

Australian Energy Market Commission

FINAL REPORT

REVIEW OF THE RETAILER OF LAST RESORT SCHEME

25 FEBRUARY 2021

REVIEW

INQUIRIES

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ABOUT THE AEMC

The AEMC reports to the Council of Australian Governments (COAG) through the COAG Energy Council. We have two functions. We make and amend the national electricity, gas and energy retail rules and conduct independent reviews for the COAG Energy Council.

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SUMMARY

- 1 The Australian Energy Market Commission (AEMC or the Commission) has conducted a short review to provide a set of targeted recommendations to improve the Retailer of Last Resort (RoLR) Scheme. The RoLR scheme is the mechanism, included in the National Electricity Retail Law (NERL), to be followed in the event of the failure of a retailer, to ensure the orderly transfer of retail customers to new retailers without disruption of supply. The recommendations seek to improve outcomes for small customers following a RoLR event and enhance the financial market resilience of the national electricity market (NEM) if a medium or large RoLR event should occur.

Context

- 2 This review follows the Commission's analysis and similar recommendations in the 2020 Retail energy competition review final report to amend the RoLR scheme after assessing the effect of the pandemic on the retail electricity sector. The Commission considered that pandemic impacts heightened the risk of the failure of a retailer, or retailers with a large number of customers, due to a potentially significant increase in the number of customers who are deferring or unable to pay their bills.
- 3 On 8 October 2020 the ministerial forum of Energy Ministers (formerly COAG Energy Council) requested the Commission conduct this review to provide advice to governments on updating the RoLR scheme. The review's terms of reference (TOR) detailed that a Final report be finalised three months after initiation of the review by the Commission. The TOR also established a reference group, comprising jurisdictional representatives and the AER, to provide input to this review. The AEMC published a consultation paper on 22 October 2020 seeking stakeholder feedback on a number of specific issues and recommendations to improve the RoLR scheme.

Recommendations

- 4 To address the risks of potential retailer failure the Commission considers that changes should be made to improve the RoLR scheme. The Commission's key RoLR review final report recommendations are that the:
 - NERL is amended to remove the requirement (but not the ability) for the small customers of a failed retailer to be transferred on to the standard retail contract of the designated RoLR. This would allow customers to be placed immediately on lower priced market offers and therefore face lower electricity bills, if a RoLR's market offer is approved by the AER.
 - RoLR cost recovery arrangements in the NERL be amended to provide greater certainty to the designated RoLR(s) that they can quickly recover the efficient costs they incur following a RoLR event and that the failed retailer's customers will not bear the financial burden of their retailer's failure.

- RoLR scheme is amended to allow the AER to delay the designation of RoLRs by up to 24 hours following a RoLR event which gives the AER greater ability to appoint multiple RoLRs if appropriate.
- National Electricity Rules (NER) are amended to give the RoLR more time to meet AEMO's credit support requirements in relation to the RoLR customers it gains, noting that this may be a significant number of customers in the event of a large retailer failure or multiple retailer failures.
- NERL is amended to provide the AER with appropriate flexibility in its RoLR plan communication and publication requirements.

5 The Commission considers that these recommendations will reduce barriers to retailers participating in the scheme, such as cost recovery and credit or cash flow risks making it easier for retailers to compete with existing RoLRs to be the designated RoLR and take on the failed retailer's customers. These recommendations will also increase the AER's ability to designate multiple RoLRs which will allow the burden of a large number of customers being transferred in the case of a large retailer failure to be shared across additional retailers.

6 These changes will increase the financial resilience of the NEM by reducing the risk of the RoLR scheme triggering financial contagion across the sector due to the transfer of a large number of customers in the event of a large retailer failure or multiple retailer failures causing the failure of the designated RoLR. The recommendations also seek to improve customer outcomes directly by reducing the burden of cost recovery on the failed retailer's customers and allowing customers to immediately be placed on a lower priced market offer, if a RoLR's market offer is approved by the AER.

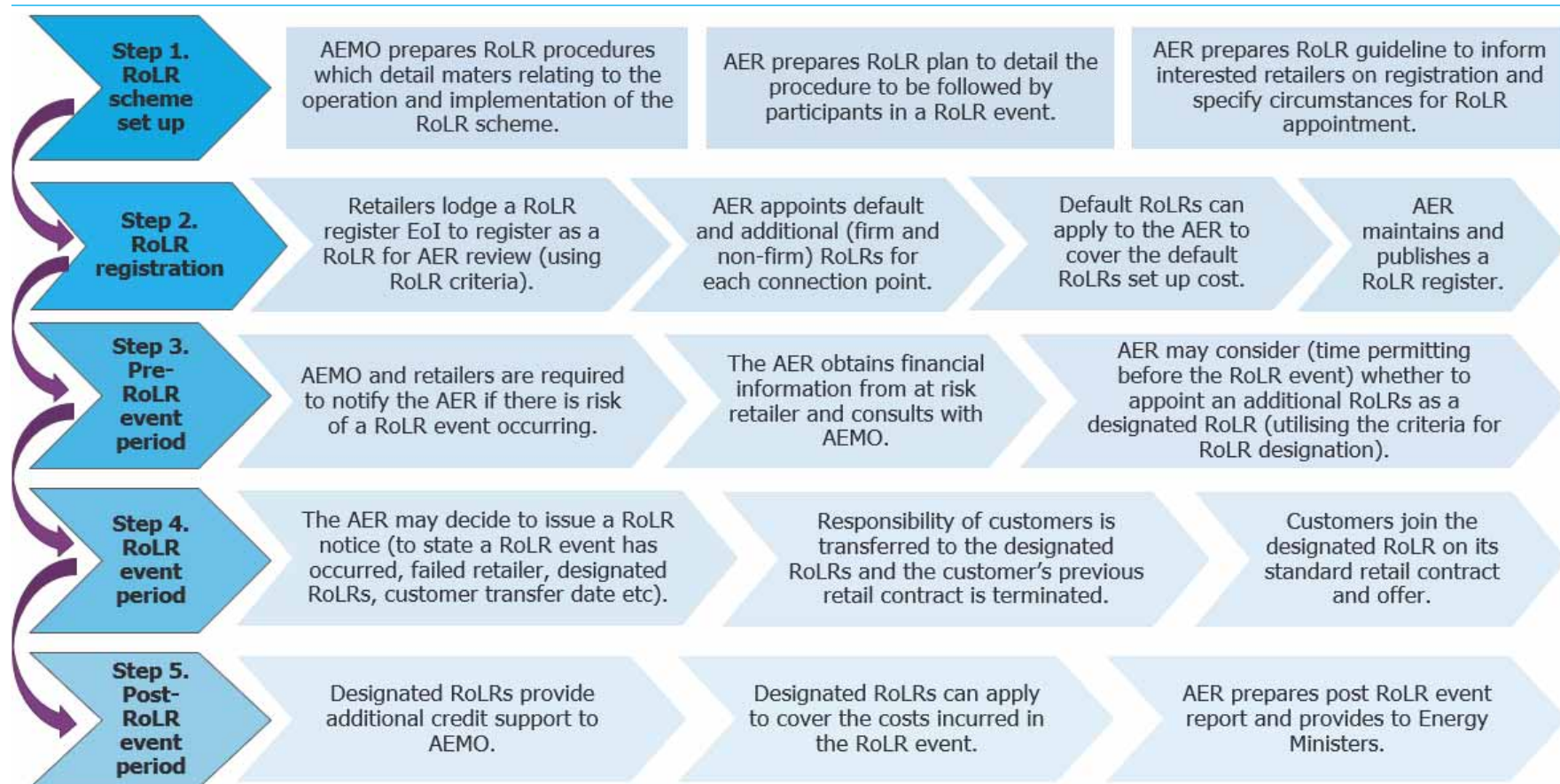
Next steps

7 In this report, the Commission presents policy advice that can be further developed into law and rule changes that will address issues present in the RoLR scheme. If recommendations are accepted by jurisdictions, law changes to the NERL will be progressed by jurisdictions and in coordination rule changes would be progressed by the AEMC.

ROLR REVIEW OVERVIEW

- 1 This section provides a process overview of the RoLR scheme, highlighting the five key time periods associated with the scheme and relevant regulatory processes and challenges for each period. It then provides an overview of each regulatory step within each period and the proposed changes to the current arrangements. This is designed to provide an easy to understand tool to conceptualise the RoLR scheme, the current arrangements and the proposed arrangements.

Figure 1: RoLR process overview



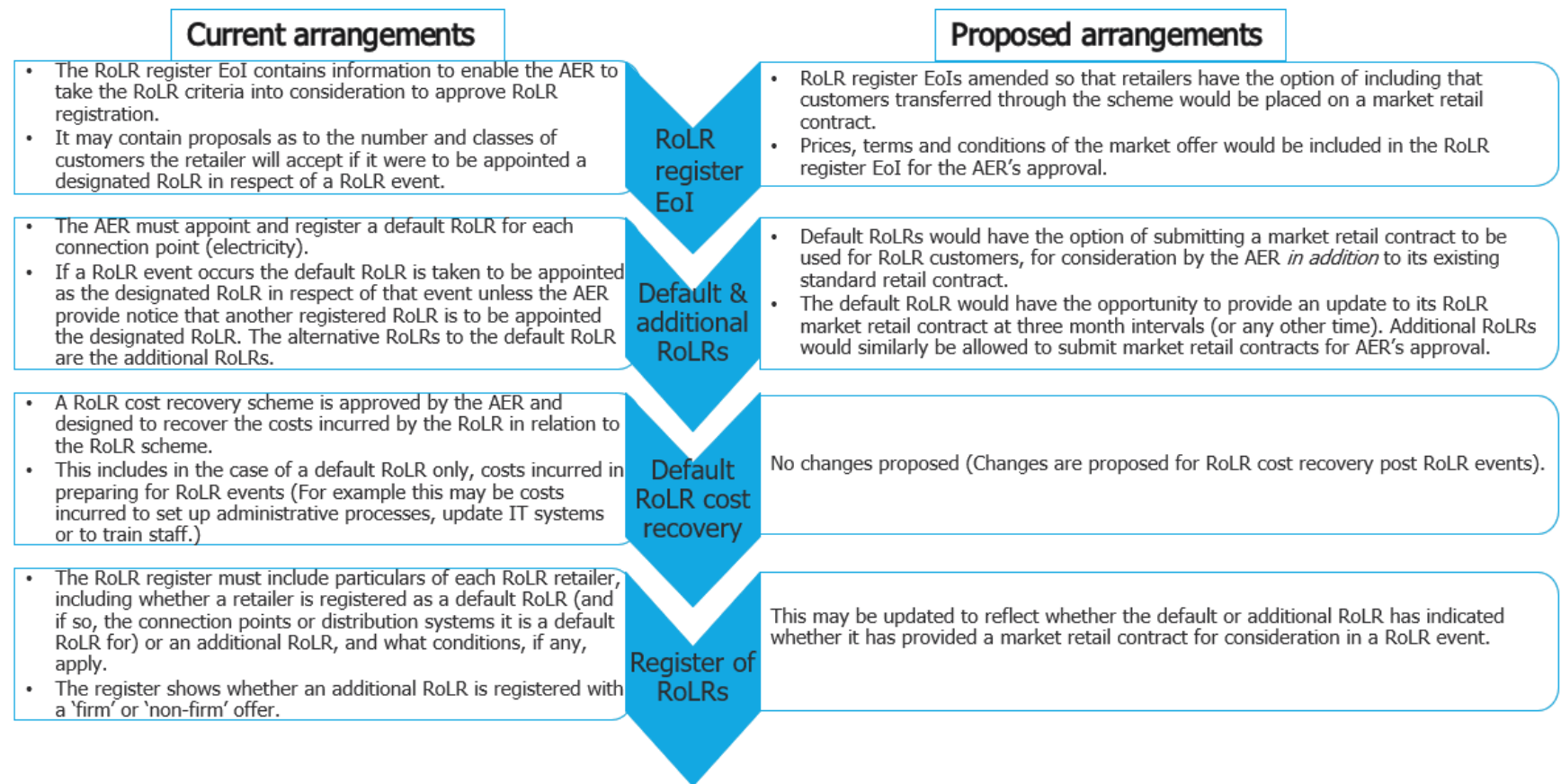
Source: AEMC

Figure 2: Step 1. RoLR scheme set up

Current arrangements	RoLR procedures	Proposed arrangements
<ul style="list-style-type: none"> RoLR Procedures are procedures published by AEMO that deal with any matters relating to the operation or implementation of the RoLR scheme. This includes, identifying the roles and responsibilities of various parties if a RoLR event were to occur that impacted on AEMO's Market Settlement and Transfer Solution (MSATS) or on business-to-business communications. 		<ul style="list-style-type: none"> AEMO would be expected to carry out a general update to RoLR procedures after the RoLR review recommendations are implemented.
<ul style="list-style-type: none"> The RoLR scheme includes requirements for the AER to develop, make and maintain RoLR plans that are published on the AER's website. The AER's RoLR plan details the procedures to be followed by the participants for a RoLR event, including direct communication with customers of a failed retailer. It also includes regular exercises to be carried out by the participants in the plan. 		<ul style="list-style-type: none"> Address two minor issues, raised by the AER, through changes to section 163 of the NERL, a change from "must" to "may" and inclusion of "external". This would see section 163 of the NERL as - <i>Without limitation, a RoLR plan must may— (a) provide that exercises are to be held at such times as the AER considers appropriate and that a report on the conduct of each external exercise be published on the AER's website;</i>
<ul style="list-style-type: none"> The AER must make and maintain AER RoLR Guidelines which must specify the circumstances in designating a RoLR. It may also specify information to be included in a RoLR register Expression of Interest (EoI), RoLR cost recovery scheme and provide for any other RoLR matter. 		<ul style="list-style-type: none"> The RoLR guidelines would be updated by the AER after the RoLR review recommendations are implemented. This would include in relation to guidance on additional information to be included for market contracts and offers to be included in RoLR register EoIs.

