



AUSTRALIAN ENERGY MARKET COMMISSION

Draft report

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

REVIEW

February 2024

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About the AEMC

The AEMC reports to the energy ministers. We have two functions. We make and amend the national electricity, gas and energy retail rules and conduct independent reviews for the energy ministers.

Acknowledgement of Country

The AEMC acknowledges and shows respect for the traditional custodians of the many different lands across Australia on which we all live and work. We pay respect to all Elders past and present and the continuing connection of Aboriginal and Torres Strait Islander peoples to Country. The AEMC office is located on the land traditionally owned by the Gadigal people of the Eora nation.

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Summary

- 1 Market participants and regulatory agencies gained valuable experience in managing energy retailer failures from the 2022 energy market crisis. Using this experience, the Australian Energy Market Commission (AEMC) has made ten draft recommendations to improve the Retailer of Last Resort (RoLR) scheme. Our recommendations will simplify and improve the RoLR scheme, better protect retailers who take on the failed retailer's customers and lower costs for consumers.

Retailer failures are managed using the RoLR scheme

- 2 In the event of a retailer failure, the RoLR scheme facilitates the orderly transfer of customers to new retailers (referred to as the designated RoLR) without disruption to their electricity or gas supply.
- 3 Between 2012 and 2022, the RoLR scheme had only been used four times, and the Australian Energy Regulator (AER) had never used its RoLR gas directions powers. High wholesale prices and reduced liquidity in the contract market that occurred in 2022 put pressure on retailers. This resulted in ten authorised retailers failing and the AER using its gas directions powers for the first time.

Electricity and gas have different approaches to managing risks

- 4 While the RoLR scheme facilitates a timely transfer of customers to a new retailer, it can result in risks and costs for customers and designated RoLRs. The failed retailer's customers are transferred but the contracts that the failed retailer used to manage wholesale price risks are not. When a retailer failure occurs during high wholesale prices, the designated RoLR may face financial stress from being exposed to these prices. For gas retailer failures, there may also be a risk of the designated RoLR being unable to obtain gas.
- 5 There are different arrangements in electricity and gas to manage these risks:
 - In gas, the RoLR scheme includes a directions framework that allows the designated RoLR to access the physical gas supply and pipeline capacity held by the failed retailer. This provides the designated RoLR with the gas and pipeline capacity it needs to supply the transferred customers.
 - In the NEM, electricity is purchased through the gross pool market. This means there is no risk of a designated RoLR facing a physical supply shortage. However, the designated RoLR may face significant financial risk because it will not have hedging contracts in place to manage price risks from servicing the transferred customers.

Our draft recommendations simplify and improve the RoLR gas directions framework

- 6 The Commission has made six draft recommendations to simplify and improve the RoLR gas directions framework. The current and proposed arrangements are summarised in figure 1.

Figure 1: Recommendations to improve to the gas directions framework against current arrangements

	Current process	Draft recommendations 1-6	
Direction to supply gas	<u>When is the direction issued:</u> there is no declared wholesale gas market or short term trading market or where, in the opinion of the AER, sufficient capacity or gas is not available in a short term trading market	The AER must issue gas directions in the event of a gas RoLR, unless it reasonably considers that doing so would not benefit the designated RoLR or consumers.	Recommendation 1
	<u>What must the directed entity do:</u> can be directed to make gas supply and pipeline capacity available to the designated RoLR that was available to the failed retailer immediately before the transfer date on equivalent terms. <i>The designated RoLR "may but is not obligated to" use any or all of the gas</i>	Expand the scope of directions to include storage contracts and the gas held in storage by the failed retailer.	Recommendation 5
	<u>Customer benefits from directed gas:</u> no requirement on the designated RoLR to pass through any low costs from the directed gas onto customers	Place a requirement that designated RoLRs must pass the financial benefits of gas directions on to customers.	Recommendation 6
Direction to negotiate	<u>What negotiation must take place:</u> as soon as practicable after the transfer date, commence negotiations for novation or replacement contract.	There is no requirement to negotiate. The failed retailer and gas supplier may go out to market immediately and sell the gas supply contract for the period beyond the direction period.	Recommendation 3
	<u>Who negotiates:</u> the gas supply counterparty must commence negotiations with the designated RoLR and failed retailer (if still solvent) for either the novation or a replacement contract.	There is no requirement to negotiate. However, the designated RoLR and the failed retailer can negotiate for the novation of the contract if they wish.	
Duration and when the direction ends	<ul style="list-style-type: none"> If, after 3 months, no agreement is reached, the failed retailer must put the gas up for sale by auction. Must use best endeavours to ensure the auction is completed and gas sold within 6mths of the transfer date. Direction ceases to have effect once contract is sold either to the RoLR within the 3mths, or to another counterparty after the 3mths. 	<ul style="list-style-type: none"> Period of direction is extended from 3 months to 6 months. No mandatory negotiation takes place, and the auction process is removed. Direction ceases to have effect if the contract is sold to the designated RoLR within the 6 months, or after the 6 months. 	Recommendation 2
Directions for contracts that begin or expire during directions	<u>What happens if the contract expires during the direction period?</u> Currently ambiguous	Make explicit that the direction: <ul style="list-style-type: none"> cannot continue in force after a contract is or would have been due to expire during the direction period. continues in force if a contract has extension terms that are at the sole discretion of the failed retailer. 	Recommendation 4
	<u>What happens if the contract was due to commence during the direction period?</u> Currently ambiguous	Make explicit that the direction applies for contracts that are due to commence during the directions period.	

Source: AEMC analysis.

- 1 The proposed changes to the gas directions trigger, duration and scope will give RoLRs better access to gas contracts to serve their new customers. This will decrease the costs designated RoLRs incur as a result of servicing a sudden increase in customers. These decreases in costs will result in lower prices for consumers through the RoLR passing on the financial benefits of gas directions or through smaller cost recovery claims from RoLRs.
- 2 The proposed gas directions framework is simpler and easier to understand. This clarity will decrease risk for RoLRs and administrative burden on the AER, designated RoLRs and failed retailers.

Our draft recommendations reduce costs and provide better incentives for failing retailers in electricity and gas

- 3 The Commission has made four draft recommendations to improve incentives for failing retailers and reduce costs from the RoLR scheme. The current and proposed arrangements are summarised in figure 2 set out on the next page.
- 4 The introduction of the bill framework will reduce overall costs for customers from retailer failures. By requiring the failed retailer to pay for the costs associated with its failure, it will lower the amount of the RoLR cost recovery scheme that's paid for by consumers (to the extent that the failed retailer can pay the bill).
- 5 The introduction of civil penalties for retailers who do not take all reasonable steps to avoid causing a RoLR event will discourage the use of the RoLR scheme. It will also provide better incentives for retailers seeking to exit the market to do so in a less disruptive manner.
- 6 Our proposed changes to the AER RoLR guideline and information gathering powers will make the RoLR scheme clearer and easier to administer. In particular:
 - Clear guidance on RoLR cost recovery will help designated RoLRs prepare high quality claims with the right information and to engage with the process.
 - Expanding the RoLR regulatory information notices (RINs) to include all entities that may hold the failed retailer's information will enable designated RoLRs to get the necessary customer information quickly.

Our review is one of several projects considering the RoLR scheme

- 7 The AER and the Commonwealth Department of Climate Change, Energy, Environment and Water (DCCEEW) are considering issues relevant to this review. These include:
 - DCCEEW will soon publish a Draft Bill for consultation on specific improvements to the RoLR scheme. This was endorsed by Energy Ministers as part of the package of RoLR reforms and predominantly relates to the recommendations that the AEMC made in its 2021 RoLR review.
 - The AER will soon publish a consultation paper on a series of cost recovery applications made in response to electricity events in 2022. This is the first time the AER has considered a RoLR cost recovery application from a designated RoLR following a RoLR event.

Figure 2: Recommendations to improve the RoLR scheme in electricity and gas against current arrangements

	Current process	Draft recommendations 7-10	
Retailer failure event	Information for the designated RoLR(s): the AER can use RoLR regulatory information notices (RINs) to gather information needed to manage new customers. The AER can issue RoLR RINs to the failed retailer, any insolvency official of the failed retailer, and anyone else given a RoLR notice.	Expand the section of the NERL for regulatory information notices to include retailer agents and third parties that hold relevant information for the designated RoLR/s.	Recommendation 8
	No arrangements exist to discourage retailer exit through the RoLR scheme	The AER issues a notice for a pending bill to the failed retailer for the designated RoLR cost recovery scheme. This does not have an immediate impact beyond putting the failed retailer on notice for receiving a bill in the future.	Recommendation 9
		Introduce a new Tier 1 civil penalty provision for retailers that did not take all reasonable steps to avoid causing a RoLR event.	Recommendation 10
Preparing cost recovery claims	Time period for RoLR cost recovery application: nine-months following the RoLR event	The AER update its pre-existing RoLR guidelines to help the designated RoLR prepare the cost recovery application. The updated RoLR guidelines will specify the: <ul style="list-style-type: none"> types of costs the AER would reasonably consider information needed for the AER to assess the claim period for which the designated RoLR can claim costs timing and process the AER will use to consider applications. 	Recommendation 7
	Reasonable costs to be claimed through the RoLR cost recovery scheme: Current arrangements are not clear on what costs over what period the AER would consider as reasonable.		
Determining cost recovery claims	The AER considers the RoLR cost recovery scheme application. It must also complete a round of public consultation as part of this process.	Amend this process to improve clarity and certainty on timing by requiring the AER specify timing in its guidelines for when it will: publish the claim, publish a consultation paper, and make the decision.	
After the AER determines the cost recovery application	The AER approves or rejects the RoLR cost recovery application. <ul style="list-style-type: none"> If approved: <ul style="list-style-type: none"> The AER instructs the relevant DNSP to pay the designated RoLR the value of the approved RoLR cost recovery scheme. The DNSP then recovers the value of the RoLR cost recovery scheme through a positive cost pass through to customers. If rejected, then no further actions take place. 	<ul style="list-style-type: none"> In addition to the existing arrangements, the AER issues a bill to the failed retailer around the time that the AER completes the actions in the current process. The failed retailer had been put on notice about this at the point of failing through the notice for a pending bill. If able, the failed retailer pays the AER the bill for the RoLR cost recovery scheme. The AER then: <ul style="list-style-type: none"> pays the DNSP what it receives from the failed retailer, and instructs the DNSP to pass this through to customers through a negative cost pass through to customers. 	Recommendation 9

Source: AEMC analysis.

Submissions are due by 4 April 2024

- 1 Our assessment was informed by stakeholder submissions throughout this review, and discussions with international market and government bodies. We thank stakeholders for the valuable input, time and effort they have taken to assist us in getting to this stage. It has been instrumental in reaching the recommendations.
- 2 The Commission encourages stakeholders to provide feedback on the Review's analysis and recommendations. Submissions are due by 4 April 2024. The Commission expects to release its final report in mid-2024.
- 3 Energy Ministers will need to endorse any final recommendations to enable changes to the energy laws. The Commission has made ten draft recommendations which are set out below.

Box 1: Summary of Draft Recommendations

Draft recommendation 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

Draft recommendation 2: Extend the RoLR gas directions period from three to six months.

Draft recommendation 3: Remove the mandatory negotiation process between the failed retailer and designated RoLR, and the subsequent auction process if negotiations are unsuccessful.

Draft recommendation 4: Clarify what happens to contracts that begin or end during the directions period. Specifically that gas directions:

- 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.

Draft recommendation 5: Expand the RoLR gas directions framework to include storage contracts and gas held in storage.

Draft recommendation 6: Require designated RoLRs to pass on the financial benefits of RoLR gas directions to customers.

Draft recommendation 7: Improve cost recovery clarity through changes to AER guidelines.

Draft recommendation 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.

Draft recommendation 9: Introduce a new framework that allows the AER to issue the failed retailer a bill for the costs associated with its failure.

Draft recommendation 10: Introduce civil penalties for retailers who did not take all reasonable steps to avoid causing a RoLR event.

How to make a submission

We encourage you to make a submission

Stakeholders can help shape the recommendations by participating in the review process. Engaging with stakeholders helps us understand the potential impacts of our recommendations and, in so doing, contributes to well-informed, high quality review recommendations.

How to make a written submission

Due date: Written submissions responding to our draft recommendations must be lodged with the Commission by **4 April 2024**.

How to make a submission: Go to the Commission's website, www.aemc.gov.au, find the "lodge a submission" function under the "Contact Us" tab, and select the project reference code **RPR0016**.¹

We encourage stakeholders to provide feedback against each consultation question.

