Draft decision

Meridian SeamGas Joint Venture and WestSide Corporation Limited

Ring fencing exemption application

June 2012

AUSTRALIAN ENERGY REGULATOR

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Request for submission

This document sets out the Australian Energy Regulator's (AER) draft decision in relation to the application by Meridian SeamGas Joint Venture and WestSide Corporation Limited seeking exemptions from its ring fencing obligations under ss. 139–141 of the National Gas Law.

The AER will publish this draft decision on its website and interested parties are invited to make written submissions on this draft decision to the AER by 25 June 2012.

Please forward submissions electronically to AERInquiry@aer.gov.au.

Submissions should be copied to:

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To allow for an informed and consultative process, all submissions will be considered as public submissions and will be posted on the AER website. If interested parties wish to submit commercial-in-confidence material to the ACCC, they should submit both a public and a commercial-in-confidence version of their submission. The public version of the submission should clearly identify the commercial-in-confidence material by replacing the confidential material with an appropriate symbol or '[c-i-c]'. All non-confidential submissions will be placed on the AER website.

The *ACCC/AER information policy: the collection, use and disclosure of information* sets out the general policy of the ACCC and the AER on the collection, use and disclosure of information. A copy of the guideline can be downloaded from the ACCC website: http://www.accc.gov.au.

Enquiries about the draft decision or about lodging submissions should be directed to the Network Operations and Development Branch on (03) 9290 1436.

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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 wish to keep the current business and staffing arrangements following the acquisition of DVP and other assets from the 2007 Applicants. In addition, the Applicants also wish to keep the existing account keeping arrangements. As a consequence, the Applicants are seeking exemptions for all three ring fencing requirements under ss. 139–141 of the NGL. The assessment of the application for exemption must be made according to the criteria set out in r. 31 of the National Gas Rule (NGR) and in accordance with the procedures set out in r. 9 of the NGR.

The AER considers that the absence of current and prospective third party users of the DVP is significant in assessing whether exemptions shall be granted for the ring fencing obligations under ss. 139 and 140 of the NGL. This means that public benefit in compliance with the ring fencing obligations, in the form of enhancing competition and reducing the barrier to entry in the upstream and downstream markets, is likely to be limited.

However, the AER considers that the ring fencing obligation to keep separate accounts for the regulated pipeline services under s. 141 of the NGL serves a wider purpose in facilitating an access arrangement review, as well as preserving the efficacy and integrity of the overall access arrangement regime. Accordingly, the public benefit resulting from compliance with this obligation is not insignificant even in the absence of current and prospective third party users.

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

- does not exempt 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

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[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).

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 SeamGas 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. Currently, an eight-year access arrangement (5 September 2007 – 5 September 2015) is 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

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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]

Currently, the JV participants 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 all three 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.

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[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.

2 Legislative and rule requirements

2.1 Relevant legislative and rule requirements

2.1.1 Granting an exemption

The Code has been replaced by the NGL and NGR. 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.[9] 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 and states that:

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9 NGR, r. 31(2).

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

2.2 Consultative process and key dates

The AER received the application for exemption from the minimum ring fencing requirements from the Applicants on 21 February 2012, and is required to consider the application in accordance with the expedited consultative procedure under r. 9(2) of the NGR.[10]

In accordance with this procedure, the AER conducted a public consultation prior to making the draft decision.[11] No submissions were received.

Sub rule 9(2) does not specify the time period within which the AER must make a draft decision. However, once the AER has made its draft decision, it must publish that decision on the AER website along with a notice stating why the decision is required.[12] The notice must also invite written submissions and comments on the draft decision within 15 business days from the date of the notice.[13] The AER must then make a final decision within a further 20 business days after the end of the period allowed for making submissions.[14]

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[10] NGR, r. 9(2)(a).
[11] See the AER website at: http://www.aer.gov.au/content/index.phtml/itemId/753092.
[12] NGR, r. 9(2)(c).
[13] NGR, r. 9(2)(c)(iii).
[14] NGR, r. 9(2)(d).

3 Assessment of the related business exemption

Section 139 of the NGL prohibits a pipeline service provider from carrying on the related business of producing, purchasing and selling natural gas or processable gas, other than for operational or balancing purposes.[15]

An exemption from compliance with s. 139 would allow the Applicants to continue engaging in the following conduct while providing pipeline services on the DVP:

- gas production in the Meridian SeamGas fields
- purchase of raw gas from Molopo Joint Venture[16]
- sale of gas to AGL Sales (Queensland) Pty Limited.

The AER will grant an exemption if it is satisfied that each of the three requirements set out in r. 31(3) of the NGR is met. Each of the requirements is considered below.

3.1 Rule 31(3)(a)

The AER must be satisfied that either:

- the relevant pipeline is not a significant part of the pipeline system for any participating jurisdiction; or
- 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.