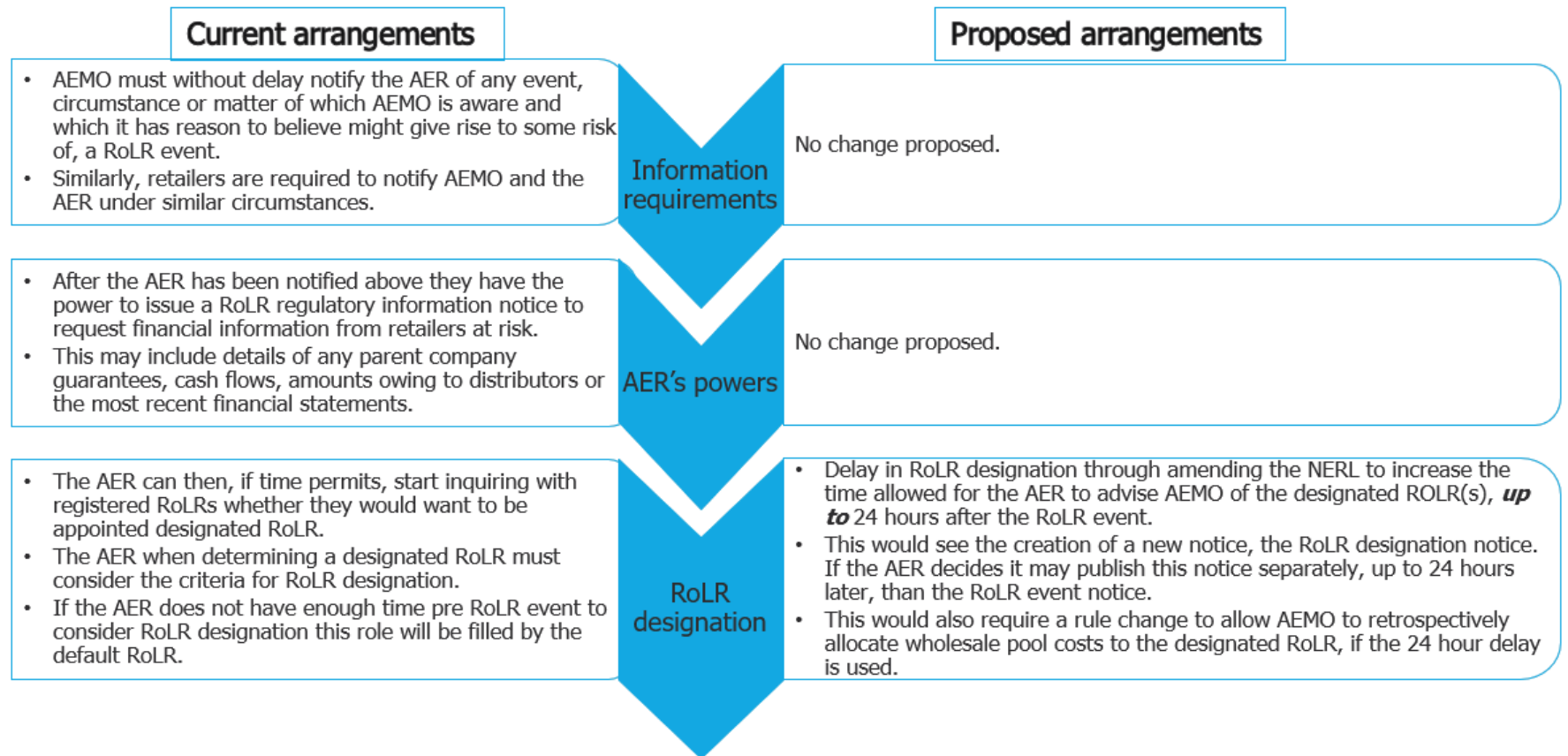
Source: AEMC

Figure 3: Step 2. RoLR registration



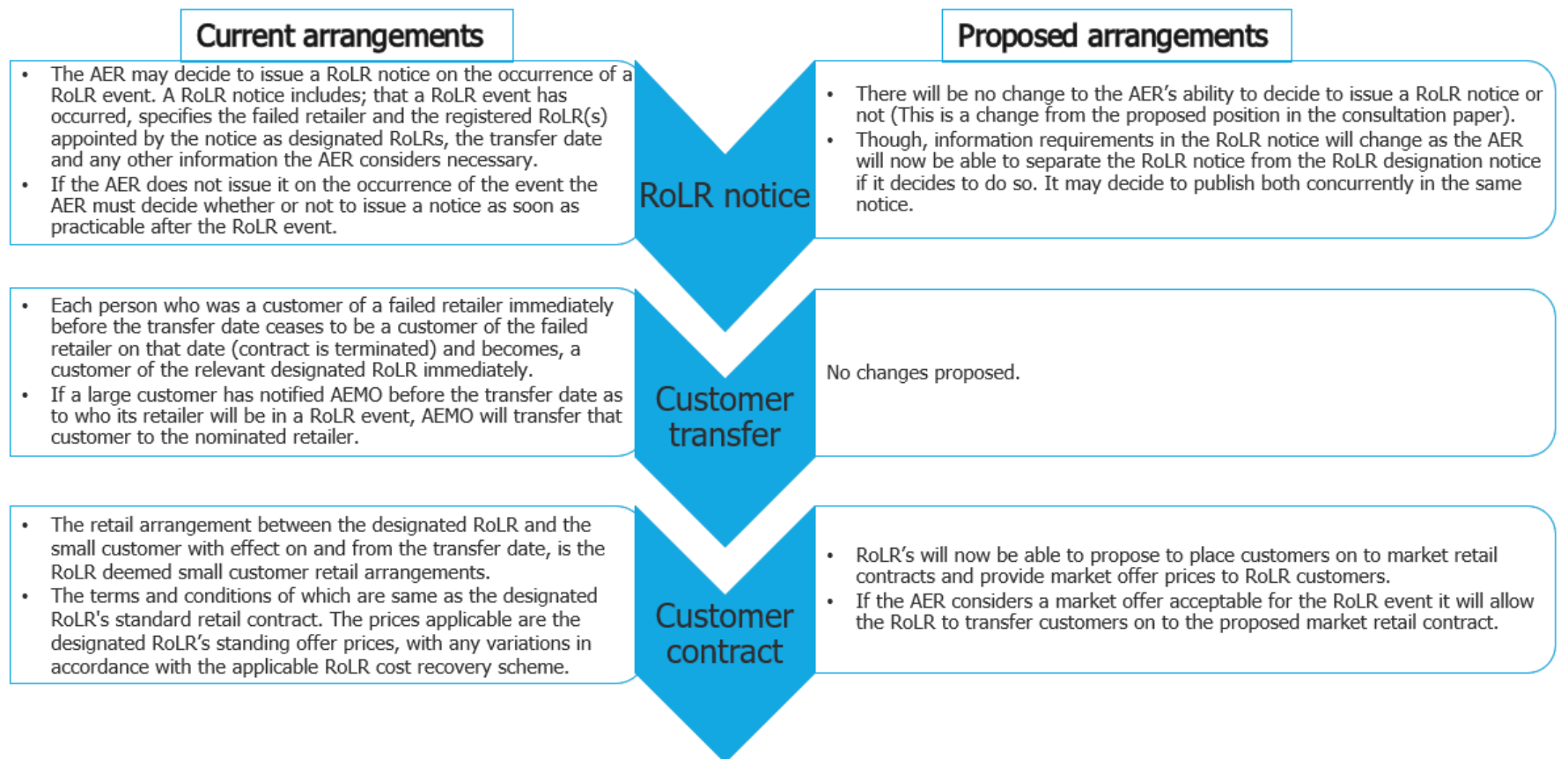
Source: AEMC

Figure 4: Step 3. Pre-RoLR event period



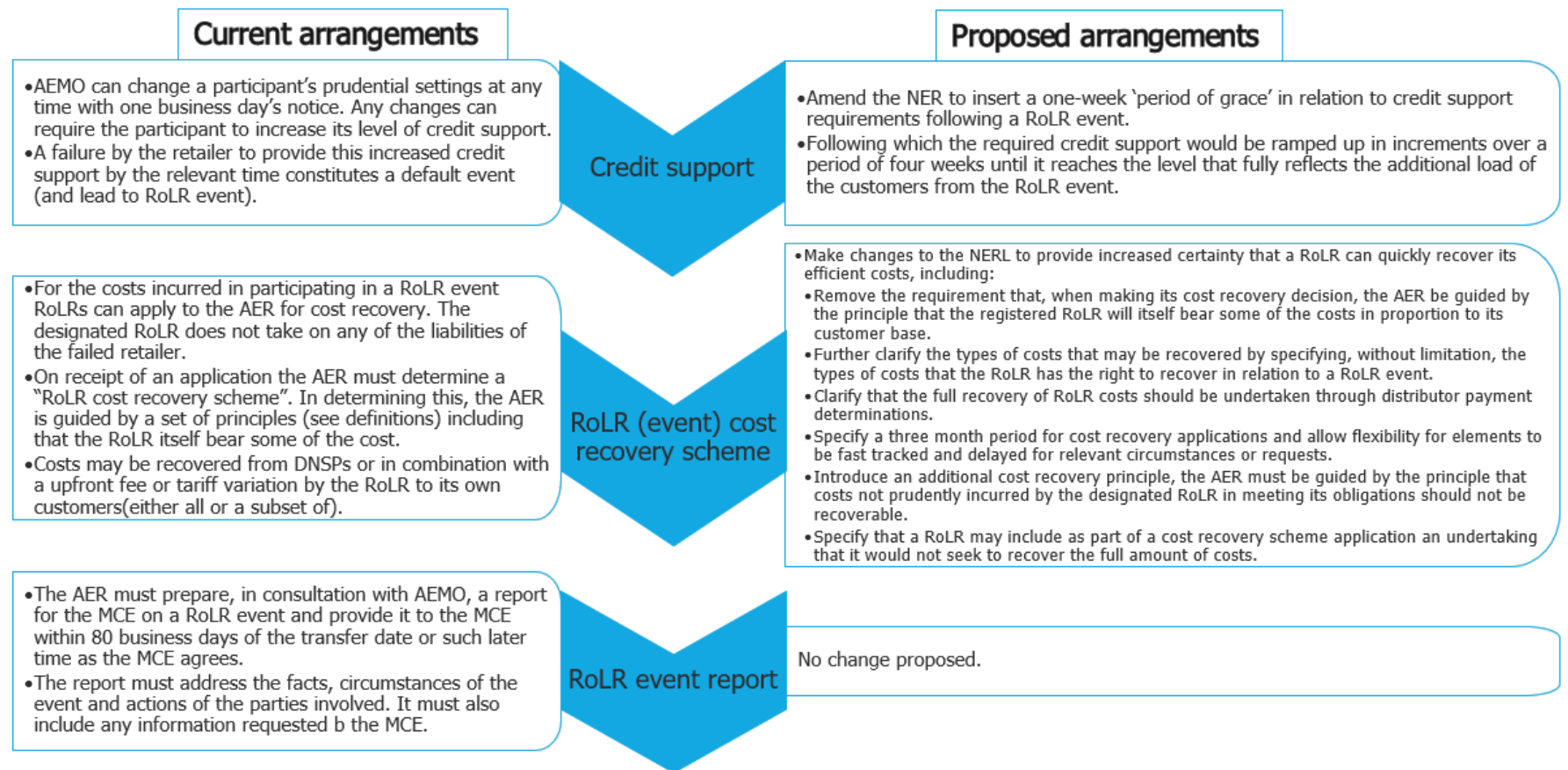
Source: AEMC

Figure 5: Step 4. RoLR event period



Source: AEMC

Figure 6: Step 5. Post-RoLR event period



Source: AEMC

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1 INTRODUCTION

This chapter outlines the following:

- the purpose of the review
- an overview of the RoLR scheme
- an overview of the AEMC's analysis of the RoLR scheme in the 2020 Retail energy competition review
- the review's terms of reference
- next steps.

1.1 The purpose of the review

On 8 October 2020 the ministerial forum of Energy Ministers (formerly COAG Energy Council) requested the AEMC conduct a review to provide advice to governments on updating the RoLR scheme.¹ The request followed the Commission's analysis and recommendations in the 2020 Retail energy competition review final report to amend the RoLR scheme to improve outcomes for small customers and to enhance the financial market stability of the national electricity market (NEM).² The review's terms of reference (TOR) detail that a Final report be finalised three months after initiation of the review by the Commission.³

The aim of this review is to refine the Commission's recommendations to improve the RoLR scheme and provide an opportunity for stakeholder input.

Notably, the time required to implement changes are potentially lengthy due to the required law and rule change processes that may follow this review. Given this, recommendations need to be considered in the context of not only the pandemic but as addressing systemic issues with the RoLR scheme to improve its effectiveness for the next internal or external shock to the electricity sector that may cause retailer default.

1.2 The RoLR scheme

1.2.1 Overview of the RoLR scheme

Electricity is considered an "essential" service. It is therefore undesirable for customers to be disconnected for reasons outside their control, such as the insolvency of their retailer. For this reason, the National Energy Retail Law (NERL) sets out a mechanism to be followed in the event of the failure of a retailer, to ensure the orderly transfer of retail customers to new retailers without disruption of supply. This mechanism is known as the RoLR scheme.⁴

The RoLR scheme may be triggered if there is a RoLR event, such as a retailer becomes insolvent, does not meet the financial obligations required by the Australian Energy Market

1 See Review of the retailer of last resort project page on the AEMC's website.

2 AEMC, 2020 Retail energy competition review, Final report, 30 June 2020.

3 Exclusive of holiday periods.

4 The RoLR scheme under the NERL is managed by the AER and applies in New South Wales, Queensland, Tasmania, South Australia and the Australian Capital Territory. In Victoria the Essential Services Commission manages its own RoLR scheme. The RoLR scheme mechanism also extends to gas customers.

Operator (AEMO), or ceases to be a Registered Participant in the wholesale market. If the RoLR scheme is triggered the customers of the failed retailer are immediately allocated to one or more other retailers who have volunteered to perform the role of the RoLR.⁵ Transferred customers are placed on the standard retail contract (SRC) of these retailers, which typically have higher prices than market offers but may also have stronger consumer protections (as these contracts use the model terms and conditions for SRC).⁶

Under normal circumstances, the RoLR scheme has worked effectively for the failure of small retailers. It has been invoked several times in the history of the NEM⁷ without interruption in service for end-use customers and without wider impacts on the retail market. However, to date, the RoLR events that have occurred have been relatively small—the largest, in the case of Jackgreen, involving the transfer of around 67,500 electricity customers,⁸ and, in the case of the two most recent RoLR events, no customer transfers.⁹ For additional detail on the RoLR scheme see appendix B.

1.2.2

Existing RoLRs

The AER must maintain and publish on its website a register of RoLRs.¹⁰ The register must include particulars of each retailer, including whether a retailer is registered as a default RoLR (and if so, the connection points or distribution systems it is a default RoLR for) or an additional RoLR, and what conditions, if any, apply. The register shows whether an additional RoLR is registered with a 'firm' or 'non-firm' offer.¹¹

5 Currently this role is played by AGL (NSW, QLD, SA), Origin (ACT, NSW, QLD, SA), EnergyAustralia (NSW), ActewAGL (ACT), and Aurora (Tasmania). Source: AER [Register of RoLRs](#)

6 NERL, section 145.

7 Including Energy One (2007), Jackgreen (2009), Go Energy (2016) and Urth Energy (2017).

8 This included New South Wales with 47,000 customers (EWON, Jackgreen – the failure of an energy retailer, September 2010, p.1.), Queensland with 17,500 customers (EOQ, Annual Report 2010, p.10.) and Victoria with 3,000 customers (EWOV, Submission to the AEMC First Interim Report - NEM financial market resilience, p. 3.)