Tips for making submissions are available on our website.²

Publication: The Commission publishes submissions on its website. However, we will not publish parts of a submission that we agree are confidential, or that we consider inappropriate (for example offensive or defamatory content, or content that is likely to infringe intellectual property rights).³

Further opportunities for engagement

There are other opportunities for you to engage with us, such as one-on-one discussions with the project team prior to, and following, your formal submission.

For more information, you can contact us

Please contact the project sponsor with questions or feedback at any stage.

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¹ If you are not able to lodge a submission online, please contact us, and we will provide instructions for alternative methods to lodge the submission.

² See: <https://www.aemc.gov.au/our-work/changing-energy-rules-unique-process/making-rule-change-request/our-work-3>

³ Further information is available here: <https://www.aemc.gov.au/contact-us/lodge-submission>

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1 The Commission has made draft recommendations to improve how retailer failures are managed

This draft report seeks stakeholder feedback on the Commission's draft recommendations to improve how gas and electricity retailer failures are managed. This chapter provides:

- an overview of how retailer failures are managed and the events that triggered this review (section 1.1)
- an explanation of the difference between how electricity and gas retailer failures are managed in the context of this review (section 1.2)
- a description of how stakeholder feedback has shaped the Commission's draft recommendations (section 1.3)
- the context for this review (section 1.4).

Our review considers the National Energy Customer Framework (NECF) jurisdictions. Victoria has a Retailer of Last Resort (RoLR) scheme and is outside the scope of this review. However, aspects of the two RoLR schemes interact, especially for the physical supply of gas. Therefore, we are consulting with the relevant organisations in Victoria, including the Victorian Department of Energy, Environment and Climate Action, and the Essential Services Commission of Victoria.

1.1 Retailer failures are managed through the Retailer of Last Resort Scheme

In recent years, there has been significant entry into the retail electricity and gas markets. In competitive markets with low barriers to entry, we would expect to see retailer exits, as retailers test new business models and less successful models fail. However, because energy is an essential service, the National Energy Retail Law (NERL) sets out a mechanism—the Retailer of Last Resort (RoLR) scheme—to protect customers in the event that their retailer fails.

In the event of a retailer failure, the RoLR scheme facilitates the transfer of customers to new retailers without disrupting their electricity and/or gas supply. If the RoLR scheme is triggered, the Australian Energy Regulator (AER) allocates the customers of the failed retailer to one or more other retailers. These retailers are referred to as designated RoLRs.

The RoLR scheme in gas also has a directions framework. If triggered, this allows the designated RoLR to access the gas supply and pipeline capacity that the failed retailer had under contract.

1.1.1 East coast markets saw record high prices and retailer failures in 2022 and 2023

In 2022, the National Electricity Market (NEM) saw record-high wholesale prices and reduced liquidity in the contract market. This put significant pressure on retailers. The result was a record number of retailer failures. From 24 May to 1 September 2022:

- Seven authorised retailers failed and triggered RoLR events:
 - Weston Energy in gas where the AER used the RoLR gas directions power for the first time
 - Pooled Energy, Enova Energy, Powerclub, Mojo Power East (also trading as People Energy), Social Energy and Elysian in electricity
- Apex Energy (an exempt seller within embedded networks) also entered administration.

At the same time, there were reports of some retailers allegedly selling their hedges after actively encouraging their customers to move to other retailers. We were also informed that some RoLRs experienced difficulty accessing contracts to service their new customers.

From 16 June 2023 to 21 June 2023 a further three electricity retailers failed and triggered RoLR events. These retailers were QEnergy, Mojo Power, and Sanctuary Energy.

There is still potential for more retailers to exit the market, particularly for retailers that purchased contracts for future periods at those previously elevated prices.

Prior to the events of 2022, the RoLR scheme was used four times since the NECF was introduced in 2012.

1.2 The RoLR scheme creates risks for electricity and gas retailers

While the RoLR scheme facilitates the necessary and timely transfer of customers to a new retailer, it can result in risks and costs for customers and remaining retailers. While the failed retailer's customers are transferred to the designated RoLR, the contracts that the failed retailer used to manage wholesale price risks for those customers are not transferred. If retailer failure occurs in volatile market conditions with high wholesale prices, the designated RoLR may face financial stress from being exposed to these prices or being unable to obtain gas.

There are different arrangements in electricity and gas to manage this risk:

- In gas, the RoLR scheme has a directions framework that allows the designated RoLR to access the physical gas supply and pipeline capacity contracts previously held by the failed retailer. This provides the designated RoLR with the physical gas it needs to support the transferred customers on the same terms and conditions that were available to the failed retailer for the period of the direction.
- In electricity, where electricity is purchased through the NEM gross pool there is no need for directions to make sure the designated RoLR can supply the transferred customers. The designated RoLR purchases electricity through the NEM and manages its cost risk for supplying the transferred customers via hedging contracts.
- Both electricity and gas RoLR arrangements allow the designated RoLR to claim costs associated with being the RoLR. However, these arrangements are ex-post, participants have little familiarity with them because of the small number of failures in the past, and stakeholders have suggested there is a lack of clarity about what costs can be claimed.

1.3 Stakeholder feedback has shaped our recommendations

Stakeholder feedback through formal submissions and discussions has been critical to the development of the Commission's draft recommendations. Stakeholders responded to two rounds of consultation: our stage one feasibility study consultation paper, and our directions paper.

The UK Office of Electricity and Gas Markets (Ofgem), the New Zealand Electricity Authority and the Australian Energy Regulator (AER) provided key insights that supported the Commission's development of the options we sought feedback on in the stage one feasibility study.

In response to our stage one feasibility study, we received 12 submissions from a range of stakeholders. These stakeholders provided evidence-based submissions with constructive feedback. To support the Commission's analysis we had constructive engagement with the AER, AEMO, Federal Treasury, the Reserve Bank of Australia (RBA) and the Australian Securities and Investment Commission (ASIC) to test and further understand the risks of possible options. In particular, stakeholders:

- identified key issues with introducing a directions framework in electricity or sharing information about failed retailers' hedge contracts

- provided information about experiences with the use of the RoLR scheme and gas directions framework.

In response to our directions paper, we received 15 submissions from a similar range of stakeholders. As with the stage one feasibility study, stakeholders provided evidence-based submissions with constructive feedback. Stakeholder feedback was critical for the Commission's decision to not pursue options that require retailers to list a security interest in favour of the AER on the Personal Property Securities Register (PPSR).

1.4 Governments asked for advice when the market was under pressure in 2022

Following the events of 2022, Energy Ministers requested the AEMC provide specialist advice on improving market resilience and managing retailer failures. We put forward a suite of recommendations to Energy Ministers to strengthen the RoLR scheme and last-resort measures to plan for and manage crises and the risk of significant market participant failure. These recommendations were informed by previous AEMC reviews into financial resilience (2015), retail competition (2020), the RoLR (2021), and the AER's recent experience in managing retailer failures. Collectively, the recommendations being progressed reduce the risk of a significant retailer failure resulting in significant financial stress of cascading failures for remaining retailers. In addition to this review, some of our key recommendations were to:

- **Implement previously consulted-on improvements to the RoLR scheme.** The immediate reforms to the RoLR scheme included improving the clarity and certainty of cost recovery, and extending the time frame for a designated RoLR to meet AEMO's increased credit support requirements. These changes were proposed in the AEMC's 2021 RoLR review and supported by recent AER experience administering the RoLR scheme. DCCEEW will soon consult on a draft Bill to implement these improvements which has substantial interlinkages with our draft recommendations for RoLR cost recovery.
- **Explore government-owned retailer participation in the RoLR scheme to prevent cascading retailer failures.** There is no last-resort mechanism to manage significant retailer failures that could trigger cascading retailer failures. We have recommended that government owned retailers could act as RoLRs to prevent cascading failures, and that scenario planning be progressed so the industry's ability to withstand crises is improved.

Jurisdictional governments are considering these recommendations.

2 Our draft recommendations simplify and improve the RoLR gas directions framework

The Commission has made six draft recommendations to simplify and improve the RoLR gas directions framework. Figure 2.1 sets out these recommendations and compares them against the existing arrangements.

The recommendations will better protect designated RoLRs by ensuring that when a gas retailer fails they can access the full scope of contracts held by the failed retailer. This will provide them with sufficient time to negotiate long-term contract coverage at the end of the directions period. Consumers will benefit from these changes by not having to pay as large cost recovery claims to RoLRs and through new requirements that the benefits of directed contracts are passed through to consumers. It will also reduce systemic risks in the system by reducing the financial strain on RoLRs if there are a series of retailer failures.

Our recommendations simplify the gas directions framework by removing the mandatory negotiations and auction processes from RoLR gas directions. We also recommend clarifications to how contracts that end or are due to commence during the directions period are handled. By clarifying and simplifying the framework we will reduce risk to the RoLRs through greater certainty and decrease the administrative burden on the AER.

Figure 2.1: Recommendations to improve the gas directions framework against current arrangements

	Current process	Draft recommendations 1-6	
Direction to supply gas	<u>When is the direction issued:</u> there is no declared wholesale gas market or short term trading market or where, in the opinion of the AER, sufficient capacity or gas is not available in a short term trading market	The AER must issue gas directions in the event of a gas RoLR, unless it reasonably considers that doing so would not benefit the designated RoLR or consumers.	Recommendation 1
	<u>What must the directed entity do:</u> can be directed to make gas supply and pipeline capacity available to the designated RoLR that was available to the failed retailer immediately before the transfer date on equivalent terms. <i>The designated RoLR "may but is not obligated to" use any or all of the gas</i>	Expand the scope of directions to include storage contracts and the gas held in storage by the failed retailer.	Recommendation 5
	<u>Customer benefits from directed gas:</u> no requirement on the designated RoLR to pass through any low costs from the directed gas onto customers	Place a requirement that designated RoLRs must pass the financial benefits of gas directions on to customers.	Recommendation 6
Direction to negotiate	<u>What negotiation must take place:</u> as soon as practicable after the transfer date, commence negotiations for novation or replacement contract.	There is no requirement to negotiate. The failed retailer and gas supplier may go out to market immediately and sell the gas supply contract for the period beyond the direction period.	Recommendation 3
	<u>Who negotiates:</u> the gas supply counterparty must commence negotiations with the designated RoLR and failed retailer (if still solvent) for either the novation or a replacement contract.	There is no requirement to negotiate. However, the designated RoLR and the failed retailer can negotiate for the novation of the contract if they wish.	
Duration and when the direction ends	<ul style="list-style-type: none"> If, after 3 months, no agreement is reached, the failed retailer must put the gas up for sale by auction. Must use best endeavours to ensure the auction is completed and gas sold within 6mths of the transfer date. Direction ceases to have effect once contract is sold either to the RoLR within the 3mths, or to another counterparty after the 3mths. 	<ul style="list-style-type: none"> Period of direction is extended from 3 months to 6 months. No mandatory negotiation takes place, and the auction process is removed. Direction ceases to have effect if the contract is sold to the designated RoLR within the 6 months, or after the 6 months. 	Recommendation 2
Directions for contracts that begin or expire during directions	<u>What happens if the contract expires during the direction period?</u> Currently ambiguous	Make explicit that the direction: <ul style="list-style-type: none"> cannot continue in force after a contract is or would have been due to expire during the direction period. continues in force if a contract has extension terms that are at the sole discretion of the failed retailer. 	Recommendation 4
	<u>What happens if the contract was due to commence during the direction period?</u> Currently ambiguous	Make explicit that the direction applies for contracts that are due to commence during the directions period.	

Source: AEMC analysis, 2024.

2.1 Draft recommendation 1: Require the AER to issue directions for all RoLR events, except if it reasonably considers that issuing the direction would not benefit the designated RoLR or consumers

This section describes:

- stakeholder feedback on making the directions process automatic
- the Commission's draft recommendation to amend the NERL to require the AER to issue gas directions for gas RoLR events.

2.1.1 Stakeholder feedback suggested removing the trigger to make issuing directions automatic

In our directions paper we noted that the current directions framework does not address the risk that a designated RoLR could be put under financial pressure from taking on new customers during high spot prices in the gas markets. We considered this was important and therefore proposed making the directions trigger financial as well as physical.

Stakeholders generally agreed that the existing gas directions trigger should be changed. However, several stakeholders suggested alternatives to a financial trigger:

- The AEC, Energy Australia and AGL suggested that directions should be automatic rather than expanded to include financial considerations.⁴ Stakeholders considered that automating the directions framework would simplify arrangements and provide greater clarity to designated RoLRs that they will have access to gas to service transferred customers.⁵
- The AER considered there is no need for any specific trigger and its decision to issue directions should simply be based on whether the direction would be in the long-term interests of consumers.⁶
- Origin suggested that the current gas adequacy trigger remained appropriate and considered that the AER does not have sufficient insight or experience to make decisions on the potential financial impact of RoLR events. The use of alternative triggers would only create further uncertainty in the directions process.⁷

2.1.2 Requiring directions to be issued will improve certainty for designed RoLRs

The Commission's draft recommendation is to amend the NERL such that the AER is required to issue directions for gas RoLR events, except if it reasonably considers that issuing the direction would not benefit the designated RoLR or consumers.