3.1.1 Submissions by the Applicants

The Applicants made submissions on the basis that only WestSide A, WestSide D and MEPAU need an exemption for s. 139 of the NGL. The Applicants, however, submitted that if WestSide is considered to be engaged in the production, purchase or sale of natural gas, the following arguments equally apply.[17]

At the request of the AER, the Applicants have also provided further supporting information in a confidential submission.[18]

In arguing that the DVP is not a significant part of the pipeline system, the Applicants referred to the ACCC's final decision on the 2007 application and submitted that the circumstances under which the ACCC granted an exemption in 2007 have not changed. In particular, the Applicants submitted that the DVP transports only a small

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15 Section 137 of the NGL defines 'related business'.

16 Molopo Joint Venture comprises of Molopo (Queensland) LLC ACN and Lowell Petroleum NL.

17 Application, p. 11.

18 WestSide Corporation Limited, *Confidential submission to the AER: Application for exemptions from ring fencing requirements for Dawson Valley Pipeline*, 23 April 2012, (WestSide, Confidential submission, April 2012).

percentage of total gas consumption in Queensland and represents 47km of a total network of more than 2,700km.[19]

The Applicants also drew attention to the fact that the DVP has no current or potential third party users.[20]

3.1.2 AER's considerations

The AER considers that the phrase 'carry on' used in s. 139 of the NGL does not limit the scope of prohibited activities to the ownership of a related business. The AER is of the view that carrying on a business extends to conducting, managing and dealing with the business. WestSide's role as the operator of the JV includes managing the JV and operating the assets of the JV in respect of the DVP and other related businesses.[21] The AER considers that these activities are within the meaning of carrying on a related business for the purpose of s. 139 of the NGL. As a result, WestSide also needs an exemption if it wishes to continue all of its current activities.

In its assessment of r. 31(3)(a) of the NGR, the AER has considered both the arguments presented in the Application and supporting information contained in the confidential submission. The AER is of the view that the DVP is not a significant part of the gas pipeline system in Queensland. The AER came to this view taking into account:

- the number of current and prospective users of the DVP
- the volume of gas transported through the DVP in comparison with total gas production in Queensland
- the capacity of the DVP in comparison with total pipeline capacity in Queensland

Accordingly, the AER is satisfied that the requirement under r. 31(3)(a) is met.

3.2 Rule 31(3)(b)

The AER must be satisfied that the cost of compliance with s. 139 of the NGL for the service provider and its associates would outweigh the public benefit resulting from compliance.

3.2.1 Submissions by the Applicants

Cost of compliance

The Applicants submitted that in order to comply with s. 139 of the NGL, the Applicants would be required to divest either the DVP transportation business or the gas exploration and production business to a separate entity.[22] Consequently, significant costs would be incurred, including transaction and advisory costs to implement the separation, internal time and resources, and ongoing annual

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[19] Application, p. 11.
[20] Application, p. 12.
[21] Application, p. 3.
[22] Application, p. 12.

administrative, governance and accounting costs. The Applicants estimated that the fees payable to external advisers in undertaking separation would be in excess of $200,000.[23] The applicant did not provide estimates of other costs.

The Applicants also submitted that if WestSide is regarded as engaging in related businesses, compliance with s. 139 of the NGL would also require another company to be appointed to perform the functions of pipeline operator.[24]

Public benefit

The Applicants submitted that the AER should adopt the same assessment approach as the ACCC did in the 2007 application. This is to recognise that the key public benefit of compliance with s. 139 of the NGL is the additional comfort and assurance (above that achieved through r. 137 of the NGR[25]) to users and prospective users of a pipeline that confidential information will not inappropriately flow between a gas production business and a pipeline business.[26]

Rule 137 of the NGR imposes obligations on pipeline service providers in respect of confidential information provided by a user or prospective user. The Applicants submitted that in addition to complying with r. 137, a confidentiality (Protocol) has been established which outlines the manners in which they will act to ensure the protection and appropriate use of users' and prospective users' confidential information.[27] The Applicants consider that there is no public benefit in having 'additional comfort and security' in respect of confidential information of users and prospective user, in addition to the obligations and sanctions contained in r. 137 of the NGR and the Protocol developed by the Applicants. To the extent that there is, the Applicants submitted that this benefit does not outweigh the costs associated with complying with s. 139 of the NGL.[28] The Protocol was submitted to the AER along with the confidential submission.

In addition, the Applicants considered that the AER should take into account the absence of current and prospective third party users on the DVP in making its assessment.[29]

3.2.2 AER's considerations

Cost of compliance

The AER recognises that compliance with s. 139 of the NGL would impose initial cost of separation and ongoing compliance cost on the service providers. The Applicants identified various types of costs that may be incurred as a result of compliance in the Application, and provided estimate for one type of cost (advisory fees).

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23 Application, p. 13.
24 Application, p. 13.
25 The equivalent provisions under the Code were ss. 4.1(f) and (g).
26 Application, p. 13.
27 Application, p. 13.
28 Application, pp. 13-14.
29 Application, p. 12.

