



4 April 2024

Ben Davis
Australian Energy Market Commission

Submitted On-Line

Dear Ben,

Review into the arrangements for failed retailer's electricity and gas contracts

Alinta Energy welcomes the opportunity to comment on the Australian Energy Market Commission's (Commission's) Draft report into the arrangements for failed retailer's electricity and gas contracts.

As an active investor in energy markets across Australia with an owned and contracted generation portfolio of over 3,300MW and more than one million electricity and gas customers. Alinta Energy has a strong interest in the governance, rules and policy approaches that are applied when a retailer failure takes place. Retailer of Last Resort (RoLR) arrangements play a key role in ensuring consumer confidence in the retail energy market through, at a minimum, maintaining the continuity of supply.

To date, when relying on RoLR provisions following retailer failure, consumers have received all the required protections to ensure a continuity of supply. We understand that the review being undertaken by the Commission is aimed at reducing the cost of providing RoLR services, whilst also seeking to introduce incentives that will drive retailer behavior, particularly behavior when a retailer may be facing failure and considering an exit from the market.

Any regulatory or rule changes that are to be implemented in an attempt to direct retailer behavior should not, in any way, impede a retailer's ability to manage their commercial risk.

As was stated in our submission to the Directions paper, Alinta Energy does not support a directions framework that would expose commercially sensitive pricing and contractual supply information to competing supplier entities, given the potential for commercial detriment with existing and future counter parties.

Alinta Energy supports the decision of the Commission not to pursue the recommendation that would require retailers to register a security interest in favor of the Australian Energy Regulator. As set out in the draft report, such an approach would significantly influence the day-to-day activities of retailers, introduce costs, increase barriers to entry and innovation, whilst any potential benefits from such an approach remain significantly uncertain.

Our detailed comments on the draft report are provided below. Should you have any questions or wish to discuss any aspect of our submission I can be contacted on 0419 262 382 or via email shaun.ruddy@alintaenergy.com.au

Yours sincerely

A handwritten signature in cursive script, appearing to read 'Shaun Ruddy', written in black ink.

Shaun Ruddy
Manager National Retail Regulation

Review into the arrangements for failed retailer's electricity and gas contracts.

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.

As a matter of principle, Alinta Energy does not support a directions framework that creates compulsory obligations on independent commercial parties to enter into supply agreements. As we commented in our submission to the directions paper, there are significant concerns with the potential disclosure of commercial information to parties that otherwise would not be privy to such information. Alinta Energy is of the view that compelling such disclosure through a directions framework significantly increases the risk of potential commercial detriment with existing and future counterparties.

However, if directions are to be considered, it is imperative that they are drafted to be clear and unequivocal, ensuring both consistency and transparency. This ensures that the process of issuing directions provides certainty, thus minimizing the potential for unintended consequences and associated risks.

The proposed draft recommendation is for the National Energy Retail Law to be amended 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 discretion provided to the AER under this draft recommendation, to determine whether or not to issue a direction, has the potential to create significant uncertainty for the designated RoLR. In particular, there is no clarity regarding what the AER must (or must not) take into consideration when determining whether there is benefit in issuing the direction.

This uncertainty is not restricted to the designated RoLR; the failing retailer and counterparties of the failed retailer have to manage a level of uncertainty as to whether or not they maintain access to their relevant gas contracts. Noting that any contracts may be considered financial assets in the settlement of debts owed by the failing retailer.

The examples contained in the draft report, depicting when the AER may choose not to issue a direction, are even open to interpretation. For example, the Draft report cites the case when the failing retailer's contracts were due to expire "in a short period of time," as an example of when it may choose not to issue a direction. However, what constitutes a "short period of time" is open to interpretation, as well as whether any benefit could be derived from access to the contacts within that period.

If the NERL is to be amended to give the AER the power to issue directions, including giving the AER the discretion as to whether or not a direction is issued, it is imperative that clear definitive guidelines are provided, covering the execution of such a power, in order to provide both clarity and certainty to all market participants.

Draft Recommendation 2

Extend the RoLR gas directions period to six months.

Alinta Energy has no specific comments on the proposal to extend a directions period, however we would point to the concerns raised in relation to Draft recommendation 1, and the issue of clarity and certainty around direction arrangements.

As highlighted in the Draft report, we are not supportive of a flexible directions period.

Draft Recommendation 3

Remove the mandatory negotiations framework and auctions processes.

Alinta Energy supports the proposal to remove the mandatory negotiations framework and auctions processes. In principle we support their removal.

Draft Recommendation 4

Clarify how contracts that end or are due to commence during the directions period are treated,

If a contract is due to expire during a directions period, it should be permitted to expire. Forcing a gas producer (supplier) to supply beyond the expiry date of a supply contract would expose it to supply risk issues and additional costs. The "natural" expiry of the contract should be upheld in the first instance.