We continue to consider that the financial impacts of RoLR events could cause a significant impact on designated RoLRs and should be a basis for gas directions. However, adding a financial trigger would likely increase complexity and uncertainty during RoLR events. This is because a financial trigger would be difficult for the AER to assess within the tight timelines necessary for the directions to be useful within a RoLR event. In particular, the AER would need to make complicated decisions, with little information, about the effect of the transferred customers on the RoLR.

⁴ Submissions to the directions paper, AEC, p. 3. Energy Australia, p. 5. AGL, p. 4.

⁵ AEC, EA

⁶ AER, submission to the directions paper, p. 7.

⁷ Origin, submission to the directions paper, p. 4.

We consider that a requirement to issue gas directions, unless doing so would not benefit the designated RoLR or consumers, would better protect designated RoLR(s) and consumers. This requirement ensures that useful contracts held by the failed retailer would be made available to the designated RoLR. This provides certainty for designated RoLRs and gas producers that directions are expected to be issued in the majority of RoLR events. At the same time, in circumstances where there may be little or no benefit to the RoLR or consumers from a direction the AER can use its discretion not to issue directions. We expect this will rarely be the case, but it may occur (for example) where:

- the failed retailers' contracts were due to expire in a short period of time
- only a very small amount of gas is contracted.

2.2 Draft recommendation 2: Extend the RoLR gas directions period to six months

This section describes:

- stakeholder feedback on extending the directions period
- the Commission's draft recommendation to amend the NERL to specify that RoLR gas directions apply for six months.

2.2.1 Stakeholders considered at least six months is an appropriate directions period

The directions paper called for stakeholder feedback on extending the RoLR gas directions period. Stakeholders supported extending the time directions apply from their current level of three months and suggested that a period of at least six months would be sufficient.⁸ Key points raised by stakeholders on the specific length included:

- Energy Australia outlined that a direction period of six months should be a minimum, reflecting the time required for a designated RoLR to negotiate a new gas supply contract with a producer.⁹
- AGL noted that designated RoLRs will likely require the directed gas supply contracts to supply the transferred customers during the winter months. However, six months would be expected to mitigate the risks in most situations.¹⁰
- The AER suggested that directions should be in place for a maximum of nine months to facilitate the potentially complex negotiations for a novation or replacement of the failed retailers' gas contracts.¹¹ The AER also outlined that extending the gas directions period would not materially impact a retailer's cost of obtaining finance or disincentivise market entry because:
 - few genuine retailers would be deterred from entering the market based on less favourable regulatory arrangements surrounding their gas contracts during their failure
 - the conditions that trigger gas directions are relatively rare.

The directions paper also outlined an option to include flexibility in the time frame that directions apply. Energy Australia and AGL also supported the Commission's proposal in the directions paper to create a flexible directions period.¹² The AER noted that it could be appropriate to extend a

8 Submissions to the directions paper, AEC, pp. 4-5; Origin, p. 4; Energy Australia, p. 6; AGL, p. 5, and AER, pp. 7-8.

9 Energy Australia, submission to the directions paper, p. 6.

10 AGL, submission to the directions paper, p. 5.

11 AER, submission to the directions paper, pp. 7-8.

12 Submissions to the directions paper, Energy Australia, p. 6. AGL, p. 5.

direction beyond a fixed period in certain market conditions, but it would be difficult to specify the market conditions that would trigger an extension.¹³

2.2.2 A direction period of six months provides an appropriate level of support for RoLRs

The Commission's draft recommendation is to amend the NERL to specify that RoLR gas directions apply for six months.

Six months is expected to be sufficient coverage for a designated RoLR.

Six months provides an appropriate level of support for designated RoLRs. RoLR events are likely to occur during volatile market conditions. In the case of gas, this is almost exclusively during winter when demand is highest. Given this, a six-month period provides sufficient coverage for designated RoLRs because it will provide coverage for the duration of the winter that the event occurs in.

Six months also gives adequate time to the designated RoLR to negotiate new contracts following the end of the directions period, which would also be outside of winter when there is typically more supply in the market.

This draft recommendation is not expected to materially impact gas producers in offering gas supply agreements. This is because the terms of supply are not changed, only the length of time it is directed to make gas available to the designated RoLR. In any event, we have also recommended (see draft recommendation 4) that the NERL be amended to make it explicit that, if a contract is due to expire during the directions period, then the direction cannot continue in force after that date.

The Commission notes that this position has been supported by gas producers in our discussions with them. This draft recommendation is also not likely to deter new entrants because (as outlined by the AER) businesses are highly unlikely to enter the market with the prospects of retaining gas contracts post-failure.

We do not recommend a flexible directions period.

Following stakeholder feedback and further consultation with AER staff, we do not recommend a flexible direction period. We consider a six-month direction period will be adequate in nearly all RoLR events. Furthermore:

- The time required for a designated RoLR to apply for an extension and for the AER to assess and approve this extension would create additional uncertainty. This potentially creates a situation where a designated RoLR would have very little time to find an alternative gas supply if an extension was not granted.
- It would not be easy to specify the market conditions or requirements that require an extension to the direction.

The Commission also notes that if a six-month direction is longer than necessary in some events this is likely to result in little or no harm to consumers. This is because our recommendation that designated RoLRs must pass on the benefits of gas directions to consumers, see section 2.6, ensures that designated RoLRs would not receive undue financial advantages.

¹³ AER, submission to the consultation paper, p. 8.

2.3 Draft recommendation 3: Remove the mandatory negotiations framework and auction processes

This section describes:

- stakeholder feedback supporting the removal of the mandatory negotiations and auction process
- the Commission's draft recommendation to amend the NERL to remove the mandatory negotiations framework and auction process.

2.3.1 Stakeholders supported removing mandatory negotiations and auction processes

The directions paper outlined options for introducing mandatory negotiation principles or removing the mandatory negotiations process entirely if the duration of directions is increased. Stakeholders generally supported removing the mandatory negotiation process as long as the direction period was extended and the process of issuing a direction was clear.¹⁴ For example, AGL stated that extending the directions period to six months would provide sufficient time for the designated RoLR to negotiate new contracts and remove the need for the mandatory negotiation process or negotiation principles.¹⁵

In contrast to other stakeholders, the AER saw value in retaining the mandatory negotiation framework as it attempts to facilitate a quick negotiation of a sale of the failed retailer's contracts.¹⁶ The AER also supported introducing negotiation principles alongside extending the directions period to align the incentives of the negotiating parties better.

We also engaged with gas producers during the consultation period, who did not submit formal submissions, but outlined concerns with the auction process. These were that:

- The auction process allows confidential contract terms to be shared with parties involved in the auction process.
- Gas producers don't have a say in who can be involved in the auction process. This can result in a party winning the auction that does not meet the producer's credit or risk requirements. It is unclear how this conflict would be resolved in such a situation, resulting in significant risk and uncertainty for the gas producer.

2.3.2 The mandatory negotiations and auction process are no longer required

The Commission's draft recommendation is to amend the NERL to remove:

- the mandatory negotiation process between the failed retailer and designated RoLR, and
- the subsequent auction process if negotiations are unsuccessful.

Mandatory negotiation is unnecessary given our recommended six month directions period

The mandatory negotiation process is unnecessary because the Commission's draft recommendation in section 2.2 will provide sufficient time for designated RoLRs to go to market to secure new contracts if required. Importantly the designated RoLR and failed retailer may choose to negotiate for the transfer of the failed retailer's contracts, with the mandatory negotiation process removed. It may also be the case that increasing the time directions apply incentivises the failed retailer to negotiate with the designated RoLR and receive value for its contracts before the direction ends.

¹⁴ Submissions to the consultation paper, AEC, p. 5; Origin, p. 5; Energy Australia, p. 7, and AGL, p. 5.

¹⁵ Ibid. AGL, p. 5.

¹⁶ AER, submission to the directions paper, p. 9.

Further, we consider that the mandatory negotiation process will likely be unsuccessful, even if negotiation principles are introduced. This is because there are conflicting commercial incentives between the designated RoLR and the failed retailer. The failed retailer's interest is to maximise its return on its supply contracts, whether this be through a negotiated transfer to the designated RoLR or selling in the open market. If the failed retailer views selling in the open market as delivering the most value, there is nothing that a negotiation principle can do to overcome this.

The auction process can create significant risks for producers and should be removed

We did not outline an option for removing the auction process in the directions paper. However, based on additional stakeholder feedback, we recommend also removing this process.

The auction process forces the failed retailer's contracted gas supply to be delivered back to the market, ensuring that the failed retailer can't retain it and potentially contribute to the scarcity of contracted supply. However, we consider that the failed retailer would already be strongly incentivised to sell their gas supply contracts. This is because they would likely be subject to take or pay arrangements and their contracts would be valued highly during the volatile conditions in which RoLR events typically occur.

We also recommend removing the auction process because it can create risks for gas producers, typically the counter party to most gas supply contracts.¹⁷

Removing the auction process requires changes to when directions end

The auction process currently serves as an end date for directions where a negotiated outcome is reached. The direction ceases once the contracts have been sold through the auction process. Removing the auction process would mean the endpoint for a direction may be undefined. The Commission's draft recommendation is to amend the NERL such that directions would end:

- when the directed contracts are novated to the designated RoLR or
- at the end of the six-month direction period.

2.4 Draft recommendation 4: Clarify how contracts that end or are due to commence during the directions period are treated

This section describes:

- stakeholder feedback which was supportive of clarifying that directions should apply to contracts that would have been available to the failed retailer
- our draft recommendations to clarify how contracts that end or are due to commence during the directions period are treated.

2.4.1 Stakeholders broadly agreed that directions should only apply to contracts that would have been available to the failed retailer

In the directions paper the Commission considered that directions should cease when a contract expires, and directions should include contracts due to commence. Stakeholders agreed with the AEMC's position in the directions paper that directions should cease when a contract expires.¹⁸ Additionally, stakeholders generally viewed that RoLRs should have the ability to exercise extension options within the direction period.¹⁹

¹⁷ The NERL specifies that directions can be issued to gas producers or any other party contracted to sell gas to the failed retailer. For simplicity, in this section, we refer to gas producers only.

¹⁸ Submissions to the directions paper, AEC, p. 5; Origin, p. 5; AGL, p. 5; Energy Australia, p. 7, and AER, p. 9.

¹⁹ Ibid.

The AER outlined that a designated RoLR would need to buy gas from the spot market after a direction ceases, which could increase costs for the impacted customers. Based on this, the AER suggested that gas producers should be required to show that they have no spare gas to contract at the end of the directed contract on the day the retailer failed.²⁰ The AEMC understands that if the producer had spare capacity, the direction would continue in force under this suggestion.

2.4.2 For contracts due to expire, the direction applies until the expiry of the contract

The Commission's draft recommendation is to amend the NERL such that:

- directions do not apply beyond the expiration of a contract
- directions do apply in some circumstances where there is an extension option in the contract.

These draft recommendations aim to clarify the arrangements for designated RoLRs and gas producers during the directions period.

Directions should cease when the contract being directed expires

We consider a gas producer's responsibility to comply with a direction should be limited by the period of the directed gas supply contract. Directing a gas producer to supply beyond the expiration of a contract would expose it to risks of supply which it did not willingly contract for. It could also create a situation where the producer would be required to provide gas that it may not have access to.

Directions should continue where the retailer has an option to extend

We consider that designated RoLRs should have access to the same gas supply as was available to the failed retailer. This includes options to extend if that option already exists in the contract and the decision to extend is at the sole discretion of the retailer. We make the distinction that the extension option must be at the sole discretion of the retailer in order for the option to be made available to the designated RoLR. This is because if the option to extend required both parties to agree, then there is no guarantee that the gas producer would have supply available.

This ensures that the RoLR has access to the option to extend but acknowledges that in the case where the option is at the mutual discretion or sole discretion of the gas producer, there is no guarantee the gas producer would have supply available. In this case, the designated RoLR and gas producer may agree to action an option to extend in the underlying gas supply contract.

Where the option to extend is at the retailer's sole discretion, and they choose to action this option, the gas producer is directed to supply gas on the same terms as this option. The direction to supply this gas would continue until the end of the supply period in the extension or the end of the direction period, whichever comes first.

