



Final decision

**Meridian SeamGas Joint Venture and
WestSide Corporation Limited**

Ring fencing exemption application

July 2012

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Shortened forms

ACCC	Australian Competition and Consumer Commission
AER	Australian Energy Regulator
Code	National Third Party Access Code for Natural Gas Pipeline Systems
DVP	Dawson Valley Pipeline
MEPAU	Mitsui E&P Australia Pty Ltd
NGL	National Gas Law
NGR	National Gas Rules
WestSide	WestSide Corporation Limited
WestSide A	WestSide CSG A Pty Ltd
WestSide D	WestSide CSG D Pty Ltd

Overview

On 21 February 2012, WestSide, WestSide A, WestSide D and MEPAU (the Applicants) submitted an application to the AER under s. 146(1) of the National Gas Law (NGL) seeking exemptions from ring fencing obligations under ss. 139–141 of the NGL for the Dawson Valley Pipeline (DVP).¹

Prior to 1 July 2010, Anglo Coal (Dawson) Limited, Anglo Coal (Dawson Management) Pty Ltd and Mitsui Moura Investment Pty Ltd (the 2007 Applicants) were the service providers for the DVP. The 2007 Applicants were granted waivers from the ACCC for ring fencing obligations under ss. 4.1(b), (h) and (i) of the Code. Due to an ownership change of the DVP in July 2010, the Applicants are not covered by the waivers granted in 2007.

The Applicants sought to maintain the current business and staffing arrangements following the acquisition of DVP and other assets from the 2007 Applicants. The Applicants also sought to maintain the existing account keeping arrangements. As a consequence, the Applicants sought exemptions for all three ring fencing requirements under ss. 139–141 of the NGL.

The AER assessed this exemption application according to the criteria set out in r. 31 of the National Gas Rule (NGR) and on 6 June 2012, and made its draft decision on this matter in accordance with the procedures set out in r. 9 of the NGR.

In the draft decision, the AER:

- did not exempt the Applicants from the ring fencing obligations under s. 139 of the NGL in respect of the carrying on of related businesses. The AER required the Applicants to submit a completed gas transportation term sheet that would be acceptable to the AER before making a final decision
- exempted the Applicants from the ring fencing obligations under s. 140 of the NGL with respect to the sharing of marketing staff
- did not exempt the Applicants from the ring fencing obligations under s. 141 of the NGL with respect to account keeping. The AER considered that the public benefit derived from compliance with this obligation outweighs its costs.

The AER invited interested parties to make written submissions on its draft decision by 28 June 2012. The Applicants made the only submission to the AER's draft decision. This included submitting a confidential Gas Transportation Term Sheet (the 2012 term sheet).

The AER is satisfied that circumstances have not changed since the AER made its draft decision to grant the Applicants exemption from s. 140 of the NGL in relation to the sharing of marketing staff. Therefore, consistent with the draft decision, the

¹ Meridian SeamGas Joint Venture and WestSide Limited, *Dawson Valley Pipeline – Application for exemption from the minimum ringfencing requirements imposed by sections 139, 140 and 141 of the law*, 21 February 2012 (Application).

AER's *final decision*, in accordance with s. 146(2) of the NGL, is that the AER exempts the Applicants from the ring fencing obligations set out in s. 140 of the NGL.

With respect to the exemption sought from s. 139 of the NGL, the AER is now satisfied that the Applicants have established internal controls within their business that substantially replicate the effect achieved as if the related businesses were divested into a separate entity, as required by r. 39(c). The AER formed this view having regard to the 2012 term sheet submitted by the Applicants. In accordance with s. 146(2) of the NGL, the AER exempts the Applicants from the ring fencing obligations set out in s. 139 of the NGL.

In relation to the exemption sought from s. 141 of the NGL regarding account keeping, the Applicants submitted an alternative account keeping arrangement for pipeline services provided by the DVP (proposed approach). The AER considers that the Applicants' alternative proposal lacks sufficient detail to allow the AER to fully consider the proposed approach as part of this final decision. Consistent with its draft decision, the AER has decided not to grant an exemption from the obligation regarding account keeping in s. 141 of the NGL. Subsequent to this decision, the AER proposes to informally consult with the Applicants to ensure that its proposed approach is compliant with s. 141.

In summary, the AER's final decision is that it:

- exempts the Applicants from the ring fencing obligation under s. 139 of the NGL with respect to carrying on a related business
- exempts the Applicants from the ring fencing obligation under s. 140 of the NGL with respect to the sharing of marketing staff
- does not exempt the Applicants from the ring fencing obligation under s. 141 of NGL with respect of account keeping.