Upholding the natural expiry date of the contract should not preclude the parties agreeing to an extension, assuming mutually acceptable terms can be agreed.

With regard to contracts that are / were due to commence during the directions period, while they may have formed part of the failed retailers contracting strategy, equally they may have been a contributing factor to the retailer's failure.

Nevertheless, access to these contracts may be afforded to the designated RoLR, on the basis that the contracting party is still prepared to offer these contracts into the market. The discretion to offer these contracts to the designated RoLR should sit with contract supplier in all cases.

Draft Recommendation 5

Expand the gas directions framework to include storage contracts.

Extending a gas directives framework to encompass storage contracts and physical storage introduces a level of complexity, but fundamentally the acquisition of gas by a RoLR should be treated in a similar manner regardless of the source of the gas (whether acquired under contract for supply or due to a direct transfer of title in storage).

The AEMC's proposal would create an inconsistency in the way that gas supply contracts are treated.

The AEMC has recognized that physical gas in storage has an inherent value¹ and

¹ AEMC draft recommendation that the AER will need to determine a reasonable price the designated RoLR needs to

should be compensated for. Gas supply contracts may also have inherent value depending on the terms of the agreement. Acquisition of gas from a gas supply agreement is, from an economic perspective, not fundamentally different to acquiring gas in storage and the associated rights to withdraw.

A gas supply contract that prices gas below market value (or under which the purchaser has already made payment) has a clear inherent value similar to actual gas held in storage.

It is irrelevant whether a RoLR directly acquires gas that is held in a storage facility or via a contract with a production facility. The question is, what is the fair value of the gas acquired and how much should the RoLR pay for it? In order to avoid inconsistency, the AEMC must recognise that contractual rights may have value in the same way that a physical asset such as gas in storage has value and therefore should be treated similarly.

Draft Recommendation 6

Require RoLR's to pass on the benefits from directions to customers.

Alinta Energy supports the recommendation whereby any benefits that the Designated RoLR derives as a result of the RoLR framework must be passed on to consumers impacted by the RoLR event.

Draft Recommendation 7

Improve cost recovery clarity through changes to AER Guidelines.

Alinta Energy has no specific comments on the proposal to improve cost recovery clarity through changes to the AER guideline. In principle we support improved transparency and clarity of the allowable cost recovery elements, and processes.

However, we reserve the right to provide further comments once detail of the proposed changes to the AER Guideline have become clear.

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.

Alinta Energy understands the importance of accurate timely customer data being provided to the designated retailer to allow it to provide customers of the failed retailer with the required energy retail services. However, we question the value of the above draft recommendation.

The AER is seeking to extend the issuing of Regulatory Information Notice (RIN) requests to all parties that may hold relevant information during the time of a RoLR event. This would include "third parties" who provide services to the failed retailer.

However, the AER has no ability or authority to compel such third parties to comply with any RIN issued to them. The AER cannot rely on any (should they still exist) contractual arrangements between the failed retailer and the third party. Whilst it is proposed that the recommendation would reduce barriers to the AER obtaining

pay for gas withdrawn from storage.

information for the RoLR, as there is no certainty of compliance with the issued information request, it remains questionable whether it will achieve this.

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.

Alinta Energy supports the decision of the AEMC not to recommend that the AER becomes a secured creditor of retailers. For the reasons outlined in our previous submission, this was not a workable proposal.

Whilst supportive of the notion that the failed (or failing) retailer should contribute to the costs of its abrupt exit from the market, as pointed out in the paper, the likelihood of receiving payment from the failed (or failing) retailer is dependent on the nature of the retailer failure and their ongoing financial position.

This uncertainty in relation to cost recovery introduces risk and a lack of clarity into the RoLR processes, including additional costs in the administrative framework to support and manage the issuing and recovery of bills issued.

Options could be explored to include an assessment mechanism to determine the likelihood of bill payment based on the nature of the retailer failure, prior to the issuing of any bills.

Draft Recommendation 10

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

Whilst acknowledging that the AEMC, through the introduction of this recommendation, is seeking to discourage poor retailer behavior, it is critical that, when implementing a civil penalty regime, clarity is provided on what constitutes a penalty under the regime.

We are concerned that, in circumstances where a civil penalty regime is introduced, the determination that a penalty exists is open to subjectivity and interpretation. This is indeed the case with this proposal, as it is suggested that the draft recommendation introduce civil penalties for retailer's who do not take "all reasonable" steps to avoid exit through a RoLR scheme.

The interpretation of "all reasonable" steps becomes subjective, particularly when considering the substantial divergence in business models among retailers. This variance can significantly impact their capacity to respond effectively to circumstances leading to failure, compounded by market dynamics and external factors. Relying on a determination of "all reasonable" steps for civil penalty provisions invites ongoing challenges due to its inherent subjectivity.

Draft Recommendation 10 requires more in-depth consultation and consideration, before it proceeds any further.