2.4.3 For contracts that are due to commence during the directions period, the direction applies from the commencement of the contract

The Commission's draft recommendation is to amend the NERL to clarify that directions do apply for contracts that are due to begin in the directions period. We consider that contracts due to begin in the directions period would have been part of the failed retailer's contracting strategy to serve their customers and should be made available to the designated RoLR.

This recommendation aims to ensure that designated RoLRs have access to the same contracts as the failed retailer to serve the transferred customers, and clarifies designated RoLRs and gas producers' ability to access gas supply and obligations during the directions period. This draft

20 AER, submission to the directions paper, p. 9.

recommendation is not expected to have any material risk for the gas producers that have signed these contracts, as the gas producer will have already planned to supply this gas.

2.5 Draft recommendation 5: Expand the gas directions framework to include storage contracts

This section describes:

- stakeholder feedback on expanding the directions framework to include storage contracts
- the Commission's draft recommendation to amend the NERL to include storage contracts.

2.5.1 Stakeholders supported including storage contracts and gas held in storage in directions

The Commission's directions paper outlined an option to include storage contracts in RoLR gas directions. Stakeholders supported expanding the directions framework to include storage contracts, including the gas held in storage. They considered that if storage contracts were a part of the failed retailer's contracting strategy, then they should be able to be directed, as they may be necessary to manage the transferred customers' demand.²¹

Stakeholders also considered that the gas already held in storage is important to include in the direction.²² AGL specified that RoLR events are likely to occur during periods of gas shortage or high gas prices, and directing a storage contract but not the gas held in storage would likely be pointless.²³

Stakeholders also accepted that a designated RoLR may have to reimburse the failed retailer for the gas withdrawn from storage. The following methods of valuing the gas held in storage were suggested:

- Gas held in storage should be valued at the initial cost of the gas as valuing the gas at market prices may incentivise perverse behaviours.²⁴
- Consideration should be given to the price for the gas being determined by spot market prices of gas on days the failed retailer has withdrawn gas from the market into storage.²⁵
- The 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.²⁶

2.5.2 Including storage will better support designated RoLRs to manage peak demand

The Commission's draft recommendation is to amend the NERL such that storage contracts held by the failed retailer, including the gas already held in storage, are eligible to be directed by the AER. For the gas held in storage, we recommend that the NERL be amended to specify that the designated RoLR is required to pay the failed retailer for gas withdrawn from storage, with the AER responsible for determining the price of this gas.

We consider that this recommendation would work in two parts:

21 Submissions to the directions paper, AEC, p. 6; Energy Australia, p. 7; Origin, p. 5; AGL, p. 5, and AER, p. 9.

22 Ibid.

23 AGL, submission to the directions paper, p. 5.

24 AGL, submission to the directions paper, p. 6.

25 AER, submission to the directions paper, p. 10.

26 Energy Australia, submission to the directions paper, p. 8.

- storage contracts, that is, the right to inject, store and withdraw gas, would be directed in a similar way as gas supply contracts. That is, the storage provider would be required to provide storage services on the same terms provided to the failed retailer.
- gas held in storage is available for the designated RoLR to use, but the designated RoLR must compensate the failed retailer for the gas.

Storage contracts and gas held in storage can play an essential role in managing gas demand

Retailers typically use gas held in storage to manage peak gas demand days when additional supply over the amount contracted through supply or transport agreements may be required to meet customer demand. Where a failed retailer's position includes gas storage, extending the RoLR directions to include these contracts would better allow RoLRs to manage the demand from the transferred customers. Further, allowing RoLRs access to gas held in storage can be particularly important if a RoLR event occurs in a high-demand period, as spot prices would likely be elevated, and there may be limited ability to contract gas from alternative sources.

Expanding the directions framework to include storage contracts, and gas held in storage is necessary to ensure the designated RoLR has access to peak demand coverage if required.

The Commission notes that the designated RoLR may have to register with AEMO to nominate flows from the storage facility. This requirement potentially represents a slight delay for the RoLR to utilise the directed storage contract. However, we do not consider this to be a material risk, as registration processes for RoLRs occurs reasonably quickly.

The failed retailer has already paid for gas held in storage

In contrast to gas supply contracts, which specify the quantity and price of gas that can be purchased from a producer, gas already held in storage has already been paid for. This means that the failed retailer would be entitled to compensation for the acquisition of their gas held in storage.

Gas held in storage may have been injected at different times from different underlying supply sources and may not have a readily available price. Our draft recommendation is therefore that the AER will need to determine a reasonable price that the designated RoLR will need to pay for the gas withdrawn from storage. The AER can clarify their approach to deciding prices through their RoLR guidelines, however, in determining the price, they may have regard to a range of factors, including:

- cost of the gas (if known and verifiable)
- prevailing market conditions
- the circumstances of the failed retailer and the designated RoLR.

This approach is similar to that which exists that enables the AER to specify in a RoLR notice, terms and conditions for directed contracts that, in its opinion, better accord with those that otherwise prevail in the market.²⁷

2.6 Draft recommendation 6: Require RoLRs to pass on the benefits from directions to customers

This section describes:

- stakeholder feedback supporting a requirement to pass on the benefits of gas directions

²⁷ NERL 137(6)

- the Commission's draft recommendation to require designated RoLRs to pass on the benefits from gas directions to customers.

2.6.1 Stakeholders supported introducing a requirement to pass on the benefits of directions

The directions paper called for stakeholder feedback on introducing a requirement that the benefits of a RoLR direction should be shared with the transferred customers. Stakeholders supported introducing an obligation on designated RoLRs to share the benefits of gas directions with customers. Stakeholders considered that the requirement to pass on the benefits should be high-level or principles-based rather than prescriptive because.²⁸

- The circumstances in relation to each RoLR event will be different which could make specific or detailed requirements to pass on benefits difficult or problematic to follow.²⁹
- Implementing benefits sharing on an individual level, such as for transferred customers only, would be difficult as the benefits of gas contracts are shared with other customers.³⁰ AGL provided an example that providing the benefits of gas contracts to commercial and industrial (C&I) customers will require lower default retail pricing which will benefit other C&I customers.

All stakeholders supported advising the AER on how they complied with a requirement to pass on the benefits to customers.³¹ The AER outlined that a reporting requirement would create transparency for stakeholders and provide assurance that the benefits are being passed on.³²

2.6.2 Requiring benefits to be passed on ensures consumer outcomes are prioritised

The Commission's draft recommendation is that the NERL be amended such that designated RoLRs be required to pass on the benefits of RoLR gas directions to customers and report to the AER how they have achieved this.

The benefits of directions should be passed on to consumers

Directing the failed retailer's contracts to the designated RoLR aims to provide the designated RoLR with contractual coverage and avoid it needing to buy gas at elevated prices from the spot market. Depending on the prices specified in the contracts and other retail costs, the designated RoLR may be charging customers more than their cost to serve them. Requiring designated RoLRs to pass on the benefits received from gas directions ensures that consumer outcomes are prioritised and limits the potential financial advantages to designated RoLRs from directions.

A principles-based approach best allows designated RoLR to comply with this recommendation

Retailers generally hold a portfolio of gas contracts to serve their customers, and this portfolio impacts the prices that are offered to customers. Based on this, including the directed contracts of the failed retailer into the designated RoLR's portfolio will result in the benefits being shared across the customer base rather than the specific transferred customers. This would likely make a prescriptive requirement, such as a requirement to pass on the prices specified in the directed contract, unworkable in practice.

The Commission considers that the benefits of the gas direction should be shared with the customers that the RoLR event has impacted. However, we recognise that this may only be

28 Submissions to the directions paper, AEC, p. 6; Origin, p. 6; Energy Australia, p. 8; AGL, p. 6, and AER, p. 10.

29 AGL, Submission to the consultation paper, p. 6.

30 Submissions to the consultation paper, Origin, p. 6, and AGL, p. 6.

31 Submissions to the directions paper, AEC, p. 6. Origin, p. 6. Energy Australia, p. 8. AGL, p. 6. AER, p. 10.

32 Ibid. AER, p. 10.

feasible in some situations, requiring a principles-based approach so individual retailers can share benefits appropriately.

RoLRs must report to the AER on how this requirement is met

To provide certainty that the benefits of the directions have been passed on to consumers, the designated RoLRs will be required to report to the AER how they have achieved this obligation.

We recognise that a principles-based approach may lead to uncertainty for designated RoLRs in how they need to report to the AER, but consider that flexibility is required given the broad range of market circumstances. We also note that the AER can use its discretion, if it considers it beneficial, to provide guidance on how this obligation should be complied with in their RoLR guidelines.

3 Our draft recommendations reduce costs and provide better incentives for failing retailers

The Commission's four draft recommendations for improving the electricity and gas RoLR scheme are set out in Figure 3.1. The changes will have the following key benefits:

- The bill framework will reduce the costs of the RoLR event that are paid for by consumers via the RoLR cost recovery scheme (to the extent the failed retailer is able to pay the bill).
- The civil penalty and bill frameworks will discourage exit through the RoLR scheme. This is because the failed retailer may receive a bill for the costs of its failure or be prosecuted by the AER if it did not take all reasonable steps to avoid causing a RoLR event.
- Our other proposed changes will make the RoLR scheme clearer and easier to administer. This will reduce risks from uncertainty to the RoLR and decrease the administrative burden on all parties interacting with the scheme. In particular:
 - Clear guidance on RoLR cost recovery will help designated RoLRs prepare high quality claims with the right information and to engage with the process.
 - Expanding the RoLR regulatory information notices to include all entities that may hold the failed retailer's information will enable designated RoLRs to get customer information quickly.

Figure 3.1: Recommendations to improve the RoLR scheme in electricity and gas against current arrangements

	Current process	Draft recommendations 7-10	
Retailer failure event	Information for the designated RoLR(s): the AER can use RoLR regulatory information notices (RINs) to gather information needed to manage new customers. The AER can issue RoLR RINs to the failed retailer, any insolvency official of the failed retailer, and anyone else given a RoLR notice.	Expand the section of the NERL for regulatory information notices to include retailer agents and third parties that hold relevant information for the designated RoLR/s.	Recommendation 8
	No arrangements exist to discourage retailer exit through the RoLR scheme	The AER issues a notice for a pending bill to the failed retailer for the designated RoLR cost recovery scheme. This does not have an immediate impact beyond putting the failed retailer on notice for receiving a bill in the future.	Recommendation 9
		Introduce a new Tier 1 civil penalty provision for retailers that did not take all reasonable steps to avoid causing a RoLR event.	Recommendation 10
Preparing cost recovery claims	Time period for RoLR cost recovery application: nine-months following the RoLR event	The AER update its pre-existing RoLR guidelines to help the designated RoLR prepare the cost recovery application. The updated RoLR guidelines will specify the: <ul style="list-style-type: none"> types of costs the AER would reasonably consider information needed for the AER to assess the claim period for which the designated RoLR can claim costs timing and process the AER will use to consider applications. 	Recommendation 7
	Reasonable costs to be claimed through the RoLR cost recovery scheme: Current arrangements are not clear on what costs over what period the AER would consider as reasonable.		
Determining cost recovery claims	The AER considers the RoLR cost recovery scheme application. It must also complete a round of public consultation as part of this process.	Amend this process to improve clarity and certainty on timing by requiring the AER specify timing in its guidelines for when it will: publish the claim, publish a consultation paper, and make the decision.	
After the AER determines the cost recovery application	The AER approves or rejects the RoLR cost recovery application. <ul style="list-style-type: none"> If approved: <ul style="list-style-type: none"> The AER instructs the relevant DNSP to pay the designated RoLR the value of the approved RoLR cost recovery scheme. The DNSP then recovers the value of the RoLR cost recovery scheme through a positive cost pass through to customers. If rejected, then no further actions take place. 	<ul style="list-style-type: none"> In addition to the existing arrangements, the AER issues a bill to the failed retailer around the time that the AER completes the actions in the current process. The failed retailer had been put on notice about this at the point of failing through the notice for a pending bill. If able, the failed retailer pays the AER the bill for the RoLR cost recovery scheme. The AER then: <ul style="list-style-type: none"> pays the DNSP what it receives from the failed retailer, and instructs the DNSP to pass this through to customers through a negative cost pass through to customers. 	Recommendation 9

Source: AEMC analysis, 2024.

3.1 Draft recommendation 7: Improve cost recovery clarity through changes to AER guidelines

This section describes:

- stakeholder support for improvements to the RoLR cost recovery scheme in electricity and gas
- our draft recommendation to amend the NERL to require the AER to specify in its RoLR guidelines the types of costs, information required, and the process that the AER will use for RoLR cost recovery applications.