The AER has not identified any issues in relation to the estimated advisory fees of $200,000 for the initial separation. Although no estimates have been provided in relation to other types of costs, the AER acknowledges that the costs identified by the Applicants would be incurred if compliance with s. 139 of the NGL is required. The AER is of the view that the total cost of compliance would be substantial.

Public benefit

There have been a number of changes in the applicable provisions since the 2007 application. The obligations in relation to confidential information provided by a user or prospective user, originally imposed by ss. 4.1(f) and (g) of the Code, are now set out in r. 137 of the NGR. Despite some changes in wording, the AER considers that the substance of the obligation has not changed.

The Applicants have submitted the Protocol which contains confidentiality guidelines in respect of the treatment of users' and prospective users' information. The AER has considered the provisions set out in this document. The AER is satisfied that any additional public benefit in ensuring the confidentiality of users by compliance with s. 139 of the NGL over and above that achieved by the Protocol, would be limited.

However, the AER considers that ensuring confidentiality of the information provided by a user or prospective user is not the only public benefit that may result from compliance with s. 139 of the NGL. Ring fencing requirements in general are designed to prevent a vertically integrated service provider from engaging in actions that may reduce competition in the upstream or downstream market. These actions include denying potential upstream and downstream competitors access to the essential facility and charging upstream or downstream competitors a high price for access to the essential facility.[30] The prohibition on carrying on related business in the upstream and downstream market is the most direct means by which these actions are prevented. By forcing the service provider to vertically separate, it is denied access to the upstream and downstream market altogether. Therefore, the AER considers it is appropriate to take into account the potential effect of compliance on competition in relevant upstream or downstream markets in assessing the public benefit issue under r. 31(3)(b) of the NGR.

The AER considers that compliance with s. 139 of the NGL in this case is likely to have little effect on competition in the market for processed gas. There is currently no upstream stakeholder that is in direct competition with the Applicants in supplying processed gas to downstream retailers that will need transportation service on the DVP. Furthermore, the AER received no submissions which indicate that any stakeholder is likely to enter into competition with the Applicants in the foreseeable future.

Therefore, any public benefit resulting from compliance with s. 139 would be minimal. In reaching this conclusion, the AER agrees with the Applicants that the absence of current or prospective third party user of the pipeline service is relevant and significant.

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[30] Productivity Commission, *Review of the gas access regime*, 2004, p. 437.

The AER is satisfied that under the current circumstances it is likely that the costs of compliance will outweigh any public benefit resulting from compliance. Therefore, the AER considers that the requirement under r. 31(3)(b) is met.

3.3 Rule 31(3)(c)

The AER must be satisfied that 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.[31]

The controls applicable to associate contracts are set out in ss. 147–148 of the NGL and rr. 32–33 of the NGR.

Sections 147–148 of the NGL prohibit the service providers from entering into or giving effect to associate contracts that have anti-competitive purpose or effect, or are inconsistent with the competitive parity rule.[32]

Rule 32 of the NGR provides that a service provider may apply to the AER for approval of an associate contract. The AER must approve such a contract if it is satisfied that, effectively, it does not breach ss. 147–148 of the NGL. Even if the AER is not so satisfied, it may still approve the contract if it considers that the resulting public benefit would outweigh any resulting public detriment.

Under r. 33 of the NGR, a service provider is required to notify the AER within 5 business days after entering or varying an associate contract.

3.3.1 Submissions by the Applicants

The Applicants noted that the regime in relation to associate contracts under the Code was more prescriptive than that under the NGL and NGR. Under the Code, all associate contracts were required to be submitted for approval while the NGL and NGR only require approval to be sought for associate contracts which have a particular purpose or may have a particular effect.[33] The Applicants submitted that the approach to be taken in assessing the application for exemption should remain the same.[34]

The Applicants submitted that in granting the waiver in 2007, the ACCC accepted that the comparable provision (to r. 31(3)(c) of the NGR) under the Code was satisfied by an undertaking from the service providers that they would submit for approval any new or revised arrangements for transport of the service providers' gas on the DVP.[35] Relevantly, the Applicants noted that the Protocol provides that the Applicants will submit to the AER for approval of any new contract, arrangement or understanding

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[31] See s. 2 of the NGL for definitions of associate and associate contract.
[32] See s. 148(2) of the NGL for a definition of the competitive parity rule.
[33] Application, p. 15.
[34] Application, p. 15.
[35] Application, p. 15.

for the use of the DVP where the contract, arrangement or understanding would require approval under ss. 147–148 of the NGL.[36]

The Applicants also submitted that they have commenced preparation of a gas transportation term sheet outlining the internal arrangements under which the service provider's gas is transported, similar to the term sheet required by the ACCC in the 2007 application.[37] The AER has received a confidential indicative term sheet from the applicants which sets out the heads of terms and conditions for the transportation of gas on the DVP between the production and transportation arms of the Applicants.