1 Introduction

1.1 Background

The DVP is a covered gas transmission pipeline that starts at the Dawson River Central Gas Processing facility in the Meridian Seam Gas fields in central Queensland. It is approximately 47 km long and interconnects the Queensland Gas Pipeline. It also has a 3.7 km long off-take to the Queensland Nitrates Plant facility near Moura.

The DVP has a current capacity of 21TJ/day.² It is operating significantly below its capacity.³

The DVP is subject to full regulation under the NGL, which includes being subject to the AER's review of its proposed access arrangements. A full access arrangement contains price and revenue terms and other non-price terms and conditions of access for reference services provided by the pipeline. An eight-year access arrangement (5 September 2007 – 5 September 2015) is currently in place for the DVP.

Being a covered pipeline, the DVP is also required to comply with the minimum ring fencing obligations set out in ss. 139–141 of the NGL. These obligations include prohibition on service providers carrying on related businesses, prohibition on service providers' marketing staff taking part in related businesses and maintaining separate accounts for the regulated parts of the service provider's businesses.

The 2007 exemption

Prior to 1 July 2010, the 2007 Applicants were the service providers for the DVP. On 14 November 2006, the 2007 Applicants submitted applications to the ACCC for approval under provisions of the *National Third Party Access Code for Natural Gas Pipeline Systems* (Code) to waive certain ring fencing obligations in relation to the DVP.⁴ The applications were made under s. 4.16 of the Code.

All 2007 Applicants requested waiver of the prohibition from carrying on a related business of producing, purchasing or selling natural gas (s. 4.1(b) of the Code). Anglo Coal (Dawson) Limited and Anglo Coal (Dawson Management) Pty Ltd also requested that the obligations dealing with the sharing of marketing staff between associate companies (ss. 4.1(h) and (i)) be waived.

On 14 February 2007, the ACCC released a final decision stating that it would issue notices under s. 15 of the Code to waive the obligation to comply with s. 4.1(b) for each of the 2007 Applicants.⁵ It also decided to issue notices to waive the obligation to comply with ss. 4.1(h) and (i) for Anglo Coal (Dawson) Limited and Anglo Coal

² Application, p. 4.

³ Application, p. 5.

⁴ Anglo Coal (Dawson) Limited, Anglo Coal (Dawson Management) Pty Ltd and Mitsui Moura Investment Pty Ltd, *Application for waiver of the obligations in sections 4.1(b), (h) and (i) of the National Third Party Access Code for Natural Gas Pipeline Systems*, 14 November 2006 (2007 Application).

⁵ ACCC, *Final decision: Applications to waive ring fencing obligations by Anglo Coal (Dawson) Limited, Anglo Coal (Dawson Management) Pty Ltd and Mitsui Moura Investment Pty Ltd for the Dawson Valley Pipeline*, 14 February 2007 (ACCC, *Final decision for DVP*, February 2007).

(Dawson Management) Pty Ltd. The ACCC was satisfied that the criteria specified in ss. 4.15(a) and (b) of the Code had been met under the market conditions in 2007. Specifically, the ACCC found that the scale of current and potential third party usage of the DVP was small and the potential public benefit resulting from compliance would be limited.⁶

1.2 Application for exemption

On 1 July 2010, WestSide A, WestSide D and MEPAU acquired the Meridian SeamGas fields from the 2007 Applicants. WestSide A and WestSide D acquired the 51 per cent interest held by Anglo Coal (Dawson) Limited and Anglo Coal (Dawson Management) Pty Ltd and the 49 per cent interest held by Mitsui Moura Investment Pty Ltd was assigned to MEPAU. WestSide A, WestSide D and MEPAU are the participants in the Meridian SeamGas Joint Venture (JV). The JV's assets comprise the DVP together with the ML Pipeline (previously known as the Moura Pipeline), a petroleum lease, gas rights in mining leases under a co-development agreement, and gas processing and compression infrastructure.⁷

The JV participants currently own the DVP and WestSide is the operator of the DVP as well as other JV assets. The JV participants and WestSide are all regarded as the service providers of the DVP.⁸

Given that the Applicants are not covered by the waiver granted in 2007 and wish to keep current arrangements in place, the Applicants are seeking exemptions under s. 146 of the NGL. Specifically, the Applicants are seeking exemptions from the minimum ring fencing requirements under the following provisions of the NGL:

- section 139: prohibition on carrying on related business
- section 140: segregation of marketing staff
- section 141: account keeping requirements.