3.1.1 Stakeholders supported improvements to the RoLR cost recovery scheme

The directions paper explored changes to RoLR cost recovery, with the intent of increasing certainty for RoLRs about which costs they will be able to recover following a RoLR event. We asked stakeholders:

- Should there be specific costs for electricity? If yes, should these be relative to the Default Market Offer (DMO)?
- Should gas RoLRs be able to claim wholesale costs when there are no restrictions on prices for gas customers?
- Should costs only be claimed for the period up to nine months after the RoLR event?
- Should there be changes to help manage cash flow issues?

In submissions to the directions paper, stakeholders provided feedback on the above issues and supported further work on ways to manage potential cashflow issues.

- **Electricity RoLR cost recovery.** Stakeholders supported specifying the costs and proposed a range of options. Specifically:
 - Electricity wholesale costs could be in reference to standing offer prices³³ or the DMO with the ability to claim more if the RoLR can prove it supplied customers below cost.³⁴ Others preferred broad drafting without reference to the DMO.³⁵
 - Including other costs such as 'green' costs,³⁶ the cost of financing³⁷ and hedging for the new customers³⁸ could be incurred and should be considered.
 - In contrast, the Public Interest Advocacy Centre (PIAC) considered the DMO should provide a more than sufficient cover for the costs incurred from a RoLR event. It considered any extra cost recovery would represent unnecessary and unreasonable cross-subsidisation.³⁹
- **Gas RoLR cost recovery.** In our directions paper, we asked stakeholders whether there should be RoLR cost recovery in gas. We noted there is no limit to the price of standing offers for gas so designated RoLRs could recover costs by increasing the price of their standing offer. Stakeholders supported wholesale gas costs being claimed in RoLR cost recovery and considered it inappropriate that the RoLR customers should pay higher prices. Specifically:

33 AFMA, submission to the directions paper, p. 3.

34 Submissions to the directions paper, Alinta, p. 3; Origin Energy, p. 2; and AGL Energy, p. 3.

35 EnergyAustralia, submission to the directions paper, p. 3. AFMA and Stanwell also opposed using the DMO.

36 Submissions to the directions paper, AEC, p. 2, and RedLumo, pp. 3-4.

37 Submissions to the directions paper, AGL Energy, p. 3, and Origin Energy, p. 2.

38 AFMA, submission to the directions paper, p. 4.

39 PIAC, submission to the directions paper, p. 2.

- Wholesale gas costs should be recoverable with reference to the standing offer price⁴⁰
- RoLRs should be able to claim any reasonably incurred costs that exceed benefits from RoLR gas directions⁴¹
- It would be impractical to require wholesale costs to be recovered through increased prices for the transferred customers⁴²
- Origin considered that charging the transferred customers a higher price would result in these customers being penalised twice; once for losing the offer they had with the failed retailer and secondly for paying a higher price with the RoLR as a consequence.⁴³
- **Cost recovery period.** Stakeholders generally supported specifying a nine-month period over which costs can be claimed.⁴⁴
- **Managing potential cashflow issues.** Several stakeholders supported further work to manage potential cashflow issues by introducing changes to the RoLR cost recovery scheme to enable full or partial payments using estimated costs with a true-up process later.⁴⁵ In contrast:
 - AGL considered improving the RoLR cost recovery framework should mitigate issues with cashflow or accessing financial support.⁴⁶
 - AER noted Ofgem's temporary multiple claim process which involved an initial and true-up. In 2022, it removed this process noting the risk of over-payment and short-term impacts on consumer bills.⁴⁷

3.1.2 Our draft recommendation will increase certainty for the RoLR by clarifying which costs it can recover

The Commission has made a draft recommendation to specify in the NERL the categories of information that the AER must set out in its RoLR guideline for RoLR cost recovery. We consider including these categories in the NERL will increase market participants' certainty about the costs they may claim and the process they need to follow to make a claim. We consider that the AER determining the detailed specifications is preferred, as its experience of RoLR events means it can develop and revise guidance as needed.

Our draft recommendation proposes to require the AER to update its RoLR guidelines to specify the:

- types of costs the designated RoLR could reasonably apply for
- information needed for the AER to assess claims
- period for which the designated RoLR can claim costs
- timing and process the AER will use to consider applications.

After considering stakeholder feedback and further analysis, the Commission's draft recommendation proposes these four areas are most critical to give market participants greater certainty about the RoLR cost recovery scheme in both electricity and gas. The four areas and key benefits of each are described below.

40 Origin Energy, submission to the directions paper, p. 6.

41 AEC, submission to the directions paper, p. 6.

42 Submissions to the directions paper, AFMA, p. 2, and Origin Energy, p. 2.

43 Origin Energy, submission to the directions paper, p. 2.

44 Submissions to the directions paper, Simply Energy, p. 1; Stanwell, p. 3; Momentum Energy, p. 2; AEC, p. 2; Origin Energy, p. 2; EnergyAustralia, p. 3, and AGL Energy, p. 3.

45 Submissions to the directions paper, AFMA, p. 4; Momentum Energy, p. 2; AEC, p. 2; RedLumo, pp. 2-3; Stanwell, pp. 3-4; Simply Energy, p. 1; Origin Energy, p. 2, and EnergyAustralia, p. 3.

46 AGL Energy, submission to the directions paper, p. 3.

47 AER, submission to the directions paper, p. 4.

The types of costs that designated RoLRs could reasonably apply for

The Commission considers there are a range of costs RoLRs could reasonably apply for in response to RoLR events for both electricity and gas. We also note that these may vary between RoLR events and over time as the retail market changes.

The Commission notes the issues raised by stakeholders and considers the AER should specify how it will consider energy (both in electricity and gas), hedging, financing, and environmental costs in RoLR cost recovery claims. We also note that the AER has flexibility to develop and amend that guidance over time as needed.

The information needed for the AER to assess claims

The information the AER may need to consider the claim is equally important when we anticipate RoLR events and subsequent cost recovery claims could vary substantially. The AER needs to obtain the right information to accurately assess RoLR cost recovery claims in a timely fashion. Therefore, our draft recommendation proposes that the AER RoLR guidelines also specify the information needed for the AER to assess a RoLR cost recovery claim. Information that the AER may consider specifying could include information about the methodology used and evidence about the costs incurred.

The period for which the designated RoLR can claim costs

In the directions paper, we proposed a RoLR cost recovery claim period of nine months following the transfer of customers. This is in line with the period when a RoLR cost recovery application must be made. Stakeholder submissions generally supported this nine month period following the transfer of customers. However, our draft recommendation proposes to give the AER discretion to specify the period in the RoLR guidelines to be consistent with our other proposed changes for RoLR cost recovery. The AER may consider a nine-month period, but should assess the appropriateness of this against the types of costs it would reasonably consider and the information that must be provided with a claim.

The timing and process the AER will use to consider applications

The RoLR cost recovery process only specifies that the AER must publish the RoLR cost recovery claims and undertake public consultation.⁴⁸ However, this does not provide designated RoLRs certainty about the period the AER will use to consider RoLR cost recovery claims before publishing a consultation paper on its website, or how long it may take to make a decision after consultation. This can leave a potentially significant period of uncertainty:

- **For designated RoLRs, about whether they will be granted a claim.** Designated RoLRs will likely be required to bear the financing cost in the period between incurring costs and being potentially granted RoLR cost recovery. Certainty on the timing of this process may reduce costs for the designated RoLR.
- **For all retailers, about whether and when they may need to adjust consumer tariffs in a distribution area to cover the costs of the RoLR cost recovery scheme.** Cost recovery claims materially increased customers bills in the UK following a substantial number of retailer failures in 2022.⁴⁹ Currently, consumer bills are capped by the DMO. In volatile periods, the use of the RoLR cost recovery scheme for multiple failures could similarly impact consumer bills in

⁴⁸ Section 166 of the NERL.

⁴⁹ In 2022, the UK Office of Electricity and Gas Markets (Ofgem) reported that the costs to be recovered from electricity consumers exceeded £1bn, with around £800m being recovered from gas consumers. This resulted in electricity and gas customers bills increasing by £34 and £33 respectively. <https://www.ofgem.gov.uk/sites/default/files/2022-07/07%20Open%20letter%20Review%20of%20how%20the%20costs%20of%20supplier%20failure%20are%20recovered%20.pdf>, 9 July 2022, Ofgem.

Australia but retailers may be limited on what can be passed through to consumers if not accounted for in setting up consumer tariffs or in the AER's determination of the DMO.

We are not considering implementing a multiple claim or progressive payment process

The Commission considers detailed changes to the RoLR cost recovery scheme, such as a multiple claim or progressive payment process, would be challenging. We consider this is particularly challenging in the context of work underway by DCCEEW which will soon consult on a draft Bill to improve aspects of the RoLR cost recovery scheme (see section 1.4). Given this and Ofgem's experience, the Commission's draft recommendation is to improve clarity and certainty for the RoLR cost recovery scheme through changes to AER guidelines but not to otherwise change the single payment process for the RoLR cost recovery scheme.

We encourage the AER to consider changes to the RoLR guidelines as soon as practicable

The Commission notes that because this draft recommendation proposes to expand the information the AER specifies in existing guidelines, the AER could choose update its RoLR guidelines prior to commencement of the NERL changes that would be required through South Australian parliament. The Commission supports timely changes to the AER RoLR guidelines to increase regulatory certainty for market participants.

3.2 Draft recommendation 8: Expand the AER's RoLR information-gathering powers to include third parties

This section describes:

- stakeholder feedback that supported better information gathering for RoLR events
- our draft recommendation to expand the NERL to allow the AER to issue RoLR Regulatory Information Notices (RINs) to the failed retailer's agents and third parties in possession of the failed retailer's information.

3.2.1 Stakeholders supported better information gathering for RoLR events

The directions paper proposed improvements to information collection for RoLR events. We sought feedback on the following issues across both electricity and gas:

- Do RoLRs need more information such as historic customer load, location, offers held with the failed retailer?
- Should there be limits on how the RoLR can use the information?
- How should this information be efficiently collected?

Stakeholders supported improving and standardising the information provided to RoLRs and generally considered the AER was best-placed to collect this information. The six stakeholders that commented on this issue supported further work to improve the information provided to RoLRs.⁵⁰ Specific stakeholder feedback is described below.

Standardising the format of information collected through RoLR RINs

EnergyAustralia and Origin considered that the information should be collected in a standardised format.⁵¹ EnergyAustralia noted that if this information is standardised, the failing retailer could provide this to the AER at the same time the RoLR event occurs.⁵²

50 AER, AEC, EnergyAustralia, Origin Energy, AGL Energy and Stanwell Energy submissions to the directions paper.

51 Submissions to the directions paper, EnergyAustralia, p. 5, and Origin Energy, pp. 3-4.

52 EnergyAustralia, submission to the directions paper, p. 5.

Process for collecting, and limits on the use of, information collected through RoLRs RINs

The AEC, EnergyAustralia and Origin considered the AER is best-placed to collect and share information relevant for designated RoLRs to manage transferred customers.⁵³

The AEC and EnergyAustralia considered it is unnecessary to specify additional limits on how designated RoLRs use information gathered under RoLR RINs.⁵⁴ The AER also noted that it can control what information is transferred to the designated RoLR and proposed it could include its approach in the AER RoLR guidelines.⁵⁵

Collecting information in a timely manner

The AER noted that the current RoLR RINs can only be issued to those who can also be issued a RoLR notice, which may exclude third parties who hold the failed retailer's information.⁵⁶ The AER considered it could obtain the necessary information via the failed retailer or by using its generic information gathering powers but that this process can be time-consuming, particularly when the information may be critical for the designated RoLR to manage transferred customers.

3.2.2 Our draft recommendation will reduce barriers to the AER obtaining information for RoLRs

The Commission has made a draft recommendation to improve the AER's ability to issue RoLR RINs to all parties that may hold relevant information. This will involve expanding the NERL to allow the AER to issue RoLR RINs to the failed retailer's agents and third parties in possession of the failed retailer's information.

We consider this will increase the speed and ease with which the AER can obtain information for the designated RoLR to manage the sudden increase in customers. This will ensure the AER can issue RoLR RINs to all relevant parties rather than via the failed retailer which may take longer.

Currently, the AER issues RoLR RINs to help the designated RoLRs receive the right information to manage customers following a retailer failure. However, this process can be time-consuming for the AER to get all the relevant information from the right parties because the AER can only use RoLR RINs on a retailer (or former retailer). Our draft recommendation would enable the AER to issue RoLR RINs to all relevant parties thereby streamlining the information gathering process for the AER. This will enable designated RoLRs to get the necessary information to manage transferred customers in a timely manner.

The Commission supports the AER pursuing RoLR guideline changes so market participants better understand the RoLR RIN process

The Commission considers no changes are needed to the NERL to improve the process for collecting, or limits on the use of, information collected through RoLR RINs. However, we support the AER's proposal in its submission that it specify its approach for information gathering through changes to its RoLR guidelines.