3.3.2 AER's consideration

To comply with s. 139 of the NGL, the service provider must divest the related business to a separate legal entity. In the event that the other entity is an associate of the service provider, any contract or arrangement between the service provider and the associate in respect of the transportation service on the pipeline, are associate contracts subject to controls under the NGL and NGR.

The purpose of r. 31(3)(c) of the NGR is to ensure that before the service provider is allowed to carry on any related business within its own entity, the internal arrangement between the production arm and transportation arm is subject to the same controls as an associate contract in the case where the service provider is structurally separated.

The AER agrees with the Applicants in respect of the effect of the changes in the legislative regime in respect of associate contracts. Under the NGL and NGR, a service provider does not need to apply to the AER for approval of every associate contract that it intends to enter into or vary. Effectively, the service provider has discretion in assessing whether an associate contract may give rise to issues under ss. 147 or 148 of the NGL and requires the approval of AER.[38] However, the service provider must promptly notify the AER if it enters into or varies an associate contract under r. 33 of the NGR. This notification requirement is important to encourage strict adherence to ss. 147–148 of the NGL when the approval process is no longer mandatory. It also allows the AER to promptly identify associate contracts that may have anti-competitive effects.

The AER has reviewed the Protocol, which requires the Applicants to seek the approval of the AER for new contracts, arrangements or understandings for the use of the DVP and any variation to existing arrangements in accordance with the controls applicable to associate contracts under ss. 147–148 of the NGL and r. 32 of the NGR. The AER is satisfied that the Applicants are aware of their obligations under rr. 32 and 33 of the NGR.[39]

The AER has also reviewed the content of the indicative term sheet, which sets out the heads of terms and conditions for the transportation of gas on the DVP between the production and transportation arms of the Applicants. The AER is of the view that

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[36] Application, p. 15.
[37] Application, pp. 15–16.
[38] *National Gas (South Australia) Bill 2008*, Second reading speech, p. 16.
[39] Application, p. 15.

the indicative term sheet does not sufficiently address the requirements of r. 31(3)(c) of the NGR. As submitted by the Applicants, the term sheet submitted in the 2007 application was to provide a baseline to enable the ACCC to assess the nature or effect of any variation to existing internal arrangements in the future. In this instance, although the Applicants have discretion in assessing whether any changes to the existing internal arrangements would require approval, the AER still needs a baseline to assess the nature and effect of these changes, should the Applicants decide that approval is required. The AER considers that the term sheet is required for the assessment under r. 31(3)(c) regardless of whether the Applicants consider the term sheet itself would require approval for the purposes of ss. 147–148 of the NGL. Accordingly, the AER is prepared to grant the applicants an exemption from s. 139 of the NGL if the applicants provide a final term sheet that is acceptable to the AER.

3.4 Conclusion on the related business exemption

The AER is satisfied that under the current market conditions, the Applicants have met the criteria specified in rr. 31(3)(a) and (b) of the NGR. However, as noted above, the AER considers that a final term sheet needs to be submitted by the applicants in order for the AER to complete its assessment under r. 31(3)(c) of the NGR. This term sheet will need to be acceptable to the AER.

4 Assessment of the marketing staff exemption

Section 140(1) of the NGL requires a service provider to ensure that its marketing staff are not also officers, employees, consultants, independent contractors or agents of an associate that takes part in a related business. Section 140(2) of the NGL requires a service provider to ensure that none of its officers, employees, consultants, independent contractors or agents are also marketing staff of an associate that takes part in a related business.

An exemption from this ring fencing requirement would allow the Applicants to employ marketing staff that provide services to an associate taking part in a related business. It would also allow the marketing staff of an associate that takes part in a related business to provide services to the Applicants.

4.1 Assessment criteria

Sub rule 31(4) of the NGR requires the AER to grant an exemption from the ring fencing obligation under s. 140 of the NGL if the AER is satisfied that the cost of compliance for the Applicants would outweigh the public benefit resulting from compliance.

4.2 Submissions by the Applicants

The Applicants submitted that the primary issue arising under s. 140 of the NGL is the role of WestSide's Commercial Manager (CM), who undertakes all commercial activities for the WestSide Group, including all general activities for the JV. The Applicants submitted that the CM may be regarded as being marketing staff of the JV participants. The Applicants also consider that for the purpose of the application the CM may also be regarded as marketing staff of WestSide.[40]

The Applicants are seeking an exemption from the obligation under s. 140 of the NGL to allow the CM:

- to be an officer or agent of WestSide A and WestSide D; and
- to be marketing staff of WestSide A and WestSide D.[41]

4.2.1 Cost of compliance

The Applicants submitted that to comply with s. 140 of the NGL, an additional resource would need to be hired to provide pipeline marketing services and respond to access requests. This is likely to be an independent contractor rather than a permanent employee due to insufficient demand for the pipeline services.[42]

The Applicants submitted that the cost of hiring an independent contractor would be significant because of the need for a skilled and knowledgeable person to be available