9 A RoLR notice was issued on 29 June 2018 in relation to COzero Energy Retail Pty Ltd, which had no customers to transfer. A RoLR notice was issued for Flow Systems Pty Ltd on 15 February 2019, which was an embedded network operator with 2000 customers, the AER decided not to revoke Flow Systems' authorisation and Flow Systems was sold to Brookfield FS Holdings Pty Ltd on 15 April leading to Flow Systems no longer being under external administration and returning to trading as usual.

10 NERL, section 127.

11 Explanation of 'firm' and 'non-firm' offers is included in appendix B.

Table 1.1: List of registered RoLRs (electricity only)

RETAILER	CATEGORY	REGION
ActewAGL	Default RoLR	Australian Capital Territory, New South Wales
AGL	Default RoLR, Additional RoLR firm	New South Wales, Queensland, South Australia
Aurora Energy	Default RoLR	Tasmania
EnergyAustralia	Default RoLR	New South Wales
Origin Energy	Default RoLR, Additional RoLR non-firm	Australian Capital Territory, New South Wales, Queensland, South Australia

Source: For more information see <https://www.aer.gov.au/retail-markets/retailer-failure/register-of-rolrs>.

1.2.3

RoLR terms

Table 1.2 below sets out key terms relating to the RoLR scheme that will be used throughout this report.

Table 1.2: RoLR terms

TERM	DESCRIPTION
Additional RoLR	A retailer may seek registration to be an additional RoLR for an electricity connection point or gas distribution system for which they are not the default RoLR. In the event of retailer failure, the AER may appoint as the designated RoLR an additional RoLR instead of, or in addition to, the default RoLRs. (NERL section 126)
Backup RoLRs	A registered RoLR who may be designated if a default RoLR fails. Backup RoLR arrangements are not a category of registration under the NERL. These are practical arrangements the AER will determine based on registered default RoLRs and additional RoLRs. Backup RoLR arrangements are required in the event of the failure of a default RoLR. (AER, Retailer of Last Resort statement of approach, November 2011, p.9.)
Criteria for RoLR designation	In determining whether to appoint a registered RoLR (either default or an additional RoLR) as a designated RoLR, the AER must take into consideration— (a) the RoLR criteria, (b) whether the registered RoLR has a RoLR cost recovery scheme and if so what costs are recoverable pursuant to that scheme and the amount or likely amount of those costs, (c) the imminence of the RoLR event and (d) any other matters the AER considers relevant in the circumstances. (NERL section 133)
Default RoLR	A retailer appointed and registered as a default RoLR. (NERL section 122)
Designated	A registered RoLR who is appointed or is taken to be appointed as a designated

TERM	DESCRIPTION
RoLR	RoLR for a RoLR event. (NERL section 122)
Failed retailer	A retailer (or former retailer) in relation to whom a RoLR event has occurred. (NERL section 122)
Insolvency official	A receiver, receiver and manager, administrator, provisional liquidator, liquidator, trustee in bankruptcy or person having a similar or analogous function. (NERL section 122)
Registered RoLR	A retailer registered with the AER as a RoLR. (NERL section 122)
Register of RoLRs	The AER must maintain and publish on its website a register of RoLRs. The register must include particulars of each retailer, including whether a retailer is registered as a default RoLR (and if so, the connection points or distribution systems it is a default RoLR for) or an additional RoLR, and what conditions, if any, apply. The register shows whether an additional RoLR is registered with a 'firm' or 'non-firm' offer. (NERL section 127)
Relevant designated RoLR	For a customer, in relation to a RoLR event, means: (a) if only one RoLR is designated for the event, that RoLR (b) if more than one RoLR is designated for the event, the RoLR allocated to the customer. (NERL section 122)
RoLR cost recovery scheme	A designated RoLR can apply to the AER to recover the costs that it incurs on or after a RoLR event. A default RoLR may also apply to recover costs incurred in preparing for RoLR events. (NERL Division 9)
RoLR cost recovery guiding principles	In assessing a RoLR cost recovery scheme application, the AER must be guided by the following principles: (a) the registered RoLR should be provided with a reasonable opportunity to recover the reasonable costs that it incurs with respect to the RoLR scheme, (b) the recovery of costs should allow for a return commensurate with the regulatory and commercial risks with respect to the RoLR scheme, (c) the registered RoLR will itself bear some of the costs, in proportion to its customer base. (NERL section 166)
RoLR criteria	The RoLR criteria require the retailer to demonstrate adequate financial resources, necessary organisational and technical capacity suitable to be the RoLR and any other matters the AER considers relevant. The AER must take the RoLR criteria into consideration when deciding whether to register RoLRs. (NERL section 123)
RoLR deemed small customer retail arrangement	The retail contract that small customers are transferred to. The terms, conditions and prices applicable are the relevant designated RoLR's SRC and standing offer prices. Any variations to prices are in accordance with or consequent on the applicable RoLR cost recovery scheme.

TERM	DESCRIPTION
nt	
RoLR event	The NERL defines a number of triggers of a “RoLR event”: revocation of retailer’s authorisation; retailer market suspension (AEMO initiated) or retailer cessation as 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 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 guidelines	The AER must make and maintain AER RoLR Guidelines which must specify the circumstances in designating a RoLR. It may also specify information to be included in a RoLR register EoI, RoLR cost recovery scheme and provide for any other RoLR matter. (NERL section 135)
RoLR notice	The AER must decide whether or not to issue a notice as soon as practicable after the RoLR event occurs. A RoLR notice includes; that a RoLR event has occurred, specifies the failed retailer and the registered RoLR(s) appointed by the notice as designated RoLRs, the transfer date and any other information the AER considers necessary or desirable. (NERL section 136)
RoLR plan	The RoLR scheme includes requirements for the AER to develop, make and maintain RoLR plans that are published on the AER’s website. The AER’s RoLR plan details the procedures to be followed by the participants for a RoLR event, including direct communication with customers of a failed retailer. It also includes regular exercises to be carried out by the participants in the plan. (NERL section 162)
RoLR procedures	RoLR Procedures are procedures published by AEMO that deal with any matters relating to the operation or implementation of the RoLR scheme, including, for the purpose of identifying the roles and responsibilities of various parties if a RoLR event were to occur that impacted on AEMO’s Market Settlement and Transfer Solution (MSATS) or on business-to-business communications. (NERL section 144)
RoLR register EoI	The RoLR register expression of interest (EoI) contains such information as will enable the AER to take the RoLR criteria into consideration in relation to the retailer. It also may contain proposals as to the number and classes of customers the retailer will accept if it were to be appointed a designated RoLR in respect of a RoLR event. It may also contain variation to the retailer’s RoLR cost recovery scheme. (NERL section 124)
RoLR scheme	Means the RoLR scheme constituted by the NERL, the RoLR procedures and the National Regulations. (NERL section 122)
Transfer	The date on which the customers of the failed retailer are transferred to the

TERM	DESCRIPTION
date	relevant designated RoLR. 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 136(2)(e))

1.3 2020 Retail energy competition review final report

COVID-19 was declared a pandemic by the World Health Organisation (WHO) on 12 March 2020.¹² The Commonwealth Government started closing borders in early February, and by 20 March all foreign nationals were banned from entering Australia.¹³ Jurisdictional governments started closing non-essential services and imposing social distancing measures in late March 2020. These measures have had a significant impact on energy consumers.

In the 2020 Retail energy competition review final report, the Commission assessed the retail market under the COVID-19 pandemic conditions. The Commission traced through the effects of the pandemic on consumers, retailers and the market as a whole. The Commission recommended changes to regulatory frameworks to improve consumer protections and enhance retail market financial resilience in the immediate term, and in the long term for future shocks.

The most significant effect of the pandemic is an increase in the number of residential and small business consumers which are under financial stress and are therefore likely to face difficulty paying their energy bills. The Commission found that a relatively small increase in the number of non-paying customers could quickly place some retailers in a position where their cash-flow is negative (that is, where their revenue falls short of their expenses).

Given this the Commission assessed the adequacy of the existing market and regulatory framework to deal with the potential for retailer failures. The Commission updated the extensive analysis it previously conducted in the NEM financial market resilience review for pandemic conditions. These specific conditions relate to the failure of a retailer or retailers with a large number of customers, due to a significant increase in the number of customers who are deferring or unable to pay their bills. This may:

- heighten the risk of the existing RoLR scheme triggering financial contagion across the sector through the transfer of non-paying customers to retailers who already have a growing number of non-paying customers
- result in both paying and non-paying customers being automatically placed on the receiving retailer's standing retail contracts, when experience shows that it may take many years for customers to shift onto lower priced market offer contracts

¹² <https://twitter.com/WHO/status/123777021742338049>

¹³ <https://www.pm.gov.au/media/border-restrictions>

- reduce competitive pressure on prices generally through the loss of second and third tier retailers who have over recent years been increasing their market shares at the expense of the “Big 3”.

To address these risks the Commission considered that changes should be made to improve the RoLR scheme outcomes for small customers. The Commission's RoLR recommendations included:

- removing the RoLR requirement for small customers to be placed on the standing retail contract (SRC) if a RoLR event occurs
- making some of the changes to the RoLR scheme as previously recommended in the NEM financial market resilience review. Those changes included:
 - providing greater clarity on RoLR cost recovery arrangements
 - delaying designation of RoLRs
 - delaying requirements for the RoLR to provide credit support to AEMO associated with the additional customers.

The Commission also recommended removing the RoLR scheme from the NERL and including it in the National Energy Retail Rules (NERR) through rule changes. For more information on the Commission's analysis and recommendations see chapter seven of the 2020 Retail energy competition review final report.¹⁴

Following the AEMC's analysis and recommendations, the ministerial forum of Energy Ministers (formerly COAG Energy Council) requested, on 8 October 2020, the AEMC conduct a review to provide advice to governments on updating the RoLR scheme. The Commission considers it timely to continue reviewing the RoLR scheme given the sustained impacts of the pandemic. The review's TOR are detailed in section 1.4 below.

1.4 Terms of reference

The TOR for this review set out that its purpose is to advise on amendments to the RoLR scheme. The output of this review is this final report to the ministerial forum of Energy Ministers (formerly COAG Energy Council) that includes:

- policy advice on changes to the National Electricity Rules (NER), that could subsequently form the basis of a rule change requests to the AEMC
- policy advice for recommended changes to the NERL
- advice on other RoLR issues that could warrant further consideration in future processes.

The scope of the changes to the RoLR scheme considered by the review includes those recommended by the Commission and listed in section 1.3 above.¹⁵ The Commission also consulted on an additional issue suggested by the AER, on making RoLR plan requirements less prescriptive.

¹⁴ Final report can be accessed here <https://www.aemc.gov.au/market-reviews-advice/2020-retail-energy-competition-review>.

¹⁵ It does not include the recommendation to remove the RoLR scheme from the NERL as this cannot be considered sufficiently within the required time frame.

In addition, the Commission consulted on and considered stakeholder feedback on other issues related to the RoLR scheme for the purposes of identifying issues that may warrant further consideration at a later time.

A reference group, comprising jurisdictional representatives and the AER, was formed to provide input to this review. This reference group provided input during the review on the importance, priority and acceptability of the issues and proposed solutions considered through the review and provided guidance to the Commission with the aim of streamlining the jurisdictional processes which will follow the review, if the Commission's recommendations are accepted.

1.5 Next steps

The main output of this review has been to provide policy advice to governments on changes to the NER and NERL to improve RoLR scheme outcomes for small customers and to enhance the financial market stability of the NEM. Policy advice developed on proposed changes to the NERL is considered a preliminary step to the jurisdictional processes which would follow the review to implement legislative changes. Policy advice on the NER may form the basis of subsequent rule change requests to the AEMC, which the Commission considers should ideally be timed to align with the NERL changes. The Commission will continue to work with jurisdictions and relevant stakeholders to progress NERL and NER changes if the review recommendations are agreed.

2 KEY ISSUES

The key issues that the Commission has made recommendations to address, along with summaries of stakeholder feedback, are detailed in the following section. These issues are primarily those recommended in the 2020 Retail energy competition review final report. The one additional issue that has been included is to reduce the level of prescription included in the NERL for RoLR plans.

The Commission notes that although the primary consideration of the changes to the RoLR scheme is to improve electricity customer outcomes under the RoLR scheme, the RoLR scheme in the NERL applies to both electricity and gas. As a number of retailers have both electricity and gas customers, a retailer failure may create financial system instability across both electricity and gas markets. Given this, the Commission considers it appropriate that the recommendations in this review to governments on changes to the RoLR scheme should extend, where possible and appropriate, to a retailer failure in gas markets to provide for a simpler and more comprehensive implementation.

2.1 Retail contracts for RoLR customers

2.1.1

Context

A RoLR event under the current provisions in the NERL would result in both paying and non-paying small customers being automatically placed on a RoLR deemed small customer retail arrangement, on the terms and conditions of the receiving retailer's SRC. The prices applicable to the RoLR deemed small customer retail arrangement are the relevant designated RoLR's standing offer prices, with any variations in accordance with or consequent to the applicable RoLR cost recovery scheme.¹⁶

2.1.2

Issue

Given the heightened risk of RoLR events occurring due to the pandemic, the current RoLR scheme may have long-lasting impacts on market structure and conditions. Specifically, over the past ten years the retail sector in the NEM has gradually become more competitive, with 40 active retail electricity brands and with smaller retailers consistently gaining market share from the 'Big 3' incumbent retailers.¹⁷ There has also been a general trend of an increasing proportion of customers moving to market offers under market retail contracts (MRC) from SRCs.¹⁸

The current registered RoLRs are limited to the 'Big 3' retailers for the majority of the NEM.¹⁹ The failure of a number of retailers would therefore reduce competition in the market because the failing retailer's customers would be transferred to the 'Big 3' retailers and be

¹⁶ NERL, section 145. The RoLR designation process is described in more detail in the appendix.

¹⁷ AEMC, 2020 Retail energy competition review, Final report, 30 June 2020, p.23.

¹⁸ The proportion of customers on market offers over 2019/20 was 65.3% for the Australian Capital Territory, 88.2% for New South Wales, 61.3% for Queensland although this includes regional Queensland which has limited retail competition, 91.8% for South Australia and 1.4% for Tasmania. AER Retail energy market performance update for Quarter 1, 2020-21.