The Commission supports the AER developing templates to improve the accuracy of information provided under RoLR RINs

The AER noted that it could improve the process for gathering accurate and complete information by creating templates for those issued a RoLR RIN to complete.⁵⁷ This process would be familiar

53 Submissions to the directions paper, AEC, p. 6; EnergyAustralia, p. 4; and Origin Energy, p. 3.

54 Submissions to the directions paper, AEC, pp. 6-7 and EnergyAustralia, p.5.

55 AER, submission to the directions paper, p. 6.

56 Further information provided by the AER following the close of submissions.

57 Further information provided by the AER following the close of submissions.

to retailers as the AER currently requires retailers to fill out information templates for retail performance reporting on a quarterly basis.⁵⁸ The Commission supports procedural changes by the AER to improve the accuracy and format of information provided to designated RoLRs. This is preferable to specifying in the NERL or rules how retailers collect and store information which would be costly to implement.

3.3 Draft recommendation 9: Introduce a new framework that allows the AER to issue the failed retailer a bill for the costs associated with its failure

This section describes:

- an overview of the option considered in the directions paper and stakeholder feedback that:
 - generally supported introducing a bill framework in electricity
 - opposed measures to increase the likelihood that a bill is paid in the event of insolvency.
- our draft recommendation to introduce a new framework in the NERL to enable the AER to issue a bill to the failed retailer for the costs associated with its failure, in both electricity and gas.

3.3.1 Stakeholders supported issuing the failed retailer a bill to reduce costs to consumers

The directions paper explored enabling the AER to issue a bill to the failed retailer for the costs the designated RoLR claims through the RoLR cost recovery scheme. This means that the AER would issue the failed retailer a notice for a pending bill when the RoLR event occurs. Once the designated RoLR has applied to the AER for the RoLR cost recovery scheme and determined the amounts, the AER would then issue the failed retailer a bill.

The likelihood of receiving payment from the failed retailer for this bill depends on the nature of the retailer failure. Specifically, if the failed retailer is:

- still solvent it would be required to pay the costs as a debt due and owing
- insolvent the AER would have an outstanding bill, and rank as an unsecured creditor in the insolvency process.⁵⁹

In submissions to the directions paper, almost all stakeholders supported issuing the failed retailer a bill for the costs associated with its failure.⁶⁰ Stakeholders supported this because it may deter retailers from deliberately exiting the market through the RoLR scheme and reduce overall costs to consumers.⁶¹

While stakeholders supported the intent of the bill framework, some noted potential limitations which are discussed below.

- **The bill framework may be ineffective.** It may not be effective if a retailer fails with little/no funds for the failed retailer to pay the bill.⁶² Issuing the failed retailer with a bill reduces incentives for retailers to strategically exit the market when still solvent as they may still receive a bill for the costs of their failure. However, if the failed retailer is insolvent, this may

58 [Performance reporting procedures and guidelines \(retail law\) 2019](#), AER.

59 The AER can already receive and manage payments. Currently, the Australian Competition and Consumer Commission handles the receipt of infringement penalty payments for the AER on behalf of the Commonwealth of Australia. All payments received are paid into the Consolidated Revenue Fund.

60 Stakeholder submissions to the directions paper in support: AEC, pp. 2-3; AER, p. 4; AFMA, p. 5; AGL Energy, p. 3; EnergyAustralia, p. 4; GloBird, p. 1; Momentum Energy, p. 2; Origin Energy, p. 3; PIAC, p. 2; RedLumo, p. 3; Simply Energy, p. 2 and Stanwell, p. 4.

61 Submissions to the directions paper, AEC, p. 2, and GloBird, p. 1.

62 Submissions to the directions paper, Momentum Energy, p. 2, and Alinta, p.3, submissions to the directions paper.

result in the AER receiving little to no return once the insolvency process is complete, so the mechanism may not offset any or all RoLR costs.

- **The bill framework may be difficult to enforce.** It may be difficult to enforce and will need to ensure that recovery extends to parent or holding companies, so retailers aren't incentivised to adopt corporate structures to avoid payment.⁶³
- **The AER must have discretion about whether to pursue debts.** The AER raised in its submission that there are likely to be instances where the AER may receive little or no return. In these instances, it would be inefficient if the AER was compelled to pursue a debt as a Commonwealth government agency and divert resources from other roles and functions of the AER.⁶⁴

3.3.2 Stakeholders opposed strengthening the bill framework by making the AER a secured creditor

The directions paper also explored ways to strengthen the proposed bill framework to increase the likelihood that a bill is paid and reduces costs for consumers. A RoLR event can be triggered by the failed retailer becoming insolvent. An insolvency event enacts a defined process under the Corporations Act for the distribution of the failed retailer's assets, with secured creditors ranking above unsecured creditors. In this instance, the AER would be an unsecured creditor and it may receive little to no return.

The directions paper proposed making the AER a secured creditor by requiring retailers to register a security interest on the Personal Property Securities Register (PPSR) in favour of the AER. The intention of this was to increase the likelihood that the AER receives a return if a failed retailer is insolvent.

In submissions to the directions paper, almost all stakeholder submissions opposed the Commission's proposal to increase the likelihood that a bill is paid in the event of insolvency.⁶⁵ These stakeholders considered this option would:

- be likely to reduce new entry, innovation and competition because of the up-front capital requirements to establish a retail business⁶⁶
- be likely to increase finance costs and potentially impact prudential obligations⁶⁷
- potentially put existing retailers' business models at risk.⁶⁸

3.3.3 Our draft recommendation will reduce costs to consumers in circumstances where the failed retailer can pay the bill

The Commission has made a draft recommendation to create a framework in the NERL to enable the AER to issue a bill to the failed retailer for the costs the designated RoLR claims through the RoLR cost recovery scheme as proposed in the directions paper. Our draft recommendation is to introduce this for both electricity and gas.

This draft recommendation has the following benefits:

- it will reduce the costs of the RoLR event that are paid for by consumers via the RoLR cost recovery scheme (to the extent the failed retailer is able to pay the bill)

⁶³ Submissions to the directions paper, Origin Energy, p. 3, and AFMA, p. 5.

⁶⁴ AER, submission to the directions paper, p. 5.

⁶⁵ Submissions to the directions paper, AEC, pp. 2-3; AER, pp. 4-6; Alinta, p. 4; AFMA, pp. 6-7; AGL, p. 3; Compliance Quarter, p. 2; EnergyAustralia, p. 4; GloBird, p. 2; Momentum Energy, p. 2; Origin Energy, pp. 2-3; RedLumo, p. 3, and Simply Energy, p. 2.

⁶⁶ Submissions to the directions paper, AEC, p. 3; Alinta, p. 4; AFMA, pp. 6-7; Compliance Quarter, p. 3; Origin, p. 3, and RedLumo, p. 3.

⁶⁷ Submissions to the directions paper, AEC, p. 3; Alinta, p. 4; AFMA, pp. 6-7; Compliance Quarter, pp. 2-3; GloBird, p. 2; Momentum Energy, p. 2; Origin Energy, p. 3, and Simply Energy, p. 2.

⁶⁸ Submissions to the directions paper, AFMA, pp. 6-7; Momentum Energy, p. 2; Origin Energy, p. 3, and Simply Energy, p. 2.

- it will discourage exit through the RoLR scheme, particularly for solvent retailers because the failed retailer may receive a bill for the costs of its failure
- in gas, we consider it is complementary to the directions framework because the designated RoLR may incur costs even if a direction is issued.

The Commission has not proposed recommendations to strengthen the likelihood that a bill is paid

The Commission has decided to not recommend changes that require retailers to register a security interest in favour of the AER on the PPSR. We considered the risks and likely costs raised in submissions were significant and would influence day-to-day retailer activities and increase barriers to entry and innovation. In contrast, the potential benefits are uncertain and depend on the nature and size of retailer failures.

The Commission considers there may be limited effectiveness in certain circumstances

We considered stakeholder feedback about effectiveness. If the failed retailer is unable to pay the bill there would be no value to extract from the failed retailer and the risk of higher costs remain with customers. In this instance, costs to customers can only be reduced through government financial support or by limiting the costs that can be recovered by retailers which would contradict with the intent of draft recommendation 7 (see section 3.1).

While we consider the bill framework may discourage some exits through the RoLR scheme, it's unlikely to be sufficient without extra enhancements. Therefore, the Commission has explored alternative policy options to deter inefficient exit through the RoLR schemes (see section 3.4).

The Commission considers the draft recommendation is likely to be enforceable

We considered stakeholder concerns about the potential difficulty of enforcing the bill. The draft recommendation will use the existing legislation and common law which can in certain instances trace debts to parent or holding companies. At this point, we do not have evidence that energy retailers pose risks that would require additional measures beyond what currently exists in legislation. Therefore, the Commission has not proposed additional measures in our draft recommendation.

The Commission considers the AER has appropriate discretion to pursue debts in line with the Public Governance, Performance and Accountability Act

We considered the issues raised by the AER about discretion to pursue debts. The Commission intends for the AER to have discretion to determine whether to issue a notice to a failed retailer seeking recovery of RoLR costs. This will enable the AER determine that in some cases the cost recovery (or partial recovery) from a failed retailer is not justified. We consider this is an extension of the current RoLR cost recovery scheme process which allows the AER to determine whether and which costs claimed by the designated RoLR can be recovered.

A summary of the key legal issues around debts and the AER's obligation to pursue them is set out below.

The *Public Governance, Performance and Accountability Act 2013 (PGPA Act)* sets out various obligations for Commonwealth entities in relation to debts. The AER and the Australian Competition and Consumer Commission (ACCC) are subject to these obligations as they are considered a single non-corporate Commonwealth entity for the purposes of the PGPA Act.⁶⁹ The accountable authority of this entity is the Chairperson of the ACCC.⁷⁰ Therefore, the accountable

69 Section 44AAL, Competition and Consumer Act 2010 (Cth).

authority would be required to recover debts unless: it's not economical to pursue recovery of the debt; it's satisfied the debt is not legally recoverable, or; the debt has been written off by an Act.⁷¹ Under a delegation from the Finance Minister,⁷² the accountable authority may modify the terms and conditions of amounts owing to the Commonwealth, however only the Finance Minister may waive a debt.⁷³

In addition to the requirement to pursue debts, the accountable authority must govern the ACCC and AER in a way that promotes the proper use and management of public resources, as well as the financial sustainability of the entity.⁷⁴

3.4 Draft recommendation 10: Introduce a civil penalty provision for improper use of the RoLR scheme

This section describes:

- an overview of the issue
- our draft recommendation to introduce a civil penalty for retailers who do not take all reasonable steps to avoid causing a RoLR event.

3.4.1 Retailers may use the RoLR scheme as a way to easily exit the market

In submissions to our stage one consultation paper, stakeholders noted there could be circumstances where a retailer could choose to cause a RoLR event, such as by choosing to not meet prudential requirements or ceasing the sale of energy.⁷⁵ The Commission considers retailers should not be able to use it as a means for low-cost market exit because that imposes costs on RoLRs and consumers. Our draft recommendations 1, 2, 5 and 9 propose changes that will place the costs associated with a RoLR event back on the failed retailer. These changes include:

- Introducing a framework that enables the AER to issue a bill to the failed retailer for the costs the designated RoLR claims through the RoLR cost recovery scheme.
- Increasing the duration and removing the trigger for the RoLR gas directions framework and expanding it to include storage contracts and gas held in storage. This will mean that failed retailers may have their gas contracts directed more easily and for longer periods. As a result, the changes to the directions framework will limit the failed retailer's ability to potentially sell its contracts for a profit.

While our proposed changes seek to require the failed retailer to pick up the costs of its use of the RoLR scheme to exit the market, we consider that this may not be sufficient to discourage retailer exit through the RoLR scheme.⁷⁶ The Commission considers this is an important issue given the risks and costs that a RoLR event can place on designated RoLRs and customers. We consider the following issues remain:

70 Section 44AAL(c), Competition and Consumer Act 2010 (Cth).

71 Section 11, *Public Governance, Performance and Accountability Rule 2014*.

72 Part 9, Public Governance, Performance and Accountability (Finance Minister to Accountable Authorities of Non-Corporate Commonwealth Entities) Delegation 2022.

73 Section 63, *Public Governance, Performance and Accountability Act 2013 (Cth)*

74 Section 15, PGPA Act.

75 AFMA, p.8-9 and EnergyAustralia, p.3 submissions to the [consultation paper](#).

76 We note that there are deterrence measures in place for retailers who may wish to re-enter the retail market which was raised by RedLumo and the AEC. The AER's Retailer authorisation guidelines state that the AER may refuse a future retailer authorisation application where the applicant (or associate) had previously triggered a RoLR event. [AER Retailer authorisation guideline, 2014](#).

