notice on the large customer stating that its default agreement in place because of the RoLR will be terminated after a period of 6 months after the transfer date.

Question 6: Should we introduce negotiation principles?

We support introducing good faith negotiation principles to help improve outcomes which may deter failed retailers from frustrating negotiations (billing the failed gas retailer the cost of failure can also do this).

We suggest a requirement to negotiate in good faith and best endeavours to reflect the original price terms of the contract between the gas producer and the failed retailer, as discussed in our previous submission.

Failure to do this can result in the failed retailer being removed from the negotiation process. We ultimately consider that the failed retailer should have limited rights in a RoLR event.

Question 7: Should we remove the negotiation process?

Current arrangements saw the failed gas retailer able to frustrate negotiations until the 3-month period ended whereby it was then able to auction off the remainder of its gas.

We consider that if the directions framework is clear and provides the RoLR with clear access to the failed retailer's gas contracts then a negotiation process may not be needed.

As reflected in our responses above, the gas directions framework should:

- automate the gas direction trigger in a RoLR event which would provide certainty that the designated RoLR will be able to physically supply gas to customers.
- set a 6-to-12-month period for the RoLR gas directions with the ability for the AER to extend.
- include all gas contracts necessary to supply transferred customers.
- Be complementary to a cost recovery scheme which allows the RoLR to recover additional costs from providing RoLR services.

Question 8: How should we clarify what happens to contracts that begin or end during directions?

AEMC's view on the following appears to make sense, which we are comfortable with:

- Gas producers' responsibility to comply with direction should end when the directed contract expires.
- It may be appropriate for direction to continue to apply for contracts that have options to extend contracts.
- Direction should include contracts that are due to commence. This is because producers will have planned to supply this gas anyway and the gas might be needed for the incoming RoLR to service new customers.

Question 9: Should gas storage contracts be considered in the RoLR gas directions framework?

We consider that any gas contracts that are necessary for the physical supply of gas to service transferred customers should be included in the RoLR gas directions. We therefore support extending directions to gas storage contracts. As raised in our previous submission, the gas directions power should also extend to pipeline capacity contracts and DWGM Entry and Exit Capacity certificates as they are all potentially required to physically deliver to the failed retailers' customers.

Gas held in storage that is needed to supply the transferred customers should be transferred to the RoLR. If the failed retailer paid for this gas, it is reasonable to require the RoLR to pay the

failed retailer. Ultimately, a cost recovery framework for gas can include a reconciliation process after costs and revenue from the transferred customers are fully known and adjustments can be made at this stage.

Question 10: How can the benefits or costs of RoLR events be shared with customers?

On costs, establishing a cost recovery framework for gas as proposed in electricity can assist with capturing costs from the failed retailer and reducing the cost of the retailer failure for impacted customers and the RoLR.

We support an obligation to share the benefits of RoLR direction with customers in a way that is not too prescriptive. We support the view that this is done in good faith and on a reasonable basis with a requirement for the RoLR to let the AER know how this obligation was met.

Question 11: What information is necessary for the AER and gas RoLRs to fulfil their duties, and how should it be collected?

Similar to electricity, the designated gas RoLR should have access to relevant, timely and standardised information at the start of a RoLR event. This includes a comprehensive brief on the failed retailer's customers, such as information about:

- the current offers customers are on – including whether they are on a fixed price contract
- hardship program support
- payment plan support
- applicable concessions
- life support requirements
- usage profile information
- other relevant customer indicators.

The above information should be sourced from the failed retailer and collected by the AER.

Should there be limits on how the designated RoLR uses certain information?

On the customer information sourced from the failed retailer, we do not consider it necessary to limit the use of this information. The RoLR should treat customer data it is provided with appropriate care, with the same level of protection and sensitivity as its existing customer data. Providing this customer information can enhance the level of support and customer care that the RoLR provides to transferred customers.

Who is best placed to hold and then share the relevant customer data with the designated RoLR?

The AER is best placed to do this.

If you have any questions in relation to this submission, please contact Maria Ducusin (Maria.Ducusin@energyaustralia.com.au or 03 9060 0934).

Yours sincerely,

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