¹⁹ Aurora and ActewAGL currently play this role in Tasmania and the Australian Capital Territory respectively.

placed on SRCs. Such an event may reverse some of the structural competitive gains that have been made in the market over the last decade.

2.1.3 Consultation paper's proposed solution

The Commission recommended in its 2020 Retail energy competition review final report that the obligation for customers to be transferred to the designated RoLR's SRC should be amended.²⁰ This recommendation was subsequently included in the RoLR review's consultation paper to identify stakeholder views. Under this change registered RoLRs would have the ability (but not the obligation) to submit, for the AER's approval, a market offer under a MRC to be used for RoLR customers. The AER would assess the benefits of any such market offer (in relation to tariffs and non-price terms and conditions) against the tariffs and non-price benefits of the RoLR's SRC. If the AER approved a RoLR's market offer, the customers of a failed retailer would be placed onto this offer instead of a standing offer.

2.1.4 Stakeholder feedback

There was mixed support from stakeholders to amend the RoLR scheme requirement for customers to be transferred to the designated RoLR's SRC, with some retailers highlighting concerns with the proposal.

Stakeholder support and specific feedback

Some stakeholders supported the proposal, noting that it would likely result in customers whose retailer had failed receiving and benefiting from lower prices.²¹ For example:

- The AER stated that customers should not be penalised for their retailer's failure by being placed on a more expensive contract.²²
- EnergyAustralia also recognised the benefits of this change through the form of potential cost savings to customers and considered that enabling transfers to market offers could be a simple and effective way to enable the designated RoLR to place a failed retailer's customers on an offer, and which is likely to be competitive with other retailer offers.²³

Some stakeholders in support also provided input on specific elements of the proposal, including:

- EnergyAustralia considered that the NERL should also be amended to require that the AER's RoLR guidelines specify the criteria for selecting the market offer, which should extend beyond the price offered, and the process for submitting market offers.²⁴
- EnergyAustralia also noted that:
 - the AEMC should clarify an approved MRC for RoLR purposes would be taken into account by the AER in deciding whether to appoint a retailer as a Designated RoLR.

20 AEMC, 2020 Retail energy competition review, Final report, 30 June 2020

21 Submissions to the consultation paper: AER, p.2; CCIA, p.1; EWON, p.2; Endeavour Energy, p.1; EnergyAustralia, p.2.

22 Submission to the consultation paper, AER, p.2.

23 Submission to the consultation paper, EnergyAustralia, p.2.

24 Submission to the consultation paper, EnergyAustralia, p.3.

- the requirements for retailers to obtain explicit informed consent and cooling off requirements will need to be waived.
- while historically, SRCs have provided a higher level of consumer protection, today there are many protections that have been designed for MRCs. The MRC is not only a feasible alternative but in many instances will offer customers better terms of supply.²⁵
- EWON considered that the AER should be mindful of critical consumer protections included in the NERR when reviewing a MRC, including that:
 - bills must be issued at least once every 100 days, unless the customer provides explicit informed consent (Rule 24)
 - the pay-by date for a bill must not be earlier than 13 business days from the bill issue date (Rule 26)
 - and the retailer must accept certain payment methods for a bill (Rule 32(1)).²⁶
- EWON also considered that at a minimum, disclosure to customers transferred under RoLR conditions should be provided with plain English advice about terms and conditions of the new contract as well as options for contact to establish any special payment arrangements which the customer previously had established with the failed retailer.²⁷

Stakeholder concerns and feedback

There was also a number of submissions highlighting concerns with the proposal, including:

- The AEC considered that:
 - this change would require significant consequential changes to sections of the NERL and the NERR.
 - the benefits of the proposal had not been proven though it highlighted that the primary benefit from this reform would be to incentivise retailers who to date have opted not to nominate as RoLR's due to the standing offer obligations.²⁸
- Some stakeholders questioned how explicit informed consent obligations for retailers would be met. For example, Momentum Energy highlighted that market contracts without EIC is in breach of the NERL and the market contract terms. Furthermore, the EIC would not be available for verification if called upon during any current or future dispute resolution.²⁹
- How the introduction of the Default Market Offer (DMO) has reduced price benefits between standing and market offers.³⁰
- How the proposal would work administratively.³¹ For example:

25 Ibid.

26 Submission to the consultation paper, EWON, p.2.

27 Ibid.

28 Submission to the consultation paper, AEC, p.2.

29 Submissions to the consultation paper: AEC, p.2; AGL, p.3; Alinta, p.1; Origin, p.2; Momentum Energy, p.2.

30 Submissions to the consultation paper: Origin, p.2; Simply Energy, p.2; Momentum Energy, p.2.

31 Submissions to the consultation paper: AGL, p. 4; Simply Energy, p.2; Origin, p.2.

- AGL noted that there are a range of administrative matters that should be thoroughly considered by the AEMC before a recommendation is made, including: approval criteria, approval process, process for changing the MRC and transparency in the AER's consideration of designation.
- Origin noted that it will be extremely difficult for the AER to determine both the value of the product offering to a customer and the tariffs that best suit the entire RoLR customer base.
- Origin also questioned that if the AER decides on a market offer with conditional discounting how are customers treated if they do not meet the conditions of the market offer?
- Alinta Energy and the AEC considered that the proposal may not encourage customers of the failed retailer to engage with the market.³²
- AGL noted that it is likely that retailers will seek approval of RoLR market offers that are higher priced than generally available market offers. This is to ensure they cover the additional costs associated with RoLR events.³³
- Momentum Energy considered that:
 - market offer terms and conditions may not be consistent with standing offer terms and may deliver a lower level of customer protection.
 - if multiple retailers were assigned as designated RoLRs it is possible that customers, in the same area, could be allocated to different market offers and prices which customers may rightly argue is unfair.
 - most RoLR events in the past have impacted only a small number of customers but the impact to the affected RoLR is significant as it causes much greater business disruption than normal organic customer growth or a trade sale acquisition of customers.³⁴
- Simply Energy considered that standard retail contracts should remain the default option for RoLR customers.³⁵

2.1.5 Commission's analysis and conclusions

The Commission recommends that the RoLR scheme in the NERL is amended, and the NERR if necessary, to remove the requirement for the small customers of a failed retailer to be transferred on to the SRC of the designated RoLR. The use of the current RoLR scheme may have significant impacts on market structure and consumer prices if a large number of small customers were transferred to a default RoLR's standing offer. In light of changing market circumstances and greater competition leading to a heightened chance of RoLR events it is considered appropriate to facilitate, but not require, the use of market offers in the RoLR scheme. The Commission considers this would not be a major policy change to implement. This is because:

32 Submissions to the consultation paper: Alinta Energy, p.1; AEC, p.2.

33 Submission to the consultation paper, AGL, p.4.

34 Submission to the consultation paper, Momentum, p.2.

35 Submission to the consultation paper, Simply Energy, p.2.

- It would be optional for any retailer to include a market offer as a RoLR offer.
- Default RoLRs will still be required to take customers on under existing SRCs as the default arrangement.
- Retailers would still be able to apply to register as additional RoLRs without including a market offer.
- The framework is already in place for the AER to assess additional or default RoLR register EoIs which can be amended to also consider market offers.
- The existing NERL already includes exceptions to the EIC requirements for customers transferred through the RoLR scheme.

The Commission also considers that the AER will play a key role in mitigating many of the risks highlighted by stakeholders in its role of approving market offers in the RoLR register EoI application process. Subsequently, the AER will also assess whether it is suitable for customers to be placed on the market offer in the RoLR designation process at the time of the event.

The Commission recommends that the RoLR scheme in the NERL be amended so that:

- Retailers have the option of including in a RoLR register EoI, in applying to be a default or additional RoLR, that customers transferred through the scheme would be placed on an MRC. Prices, terms and conditions would be included in the RoLR register EoI for the AER's approval. If the AER did not approve the retailer's market offer it would not be included on the register of RoLRs unless it agreed to amended terms or to accept customers on SRCs.
- Default RoLRs would have the option of submitting an MRC to be used for RoLR customers, for consideration by the AER *in addition* to its existing SRC.
- Default RoLRs and firm additional RoLRs would have the opportunity to provide an update to its RoLR MRC at three month intervals (or any other time), in alignment with the existing process to update RoLR register EoIs.
- Non-firm additional RoLRs update EoI application information when contacted by the AER about a specific RoLR event (this should be relatively simple, enabling small retailers to be involved), this will include in relation to prices and terms and conditions of its RoLR MRC.
- The criteria for RoLR designation include that the AER consider what retail contract customers will be suitable and better off to be placed on, in terms of prices and contract terms and conditions, in deciding which registered RoLRs will be appointed designated RoLR. The terms and conditions of potential offers would be pre-approved by the AER, so would already be considered suitable for use in the RoLR scheme. However, the AER will be able to consider this again at the time of the event.
- The AER's RoLR guideline would be required to specify criteria for approving an MRC as a suitable RoLR market offer and specify the manner in which the AER may consider allocating customers to a market or standing offers in potential RoLR designation scenarios.

- AER approved MRCs for use in the RoLR scheme would be considered a *RoLR deemed small customer retail arrangements*, the retail arrangement that is taken to apply between the relevant designated RoLR and the small customer with effect on and from the transfer date.
- RoLRs that have customers transfer onto a RoLR market offer are required to record that those customers are RoLR market offer customers and no EIC exists.

This change may require changes to the NERR depending on the exact wording of the NERL changes. Until this is known the Commission considers it is too early to propose specific amendments to the NERR as there may be different ways to address any required changes. For example, the need to amend specific elements of the NERR relating to EIC or cooling off-periods could be addressed through provisions in the NERL or dealt with through AER RoLR guidelines that limit the specifics of RoLR market offers.

Analysis

The Commission considers this change will give the AER greater flexibility to protect customers' interests with respect to price through competition in the RoLR designation process. Given the 'Big 3' retailers are the only registered RoLRs for the majority of the NEM, a reduction in the barriers to increased retailer participation in the RoLR scheme is required in order to realise the benefit of this change. The recommendations to amend the RoLR cost recovery and designation processes may provide additional incentives to other retailers becoming RoLRs.³⁶

In addition, as supported by the AEC, this change itself may reduce barriers to becoming a RoLR because retailers may consider placing a large number of customers on standing offers onerous due to the specific terms and conditions included in SRCs. For example, SRCs require retailers to provide notification of standing offer price changes in newspapers and its website in addition to communicating the change to customers (where possible via the customers preferred communication method).³⁷

The Commission acknowledges that lower priced market offers may reduce the incentive for customers to participate in the market, but this needs to be balanced with the:

- potential for higher rates of customer switching, after a RoLR event, being a disincentive to participate as a RoLR.
- need to be engaged is lower as customers are immediately on a lower priced offer.
- experience of the RoLR event for customers may be confusing and lead to lower levels of engagement with the market
- communication to these customers will include, in plain English, a statement that the customer can transfer to another retailer or contract at anytime.³⁸

The Commission considers the price benefits of market offers are an important consideration, regardless of the reduction in price dispersion since the introduction of the DMO. Figure 2.1

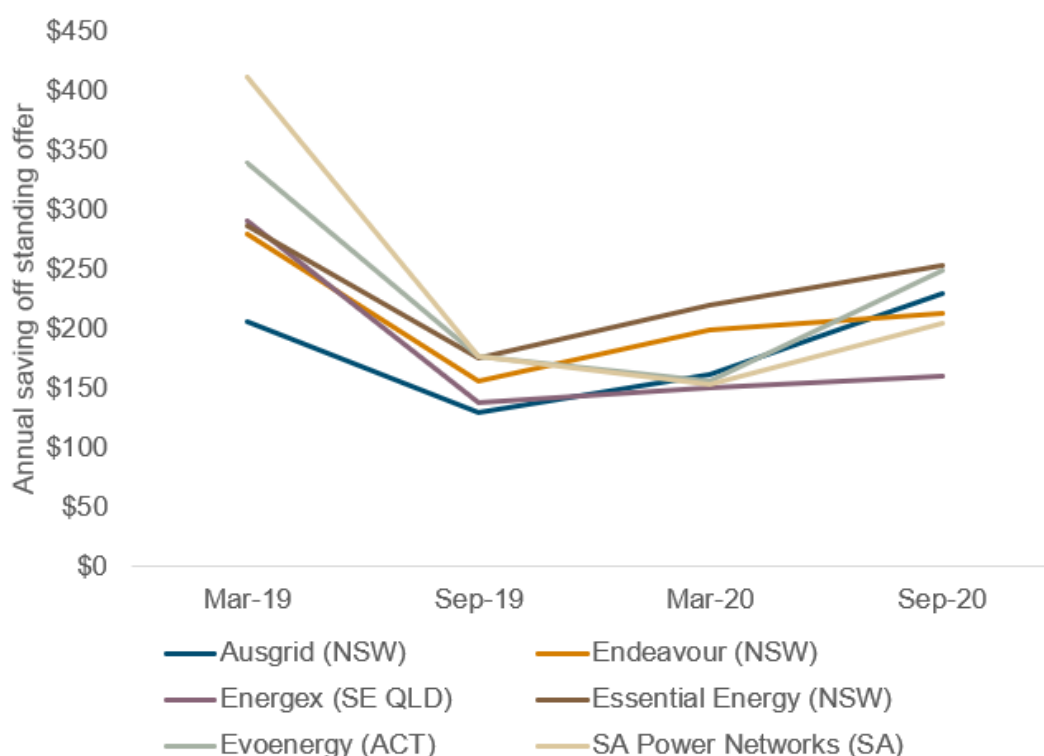
36 The primary incentive to become a RoLR is the opportunity to increase customer numbers.

37 NERR Schedule 1, 8.2.

38 Retailer of Last Resort plan, AER, July 2015, p.17.

currently the median market offer represents an annual price difference of around \$200 across jurisdictions compared to standing offer prices. This can be a significant financial burden for those who are slow to switch, with experience showing it has taken a number of years for customers to shift away from SRCs onto lower priced MRCs. This recommendation will ensure that customers receive a lower price immediately.

Figure 2.1: Annual savings off standing offer compared to median market offer



Source: AEMC analysis.

The Commission does not consider it necessary to set out specific terms and conditions that must be included in a RoLR market offer, as suggested by PIAC, as it would be the AER's role to assess each market offer to be suitable for use in the RoLR scheme. The Commission agrees with EWON that the AER should be mindful of critical consumer protections when considering whether a market offer is suitable for the RoLR scheme. The Commission does not agree with Origin that assessing offers suitable for an entire customer base would be extremely difficult for the AER. Many market offers currently available include very similar consumer protections to standing offers and the AER is well suited to be able to determine if these offers are suitable as RoLR offers. In contrast, the Commission expects that overly specific terms and conditions to market offers, such as conditional discounting would not be considered suitable by the AER. The Commission notes that NERL and NERR changes recommended will not be the final stage of this process, given the AER will be required to update its RoLR guideline through consultation with stakeholders.