- We were unable to develop a strong directions, or equivalent, framework in electricity. This means that the bill framework as proposed in recommendation 9 may be insufficient to deter market exit to extract value held by the failed retailer.
- Many of the RoLR event triggers coincide with other legal obligations or breaches of the law or rules with various tiers of civil penalty provisions. However, as highlighted by stakeholders, this does not cover all RoLR events and does not send a clear signal to discourage the use of the RoLR scheme.

3.4.2 Our draft recommendation will discourage improper use of the RoLR scheme

The Commission has made a draft recommendation to introduce civil penalties for retailers who did not take all reasonable steps to avoid exit through the RoLR scheme. This proposal, if implemented, would encourage retailers to exit the market through other, less disruptive processes, where possible. The purpose of this recommendation is to discourage the use of the RoLR scheme as a deliberate commercial means of exiting the market.

This approach could be supplemented by guidance regarding what constitute reasonable steps. For example, whether the failed retailer notified the AER of the potential RoLR event (under section 150 of the NERL), or tried to exit the market through the surrender or transfer processes. This guidance could be set out in the NERL, NERR or AER RoLR guidelines.

The Commission also notes that at face value, our draft recommendation could cause multiple civil penalties for the same conduct. However, we consider this is managed in the following ways:

- There is a long-standing principle in Australian law that a person should not be tried twice for the same offence or events arising out of or related to that offence.⁷⁷ This would likely preclude market participants from being penalised more than once for the same conduct related to the civil penalty.
- The guidance regarding what constitutes reasonable steps could be used to address any potential or perceived conflicts between this proposal and the retailers' obligations under the Corporations Act. This will avoid possible conflicting situations that could eventuate in certain circumstances, such as when a retailer is required to appoint an insolvency practitioner under the Corporations Act but may be discouraged from doing so if it may be penalised for triggering a RoLR event under the NERL (as the appointment of an insolvency practitioner to a retailer is a RoLR trigger).

Exit through the surrender or transfer processes are likely to impose less cost on, and disruption for, customers

There are a range of alternative exit arrangements that minimise disruption to customers and enable retailers to exit the market. The Commission supports retailers using these processes as a means of exiting the market and consider this should be one of the factors the AER may have regard to if a RoLR event is triggered in the future.

The AER oversees the surrender and transfer of retailer authorisation processes that can facilitate orderly retailer exit outside of the RoLR scheme.⁷⁸

Surrender: A retailer may plan to cease selling energy by surrendering its retailer authorisation through an application process with the AER. The surrender process has the following key features:

⁷⁷ The rule against double jeopardy can be traced to Greek, Roman and Canon law and is considered a cardinal principle of English law. As stated by Murphy J in *Davern v Messel* (1984) CRL 21, 62, 'It is a golden rule, of great antiquity, that a person who has been acquitted on a criminal charge should not be tried again on the same charge'.

⁷⁸ More information can be found on the AER's website, <https://www.aer.gov.au/voluntary-retailer-exit>.

- If the surrendering retailer has customers, it must ensure customers are transferred to another retailer (with an existing authorisation), to ensure customers maintain continuity of supply through the surrender process.
- The surrendering retailer must ensure its customers do not suffer unnecessary detriment as a result of being transferred to another retailer. The retailer must provide customers with all necessary information to make an informed choice about their energy service, including providing customers with an opportunity to switch to another retailer without penalty.
- The AER may impose conditions on the surrendering retailer to manage the transfer of customers. Conditions are determined on a case-by-case basis and can include customer contract terms, payment arrangements, life support and exit fees.

Transfer: Retailers can also apply to the AER to transfer an authorisation to another legal entity in certain situations. For example, where there is a change in the legal entity holding the retailer authorisation. To transfer an authorisation, the retailer and transferee (incoming retailer) need to submit a joint application to the AER. However, the AER advises that a request to transfer a retailer authorisation to another legal entity should only be considered where the incoming retailer is not yet authorised.

The Commission also considered a range of alternatives when developing the civil penalty provision

In developing this draft recommendation, we considered a range of alternatives to deter use of the RoLR scheme unless it's in the best interest of consumers. The options we considered and the reasons for not pursuing them are set out below:

- **Specifically prohibiting the *misuse* of the RoLR scheme.** The Commission considered whether *misuse* of the RoLR scheme would be an appropriate deterrent. However, we consider civil penalties, where possible, should have an objective set of criteria.
- **Targeting specific conduct that is not already a civil penalty provision.** We identified that there are some RoLR event triggers that coincide with Tier 1 civil penalty provisions in the law or rules, and considered whether a targeted provision could be used to fill in the gaps. However, this would result in a very complicated civil penalty provision. Such a provision is unlikely to send a clear signal to retailers considering exiting the market to do so in a way that minimises disruption to customers.

4 Our draft recommendations would contribute to the national energy objectives

In conducting reviews, the Commission must have regard to the national energy objectives.⁷⁹ For this review, the relevant energy objective is the National Energy Retail Objective (NERO) which is:⁸⁰

to promote efficient investment in, and efficient operation and use of, energy services for the long term interests of consumers of energy with respect to—

- (a) price, quality, safety, reliability and security of supply of energy; and
- (b) the achievement of targets set by a participating jurisdiction—
 - (i) for reducing Australia's greenhouse gas emissions; or
 - (ii) that are likely to contribute to reducing Australia's greenhouse gas emissions.

The targets statement, available on the AEMC website, lists the emissions reduction targets to be considered, as a minimum, in having regard to the NERO.⁸¹

4.1 How we have applied the NERO to our recommendations

The Commission used an assessment framework to determine whether our recommendations identified in the review promote the long term interests of consumers. The assessment framework was generally supported by stakeholders and includes the following criteria:

1. **Appropriate risk allocation.** The RoLR scheme involves the sudden transfer of customers from the failed retailer to a designated RoLR to maintain continuity of supply. While necessary, this results in a significant inefficient transfer of risk from the failed retailer to the RoLR because it cannot prepare for these customers in advance (e.g. by purchasing hedging contracts or gas supply). We therefore assess our solutions in terms of whether they assist RoLRs in managing new customers.
2. **Efficiency and incentives.** The RoLR scheme supports energy customers to maintain supply following retailer failures. To minimise costs to customers and retailers, our recommendations should seek to discourage retailers from deliberately using the RoLR scheme to exit the market.
3. **Simplicity and transparency.** The regulatory framework should be easily understood and enforceable. The RoLR scheme manages retailer failure of an essential service and was recently tested in the midst of volatile market conditions. Therefore, recommendations should be easily navigable by all relevant parties in periods of market stress, and enforceable by the AER to maintain market confidence.
4. **Timing and practicality.** Changes to the regulatory framework should be likely to achieve the benefits including their likelihood to be implemented. The RoLR scheme for NECF jurisdictions is primarily set out in the NERL which requires changes through South Australian parliament. Therefore, our draft recommendations must be endorsed and implemented by governments or be actionable through guideline changes.

⁷⁹ Section 224 of the NERL.

⁸⁰ Section 13 of the NERL. *The NEO was updated on 21 September 2023 with the introduction of the [Statutes Amendment \(National Energy Laws\) \(Emissions Reduction Objectives\) Act 2023](#). We have applied the updated NERO in this draft report, in accordance with that Act and our [emissions guidance](#). This is a change from the directions paper which referenced the old NERO.*

⁸¹ Section 224A(5) of the NERL.

4.2 Our draft recommendations contribute to the NERO

This section explains the benefits of the proposed changes and why the draft recommendations promote the NERO when assessed against the criteria. In summary, we consider that our proposed changes have low or negligible costs. These small costs largely arise from changes to the AER's RoLR guidelines and NERL. In contrast, the changes are likely to result in the following material benefits against the assessment framework.

Reduce the risks on designated RoLRs associated with RoLR events

- Improvements to the gas directions framework will increase the likelihood, duration and scope of directions. This will enable designated RoLRs to better manage the risks of a sudden increase in customers.

Discourage inefficient exit through the RoLR scheme

- Introducing the bill framework in electricity and gas will discourage exit through the RoLR scheme, particularly for solvent retailers as they may receive a bill for the costs of their failure.
- Introducing civil penalties for retailers who do not take all reasonable steps to avoid causing a RoLR event will discourage the use of the RoLR scheme. It will also provide better incentives for retailers seeking to exit the market to do so in a less disruptive manner through the surrender or transfer processes.
- Introducing the bill framework in gas is complementary to the gas directions framework because the designated RoLR may incur costs even if a direction is issued.

Make the RoLR scheme clearer and lower the administrative burden

- Simplifications to the gas directions framework will decrease risk for RoLRs and the administrative burden on the AER, designated RoLRs and failed retailers.
- Clear guidance on RoLR cost recovery will help designated RoLRs prepare high quality claims with the right information and to engage with the process.
- Expanding the RoLR RINs to include all entities that may hold the failed retailer's information will enable designated RoLRs to get customer information quickly.

Are practical to implement through guideline changes or the NERL

- The Commission has proposed a targeted set of changes in the NERL which:
 - simplify and improve the RoLR gas directions framework
 - introduce a bill framework in electricity and gas for the RoLR cost recovery scheme
 - introduce civil penalties for retailers who do not take all reasonable steps to avoid causing a RoLR event
 - make minor amendments to improve the clarity and efficacy of the RoLR scheme.
- Where appropriate, the Commission has proposed practical guideline updates for the RoLR cost recovery scheme and information about the RoLR RIN process. We encourage the AER to consider guideline changes where practicable.

4.3 Our draft recommendations will lower costs for consumers

The Commission's draft recommendations will result in lower prices costs for consumers.

- Improvements to the gas directions framework will enable the designated RoLR to supply customers at lower prices (to the extent that the failed retailer holds valuable gas contracts)
- The bill framework will reduce the costs of the RoLR event that are paid for by consumers via RoLR cost recovery (to the extent the failed retailer is able to pay the bill).

Abbreviations and defined terms

ACCC	Australian Competition and Consumer Commission
AEMC	Australian Energy Market Commission
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
AFMA	Australian Financial Markets Association
Commission	See AEMC
DMO	Default Market Offer
DCCEEW	Department of Climate Change, Energy, Environment and Water (Commonwealth)
DWGM	Declared Wholesale Gas Market, in Victoria
GSA	Gas supply agreement
GTA	Gas transportation agreement
NECF	National Energy Customer Framework
NEL	National Electricity Law
NEO	National Electricity Objective
NER	National Electricity Rules
NERL	National Energy Retail Law
NERO	National Energy Retail Objective
NERR	National Energy Retail Rules
NGL	National Gas Law
NGO	National Gas Objective
NGR	National Gas Rules
Ofgem	UK Office of Electricity and Gas Markets
PPA	Power purchase agreement
PPSR	Personal Property Securities Register
RIN	Regulatory information notice
RoLR	Retailer of Last Resort
SoLR	Supplier of Last Resort (equivalent RoLR scheme used in the UK)
STTM	Short term trading market
ToR	Terms of Reference

A Summary of other issues raised in submissions

Table A.1: Summary of other issues raised in submissions

Stakeholder(s)	Issue	AEMC Response
Shell, AEC	<p>The AEC and Shell raised that the administered pricing provisions for gas RoLR events has yet to be previously considered and should be investigated through this review.</p> <p>Both noted that applying administered pricing due to a RoLR event could lead to inefficient market outcomes, including:</p> <ul style="list-style-type: none"> • reduced supply by gas producers • large and potentially unsustainable withdrawals/demand by gas consumers at the artificially lower price <p>If these inefficient outcomes are sustained, this can lead to the cumulative price threshold (CPT) being exceeded. These outcomes were observed following the Weston RoLR in May and June 2022.</p>	<p>The Commission acknowledges that this issue has been raised in several forums over the past two years and is a genuine issue that warrants further consideration.</p> <p>The Commission considers:</p> <ul style="list-style-type: none"> • This issue is outside the core scope of the review. The terms of reference described the objectives of the review to minimise the risks that designated RoLRs face and the costs that customers incur. Furthermore, the majority of the RoLR scheme is held in the NERL and this review is looking at proposed law changes. Whereas, the issues proposed by AEC and Shell can be considered in a more timely fashion through a rule change process. The Commission will seek to engage with Shell and the AEC on a path forward to progress such a rule change. • This issue is best-placed to be considered in a rule change process potentially for all administered pricing provisions other than just RoLR. Shell or the AEC could propose a rule change request if they wished to pursue this issue further.