[40] Application, p. 17.
[41] Application, p. 18.
[42] Application, p. 18.

on short notice, the need to pay retainer, and the time needed for the independent contractor to become familiar with the DVP and associated information.[43] The Applicants estimated set up costs of between $30,000–$60,000 and annual retainer costs of $48,000.[44]

4.2.2 Public benefit

The Applicants submitted that the analysis undertaken by the ACCC in granting the waiver in 2007 is still generally applicable. This consists of considerations of obligations relating to confidential information, barriers to entry, spare capacity, demand and extent of competition.[45]

The Applicants submitted in particular that the Protocol has been adopted specifically to ensure compliance with the confidentiality obligations.[46] The Applicants also noted that there is currently no third party user of the DVP, unlike the situation in 2007. The Applicants also noted that a potential third party user, Molopo Joint Venture, which holds a sublease in the immediate vicinity of the DVP and supplies raw gas to the JV, has not indicated any intention to obtain pipeline services in its correspondence with the Applicants.[47]

The Applicants concluded that there is no, or limited, identifiable public benefit from compliance with s. 140 of the NGL and the costs of compliance would not be outweighed by any public benefit.[48]

4.3 AER's considerations

The effect of s. 140 of the NGL is to prevent a pipeline service provider and an associate that takes part in related business, from sharing marketing staff. It provides that marketing staff of the service provider cannot also provide services to an associate of the service provider that takes part in a related business. Likewise, a person that provides services to the service provider cannot also be a marketing staff of the associate that takes part in a related business.

4.3.1 Relevant definitions

Associate

An associate for the purpose of s. 140 of the NGL is defined to have the same meaning as under Division 2 of Part 1.2 of the *Corporations Act 2001* (Cth) (but excluding specific parts of that legislation).[49]

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43 Application, pp. 18–19.
44 Application, p. 19.
45 Application, p. 19.
46 Application, p. 19.
47 Application, p. 19.
48 Application, p. 20.
49 See NGL, s. 2 which defines 'associate' in relation to a person to have the same meaning it would have under Division 2 of Part 1.2 of the *Corporations Act 2001* (Cth) if sections 13, 16(2) and 17 did not form part of that Act.

Section 11 of the *Corporations Act 2001*states that an associate of a body corporate includes a related body corporate.[50] Section 50 of the *Corporations Act 2001* sets out when a body corporate is related to another body corporate:

> Where a body corporate is:
>
> (a) a holding company of another body corporate; or
>
> (b) a subsidiary of another body corporate; or
>
> (c) a subsidiary of a holding company of another body corporate;
>
> the first-mentioned body and the other body are related to each other.

Since WestSide A and WestSide D are both wholly owned subsidiaries of WestSide, the three companies are related body corporates and therefore associates of each other.

Section 15 of the *Corporations Act 2001* provides that:

> (1) The associate reference includes a reference to:
>
> (a) a person in concert with whom the primary person is acting, or proposes to act; and
>
> (b) a person who, under the regulations, is, for the purposes of the provision in which the associate reference occurs, an associate of the primary person; and
>
> (c) a person with whom the primary person is, or proposes to become, associated, whether formally or informally, in any other way;
>
> in respect of the matter to which the associate reference relates.

The AER considers that by being a participant in the JV, MEPAU may be a person with whom the other Applicants are 'acting in concert' with for the purpose of s. 15(1) of the *Corporations Act 2001.* Therefore, the following analysis proceeds on the basis that MEPAU is an associate of each of the other Applicants

Related business

As previously discussed, 'related business' means the business of producing, purchasing or selling natural or processable gas other than for operational or balancing purposes.[51] WestSide A,WestSide D and MEPAU all take part in related businesses.

Similar to the discussion in section 3.1.2, the AER considers that the phrase 'take part' encompasses more than just ownership and should extend to the activities of WestSide in managing and operating the JV's gas production business. Therefore, the AER considers that WestSide also takes part in a related business for the purpose of s. 140 of the NGL.

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[50] *Corporations Act*, s. 11.
[51] NGL, s. 137.

Marketing staff

There are two components to the definition of marketing staff.[52] First, the person must be an officer, employee, consultant, independent contractor or agent of the service provider or an associate of the service provider. Second, the person must be directly involved in the sale, marketing or advertising of pipeline services. Marketing staff may also engage in other activities. However, a person is not marketing staff if the role or function is to provide technical, administrative, legal and accounting services or the involvement in sales, marketing or advertising is only incidental to that person's role or function.

The Applicants submitted that it is unclear whether the CM is marketing staff of WestSide because WestSide is the operator of the DVP and does not itself provide 'pipeline services'.[53]

The AER is of the view that the CM may be regarded as marketing staff of WestSide for two reasons:

- First, WestSide, being a person that operates the DVP, is a service provider for the DVP.[54] Therefore, WestSide may provide pipeline services for the purposes of the NGL and NGR.