The Commission considers that transferring customers to a market contract without EIC will be relatively simple to address as the NERL already includes exceptions to the EIC requirements for customers transferred through the RoLR scheme.³⁹ It may require additional changes to the NERL pending the final wording of the NERL changes, as mentioned earlier. The Commission considers that requiring retailers to keep a record of customer transfers onto RoLR market offers addresses stakeholder concerns in relation to retailer EIC record keeping obligations.

In regard to specific comments made by Simply Energy, AGL and EWON, the Commission:

- Agrees with Simply Energy that the default RoLRs standing offer should be the default option which ensures that the introduction of market offers is only additional to existing arrangements.
- Does not agree with AGL that it is likely that retailers will seek approval of RoLR market offers that are higher priced to ensure they cover the additional costs associated with RoLR events. Such offers are less likely to be approved by the AER and the RoLR cost recovery recommendations provide certainty that RoLR costs are recoverable, so there will be little incentive to recover additional costs through RoLR retail offer prices.
- Agrees with EWON, that the designated RoLR should send communications to transferred customers in plain English about contract terms and conditions as is already required by the NERL and detailed by the RoLR plan.⁴⁰

2.2

RoLR cost recovery arrangements

2.2.1

Context

For the costs incurred in participating in, or preparing for, a RoLR event the NERL includes a process for RoLRs to apply to the AER for cost recovery.⁴¹ The designated RoLR does not take on any of the liabilities or obligations of the failed retailer.

On receipt of an application the AER must determine a "RoLR cost recovery scheme".

The AER has provided examples of how it may exercise its powers in potential "RoLR cost recovery scheme" determinations:

- In the event of a small retailer failure, the customers of the failed retailer should bear a greater proportion of the costs (such as administrative costs) through an upfront fee, with the remainder recovered through a distributor payment.⁴²
- Where a RoLR, with a firm offer, has included in its RoLR register EoI that it will not seek to recover costs, the AER may designate it as a RoLR and it will not be allowed to recover any costs.⁴³

39 NERL Part 2, Division 5, Section 38 (a).

40 Section 163 of the NERL.

41 NERL, section 166. Under the AER's RoLR guidelines, applications must be made within nine months of the relevant RoLR event. See AER, Retailer of last resort statement of approach, November 2011.

42 AER, Retailer of last resort statement of approach, November 2011, p.21.

43 NERL, section 167(5).

- In the event of a large retailer failure, the AER may opt for the entire cost recovery to be managed through distributor payments to spread the costs across a wide customer base and minimise impacts. The AER may also consider recovering RoLR scheme costs through a combined upfront fee (paid by the customers of the failed retailer) and a distributor payment determination.⁴⁴

In the event that the AER determines that costs should be recovered through a distributor payment determination, the costs are taken to be positive pass through amounts approved under the NER. There is no cost materiality threshold on the amount recoverable⁴⁵ or any administrative process for DNSPs to submit a specific application to recover these costs for AER approval. The details on when payments would be made from the DNSPs to the RoLR would depend upon the AER's determination, subsequent to which the DNSP would then include the amounts payed to the RoLR during annual pricing proposals.⁴⁶

2.2.2

Issue

Under the existing arrangements the designated RoLR may be able to recover all of its prudent costs. However, the NERL provisions provide the AER with broad discretion on cost recovery and this *may* undermine the confidence of the designated RoLR - and those who finance it - that the RoLR can recover all of its prudent costs. This lack of certainty may also discourage other retailers from becoming RoLRs.

If cost recovery is delayed and uncertain, it could present cash flow problems for the RoLR(s) and make it more difficult for them to secure financing. Where the RoLR event involves the failure of a large retailer, this could result in financial distress or failure of the RoLR, and lead to cascading retailer failure and instability in the NEM.

2.2.3

Consultation paper's proposed solution

The 2020 Retail energy competition review final report recommended cost recovery changes targeted to address the uncertainty of cost recovery and its impact on cash flow, financing, and access to credit support. This recommendation was subsequently included in the RoLR review's consultation paper to identify stakeholder views. The following changes to the RoLR scheme in the NERL to provide increased certainty that a RoLR can quickly recover its prudent RoLR costs were recommended:

- Remove the requirement in the NERL that, when making its cost recovery decision, the AER be guided by the principle that the registered RoLR will itself bear some of the costs in proportion to its customer base.⁴⁷
- Clarify the AER's approach to RoLR cost recovery by introducing an additional cost recovery principle in to the NERL - that the actions of the designated RoLR in performing its obligations have been prudent in the circumstances.

⁴⁴ Ibid, p.19.

⁴⁵ Clause 167(4)(a) of the NERL.

⁴⁶ AER, Notice of final instruments - RoLR guidelines, RoLR plan and RoLR statement of approach, November 2011, p.16-18.

⁴⁷ NERL, section 166.

- Clarify the types of costs that may be recovered by specifying, without limitation, the types of costs that the RoLR has the right to recover in relation to a RoLR event. These costs may include:
 - administration costs
 - additional energy costs in relation to the acquired customers (to the extent that they are not recovered in the prices charged to those customers)
 - financing costs in relation to additional credit support that is required to be provided to AEMO in relation to the acquired customers
 - financing costs to cover the period from when the costs are incurred and when they are recovered under this mechanism.
- Specify a three month period from the date of the RoLR event during which a RoLR cost recovery application must be made while providing the AER discretion to allow the recovery of costs beyond the initial three-month period where the RoLR can provide evidence that it is prudent to do so. For default RoLRs, this three month time frame would apply from the date of appointment as a default RoLR.⁴⁸
- Enable the AER to fast-track all or part of a RoLR cost recovery application where the RoLR costs claimed are clearly identifiable and quantifiable by providing the AER discretion over the length of consultation required. The NERL currently requires a minimum 20 day consultation period for RoLR cost recovery applications.
- Specify that the AER is only able to amend the costs recoverable under a RoLR cost recovery scheme if that determination is affected by a material error or deficiency such as the provision of false or misleading information to the AER.
- Clarify that the full recovery of RoLR costs should be undertaken through distributor payment determinations as the NERL is currently unclear as to the mechanism that should be used to recover RoLR costs.

2.2.4

Stakeholder feedback

There was broad support from stakeholders for cost recovery changes targeted to address the uncertainty of cost recovery and its impact on cash flow, financing, and access to credit support.⁴⁹

For example:

- The AEC supported developing approaches to increase certainty for retailers around costs. Whilst not appropriately tested, the existing arrangements are high level, and create risks for retailers that the AER might not allow prudent costs to be recovered.⁵⁰
- Momentum Energy agreed that the current cost recovery mechanism creates uncertainty and supports all costs being recovered via distributor payment determinations. Spreading these costs across the wider distributor areas will result in minimal cost increases to other

⁴⁸ Please see appendix for more information around default RoLRs.

⁴⁹ Submissions to the consultation paper: AEC, p. 2; CCIA, p.1; EnergyAustralia, p.4; Simply Energy, p.1; Origin Energy, p.3; Momentum Energy, p.3; Alinta, p.2; AGI, p.5; AER, p.2.

⁵⁰ Submission to the consultation paper, AEC, p.2.

customers and ensure that the RoLR customers are not unduly penalised for participating in the market. An effective competitive market delivers ongoing benefits for all customers.⁵¹

Some stakeholders which supported the proposal also provided input on specific elements of the proposal, including:

- Origin and Momentum Energy noted that a three-month time period is too short for cost recovery applications and considered a six or nine month time frame would be a more reasonable time.⁵²
- Origin supported a network cost recovery though highlighted it is unclear which cost recovery mechanism will be utilised. Origin considered that the most appropriate cost recovery mechanism for networks would be to include these costs in their annual pricing proposal and considered this would remove materiality threshold requirements.⁵³
- AGL noted that allowing market offers for RoLR customers, may make the cost recovery process and calculations become far more complicated.⁵⁴
- EnergyAustralia considered that more detailed examples of recoverable costs could be added to the NERL, or the AER RoLR guideline, including wholesale energy costs, additional hedging cover costs, any green scheme costs, AEMO costs and specific administrative costs.
- The AER and Endeavour Energy considered the principle that the registered RoLR will itself bear some of the costs of the event, specifically in relation to small retailer failure, should be preserved.⁵⁵
- Endeavour Energy also considered that materiality cost thresholds in the NER could deny distributors the opportunity to recover costs through AER RoLR distribution payment determinations.⁵⁶

PIAC suggested the cost of maintaining supply should either be carried by the failed retailer or shared across the industry, but not borne by consumers of that retailer.⁵⁷

2.2.5

Commission's analysis and conclusions

The Commission recommends that RoLR cost recovery arrangements in the NERL be amended to provide greater certainty to the designated RoLR(s) so that they can quickly recover the prudent costs that they incur following a RoLR event. The Commission considers that the recommendation, as detailed in section 2.2.3, remains relevant with a number of minor changes to the proposed amendments to the NERL, including to:

- Specify that a RoLR may include as part of a cost recovery scheme application an undertaking that it would not seek to recover the full amount of costs.

51 Submission to the consultation paper, Momentum Energy, p.3.

52 Submissions to the consultation paper: Origin, p.3; Momentum Energy, p.3.

53 Submissions to the consultation paper: Origin, p.3.

54 Submission to the consultation paper, AGL, p.5.

55 Submissions to the consultation paper; AER, p.2; Endeavour Energy, p.2.

56 Ibid.

57 Submission to the consultation paper, PIAC, p.9.

- Clarify that the additional energy costs recoverable is the difference between what would have been recovered from the customer, at the RoLRs standing offer prices, and the unhedged energy exposure of those additional customers.

These recommendations offer an appropriate balance between providing customers with protection from the pass through of inefficient costs, while recognising that the RoLR is performing an important function by ensuring customers have continuity in retail services following the failure of a retailer.

Analysis

Reducing the financial uncertainty and cash flow risk faced by the designated RoLR(s) would have a number of benefits:

- The designated RoLR would face less barriers in borrowing funds to cover the short-term costs of being a RoLR because it would have more certainty that prudent RoLR costs can be recovered and about the timing of cost recovery. Also improving cash flow after a RoLR event would likely reduce the risk of cascading retailer failure.
- Similarly, the designated RoLR would be likely to have more success in obtaining the additional credit support required for AEMO because its future cash flows would be more certain.
- Increased certainty over cost recovery could encourage an increase in the number of retailers volunteering to become RoLRs. The appointment of multiple RoLRs would reduce the impact of the RoLR event on each designated RoLR, spread the risks of being a RoLR among several retailers, and reduce the likelihood that the RoLRs experience financial distress or failure.
- By increasing the potential for multiple RoLRs it may also improve the long term competitiveness of the market by spreading the failed retailer's customers across a range of retailers. An increase in the number of RoLRs may also lead to RoLRs offering to bear more of the cost burden as they compete for the failed retailer's customers.

The Commission considers recommendations are well targeted to support these benefits because they address potential sources of financial distress of uncertain cost recovery and its impact on cash flow, financing, and access to credit support. This position was generally supported by stakeholder submissions. In addition, enhancing the ability for the RoLR to recover the prudent costs of performing its functions offers benefits across the NEM, by reducing the risk of cascading retailer failure and the adverse impact this would have on customers. Furthermore, some of these recommendations offer the potential to reduce RoLR costs, to the benefit of customers as providing RoLRs with greater certainty about cost recovery may mean they are able to obtain financing on more competitive terms and conditions.

The Commission does not consider it necessary to provide additional detail in the NERL regarding what costs are recoverable given the proposed wording is broad and does not limit other costs being included. The Commission considers the proposal to include additional costs in relation to the acquired customers will broadly allow the retailer to recover the costs for unhedged energy consumed that would not be recovered through the standing offer price

and for procuring a hedging position. The Commission does not consider it appropriate to specify environmental scheme or participant levies as costs as these will likely be incorporated in the costs recoverable from customers through the standing offer prices.⁵⁸

The Commission agrees with AGL that cost recovery calculations for additional energy costs relative to market offer prices may make the process more complex for the AER to assess. To address this the Commission recommends that cost recovery calculations should be done relative to the standing offer prices. This simplifies the calculation and ensures that RoLRs do not seek to undercharge customers through an artificially low RoLR market offer and recover the difference through distributor payment determinations. The Commission does not consider it necessary to extend the timeline, as Origin and Momentum Energy suggested, as the RoLR has the ability to request a longer timeframe if necessary.

The Commission does not disagree with the AER and Endeavour Energy that RoLRs should bear some of the costs of a RoLR event but considers that competition in the RoLR appointment process is the appropriate way to achieve that outcome. The Commission considers that removing the requirement, but not the option, for a RoLR to bear a proportion of the efficient RoLR costs will reduce the barrier that uncertainty around RoLR cost recovery is to increased retailer participation as RoLRs. To ensure that retailers still seek to bear some portion of the cost where appropriate the Commission's recommendation is amended to specify that a RoLR may include an undertaking that it would not seek to recover the full amount of costs. The Commission also notes that under the recommendation that a RoLR will only be able to recover prudently incurred costs.

The Commission does not consider the concerns raised by Endeavour Energy, that materiality cost thresholds in the NER could deny distributors the opportunity to recover costs through AER RoLR distribution payment determinations, are material. The Commission considers that the NERL clearly indicates that payments made under a distributor payment determination should be taken to be approved positive pass through amounts.⁵⁹ In addition, the AER has stated that distributors do not need to meet any materiality threshold to recover the distributor payment determination or costs recoverable under a retailer insolvency event nor apply to recover the distributor payment determination.⁶⁰

The Commission agrees with Origin that there is some uncertainty around how DNSPs recover their costs given the details are up to the AER RoLR cost recovery determination. However, the Commission considers this is appropriate because it provides the AER with flexibility to make its determination, which it does in discussion with DNSPs, and as discussed in section 2.2.1, the AER has indicated that recovery for DNSPs would likely be through annual pricing proposals, as suggested by Origin.

58 For example the current standing offer prices set at the DMO include environmental and residual costs, those incurred by retailers including to meet regulatory obligations. See AER Default Market Offer Prices 2020-21, 30 April 2020, AER.