1.3 AER's Draft Decision

Application for exemption from s.139 of the NGL

In its draft decision the AER accepted the submission of the Applicants that the DVP is not a significant part of the gas pipeline system in Queensland, thereby satisfying the requirements of r. 31(3)(a) of the NGR.⁹ The AER also considered that the cost of complying with the ring fencing obligations under s. 139 of the NGL outweighs any associated public benefit, satisfying r. 31(3)(b) of the NGR.

⁶ See also ACCC, *Draft decision: Applications to waive ring fencing obligations by Anglo Coal (Dawson) Limited, Anglo Coal (Dawson Management) Pty Ltd and Mitsui Moura Investment Pty Ltd for the Dawson Valley Pipeline*, 20 December 2006 (ACCC, *Draft decision for DVP*, December 2006).

⁷ Application, p. 3.

⁸ NGL, s. 8.

⁹ AER, *Draft decision: Meridian SeamGas Joint Venture and WestSide Corporation Limited Ring fencing exemption application*, June 2012 (AER, *Draft Decision*, June 2012), p. 24.

However, the AER was not satisfied that the established internal controls substantially replicate the effect achieved if the related business were divested into a separate entity. Consequently, the AER considered that a completed gas transportation term sheet needed to be submitted by the Applicants in order for the AER to complete its assessment under r. 31(3)(c) of the NGR, and to satisfy an exemption from s. 139 of the NGL. This term sheet would need to be acceptable to the AER.

Application for exemption from s. 140 of the NGL

In the draft decision, the AER considered that the cost of complying with the ring fencing obligations under s. 140 of the NGL currently outweighs any associated public benefit. Therefore the Applicants' obligations with respect to sharing of marketing staff should be waived.¹⁰

The AER considered that, based on the current market environment in Queensland, there would be little public benefit in requiring the Applicants to separate their marketing staff. These considerations were consistent with the decision made by the ACCC in the 2007 exemption.

Application for exemption from s. 141 of the NGL

In its draft decision, the AER was not satisfied that the cost of complying with the ring fencing obligations under s. 141 of the NGL outweighed the public benefit resulting from compliance. Therefore, the Applicants were not exempted from their ring fencing obligations with respect to account keeping under s. 141 of the NGL.¹¹

Overall, the AER was of the view that the cost of compliance in relation to s. 141 of the NGL is the cost of maintaining separate accounts in respect of the pipeline services as required by s. 141(a) of the NGL. The AER considered the reasonable estimate of the cost of maintaining separate accounts in accordance with s. 141(a) of the NGL is below the estimate provided by the Applicants.

The AER considered that requiring the service providers to prepare, maintain and keep accounts in accordance with s. 141 of the NGL improves the transparency, consistency and verifiability of the accounting information that is required to be submitted to the AER for the purpose of conducting an access arrangement review. The AER considered there to be a wider interest in ensuring the quality of the information provided in access arrangement reviews in order to maintain the integrity and efficacy of the access arrangement regime. The AER considered this to be imperative as long as the pipeline is covered and subject to an access arrangement approved by the AER.

The AER noted that it was willing to assess any alternative arrangement with respect to account keeping which substantially achieves the public benefit without full compliance with s. 141 of the NGL.

¹⁰ AER, *Draft Decision*, June 2012, p.24.

¹¹ AER, *Draft Decision*, June 2012, p. 24..

2 Legislative and rule requirements

2.1 Relevant legislative and rule requirements

2.1.1 Granting an exemption

Section 146(1) of the NGL enables a covered service pipeline provider to apply to the AER for exemptions from ring fencing requirements in ss. 139–141 of the NGL.

Section 139 of the NGL provides that:

On and after the compliance date, a covered pipeline service provider must not carry on a related business.

Rule 31(3) of the NGR outlines the criteria that must be satisfied before an exemption can be granted for the obligation under s. 139 of the NGL:

(3) An exemption is to be granted from section 139 of the *NGL* (prohibition on carrying on related business) if the AER is satisfied, on the application of a service provider, that:

(a) either:

(i) the relevant pipeline is not a significant part of the pipeline system for any participating jurisdiction; or

(ii) the service provider does not have a significant interest in the relevant pipeline and does not actively participate in the management or operation of the pipeline; and

(b) the cost of compliance with the relevant requirement for the service provider and its associates would outweigh the public benefit resulting from compliance; and

(c) the service provider has, by arrangement with the AER, established internal controls within the service provider's business that substantially replicate, in the AER's opinion, the effect that would be achieved if the related business were divested to a separate entity and dealings between the service provider and the entity were subject to the controls applicable to associate contracts.