- Second, the definition of marketing staff under s. 138 does not actually require the company to which the person provides services to be involved in the provision of pipeline services itself. It simply states that the person, in order to be regarded as marketing staff, must be directly involved in the marketing and advertising of pipeline services.

Due to the above considerations, the AER considers that the assessment must proceed on the basis that the CM is marketing staff for:

- WestSide

- WestSide A

- WestSide D

- MEPAU.

At the same time, the CM is also an employee of WestSide and an agent for WestSide A,WestSide D and MEPAU in performing its commercial and marketing functions.

Considering the above circumstances, the AER considers that under s. 140 of the NGL that:

- by being marketing staff for WestSide, the CM is prohibited from being an agent for WestSide A, WestSide D and MEPAU

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52 NGL, s. 138.
53 Application, p. 17.
54 NGL, s. 8.

- by being marketing staff for WestSide A, the CM is prohibited from being an agent or employee for WestSide, WestSide D and MEPAU
- by being marketing staff for WestSide D, the CM is prohibited from being an agent or employee for WestSide, WestSide A and MEPAU
- by being marketing staff for MEPAU, the CM is prohibited form being an agent or employee for WestSide, WestSide A and WestSide D.

Therefore, all Applicants need to seek an exemption of the ring fencing obligation under s. 140 of the NGL if they want to keep the current staffing arrangements in place.

The Applicants noted that a MEPAU employee was seconded to WestSide, but did not have a marketing role in either company. The AER considers that the secondment of an employee of MEPAU to WestSide does not give rise to any issues under the current circumstances.

4.3.2 Cost of compliance

The Applicants submitted that to comply with s. 140 of the NGL, an additional resource, in the form of an independent contractor, would need to be hired to provide marketing services.[55]

The AER has not identified any issue with the use of an independent contractor instead of a permanent employee under the current market conditions.

The AER considers that in the current circumstances, at least one independent contractor needs to be hired to perform the marketing functions. It is possible that more than one contractor would be needed to comply with s. 140 of the NGL, depending on the business arrangements amongst the JV participants. For the purpose of this draft decision, the AER considers it sufficient to assess the cost of hiring one independent contractor as submitted in the Application.

In order to assess the reasonableness of the cost estimates provided by the Applicants, the AER has also considered the marketing expenses forecast proposed by the 2007 Applicants in their submission to the draft decision on the access arrangement for the DVP.[56]

The 2007 Applicants intended to engage an external consultant to undertake the marketing functions and estimated that an amount of $25,000 for the year commencing 30 June 2007 would be incurred by a prudent and efficient service provider. The ACCC accepted this forecast in its final decision for the DVP access arrangement.[57] The AER considers that the market conditions that affect the volume

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[55] Application, p. 18.

[56] Anglo Coal (Dawson) Limited, Anglo Coal (Dawson Management) Pty Ltd and Mitsui Moura Investment Pty Ltd, *Submission to the ACCC in response to the draft decision on the proposed access arrangement for the Dawson Valley Pipeline*, 8 June 2007, p. 2 (Anglo Coal and Mitsui Moura, *Submission to the ACCC*, June 2007).

[57] ACCC, *Final decision: Access arrangement for the Dawson Valley Pipeline 2007–2016*, 27 August 2007, p. 16–17 (ACCC, *Final decision: Access arrangement*, August 2007).

of marketing activities to be undertaken have not changed significantly since 2007 such as to substantiate a significantly different figure for marketing expenses.

In their current application, the Applicants proposed set-up costs of $30,000-$60,000 and ongoing costs of $48,000 per annum. These costs are significantly higher than the forecast costs approved in 2007 and the AER does not consider them to be a reasonable estimate of the cost of complying with s. 140 of the NGL. However, the AER does recognise the impact these compliance costs would have on the JV participants

4.3.3 Public benefit

The AER agrees with the Applicants that the approach taken by the ACCC in assessing public benefit under s.4.15(b) of the Code is still applicable in the current application. The AER has 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.

Sharing of confidential information

The Applicants submitted that the Protocol is specifically developed to ensure compliance with confidentiality obligations.[58] The AER has taken this Protocol into account in assessing public benefit under r. 31(4) of the NGR. The AER considers that any public benefit resulting from compliance with s. 140 of the NGL in ensuring the protection and proper treatment of confidential information of users or prospective users above that achieved by the Protocol, is limited.

Barriers to entry

The AER considers that the absence of a current and prospective third party user of the pipeline services on the DVP is relevant and significant. The AER recognises that the lack of interest shown by upstream stakeholders in obtaining pipeline services on the DVP is an indication that potential entry into the upstream market and competition with the Applicants is unlikely to occur in the foreseeable future.

No submissions were received by interested parties expressing concern over the sharing of marketing staff by the Applicants. The AER therefore considers that the lack of potential entry to be the result of the characteristics of the DVP and the surrounding gas fields, rather than the sharing of marketing staff by the Applicants.

