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Attention: Mr Ben Davis

Australian Energy Market Commission

By Online Submission and Email: ben.davis@aemc.gov.au

Reference Code: RPR0016

04 April 2024

Dear Mr Davis,

[Draft Report – Review into the Arrangements for Failed Retailers’ Electricity and Gas Contracts](#)

AGL Energy (AGL) welcomes the opportunity to provide feedback to the Australian Energy Market Commission (the AEMC) in response to the abovementioned draft report (the Draft Report).

Proudly Australian since 1837, AGL delivers around 4.3 million gas, electricity, and telecommunications services to our residential, small, and large business, and wholesale customers across Australia.

AGL is registered as a default Retailer of Last Resort (RoLR) for both gas and electricity in various jurisdictions and in recent years has been the designated RoLR for several instances of retailer failure. Given these experiences, AGL is very supportive of the AEMC’s review into the wholesale risks faced by designated RoLRs.

AGL’s detailed feedback on the recommendations in the Draft Report are set out within Appendix A attached herewith. We also refer to our initial response to the AEMC’s Directions Paper submitted on 23 June 2023 (Directions Paper Submission).

In principle, we reaffirm our support for the AEMC’s proposed changes as well as highlighting any refinements to the recommendations. To the extent that the Final Report supports our revisions, we would welcome the recommendations progressing to the jurisdictions for implementation in a timely manner so as to strengthen the market’s resilience in the event of retailer failure due to market volatility.

If you have any questions in relation to this submission, please contact Liam Jones on ljones3@agl.com.au.

Yours sincerely,

A handwritten signature in black ink that reads "Liam Jones".

Liam Jones
Senior Manager Policy and Market Regulation



Appendix A – AGL’s Feedback on Recommendations in the Draft Report

Part 1 Draft recommendations to simplify and improve the RoLR gas directions framework.

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.

AGL supports the AEMC’s draft recommendation 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.

The AEMC’s Draft Report correctly identifies that gas RoLR events can have significant impacts on designated RoLRs and expose them to a range of risks that extend beyond just gas supply and price. The AEMC’s draft recommendation avoids adding further complexity to the process, and instead allows for appropriate action to be taken quickly in response to gas RoLR events. In this regard, we also recommend more explicitly clarifying that the directions framework will extend to both supply and pipeline capacity as per the current arrangements.

Draft Recommendation 2: Extend the RoLR gas directions period to six months.

AGL supports the AEMC’s draft recommendation to amend the NERL to specify that RoLR gas directions apply for six months.

This is consistent with AGL’s submission to the AEMC’s directions paper, in which we stated that the gas directions should apply for longer than the current three-month period. While AGL noted that the amount of time gas directions will be required will vary across RoLR events, our submission stated that a period of 6 months should mitigate the risks to the designated RoLR in most situations.

We note our submission also suggested there may be benefits to having some additional flexibility incorporated into the directions framework such as allowing the designated RoLR to apply to the AER for an extension of the directions in extenuating circumstances.

We are still of the view that a gas RoLR event could present circumstances that justify a gas directions period longer than six months, and that additional flexibility would assist in this regard. Despite this, we do acknowledge the difficulty in specifying particular market conditions or thresholds that would trigger an extension, as noted by the Australian Energy Regulator (AER).

On balance, we consider that the AEMC’s draft recommendation should mitigate the risks to the designated RoLR in most situations and is a significant improvement from the current arrangements which have a duration of three months.

Draft Recommendation 3: Remove the mandatory negotiations framework and auction processes.

AGL supports the AEMC’s draft recommendation 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

We agree with the AEMC that the mandatory negotiation process will be unnecessary if the RoLR gas directions period is extended to six months. This is consistent with AGL’s submission to the AEMC’s directions paper.



While we did not put forward a view on the current auction process, AGL supports the AEMC's draft recommendation to remove it. AGL agrees that a failed retailer would already be strongly incentivised to sell their gas supply contracts, so the need for a mandatory auction process is unnecessary.

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

AGL supports the AEMC's draft recommendations 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
- directions do apply for contracts that are due to begin in the directions period

This is consistent with the AGL's submission to the AEMC's direction paper, where we stated that the AER gas directions need to be automatic and allow for the designated gas RoLR to use all relevant gas contracts of the failed retailer and that, similarly, any directed contracts that come to an end during the directions period should cease to be included in the directions.

Draft Recommendation 5: Expand the gas directions framework to include storage contracts.

AGL supports the AEMC's draft recommendations 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, 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

The AEMC's Draft Report goes on to explain that 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.

Further, that gas held in storage is available for the designated RoLR to use, but the designated RoLR must compensate the failed retailer for the gas.

AGL welcomes this draft recommendation, and notes it is consistent with its submission to the AEMC's direction paper, where we noted gas directions should relate to all types of contracts, including storage. In our submission, we raised the question of how to appropriately value any gas in storage. AGL maintains its view that this should only be the initial cost of the gas.

AGL is concerned that the AEMC's draft recommendation of the AER determining a reasonable price that the designated RoLR will need to pay for the gas withdrawn from storage may not result in a price that reflects the initial cost of the gas. In circumstances where the valuation of the stored gas is relatively high, this could result in consumers of the failed retailer receiving reduced or even no benefit from this direction. While we also acknowledge that determining the cost of the gas may be difficult in some circumstances, simply valuing the gas at prevailing market conditions may incentivise perverse behaviours by a failed retailer, prior to a RoLR event.

Draft Recommendation 6: Require RoLRs to pass on the benefits from directions to customers.