Section 140 of the NGL provides that:

(1) On and after the compliance date, a covered pipeline service provider must ensure that none of its marketing staff are officers, employees, consultants, independent contractors or agents of an associate of the covered pipeline service provider that takes part in a related business.

(2) On and after the compliance date, a covered pipeline service provider must ensure that none of its officers, employees, consultants, independent contractors or agents are marketing staff of an associate of the covered pipeline service provider that takes part in a related business.

Section 141 of the NGL provides that:

On and after the compliance date, a covered pipeline service provider must prepare, maintain and keep-

- (a) separate accounts in respect of pipeline services provided by means of every covered pipeline owned, operated or controlled by the covered pipeline service provider; and
- (b) a consolidated set of accounts in respect of the whole of the business of the covered pipeline service provider.

Rule 31(4) of the NGR outlines the criteria that must be satisfied before an exemption can be granted for either s. 140 or s. 141 of the NGL:

- (3) An exemption is to be granted from section 140 of the NGL (segregation of marketing staff etc.) or section 141 (accounts) if the AER is satisfied, on the application of a service provider, that the cost of compliance with the relevant requirement for the service provider and its associates would outweigh the public benefit resulting from compliance.

The AER must deal with an application for exemption in accordance with the expedited consultative procedure.¹² Sub rule 9(2) of the NGR outlines the relevant procedures in respect of this application:

- (2) The decision maker must proceed as follows:
 - (a) the decision maker must, after such consultation (if any) as the decision maker considers appropriate (and any revision of the proposal that results from that consultation), make a draft *decision*; and
 - (b) the decision maker must give copies of the draft decision to the parties to the administrative process in which the decision is to be made; and
 - (c) the decision maker must publish, on its website and in any other way the decision maker considers appropriate, the draft decision together with a notice:
 - (i) stating why the decision is required; and
 - (ii) giving reasonable details of the context in which the draft decision has been made, the issues involved and the possible effects of the decision; and
 - (iii) inviting written submissions and comments on the draft decision within 15 business days from the date of the notice;
 - (d) the decision maker must, within 20 business days after the end of the period allowed for making submissions and comments on the draft decision, consider all submissions and comments made within the time allowed and make its final decision.

2.1.2 Repealing an exemption

Section 20 of Schedule 2 of the NGL provides for the amendment and/or repeal of a decision to grant an exemption. This section states that:

If this Law authorises or requires the making of an instrument, decision or determination-

¹² NGR, r. 31(2).

(a) the power includes power to amend or repeal the instrument, decision or determination; and

(b) the power to amend or repeal the instrument, decision or determination is exercisable in the same way, and subject to the same conditions, as the power to make the instrument, decision or determination.

3 Submissions

The AER invited interested parties to make written submissions on its draft decision in by 28 June 2012. The Applicants made the only submission to the draft decision in a submission dated 27 June 2012.¹³

¹³ WestSide Corporation, *DVP Ring Fencing Application —response to draft decision*, 27 June 2012.

4 AER's consideration

Application for exemption from s. 139 of the NGL

The AER maintains the view outlined in its draft decision, that the Applicants have met the criteria specified in rr. 31(3)(a) and (b) of the NGR.

However, as discussed above, the key outstanding issue arising from the draft decision was in respect of the requirement set out in r. 31(3)(c) of the NGR. The AER considered that in order for it to make a final decision to grant an exemption from s. 139 of the NGL, the Applicants would need to provide a completed gas transportation term sheet which outlines the internal arrangements under which the service provider's gas is transported.¹⁴

In response to this requirement, the Applicants provided to the AER a confidential term sheet. The 2012 term sheet sets out the internal arrangements under which the Applicants' gas will be transported on the DVP. The Applicants submitted that an earlier Gas Transportation Term Sheet was inherited from the previous owners of the DVP, and that this is still in use. The Applicants submitted that the 2012 term sheet will be executed after the AER's review for the purpose of the final decision.¹⁵

The AER has reviewed the term sheet provided, and is satisfied that it sets out appropriate terms and conditions, including tariffs, for the transportation of gas on the DVP between the production and transportation interests of the Applicants. The AER considers that the term sheet is a baseline against which it can assess the nature and effect of any variations the Applicants decide to make to their existing internal arrangements in the future.

The AER is satisfied that the Applicants have established internal controls within their business that substantially replicate the effect achieved if the related business were divested into a separate entity and dealings between the service provider and the entity were subject to the controls applicable to associate contracts. Accordingly, the AER is satisfied that the Applicants have met the requirements of r. 31(3)(c) of the NGR.