Accordingly, the AER considers that there is little public benefit, in the form of reducing the barriers to entry, in requiring the Applicants to comply with s. 140 of the NGL.

Spare capacity on the DVP

The AER considers that due to insufficient demand for pipeline services and the fact that no formal requests for access have been made,[59] there are limited opportunities for the Applicants to actively engage in marketing activities, even though the DVP is

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[58] Application, p. 19.
[59] Application, p. 19.

currently operating significantly below its capacity. It would therefore appear that requiring the segregation of marketing staff would have limited public benefit.

Demand

Domestic and international demand for natural gas in Queensland has continued to grow over the years, generating significant increase in gas production. However, the ability of the DVP and the Applicants to benefit from this is seriously limited by the relatively small capacity of the DVP as well as the limited production potential of the surrounding fields. This means that the ability of the Applicants and potential upstream competitors to influence prices in the Queensland gas market is minimal. The AER considers it unlikely that the strong demand for gas in Queensland would encourage potential entry, and as a consequence, compliance with s. 140 of the NGL would have little public benefit in facilitating that entry.

Extent of competition

The Applicants have currently no upstream competitors that supply gas to downstream stakeholders and therefore do not require transportation services on the DVP. As discussed previously, there is little prospect of new entry into this market. In light of the circumstances, the AER is of the view that compliance with s. 141 of the NGL has little effect in facilitating or developing a competitive upstream market.

No submissions were received from interested parties expressing concern that the sharing of marketing staff by the Applicants would hinder competition in the upstream or downstream markets.

Due to the above considerations, the AER considers that there would be little or no public benefit resulting from compliance with s. 140 of the NGL.

4.4 Conclusion on the marketing staff exemption

In the light of the additional costs that compliance would impose on the Applicants, the AER considers that any public benefit resulting from compliance the minimum ring fencing requirements, is likely to be outweighed by the cost of compliance.

Therefore, the AER is satisfied that the requirement under r. 31(4) of the NGR has been met.

The AER exempts under s. 146 of the NGL to the Applicants for the ring fencing obligations under s. 140 of the NGL. The granting of an exemption at this time will not preclude the AER from reviewing the exemption if market conditions change substantially at any time in the future.

5 Assessment of the accounts exemption

Section 141 of the NGL requires the service provider of pipeline services to 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.

An exemption from the obligation under s. 141 would allow the Applicants to keep their existing accounting arrangements. Under existing arrangements, Westside maintains consolidated accounts for the Westside group, audited to Australian Standards. Westside A and Westside D maintain financial records which simply reflect direct costs and revenues of the companies and not prepared to Australian Standards.

All Applicants seek an exemption from the obligation under s. 141(a). WestSide A and WestSide D seek an exemption from the obligation under s. 141(b).

5.1 Assessment criteria

Under r. 31(4) of the NGR, the ring fencing obligation under s. 141 of the NGL can be exempted if the AER is satisfied that the cost of compliance for the Applicants would outweigh the public benefit resulting from compliance.

5.2 Submissions by the Applicants

5.2.1 Section 141(a)

Cost of compliance

The Applicants submitted that the cost of separating accounts in respect of pipeline services, including the need to develop a manual outlining the methodology for keeping the accounts in respect of pipeline services would be significant, particularly in the context of the allowed operating costs and forecast revenues of the DVP.[60] The Applicants considered that additional cost would be incurred by either hiring an external consultant or training existing accounting staff to specifically engage in the job.[61] The Applicants further submitted that it would be necessary to pay a retainer to ensure the continued availability of an experienced consultant.[62]

The Applicants provided estimates for the various costs associated with complying with s. 141(a) of the NGL:

- $30,000 for the accountant to prepare the manual (apportioned over the remaining three years of the current access arrangement period);

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[60] Application, p. 21.
[61] Application, p. 21.
[62] Application, p. 22.

- $24,000 per year for ongoing updates of the accounts, preparation of regulatory accounts and supporting information;

These add up to a total average annual cost of $34,000 plus internal costs.

Public benefit

The Applicants identified the public benefit that would result from compliance with s. 141(a) as being the facilitation of access arrangement reviews or arbitration of access disputes by making the required information more readily available.[63] The Applicants submitted that this potential public benefit is of limited value in this case due to

- the length of time until the next access arrangement review
- the extensive information gathering powers the AER has on an access arrangement review
- the absence of current or potential third party users.

5.2.2 Section 141(b)

The Applicants submitted that separate financial accounts are not maintained for the whole of the businesses of WestSide A and WestSide D as there is no regulatory or business requirement for such accounts.[64] WestSide A and WestSide D however do maintain financial records which reflect direct costs and revenues of the companies, but these are not maintained in accordance with Australian standards.