B Overview of the RoLR scheme and gas directions framework

This appendix provides additional information regarding how the RoLR scheme currently operates, to support understanding of the draft recommendations contained in this report. This section outlines key terms, how retailers may participate as RoLRs under the scheme, information requirements before and after RoLR events, and cost recovery arrangements. This section also outlines how the gas directions framework currently operates alongside the RoLR scheme for failed gas retailers and other relevant parties.

B.1 Key terms

Table B.1: Key terms

Designated RoLR	A registered RoLR that is appointed or taken to be appointed as a designated RoLR for a RoLR event (NERL, section 122)
Failed retailer	A retailer (or former retailer) in relation to which a RoLR event has occurred (NERL, section 122)
RoLR event	<p>The NERL defines the following events or circumstances as a “RoLR events”:</p> <ul style="list-style-type: none"> • revocation of a retailer’s authorisation; • suspension of the right of a retailer to acquire electricity or gas from the wholesale exchange or wholesale gas or short-term trading market (AEMO initiated) or ceasing to be a registered participant; • appointment of an insolvency official; • an order to wind up the retailer is made or a resolution is passed to wind up the retailer; • the retailer ceases selling energy (for reasons other than the transfer or surrender of its retailer authorisation, or the transfer of all or some of its customers to another retailer, or selling or otherwise disposing of all or part of its business); • any other event or circumstances prescribed in the National Regulations (NERL, section 122)
RoLR cost recovery scheme	A designated RoLR may apply to the AER to recover costs incurred on or after a RoLR event. A default RoLR may also apply to recover costs incurred in preparing for RoLR events (NERL, Division 9)
Transfer date	The date on which the customers of the failed retailer are transferred to the relevant designated RoLR (NERL, sections 122; 136(2)(e)). On and from the transfer date, and in relation to the customers transferred to it and subject to and in accordance with the RoLR Procedures, the designated RoLR assumes the functions and powers of the failed retailer under the energy laws (NERL, section 140)

Source: NERL.

B.2 RoLR registration – retailers may lodge an expression of interest with the AER to become a RoLR

Under the NERL, the AER must both initially and afterwards at times it considers appropriate, call for expressions of interest from retailers to register as a RoLR.⁸² Retailers can lodge an expression of interest to become a RoLR both in response to a call from the AER, or at any other time.⁸³ A RoLR expression of interest may contain proposals regarding:

- customers or classes of customer the retailer will accept as its customers if it were to be appointed a designated RoLR following a RoLR event
- numbers of customers the retailer will accept if it were to be appointed a designated RoLR following a RoLR event
- variation to the retailer's RoLR cost recovery scheme⁸⁴

The AER must ensure that there is a "default" RoLR appointed for each electricity point at all times.⁸⁵ The AER must also ensure that there is no more than one default RoLR registered for each connection point.⁸⁶ A retailer's concurrence is not required for the AER to appoint and register it as a default RoLR.⁸⁷ In practice, default RoLRs are usually the largest energy retailers (AGL, Origin, EnergyAustralia), or government-owned entities.

Retailers can also submit an expression of interest to the AER to become an "additional RoLR".⁸⁸ There are two categories of additional RoLRs:

- Firm offers: an offer by the retailer to act as an additional RoLR under the terms and conditions outlined in the retailer's expression of interest. This will include details on the number and classes of customers it will take on in a RoLR event.⁸⁹
- Non-firm offer: an expression of interest by a retailer to act as an additional RoLR. Prior to any appointment as an additional RoLR, the AER will confirm with the retailer whether it is still prepared and capable of being appointed under the terms and conditions proposed in the expression of interest.

Under the NERL, retailers must meet certain criteria to become a RoLR. This includes criteria regarding a retailer's organisational and technical capacity, financial resources, and suitability, as well as any other criteria the AER considers relevant.⁹⁰ The AER must publish and maintain a register of RoLRs.⁹¹

B.3 RoLR designation – when a RoLR event is triggered the AER must appoint a designated RoLR

When a RoLR event is triggered, a designated RoLR is appointed for each electricity connection point. This designated RoLR is responsible for taking on new customers and facilitating customer transfers from the failed retailer. Under the NERL, the default RoLR is taken to be appointed the designated RoLR, unless the AER appoints a registered RoLR as a designated RoLR in respect of a

82 NERL, section 124(1)

83 NERL, section 124(2)

84 NERL, section 124(4)

85 NERL, section 125

86 NERL, section 125

87 NERL, section 125(5)

88 NERL, section 126

89 AER, RoLR guidelines, p. 6.

90 NERL, section 123

91 NERL, section 127

RoLR event before the event actually occurs, and notifies AEMO before the transfer date.⁹² The AER must notify a registered RoLR before appointing it as designated RoLR, but the AER does not require the consent of the registered RoLR to appoint it as a designated RoLR.⁹³

When determining whether to appoint a registered RoLR as the designated RoLR, the AER must consider:

- Whether the registered RoLR has a cost recovery scheme, and if so, what costs are recoverable and what is the quantum of these costs
- The imminence of the RoLR event
- The RoLR criteria, which includes consideration of the retailer's organisational and technical capacity, its financial viability and capacity, and its suitability.⁹⁴

The AER may appoint more than one designated RoLR for a RoLR event if the AER is of the opinion that it is appropriate to do so.⁹⁵ When making the appointments, the AER must allocate responsibility for particular customers or classes of customers to each designated RoLR in a manner consistent with the RoLR guidelines.⁹⁶

B.4 Information requirements – AEMO and retailers must provide certain information to the AER regarding potential or actual RoLR events

Under the NERL, there are information obligations on AEMO and retailers to promptly inform the AER of any event, circumstance, or matter regarding a potential RoLR event or the ability of a retailer to maintain continuity of sale to its customers.⁹⁷

The AER may also serve a retailer (or former retailer) with a regulatory information notice. Such a notice may be served either in connection to a RoLR event that has occurred or through the AER's powers under Division 3, whether or not a RoLR event has occurred.⁹⁸

The notice may require a retailer (or former retailer) to provide specific information to the AER, AEMO, a registered RoLR, and/or a distributor. The notice may also be served on an insolvency official of a failed retailer.⁹⁹ Information requested by the AER in a RoLR regulatory information notice may include:

- the names, contact details, billing addresses, and energy supply addresses of all the retailer's customers;
- the meter identifier for each of those customers;
- the network tariff code(s) of the distributor for each of those customers;
- details of each customer's actual consumption of energy;
- whether any customer is a hardship customer and if so details of which customer;
- whether the premises of any customer are registered under the Rules as having life support equipment and if so details of which premises;

92 NERL, section 132

93 NERL, section 132(4)

94 NERL, section 133

95 NERL, section 134(1)

96 NERL, section 134

97 NERL, section 150

98 NERL, section 152(1)

99 NERL, section 152(3)

- whether any customer is in receipt of a tariff payment, credit, or other benefit under a feed-in arrangement prescribed by the National Regulations for the purpose of this paragraph, and if so details of which customer and relevant details;
- details of customer classification under the Rules;
- details of any pension, health or social security payments to, rebate for or benefits or concessions of a customer;
- in the case of a failed retailer - any direct debit arrangements by a customer, or Centrepay arrangements with the retailer.¹⁰⁰

Upon being served with a RoLR regulatory information notice, the retailer, former retailer, or insolvency official named in the notice must comply.¹⁰¹ Civil penalties are attached to this provision.¹⁰²

B.5 Cost recovery scheme – the NERL includes provisions that allow RoLRs to recover some costs incurred following a RoLR event

Under the NERL, RoLRs can apply to the AER to recover costs incurred through participating in or preparing for a RoLR event. RoLRs cannot recover any costs incurred through a RoLR event other than in accordance with the scheme provided for in Part 6 Division 9 of the NERL.¹⁰³ The designated RoLR assumes no financial or other liabilities of the failed retailer where that liability accrues before the customer transfer date.¹⁰⁴

After receiving a cost recovery application, the AER may request additional information from the RoLR that the AER considers necessary to make a determination.¹⁰⁵ The retailer must comply with any such request. The AER must also publish a notice of the application on its website and invite submissions on the application for a minimum of 20 business days.¹⁰⁶

In deciding whether to grant or refuse an application for cost recovery, the AER must be guided by the following principles:

- the registered RoLR should be provided with a reasonable opportunity to recover reasonable costs incurred with respect to the RoLR scheme
- the recovery of costs should allow for a return commensurate with the regulatory and commercial risks with respect to the RoLR scheme
- the registered RoLR will itself bear some costs, in proportion to its customer base.¹⁰⁷

The AER's RoLR guidelines contain further detail regarding the form and information to be included in an application for a RoLR cost recovery scheme.¹⁰⁸

As part of the AER's cost recovery determination, the AER must make a determination that one or more distributors are to make a payment towards the cost of the scheme.¹⁰⁹ This is a "RoLR cost recovery scheme distributor payment determination" and is made after consultation with the

100 NERL, section 154(2)

101 NERL, section 156(1)

102 NERL, section 156

103 NERL, section 165

104 NERL, section 140(3)

105 NERL, section 166(4)

106 NERL, section 166(5)

107 NERL, section 166(7)

108 AER RoLR guidelines, p. 1.

109 NERL, section 167(1)

distributor/s concerned. The distributor/s are required to make payments to a RoLR in accordance with their liability under the determination.¹¹⁰

B.6 Overview of existing arrangements for RoLR gas directions

When a gas retailer fails, the RoLR scheme facilitates the transfer of the failed retailer's customers to a new retailer known as the designated retailer. This operates in the same way as the electricity RoLR process. However, in gas there is also a framework under the NERL that allows the AER to direct gas supply and pipeline capacity to be supplied to the designated RoLR(s).¹¹¹ This provision helps ensure that the designated RoLR has enough gas to supply the transferred customers.

An outline of the gas directions process is described below:

- **When can a RoLR gas direction be triggered?** The AER may issue a direction when there is no declared wholesale gas market or short-term trading market, or where in the opinion of the AER there is not sufficient capacity or gas available in the short-term trading market to enable gas supply to the RoLR's new customers.¹¹²
- **What can be directed?** A direction can apply to contracts held by the failed retailer immediately before the transfer date for pipeline capacity to transport gas, and contracts for gas supply.¹¹³ The contracts held by the failed retailer can be directed regardless of where the supply in the contract comes from. For instance, a failed retailer's contract for gas supply from a Victorian gas field can be made available to a designated RoLR in Queensland.
- **Who are the directions issued to?** Directions can be issued to distribution or transmission service providers (for pipeline capacity), producers, or any other entity that has contracted to sell gas to the failed retailer (for gas supply).¹¹⁴
- **What must the directed entity do?** A directed entity must make the gas supply or pipeline capacity that was available to the failed retailer immediately before the transfer date available to the designated RoLR. It must make this supply or capacity available on the same terms that were available to the failed retailer.¹¹⁵ The designated RoLR may, but is not obligated to, use any or all of the gas or pipeline capacity.¹¹⁶
- **What happens under the mandatory negotiations for a replacement or novation of a contract?** As soon as practicable after the transfer date, negotiations should commence for the contracts that were directed.¹¹⁷ This process facilitates the designated RoLR negotiating for contracts held by the failed retailer for the period after the directions ends.¹¹⁸
 - For gas supply, the mandatory negotiations depend on the circumstances of the retailer failure. Two scenarios are set out below:
 - If the contract continues in force despite the RoLR event, the failed retailer must commence negotiations between the designated RoLR and the gas producer.
 - If the contract is terminated because of the RoLR event, the gas producer must commence negotiations with the designated RoLR.

110 NERL, section 167(3)

111 NERL, section 137

112 NERL, section 137(1)

113 NERL, section 137(1)(a)-(c). The transfer date is specified in the RoLR notice issued by the AER and is the date on which the customers of the failed retailer are transferred to the relevant designated RoLR. See section 136(2)(e).

114 NERL, section 137(1)(a)-(c)

115 NERL, section 137(5)

116 NERL, section 137(4)

117 NERL, section 137(8); (12)

118 NERL, section 137(12)(a)

- **What happens if no negotiation agreement is reached?** If there is no agreement after three months from the transfer date, the contract must be put up for sale, or dispute resolution must begin.
 - For gas supply, the directed entity (either the failed retailer or gas producer) must put the gas that is the subject of the contract up for sale by auction. It must use its best endeavours to complete the auction process within an additional three months.¹¹⁹
 - For pipeline capacity, the designated RoLR, or the distribution or transmission service provider may commence an access dispute.¹²⁰
- **When does the direction end?** The direction continues in force until a novation or termination and replacement with a new contract has been completed.¹²¹ Where no agreement is reached, the direction continues in force until:
 - the gas has been sold (gas supply)
 - an access determination has seen effect (pipeline capacity).

119 NERL, section 137(12)(c)(i)-(iii)

120 NERL, section 137(10)

121 NERL, section 137