AGL supports in principle the AEMC's draft recommendation 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.

We understand the AEMC's intent is that the customers of the failed retailer receive the benefits of the directions, as opposed to the designated RoLR's entire customer base. AGL does not disagree with this premise, however, as recognised by the AEMC, there are significant practical considerations around whether



this is feasible to achieve in all circumstances, especially without introducing significant complexity and cost. Accordingly, we support a non-prescriptive approach that allows retailers to flexibly tailor their solution to the specific requirements of each RoLR event.

AGL also supports guidance from the AER on the nature and scope of reporting to demonstrate how retailers have passed-on benefits to consumers.

Part 2 Draft recommendations to reduce costs and provide better incentives for failing retailers.

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

As outlined in our Directions Paper Submission, AGL strongly supports efforts to improve the RoLR cost recovery scheme ensuring that both electricity and gas events are covered. We recognise and agree with the AEMC's assertion that doing so will lead to increased certainty and assurance about the types of costs that can be recovered for designated RoLRs and better support the application process.

AGL agrees with the Draft Report recommendation that the AER's RoLR guidelines should be updated to provide more specificity about the types of costs that are recoverable by designated RoLRs for both electricity and gas events respectively, the supporting information that designated RoLRs will be required to provide to establish such claims, the period for which the designate RoLR can claim costs and the AER's timing/process for considering applications.

AGL notes that the AEMC has not formed an opinion in the Draft Report on the preferred methodology for these four categories. While we acknowledge the AEMC's view that the AER is best positioned to determine the details behind these categories, we would welcome guidance from the AEMC in the Final Report on these topics to help inform and direct the AER's work.

In respect of the four categories of additional guidance proposed by the AEMC, AGL reaffirms its position:

- a. **Types of costs** – the costs claimable under the scheme should be explicitly defined, but with scope for additional flexibility for additional/unforeseen costs that may be relevant to a particular event. The guidelines should as a minimum (for gas and electricity) allow for recovery of wholesale costs and any reasonably incurred costs and in the specific case of electricity, any claimable costs could be determined by reference to the relevant cost allowances under the current DMO determination.
- b. **Information required to assess claims** – we support greater up-front transparency around the scope of information that may be required from designated RoLRs and associated Distribution Businesses, especially where that will expedite the timeframe to assess claims. The breadth of information sought by the AER should be balanced against the need to avoid any undue administrative burdens on designated RoLRs and should be materially relevant or responsive to the question of assessment of the claim.
- c. **Cost recovery period** – AGL continues to support the 9-month period proposed in the Directions Paper.
- d. **Timing and process to assess claims** – AGL supports greater transparency in the timing and process to assess applications.



Draft Recommendation 8: Expand the AER’s RoLR information gathering powers to include third parties.

AGL’s Directions Paper Submission provided details of the types of critical information that might ordinarily be required to be gathered by the AER in respect of electricity and gas RoLR events (see responses to questions 3 and 11 respectively). We emphasise that these were non-exhaustive examples, with the actual requirements varying from event-to-event having regard to the nature of the customers impacted and their underlying products and services.

So that designated RoLRs may effectively fulfil their duties under the RoLR scheme and to ensure positive outcomes for consumers (including lowering costs), it is clear that timely access to relevant data through a streamlined information gathering process is paramount.

Given the potential dispersion of information across the various related parties of an impacted retailer, it is therefore appropriate, and AGL supports, that the AER’s powers are expanded under the NERL to facilitate issuing RoLR Regulatory Information Notices (RINs) to all parties that may hold relevant information, in particular the relevant Distribution Networks.

AGL is also supportive of associated recommendations to raise awareness of the RoLR RIN process and to standardise the way in which data is both requested by and provided to the AER.

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.

AGL remains strongly supportive of the introduction of a mechanism to allow the AER to issue a bill to a failed gas or electricity retailer for the costs of the designated RoLR(s) under the cost recovery scheme.

We believe the introduction of such a measure (in conjunction with the civil penalty provisions discussed in Recommendation 10) will serve as an appropriate deterrent to misuse of the RoLR scheme and may, in some circumstances, reduce the costs passed through to consumers under the cost recovery scheme.

While AGL acknowledges there are inherent limitations in the potential effectiveness of this measure, (such as in the example of an insolvent retailer), any such inadequacies are a reflection of broader debt recovery processes and not a design feature of this specific recommendation.

AGL also welcomes the decision to omit the use of the PPSR to require energy retailers to register a security interest in favour of the AER, noting the inherent complexities, limited benefits and implementation costs as barriers to the effectiveness of that proposal.

Draft Recommendation 10: Introduce a civil penalty provision for improper use of the RoLR scheme.

AGL is supportive of the introduction of civil penalties for retailers who do not take “all reasonable steps” to avoid exit through the RoLR scheme. As discussed in our feedback on Recommendation 9, there is strong policy rationale for deterring the use of the RoLR scheme as a low-cost market exit method (in lieu of alternative, preferred exit mechanisms such as ‘surrender’ or ‘transfer’ which result in fewer costs and a reduced impact on customers) including as a deliberate commercial means of exiting the market.

However, in implementing these civil penalty provisions, we are mindful of the need to provide sufficient clarity and guidance to retailers, especially on the fundamental threshold question of what might constitute “all reasonable steps”. This will necessarily involve having regard to the range of factors that might cause a RoLR event, the types of action that a retailer might reasonably take to avoid a RoLR and the interaction with other civil penalty provisions for the same or similar conduct.