Therefore, the AER is satisfied that the Applicants have met the criteria under r. 31(3) of the NGR with respect to carrying on a related business. Accordingly, under s. 146 of the NGL, the AER exempts the Applicants from the ring fencing obligation under s. 139 of the NGL.

Application for exemption from s. 140 of the NGL

The AER remains of the view that there are minimal practical implications of sharing marketing staff. The AER considers that the cost of complying with the ring fencing obligations under s. 140 is substantial. In its draft decision, the AER considered matters such as the sharing of confidential information, barriers to entry, the extent of spare capacity on the DVP, the demand for services and the extent of competition.

¹⁴ AER, *Draft Decision*, June 2012, p. 24.

¹⁵ WestSide, email to AER dated 22 June 2012, *DVP gas transportation term sheet final draft to AER*; WestSide, email to AER dated 27 June 2012, *response to draft decision*.

Given these considerations, the AER is satisfied that the cost the Applicants would incur in complying with section 140 of the NGL would outweigh any public benefit from meeting these obligations. Accordingly, under s. 146 of the NGL, the AER exempts the Applicants for the ring fencing obligation under s. 140 of the NGL. In granting an exemption the Applicants will be allowed to share its marketing and sales staff with each other as they carry on a related business.

Application for exemption from s. 141 of the NGL

As discussed in section 1.3 above, the AER did not grant the Applicants an exemption from s. 141 of the NGL in its draft decision. The AER considered that the requirements under s. 141 of the NGL are fundamental in supporting the proper functioning and overall objective of the access arrangement regime under the NGL. In making its draft decision, the AER also considered the cost of compliance with s. 141 of the NGL.

The AER remains of the view that the cost of compliance does not outweigh the public benefit resulting from compliance with s. 141 of the NGL. Therefore, the AER does not exempt the Applicants under s. 146 of the NGL from the ring fencing obligation under s. 141 of the NGL.

Proposed alternative approach

The AER noted in its draft decision that it was willing to assess any alternative arrangement with respect to account keeping which substantially achieves the required public benefit without full compliance with s. 141 of the NGL.¹⁶ That is, the AER would consider granting an exemption from s. 141 of the NGL if the Service Providers could establish an alternative arrangement that was acceptable to the AER.

In response to the AER's draft decision, the Applicants submitted, on a confidential basis, an alternative arrangement which set out the proposed manner in which the Applicants will prepare a set of accounts for the pipeline services provided by the DVP (proposed approach). The Applicants submitted that to the extent that the keeping of accounts as set out in the proposed approach is not sufficient for compliance with s. 141(a) of the NGL, the public benefit of full compliance does not outweigh the additional costs of compliance.¹⁷

The AER considers that the Applicants' proposed proposal lacks sufficient detail to allow the AER to fully consider the proposed approach as part of this final decision. Subsequent to this decision, the AER proposes to consult informally with the DVP service providers in order to establish whether its proposed approach is in fact consistent with s. 141.

¹⁶ AER, *Draft decision*, June 2012, p. 23.

¹⁷ WestSide, email to AER dated 27 June 2012, *response to draft decision*.

5 AER's final decision

In accordance with section 146(2)(a) of the NGL, the AER's final decision is that it:

- exempts the Applicants from its ring fencing obligations under s. 139 of the NGL. The AER is satisfied that the requirements under r. 31(3) of the NGR have been met. The exemption will allow the Applicants to carry on related businesses
- exempts the Applicants from the ring fencing obligations under s. 140 of the NGL. The AER is satisfied that the requirements under r. 31(4) with respect to s. 140 of the NGL have been met. The exemption will allow the Commercial Manager of WestSide to continue carrying out marketing functions for the Meridian JV
- does not exempt the Applicants from the ring fencing obligations under s. 141 of the NGL. The AER considers that the benefit derived from the Applicants' current and proposed approach to account keeping for the DVP and the JV participants outweigh the cost of compliance. Therefore, the account keeping approaches should be maintained to meet the requirements of s. 141 of the NGL.

The AER has the power to revoke or vary an exemption at any time if the AER is no longer satisfied that the grounds for an exemption are met or market conditions change substantially at any time in the future.

5.1.1 Revocation of the 2007 waiver

The AER considers that the revocation of the 2007 waiver is warranted and appropriate, given the ownership changes to the DVP and the fact that a new exemption will be in place to reflect the new conditions. Therefore, the AER's final decision is that it revokes the waiver granted to Anglo Coal (Dawson) Limited, Anglo Coal (Dawson Management) Pty Ltd and Mitsui Moura Investment Pty Ltd in the ACCC's final decision on 14 February 2007.