59 Clause 167(4)(a) of the NERL.

60 AER, Notice of final instruments - RoLR guidelines, RoLR plan and RoLR statement of approach, November 2011, p.16-17.

2.3 Framework for RoLR designation

2.3.1

Context

When a RoLR event is triggered, a designated RoLR is appointed for each electricity connection point. The default RoLR is taken to be appointed as the designated RoLR, unless the AER appoints a registered RoLR as a designated RoLR before the event actually occurs, and notifies AEMO before the transfer date.⁶¹

The AER has noted that the imminence of the RoLR event is a major factor in its selection of designated RoLRs for appointment. The earlier the warning the AER has of an impending RoLR event, the more registered RoLRs it will be able to consider.⁶²

Where there is less than a few hours' notice of a RoLR event, the AER has indicated it is most likely to appoint default RoLRs. With short notice (i.e., up to 48 hours), the AER suggests it may also be able to consider additional RoLRs with firm offers.⁶³ Additional RoLRs with firm offers have agreed not to be consulted prior to being appointed as designated RoLRs (up to the maximum number of customers permitted by their terms and conditions). Where the AER has more than 48 hours' notice of a RoLR event it may consider (and consult with) other registered RoLRs. This would include non-firm additional RoLRs who have not agreed to be designated without further consultation at the time of an event.⁶⁴

2.3.2

Issue

The current provisions of the NERL make it unlikely that any retailer other than the default RoLR would be appointed as the designated RoLR, given the limited time frame for the AER to designate anyone other than the default RoLR. Where the retailer in financial distress is large, this is likely to be problematic for the default RoLR because it would take on the liabilities and credit support requirements relating to a large number of customers.

It is also possible, although unlikely given a RoLR would have meet the RoLR scheme financial resources criteria⁶⁵, that the retailer facing suspension is a default RoLR, and that there are no firm additional RoLRs, or backup RoLRs, that could be appointed readily to take on its customers. In this case, the AER could be forced to make a decision at very short notice with no specific legal structure and limited information to guide it given the RoLR scheme does not contemplate this situation. This situation could require the AER to appoint a retailer as a designated RoLR without its consent. Given this it may be appropriate to delay the designation of a RoLR.

61 NERL, section 132.

62 AER, Retailer of last resort statement of approach, November 2011.

63 Description of the type of offers that a RoLR may offer are included in the appendix.

64 Ibid.

65 NERL section 123. The RoLR financial resources criterion requires the retailer to demonstrate the extent to which it has adequate resources or access to adequate resources so that it will have the financial viability and capacity to meet the obligations of being a RoLR.

2.3.3 Consultation paper's proposed solution

The Commission, in its 2020 Retail energy competition review final report, recommended a delay in RoLR designation through amending the NERL to increase the time allowed for the AER to advise AEMO of the designated RoLR(s), up to 24 hours after the RoLR event. This recommendation was subsequently included in the RoLR review's consultation paper to identify stakeholder views.

Protocols between AEMO and the AER would need to be amended to ensure consistency with this amended time frame. This delay would result in the AER issuing a notice identifying the designated RoLR(s) 24 hours later than under the existing framework, and the designated RoLR(s) would be informed of their appointment up to 24 hours later than they are at present. This would give the AER more time to assess the most appropriate allocation of customers following a RoLR event, and to negotiate with different retailers to allocate customers to designated RoLR(s).

This change would require a distinction to be made between the following dates, which currently occur simultaneously under the NERL RoLR provisions:

- the date that the RoLR event occurs (for example the date of the suspension of the failed retailer from the NEM by AEMO, which constitutes a RoLR event under the NERL), which would reflect the RoLR transfer date
- the date that the designated RoLR is taken to be appointed.

Changes to RoLR notices

Implementing the delay to the designation of the RoLR would require changes to the notices issued to affected participants, institutions and the public. Currently, after a RoLR event occurs, the AER must decide as soon as practicable whether to issue a RoLR notice.⁶⁶ Delaying the designation of the RoLR by up to 24 hours would require:

- The AER to issue a RoLR notice as soon as practicable following a RoLR event rather than the current requirement to decide as soon as practicable whether to issue a RoLR notice. This notice would identify the date that the RoLR event occurred, the failed retailer and the transfer date.
- The AER to issue a RoLR designation notice to identify the appointed RoLRs within 24 hours of the RoLR event.

These changes would not preclude the AER from publishing a RoLR notice and a RoLR designation notice at the same time. The AER would maintain its current ability to appoint a designated RoLR before a RoLR event. There would also be no change to the current provision that where the AER determines to not designate a RoLR or issue a RoLR notice, the default RoLR is taken to be appointed.⁶⁷

⁶⁶ NERL, section 136.

⁶⁷ NERL, section 132(1).

2.3.4 Stakeholder feedback

There was support for allowing a delay in RoLR designation from most stakeholders.⁶⁸ For example:

- Simply Energy supported the changes and agreed with the AEMC that it is currently unlikely that any retailer other than the default RoLR would be appointed as the designated RoLR in the limited time frames of a RoLR event. Simply Energy highlighted that retailers are unlikely to be willing to incur the costs to register, and maintain registration, as an additional RoLR when there is a very low probability they can be appointed as a designated RoLR.⁶⁹
- The AER highlighted that the extra 24 hours will enable the AER to undertake more detailed analysis of financial positions with AEMO and the potential RoLRs as well as making the appointment of additional RoLRs more likely (including non-firm additional RoLRs). The AER also stated that it would generally try to avoid using the extra 24 hours, particularly if the extra 24 hours is unlikely to change who the designated RoLRs will be.⁷⁰

Some stakeholders in support also provided input on specific elements of the proposal, including:

- Momentum Energy and Alinta Energy both highlighted that support was subject to the RoLR cost recovery changes including a RoLRs exposure to unhedged load due to a delayed RoLR designation.⁷¹
- EWON considered that potential AER delays in notifying customers about a RoLR event could lead to higher levels of customer dissatisfaction or concern about ongoing supply.⁷²
- AEMO suggested to work through the following issues with the AEMC and the RoLR reference group:
 - Management of the additional day of exposure post RoLR effective date where there is no designated RoLR or financially responsible market participant, which creates uncertainty around allocation of pool costs.
 - Costs and impacts associated with amending existing rules, systems and processes.⁷³
- The AER did not support the proposal to require the AER to issue RoLR notices as soon as practicable after a RoLR event. The AER viewed that there are some circumstances where this may not be advisable including for the failure of an embedded network retailer, if the retailer had no customers or if the event may resolve itself but issuing a RoLR notice may make this less likely.⁷⁴

There was also a few submissions, mostly from retailers, which were cautious on the proposal. For example:

68 Submissions to the consultation paper; AEMO, p.2; AER, p.3; Alinta Energy, p.2; EWON, p.3; Momentum Energy, p.4; PIAC, p.9; Endeavour Energy, p.1; CCIA, p.1; Simply Energy; p.1.

69 Submission to consultation paper, Simply Energy, p.1.

70 This position was supported by other stakeholders, see for example Alinta Energy's submission, p.2.

71 Submissions to the consultation paper; Momentum Energy, p.4; Alinta Energy, p.2.

72 Submission to the consultation paper, EWON, p.3.

73 Submission to consultation paper, AEMO, p.2.

74 Submission to consultation paper, AER, p.3.

- Origin considered that the proposal would increase the financial risks in the market and cause greater confusion than certainty to the market.⁷⁵
- AGL encouraged the AER to utilise the existing framework to scenario plan and therefore remove the need to delay notification to the market of RoLR customer designation.⁷⁶
- The AEC did not oppose the changes though recommended the AEMC undertake further impact assessment of this reform to properly identify its costs and benefits and suggested to limit the AER's ability to extend the timeframe in times when the spot price is higher.⁷⁷

2.3.5 Commission's analysis and conclusions

The Commission recommends that the RoLR scheme is amended to allow the AER to delay the designation of RoLRs by up to 24 hours following a RoLR event. Amendments are intended to increase the time allowed for the AER to advise AEMO of the designated RoLR(s), to up to 24 hours after the RoLR event.

To achieve this, the AER would issue two notices, as detailed in section 2.3.3. The NERL would be amended to remove the requirement for the RoLR notice to specify the designated RoLR appointed and provide for a RoLR designation notice to be issued up to 24 hours after the RoLR event, which must:

- Specify the registered RoLR(s) appointed by the notice as a designated RoLR(s) for the event.
- If more than one designated RoLR is appointed, the allocation of each designated RoLR to particular customers or classes of customers.
- Specify whether the customers will be transferred to the designated RoLR(s) SRC or the RoLRs MRC.
- The notice would contain requirements to be complied with by the designated RoLR or other persons who are subject to the notice.
- The RoLR designation notice would have the same service and publication requirements that apply currently to RoLR notices.

These changes would not preclude the AER from publishing a RoLR notice and a RoLR designation notice at the same time or appointing a designated RoLR before a RoLR event. There would also be no change to the current provision that where the AER does not issue a RoLR notice at all, the default RoLR is taken to be appointed. Similarly, if the AER issued a RoLR notice and did not issue a RoLR designation notice within 24 hours of a RoLR event, the default RoLRs would be appointed as designated RoLRs.

The designated RoLR(s) would be appointed as the RoLR(s) for the relevant RoLR event and would acquire the failed retailer's customers from the transfer date specified by the AER. This would require a retrospective allocation of pool costs for the additional load of the RoLR customers to the designated RoLR by AEMO. This would require a change to the NER to provide AEMO these powers for such a circumstance. It may also require changes to AEMO

⁷⁵ Submission to consultation paper, Origin, p.5.

⁷⁶ Submission to consultation paper, AGL, p.5.

⁷⁷ Submission to consultation paper, AEC, p.3.

Credit Limit Procedures to provide AEMO the ability to not completely settle the market in the event of a delayed RoLR designation.

The designated RoLR would be liable to AEMO for the energy consumed from the transfer date, while also being entitled to bill customers for energy consumed from that same point in time, as is the case under the current provisions.⁷⁸

Analysis

The Commission considers advantages of delaying the designation of the RoLR(s) include:

- Facilitating multiple RoLRs - The main limitation on the AER's ability to appoint multiple RoLRs relates to the tight timing of designation prior to a RoLR event occurring. Spreading customers between a number of retailers may also help maintain the long term competitiveness of the retail market, since it could reduce the concentration of customers in a small numbers of retailers.
- More time to consider the optimal allocation of customers - With more time available, the AER may be better placed to judge which retailers have sufficient financial resources to meet the obligations of the RoLR, and therefore to minimise the risk of the designated RoLR(s) failing. There would be more time for the AER to negotiate terms with potential RoLRs. There would be greater capacity for the AER to involve retailers who have made non-firm offers to be additional RoLRs. These retailers would have the benefit of knowing more about the extent of obligations they would incur as a designated RoLR (such as the number of customers involved and the current spot market prices).

The Commission considers that it is important to reduce barriers to retailers participating in the scheme and the AER designating multiple RoLRs as allocating customers across multiple retailers may be the most effective means of addressing the issue of a large retailer failure or retailer failure during a high wholesale price period. Given this the Commission does not consider the AEC suggestion of limiting the AER's ability to extend the timeframe in high wholesale price periods.

While a delay in designating the RoLR means the RoLR would inherit an unhedged exposure to the spot price for all energy consumed over a longer period, the impact would be mitigated when combined with the recommendations to increase the certainty that the RoLR's prudent costs would be recovered. Furthermore, the proposed changes to the timeline provide an opportunity for the AER to hold discussions with potential RoLRs, so retailers would likely be aware of their potential appointment and could begin preparations to put any required hedging contracts into place as soon as possible after appointment.

Separating the notices for RoLR events and RoLR designation may cause confusion to the customers of the failed retailer if they do not have information on who the designated RoLR is and when they will be transferred. However, the Commission considers the benefits to customers and market participants of delaying RoLR designation outweighs the inconvenience of not knowing which retailer(s) will take over the RoLR load for a short period

⁷⁸ The transfer date may be on, before or after the publication of the RoLR notice by the AER, but if the RoLR event involves a revocation of a retail authorisation or suspension from the spot market, the transfer date is the date of revocation or suspension - see NERL, section 136(5).

of time. Also, if the RoLR is in communication with the AER throughout the appointment process a delay in designation may also increase the time a RoLR has to inform customer support staff. Under the recommendation the failed retailers customers would be notified about the event as soon as the RoLR event notice is published, as is the case already so there would be no extra delay in customers knowing about the event.

The Commission agrees with AGL that pre-planning as much as possible would assist the AER in deciding how to allocate customers, but does not consider this alone would be sufficient to support the best decision on the allocation of a failed retailer's customers. The Commission therefore does not consider it appropriate to limit the AER's ability to utilise the delay in designation, rather it would be at the AER's discretion. The Commission notes that the AER may appoint a RoLR before a RoLR event where the AER has a significant amount of notice that a RoLR event is likely to occur.⁷⁹ Conversely, where the AER has a compressed amount of time to appoint a RoLR, it may choose not to issue a RoLR notice and/or a RoLR designation notice so that the default RoLR is taken to be appointed.

The Commission does not recommend amendments to require the AER to issue a RoLR notice as soon as practicable. This change would have reduced uncertainty for participants though the Commission considers it removes necessary flexibility for the AER. Given that there is a high level of variability in the circumstances of different RoLR event triggers, as highlighted by the AER, having a blanket requirement to issue a notice as soon as practicable may not be suitable.

The Commission notes that these recommendations, if accepted by jurisdictions, will require updates to the AER's RoLR guidelines and RoLR plan. Updates to the RoLR plan would include any amendments to the communications required to affected small customer appropriate if the AER was to delay designation of the RoLR.

2.4

AEMO credit support requirements

2.4.1

Context

A participant must provide an amount of credit support to AEMO which is at least equal to its maximum credit limit (MCL).⁸⁰ AEMO can change a participant's prudential settings at any time with one business day's notice.⁸¹ Any changes that result in an increased MCL require the participant to increase its level of credit support.

A failure by the retailer to provide this increased credit support by the relevant time constitutes a default event.⁸² AEMO may then issue a default notice to the participant. If this is not rectified by 1pm the following day (or a later deadline agreed to in writing by AEMO), then AEMO may issue a suspension notice, under which AEMO notifies the market participant

⁷⁹ NERL 132(2).

⁸⁰ NER, clause 3.3.5. AEMO determines an MCL for each participant based on a two per cent probability that a participant's outstandings to AEMO will exceed its MCL by the time the participant is suspended from the market, restricting residual settlement risk to very low probability events. The two per cent probability is referred to as the NEM prudential standard.

⁸¹ NER, clause 3.3.8(m).

⁸² AEMO's current prudential monitoring process allows credit support to be delivered by 10.30am Sydney time on the MCL effective date.

of the date and time from which it is suspended from trading, and the extent of that suspension.⁸³

Since the RoLR has responsibility for the acquired customers from the time of the transfer date specified in the RoLR notice,⁸⁴ its outstandings to AEMO will increase over the following month as energy is consumed. Nonetheless, it is required to post credit support for the full MCL when notified by AEMO, which could be immediately, or up to a week after acquiring the additional customers.

2.4.2 Issue

If the increase in credit support required by AEMO is substantial, it is possible that an otherwise solvent retailer could fail to meet these obligations in the time currently allowed. Should that occur, AEMO would be entitled to issue the designated RoLR with a default notice on the same day.⁸⁵ If the default event is not remedied by 1pm the next day (or any later deadline agreed to in writing by AEMO), AEMO may issue a suspension notice.⁸⁶ Suspension would constitute a second RoLR event,⁸⁷ and could potentially have a cascading effect in which retailers are progressively suspended after being designated as RoLRs, leading to financial contagion and instability in the NEM. While the financial capabilities of the existing RoLRs make this an unlikely outcome, it is nonetheless a dynamic that could occur under the current RoLR scheme with significant consequences.

2.4.3 Consultation paper's proposed solution

The Commission, in its 2020 Retail energy competition review final report, recommended changes to delay the increase in AEMO credit support requirements. This recommendation was subsequently included in the RoLR review's consultation paper to identify stakeholder views.

The recommendation sought to amend the NER to insert a minimum time before AEMO can require increased credit support from the designated RoLR as a result of its increased customer load. There would be a one-week 'period of grace' in relation to credit support requirements following a RoLR event, following which the required credit support would be ramped up in increments over a period of four weeks until it reaches the level that fully reflects the additional load of the customers from the RoLR event. This would more closely reflect the RoLR's increase in outstandings over this time as energy is consumed and its obligations to pay AEMO increase.

83 NER, clause 3.15.21(c).

84 NERL, section 140.

85 NER, clause 3.15.21(b).

86 NER, clause 3.15.21(c).

87 NERL, section 122.

2.4.4 Stakeholder feedback

There was support from a number of stakeholders to delay the current increase in AEMO credit support requirements for RoLRs.⁸⁸ For example:

- Simply Energy considered that this change would reduce the risks of participating in the RoLR scheme.⁸⁹
- The AER explained that this change may encourage more retailers to offer to be additional RoLRs, knowing they would have more time to secure additional credit support which would increase the potential for multiple RoLRs being appointed and securing better outcomes for consumers.⁹⁰

Stakeholder also provided input on specific elements of the proposal, including:

- AEMO suggested a further clarification to this approach would be the requirement to work through eligibility criteria for a concessional treatment with regard to the establishment of credit support in response to a RoLR event.⁹¹
- The AEC queried whether equivalent changes will also be proposed to the National Gas Rules (NGR).⁹²
- Origin believed that the best way to cater for increased MCL levels as part of a RoLR event is to allow the use of cash to secure up to a new MCL level while a bank guarantee is being arranged. Origin suggested that this could be achieved by AEMO amending section 3.1 in the Credit Limit Procedures for a RoLR event to include the provision to allow cash to secure the MCL for a short period.⁹³
- Origin also suggested that allowing a lag for AEMO credit support for a RoLR event will not meet the objectives of the Credit Limit Procedures and prudential standards as it would potentially exposes the market to a new RoLR event.⁹⁴

2.4.5 Commission's analysis and conclusions

The Commission recommends changes to delay the increase in AEMO credit support requirements, as detailed in section 2.4.3, given the broad stakeholder support there are no amendments to the proposal. The precise form of credit support ramping would be set out in the credit limit procedure which AEMO is required to develop through public consultation under clause 3.3.8 of the NER. However, the Commission recommends that the NER be amended to require AEMO to take into account the desired form of credit support ramping.

Analysis

The proposal to delay AEMO credit support requirements seeks a balance between two factors:

88 Submissions to the consultation paper; AEC, p.3; AER, p.3; Momentum Energy, p.4; Endeavour Energy, p.1; CCIA, p.2; Simply Energy; p.2.

89 Submission to the consultation paper, Simply, p.2.

90 Submission to the consultation paper, AER, p.2.

91 Submission to the consultation paper, AEMO, p.2.

92 Submission to the consultation paper, AEC, p.3.

93 Submission to the consultation paper, Origin, p.5.

94 Ibid, p.2.

1. On the one hand, allowing the designated RoLR to take up its new customers without having to bear the immediate risk or cost of sharply increased credit support requirements, thereby reducing the likelihood of cascading retailer failure.
2. On the other hand, decreasing the amount of collateral held by AEMO and raising the possibility that, if the designated RoLR collapsed and was unable to pay AEMO, generators may be short-paid, as highlighted by Origin.

The Commission considers that there is a net improvement in position for generators and the market as the proposed changes give the RoLR more time to meet AEMO credit support provisions in relation to RoLR customers, which may be significant. Additionally, the Commission agrees with the AER that this change may also encourage more retailers to offer to be additional RoLRs which would increase the potential for multiple RoLRs being appointed. The Commission considers delaying the increase may also lead to a lower required amount of additional credit support as in the weeks following a RoLR event there will likely be a proportion of the RoLR customer's switch away from the designated RoLR. These factors will reduce the risk of financial contagion occurring through operation of the RoLR scheme, improving retailer and customer outcomes.

The Commission considers that the suggestions from AEMO and Origin for an eligibility criteria and use of cash temporarily in place of bank guarantees, respectively, may be beneficial though can be considered in detail and tested with stakeholders through the recommended rule change to into account the desired form of credit support ramping.

2.5 RoLR plan requirements

2.5.1 Context

The RoLR scheme includes requirements for the AER to develop, make and maintain RoLR plans that are published on the AER's website.⁹⁵ A RoLR plan includes details of the procedures to be followed by the participants in the event of a RoLR event, including direct communication with customers of a failed retailer, and regular exercises to be carried out by the participants in the plan. In developing a RoLR plan the AER must ensure that the participants are consulted and regularly participate in RoLR plan exercises.⁹⁶

2.5.2 Issue

Elements of the RoLR plan provisions are prescriptive and limit the AER to give effect to the policy objectives in a flexible and proportionate manner. In addition, the drafting no longer reflects the current market arrangements as it assumes, for example, that RoLR events affect all the specified market participants. In practice, RoLR events involving embedded network retailers do not affect AEMO or distributors. The AER is also required to prepare and publish the conduct of each RoLR exercise it undertakes. Technically, this includes internal staff exercises which may not be appropriate to publish.

⁹⁵ NERL, section 162.

⁹⁶ The participants in a RoLR plan are the AER, AEMO, registered RoLRs, distributors or other parties as nominated by the AER.

2.5.3 Consultation paper's proposed solution

The RoLR review's consultation paper proposed to address these two minor issues through changes to section 163 of the NERL of a change from "must" to "may" and inclusion of "external". This would see section 163 as below:

Without limitation, a RoLR plan ~~must~~ may—

(a) provide that exercises are to be held at such times as the AER considers appropriate and that a report on the conduct of each external exercise be published on the AER's website; ...

2.5.4 Stakeholder feedback

There was strong support from stakeholders who commented on RoLR plan requirements. For example, the AEC highlighted that the existing obligations are unnecessarily prescriptive and providing the AER with flexibility as to when RoLR exercises must be undertaken and published will be beneficial to participants.⁹⁷ PIAC cautioned that care must be taken when moving from 'prescription' to 'flexibility' that consumer protections are not compromised.⁹⁸

2.5.5 Commission's analysis and conclusions

The Commission recommends that section 163 of Part 6 of the NERL be amended through changing "must" to "may" and the inclusion of "external" at 163(a). The Commission considers that these changes provide the AER with appropriate flexibility in its communication and publication requirements without materially affecting the RoLR scheme or comprising consumer protections.

⁹⁷ Submissions to the consultation paper: AEC, p.3; AER, p.4; Alinta p.2; Momentum Energy p.4; Origin p.6; Simply Energy, p.2.

⁹⁸ Submission to consultation paper, PIAC, p.10.

3 OTHER ISSUES

The Commission considers that there are additional issues that may warrant a further more extensive review of the RoLR scheme. However, this should not be carried out until the proposed amendments to the NERL and NER included in this report have been implemented and sufficient time has lapsed to identify the impact of these changes and the potential benefit of addressing the additional identified issues. This section details the additional issues identified by stakeholders.

3.1 Appointment of administrator as a trigger for a RoLR event

3.1.1 Issue

The RoLR scheme defines a RoLR event as occurring following a number of events or circumstances including the appointment of an insolvency official, or external administrator, in respect of the retailer or any property of the retailer. The appointment of an administrator does not necessarily reflect the actual commercial viability of a retailer, or its ability to continue operating. A retailer may be able to continue trading and meet financial obligations following the appointment of an administrator and return to solvency. Avoiding the retailer failure would lead to less disruption for customers than a RoLR process.

The appointment of an administrator as a trigger for a RoLR event may act as a disincentive for a retailer facing financial distress from initiating voluntary administration. Delaying voluntary administration may increase the probability that a retailer facing financial distress will ultimately fail.

3.1.2 Proposed solution

Alternatively, the appointment of an administrator could be the trigger for a pre-RoLR monitoring process by the AER, which may not lead to a RoLR event if the retailer survives the administration process. The AER would be made aware of the appointment and monitor the financial viability of the retailer. The AER may require additional reporting requirements from the administrator during this period.

3.1.3 Stakeholder feedback

Stakeholders who provided feedback on this proposal generally supported it.⁹⁹ However, some stakeholders noted concerns, including:

- Origin considered that the principle objective of the RoLR scheme is to ensure security and continuity of supply. To the extent that the AER seeks to apply a monitoring function in the RoLR scheme, it must not compromise the objective of ensuring financial system security.
- AGL noted that introducing a “pre-RoLR” event may introduce other issues. This may represent a potential conflict between the administrator’s duty to ensure that all (or as many as possible) creditors are repaid and the AER’s duty to protect customers.

⁹⁹ Submissions to the consultation paper: AEMO, p.2; CCIA, p.1; EWON, p.3; PIAC, p.10; Momentum Energy; p.5.

3.1.4 Analysis and conclusions

The Commission considers that this potential solution would provide the AER greater discretion in relation to the RoLR process. While this discretion may be beneficial to customers and the market in certain circumstances, there are significant risks associated with discretion of this magnitude. The Commission does not consider that it has had appropriate time to consider this proposal and the full extent of possible ramifications. One example of these risks was highlighted by AGL, that there could be a potential conflict of interest between the administrator's duty to ensure that creditors are repaid and the AER's duty to protect customers. Given the potential benefits of this change is an issue that warrants consideration by a further review of the RoLR scheme.

The Commission notes that the Commonwealth Government is also making changes to the national insolvency framework to enable more Australian small businesses to quickly restructure and to survive the economic impact of COVID-19.¹⁰⁰

3.2 RoLR arrangements for embedded networks

3.2.1 Issue

A growing number of customers are provided energy through embedded network arrangements.¹⁰¹ Embedded network customers supplied by an exempt seller have no default or designated retailer assigned to their connection point if the exempt seller fails. The additional stress from the pandemic will test the already-limited consumer protection framework within embedded networks.¹⁰²

3.2.2 Proposed solution

The Commission has previously found, in its review *Updating the regulatory frameworks for embedded networks*, that the current regulatory arrangements for embedded electricity networks are not fit for purpose, including in relation to RoLR arrangements, and has recommended a suite of law and rule changes to fix these issues.¹⁰³ The Commission's recommendation in that review was the establishment of a modified set of RoLR arrangements for embedded networks, where the retailer at the parent connection point would become the RoLR in the event of the failure of an off-market retailer.

Alternative arrangements to provide RoLR arrangements for embedded networks, include the following options:

100 This will include a new debt restructuring process for small businesses to provide a faster and less complex mechanism for financially distressed but viable firms to restructure their existing debts, and maximise the chance of them surviving.

101 Embedded networks are private electricity networks – that is, they are owned and operated by parties that have been exempted from the requirement to register with AEMO – which serve multiple customers and are connected to another distribution or transmission system through a parent connection point. Embedded networks are often found in apartment blocks, community housing and caravan parks.

102 In many jurisdictions, embedded network customers do not have access to as many rebates and concessions as on market customers, and do not have access to certain national protections such as hardship policies.

103 AEMC, *Updating the regulatory frameworks for embedded networks*, Final report, 20 June 2019.

- The AER could be given powers to appoint a RoLR for the embedded network if the exempt seller has not arranged for another retailer to take on the role. This arrangement could include:
 - the AER appointing a default RoLR for the distribution network to which the embedded network is connected (similar to the experience for on-market customers)
 - alternatively, the AER could call for expressions of interest from authorised retailers or exempt sellers to be the appointed RoLR to the failed embedded network.
- The AER's exempt sellers guidelines could be updated to require exempt sellers to make arrangements with an authorised retailer or exempt seller to be the default RoLR for their network in the event of failure. The nominated RoLR could be reported to the AER and required to take on the customers in the event of the exempt seller failure.

3.2.3

Stakeholder feedback

Stakeholders who provided feedback to this proposal were generally of the position that some form of RoLR arrangement should exist for embedded network customers.¹⁰⁴ There was support for the AEMC's previous proposal or for alternatives.

Other comments from stakeholder feedback included:

- AGL noted that there are currently limitations in the market as not all embedded networks customers and NMI details are visible to the market through AEMO's B2B systems and processes, which may complicate the appointment process.¹⁰⁵
- PIAC considered that a government retailer should take on the consumers of failed embedded networks. If a government retailer arrangement is not considered, the designated RoLR of the area surrounding the embedded network being required to offer embedded network customers the lowest cost or otherwise best offer available.¹⁰⁶
- Origin noted that not all default retailers for a distribution area have embedded network billing and customer management capabilities.¹⁰⁷
- CCIA considered that establishing a modified set of RoLR arrangements for embedded networks could assist in ensuring continuity of supply to exempt customers in some embedded network types. However, a RoLR scheme would conflict with existing state-based protections for exempt customers in NSW residential land lease communities.¹⁰⁸
- Network Energy Services supported initiatives to protect consumers in embedded networks and highlighted two key points:
 - While embedded networks may theoretically be vulnerable to RoLR situations, after decades of EN operation we are not aware of any instances where the projected problems have actually occurred.

¹⁰⁴ Submissions to the consultation paper: AEC, p.4; CCIA, p.2; AEMO, p.4; EWON, p.4; AGL, p.6; Alinta; p.2.

¹⁰⁵ Submission to the consultation paper, AGL, p.6.

¹⁰⁶ Submission to the consultation paper, PIAC, p.11.

¹⁰⁷ Submission to the consultation paper, Origin, p.6.

¹⁰⁸ Submission to the consultation paper, CCIA, p.3.

- It should be a priority to avoid implementing RoLR arrangements which increase the likelihood of an embedded network failing.¹⁰⁹
- Network Energy Services also considered the potential for an embedded network to fail could be brought about if the AEMC requires the retailer at the parent meter connection to become the RoLR for all child connections. This proposal has the distinct potential to disrupt the competitive market for embedded network parent meter contracts by reducing the pool of energy retailers who will offer energy contracts to embedded networks. This would then lead to higher prices and increase pressure on financially stressed embedded networks.¹¹⁰

3.2.4 Analysis and conclusions

The Commission considers that its previous recommendations to improve RoLR arrangements in embedded networks remain sound. However, these previously proposed embedded network RoLR arrangements were provided in an integrated package of changes to laws, rules and regulations.¹¹¹ It is not possible to implement the recommendations in relation to RoLR within embedded networks in isolation because they rely on other aspects of the reforms (e.g. allocation of NMIs to embedded network customers).

Given the Commission considers the previous embedded network recommendations remain sound, but are part of a package of recommendations that has not progressed so far, in the event that the package is not going to progress, then alternative RoLR arrangements for embedded networks could be considered.

3.3 Whether sections of the RoLR scheme could be better placed in the NERR

The Commission considered, in the 2020 Retail energy competition review final report, that as competition in the retail market develops over time and the number of retailers in the NEM continues to increase it will be important that the RoLR scheme continues to evolve. In order to make changes to the RoLR scheme adaptable over the long term, the Commission recommended that the RoLR provisions in the NERL should be removed and the provisions should be included in the NERR through rule changes. This would enable the Commission, based on rule change requests from stakeholders, to make changes as new issues are identified and market conditions change. This will allow the RoLR scheme to remain fit for purpose over time.

Stakeholder feedback to the consultation paper on this issue was limited. PIAC provided support and agreed that having the RoLR provision in the NERR instead of the NERL would better enable the provisions to remain fit for purpose. Momentum Energy, AGL and the AEC did not consider that the RoLR provisions should be in the NERR, stating that the benefits are not clear and that the RoLR scheme is of sufficient importance that the certainty that comes from the scheme being in the NERL is beneficial.

¹⁰⁹ Submission to the consultation paper, Network Energy Service, p.1.

¹¹⁰ Ibid.

¹¹¹ AEMC, Updating the regulatory frameworks for embedded networks, Final report, 20 June 2019.

The Commission considers that completely removing the RoLR scheme provisions from the NERL to the NERR does not warrant further consideration. However, if there was to be another review of the RoLR scheme the Commission considers that it would be appropriate to investigate whether moving specific provisions, where the benefits are clear, would be appropriate.

3.4 Stakeholder identified issues

Stakeholders also identified other issues with the RoLR scheme. The Commission considers some of these suggestions warrant further review, at an appropriate time. They highlight the scale and detail of issues that may warrant further consideration and how the RoLR scheme could evolve over time.

The AER identified a number of additional issues including that:

- The AER can only appoint one default RoLR per connection point for electricity. There may also be merit in the AER being able to appoint a second-tier retailer as a default RoLR in some instances to help spread the RoLR load, including compulsorily.
- In the AER's experience, with the exception of the 'Big 3' retailers, retailers have shown no interest in registering as additional RoLRs. The AER recommends either removing the requirement or giving the AER the discretion to call for expressions of interest.
- That anyone given notice of the risk of a RoLR event must keep the information confidential and no-one, other than the AER and AEMO, may disclose the issue of the notice and the information it contains to their 'marketing staff'. The AER note that for retailers, marketing staff are generally responsible for managing RoLR related communications and therefore recommend a more pragmatic option is to prohibit the conduct, rather than the specific staff.
- The AER is required to appoint and register a default RoLR for each electricity connection point. The AER understand, for example, that there are some registered participants who are supplied by non-retailers under legacy arrangements. Technically, these connection points are covered by the RoLR scheme and require the appointment of a default RoLR.
- RoLR notices must be framed so as to deal with all customers of the failed retailer. This can be problematic if the retailer operates as a single legal entity and has both electricity and gas customers. A retailer that fails in one market does not necessarily fail in the other, as was the case with Go Energy.
- Where a customer has a payment plan for arrears with the failed retailer and makes those payments by direct debit or Centrepay, these arrangements should only be cancelled for liabilities accrued after the transfer date.
- Information about RoLR arrangements are required to be included in small customer contracts. The AER consider there is merit in requiring retailers to inform all customers, including large customers, of the RoLR arrangements applicable to them.¹¹²

Other issues identified by stakeholders included:

¹¹² Submission to the consultation paper, AER, p.5.

- Simply Energy supported a review of the AER's RoLR plan in relation to the obligations on failed retailers. As observed in past RoLR events, relying on failed retailers to provide information to the designated RoLR has limited value and creates unnecessary and inefficient dependencies. For example, paragraphs 2.20.1 and 2.20.2 of the RoLR plan currently require the failed retailer to provide data to the designated RoLR that would also be available from other participants (such as from AEMO and affected distributors).¹¹³
- Simply Energy noted that the current process to register as an additional RoLR is labour intensive and requires significant amounts of information to be provided to the AER. Simply Energy indicated it would support simplifications in the registration process and less frequent reviews of registration.¹¹⁴
- PIAC made a number of recommendations, including that:
 - Fees should not be imposed on the consumers of failed or withdrawn retailers.
 - Failed retailers should be required to provide detailed customer and service information to that consumer's Retailer of Last Resort.
 - A government-owned Retailer of Last Resort should be created and be made the default Retailer of Last Resort for all consumers.
 - There should be special provisions for when there is a failure of 'systemically important market participants' (SIMP), including decision making at a government level in alignment with the AEMC's 2015 recommendation.
 - Another option is requiring all retailers to contribute a set dollar amount per consumer to an industry-wide fund, which would then be accessible to RoLRs to cover the costs involved in transferring consumers. Access to the fund could be by AER discretion.¹¹⁵
 - EWON noted that the impact of a RoLR event on customers who use new technologies should be further explored. Electric vehicles and storage batteries have created additional dependency on the electricity network and the introduction of specialised market retail offers to service customer needs.¹¹⁶

113 Submission to the consultation paper, Simply Energy, p.2.

114 Ibid.

115 Submission to the consultation paper, PIAC, p.6-7.

116 Submission to the consultation paper, EWON, p.4.

ABBREVIATIONS

AEMC	Australian Energy Market Commission
AEMO	Australian Energy Market Operator
AER	Australian Energy Regulator
Commission	See AEMC
MCE	Ministerial Council on Energy
MCL	Maximum credit limit
MRC	Market retail contract
NEL	National Electricity Law
NEO	National electricity objective
NERL	National Energy Retail Law
NER	National Electricity Rules
NERR	National Energy Retail Rules
NERO	National Energy Retail Objective
NGL	National Gas Law
NGO	National gas objective
RoLR	Retailer of last resort
SRC	Standard retail contract
TOR	Terms of reference

A SUMMARY OF OTHER ISSUES RAISED IN SUBMISSIONS

This appendix sets out the other issues raised in consultation on this review process and the AEMC's response to each issue.

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

STAKEHOLDER	ISSUE	AEMC RESPONSE
PIAC	PIAC considered that having a government retailer take on the consumers of failed retailers would ensure financial contagion among private businesses does not occur when a retailer fails. PIAC suggested that such an arrangement would also reduce the risk that unviable retail business models impact unreasonably upon the market and consumers. (Page 10 of PIAC submission)	The Commission agrees with PIAC that the involvement of government owned retailers in the RoLR scheme may reduce the risk of financial contagion occurring from retailer failure, though it is not in the scope of this review to make that recommendation.
PIAC	PIAC considered that consumers of failed retailers should be put on the RoLR's best offer. PIAC stated that the RoLR's best offer must: <ul style="list-style-type: none"> • have a duration of at least 6 months without variation • not have exit fees • not have direct debit or pay on time conditionality • allow the continuation of payment plan arrangements. (Page 10 of PIAC submission) 	The Commission does not agree with PIAC that retailers should be forced to offer their best offer to customers through the RoLR scheme. This would be a significant departure from the underlying principle of contestable markets that retailers may choose when they make specific market offers to customers.
EWON	EWON noted that when notifying customers about a RoLR event and designated retailer, the customer's preferred communication method should be used. (EWON submission page 3)	The Commission considers that requiring RoLR notifications to be provided in the customers' preferred communication method would not be appropriate given those specific details may not be available to the RoLR and therefore could delay notification.
AEC	The AEC noted the varied arrangements between gas and electricity for RoLR events, and recommend the AEMC assess these differences	The Commission considers that it is appropriate that the recommendations in this review to governments on

STAKEHOLDER	ISSUE	AEMC RESPONSE
	when undertaking further considerations or recommendations. (AEC submission page 3)	changes to the RoLR scheme should extend, where possible and appropriate, to a retailer failure in gas markets to provide for a simpler and more comprehensive implementation.
EnergyAustralia	<p>EnergyAustralia asked the AEMC to consider changes to the NERL that would support the provision of timely and accurate data to help the RoLR understand, price and cover the new load from impacted customers. RoLRs mainly use historical metering data to undertake this assessment.</p> <p>To mitigate data quality issues, the AER could explore issuing RoLR Regulatory Information notices earlier and well before the RoLR event. This appears to already be enabled under the NERL (section 152(1)) so it may be a matter of changing general practice. (EnergyAustralia submission page (EnergyAustralia submission page 5)</p>	The Commission considers that the AER could consider these concerns at the next update to the RoLR guidelines and plans, likely following implementation of this review's recommendations.

B ROLR SCHEME

This appendix sets out additional detail on the existing regulatory framework for a failed retailer to exit the market through the RoLR mechanism.

B.1 RoLR registration

The AER must both initially and afterwards at such times as it considers appropriate call for an expression of interest from retailers for registration as a RoLR. A retailer may lodge an expression of interest with the AER either in response to an AER call for expressions of interest or at any other time. A RoLR expression of interest may contain proposals as to:

- customers or classes of customers the retailer will accept as its customers if it were to be appointed a designated RoLR in respect of a RoLR event
- numbers of customers the retailer will accept if it were to be appointed a designated RoLR in respect of a RoLR event
- variation to the retailer's RoLR cost recovery scheme.¹¹⁷

The NERL requires a "default RoLR" to be appointed by the AER ahead of time for each electricity connection point.¹¹⁸ In practice, default RoLRs are generally the original incumbent retailers in the area who previously acted as RoLRs under the former jurisdictional schemes. Retailers can also submit an expression of interest to the AER to become an 'additional RoLR'. The AER has established two categories of additional RoLRs:

- the 'firm offer' category where retailers pre-commit to the terms and conditions under which they would be appointed as a RoLR
- the 'non-firm' category where retailers register their interest in being a RoLR but do not commit themselves to acting in that role.

The AER must maintain and publish a register of RoLRs.¹¹⁹

B.2 RoLR designation

When a RoLR event is triggered, a designated RoLR is appointed for each electricity connection point, and 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 as the designated RoLR, unless the AER appoints a registered RoLR as a designated RoLR in respect of a RoLR event before the event actually occurs, and notifies AEMO before the transfer date.¹²⁰

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

117 NERL, section 124.

118 NERL, section 125.

119 NERL, section 127.

120 NERL, section 132.

- whether the registered RoLR has a RoLR cost recovery scheme, and if so what costs are recoverable and what is the amount of those costs
- the imminence of the RoLR event
- the extent to which the retailer has the necessary organisational and technical capacity to meet the obligations of a RoLR
- the extent to which the retailer has adequate resources or access to adequate resources so that it will have the financial viability and financial capacity to meet the obligations of a RoLR
- whether the retailer is suitable to be a RoLR taking into consideration the number and class of customers the retailer has and the areas which the retailer serves.¹²¹

The AER may consider appointing more than one designated RoLR for a RoLR event if the AER is of the opinion that it is appropriate to do so having regard to the size of, or other circumstances surrounding, the event. When making the appointments, the AER must allocate responsibility for particular customers or classes of customers to each designated RoLR.¹²²

B.3 RoLR cost recovery

The NERL incorporates a process through which a designated RoLR can apply to the AER to recover the costs that it incurs on or after a RoLR event.¹²³ A default RoLR may also apply to recover costs incurred in preparing for RoLR events.¹²⁴ The designated RoLR retailer does not take on any of the liabilities or obligations of the failed retailer.

On receipt of an application the AER must determine a "RoLR cost recovery scheme". The AER must be guided by the following principles:

- the registered RoLR should be provided with a reasonable opportunity to recover the reasonable costs that it incurs 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 of the costs, in proportion to its customer base.¹²⁵

The AER is required to make a determination on how much of a RoLR's costs should be recovered from one or more DNSPs, who are entitled to recover this cost from their customers.¹²⁶

AER statement of approach

121 The AER can also take into consideration any other matters the AER considers relevant in the circumstances. NERL, section 133.

122 NERL, section 134.

123 NERL, section 166. Under the AER's RoLR guidelines, applications must be made within nine months of the relevant RoLR event. See AER, Retailer of last resort statement of approach, November 2011.

124 NERL, section 166(3)(a).

125 NERL, section 166(7).

126 NERL, section 167.

The AER has published a RoLR statement of approach, which includes some guidance as to the general principles for cost recovery scheme determinations.¹²⁷ In summary, the AER's guidance on applying the principles for cost recovery are:

- actions of the designated RoLR in performing its obligations should be prudent and minimise the costs incurred in the circumstances
- limits will not be imposed on the classes or magnitude of costs as the RoLR should be provided with reasonable opportunity to recover its reasonable costs incurred
- cost recovery should not result in onerous price shocks for small customers, as this may present hardship issues for some customers
- cost recovery should occur over the largest customer base which is appropriate to the RoLR event.¹²⁸

The AER has the ability to negotiate the terms and conditions of a potential cost recovery scheme with registered RoLRs in the process of designating a RoLR. For example, the AER can designate a RoLR based on its willingness to bear a higher share of the cost. The AER has also indicated that one of the objectives of the RoLR scheme is to protect customers' interests with respect to price through competition in the RoLR appointment process.¹²⁹

B.4 Contingency events

If the AER receives notice of or otherwise becomes aware of any event, circumstance or matter that it has reason to believe may or will affect, or give rise to some risk of affecting, continuity of the sale of energy to a retailer's customers, the AER may utilise its powers under the RoLR provisions in the NERL.¹³⁰ If the AER was to act under these contingency powers it may request financial information from a retailer and consult with AEMO. The AER may ask one or more registered RoLRs if it wants to be appointed as a designated RoLR for that event. The AER may give notice that it considers there is a risk of a RoLR event, and of the grounds for its view, to relevant parties after providing that notice to AEMO and Ministers in participating jurisdictions.¹³¹

127 AER, Retailer of last resort statement of approach, November 2011.

128 Ibid, p.19.

129 AER, RoLR final statement of approach, Nov 2011, p. 3.

130 NERL section 130.

131 Ibid.