Cost of compliance

The Applicants estimated that the annual costs of maintaining separate accounts for the whole of the businesses of WestSide A and WestSide D are approximately $68,000 including auditing and review costs for both companies.[65]

Public benefit

The Applicants submitted that the public benefit is the same as identified for compliance with s. 141(a) and that this public benefit is limited.[66]

5.3 AER's considerations

5.3.1 Cost of compliance

The AER considers the forecast regulatory costs proposed by the 2007 Applicants for the DVP access arrangement to be a reasonable benchmark. [67] In its 2007 Access Arrangement review, the 2007 Applicants estimated an amount of $20,000 to recover regulatory costs. This forecast was accepted by the ACCC in its final decision.[68] The

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63 Application, p. 22.
64 Application, p. 23.
65 Application, p. 23.
66 Application, p. 23.
67 Anglo Coal and Mitsui Moura, *Submission to the ACCC*, June 2007, p. 3.
68 ACCC, *Final decision: Access arrangement*, August 2007, p. 16–17.

ACCC recognised that this was an average annual amount reflecting higher initial regulatory costs and lower ongoing costs.[69] It is also worth noting that this amount included not only the costs associated with maintaining separate accounts for the DVP and other expenses incurred in respect of regulatory reporting requirements, but all costs associated with complying with regulatory obligations under the NGL and NGR, such as compliance reporting and tariff resets.[70]

The AER considers that an amount of $20,000 plus inflationary adjustment is a reasonable estimate for the cost of compliance with s. 141(a), and that the estimated average annual cost of $34,000 provided by the Applicants is a little overstated.

The AER considers that the financial record keeping practices of WestSide A and WestSide D are sufficient to comply with s. 141(b). Section 141(b) does not require the pipeline service provider to keep a consolidated set of accounts that accord with any specific accounting standard. The provision simply requires 'a consolidated set of accounts' incorporating both regulated and unregulated segments of the company's business. In the absence of any financial or regulatory reporting obligation on the part of WestSide A and WestSide D, the AER would not require the two companies to prepare their financial accounts to a particular accounting standard.

5.3.2 Public benefit

While the AER agrees with the Applicants that the facilitation of access arrangement review by making the accounting information more readily available is a public benefit that would result from compliance with s. 141of the NGL, the AER considers that it is not the only benefit.

The AER is of the view 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. Due to the reliance on accounting information provided by the service providers in monitoring compliance and for regulatory determination purposes, it is of crucial importance that the accounting information used is as transparent, consistent and verifiable as possible. Section 141 of the NGR is the ring fencing requirement that directly addresses this concern. That section helps to ensure that the revenue determined in an access arrangement review accurately reflects the actual costs of providing the pipeline services.

The AER considers that requiring the service providers to prepare, maintain and keep accounts in accordance with s. 141 of NGL improves the transparency, consistency and verifiability of the accounting information eventually submitted to the AER for the purpose of conducting access arrangement review. Where cost and revenue information specific to the pipeline services is required for the purpose of an access arrangement review, it will be much easier for the service providers to comply with the information requirement if separate accounts have been kept over time. It will also enable the AER to better examine the cost allocation between the regulated segment and the unregulated segment of the business.

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[69] ACCC, *Final decision: Access arrangement*, August 2007, p. 16.
[70] Anglo Coal and Mitsui Moura, *Submission to the ACCC*, June 2007, p. 3.

The above public benefit stems from the fact that the accounting information is maintained and kept consistently over a period of time. The AER is of the view that the length of time until the next access arrangement review, and the extensive information gathering powers the AER has on an access arrangement review, do not detract from this benefit.

The AER considers that the absence of current or potential third party users of the DVP in the foreseeable future does not mean that the benefit of more transparent, consistent and verifiable accounting information, for the purpose of access arrangement review, disappears. For example, although there is no third party user who directly benefits from this in the form of a reference tariff that more accurately reflects the cost of providing the pipeline service, the AER considers there is a wider interest in ensuring the quality of the information provided in access arrangement reviews. It is to maintain the integrity and efficacy of the access arrangement regime. The AER considers this to be imperative as long as the pipeline is covered and subject to an access arrangement approved by the AER.

The AER is willing to assess any alternative arrangement with respect to account keeping which substantially achieves this public benefit without full compliance with s. 141 of the NGL. However, in the absence of such an alternative, the AER considers the public benefit resulting from compliance is substantial.

Overall, the AER is of the view that the cost of compliance in relation to s. 141is the cost of maintaining separate accounts in respect of the pipeline services as required by s. 141(a). This is because the AER considers that Westside A and Westside D may currently be keeping a consolidated set of accounts in respect of their whole of businesses as required by s. 141(b). The AER considers the reasonable estimate of the cost of maintaining separate accounts in accordance with s. 141(a) is below the estimate provided by the Applicants. The AER considers that the forecast regulatory costs proposed by the 2007 Applicants in the DVP Access Arrangement review provide an appropriate benchmark for these costs.

The AER is not satisfied that the cost of compliance with s. 141 of the NGL outweighs the public benefit resulting from compliance.

5.4 Conclusion on the accounts exemption

The AER is not satisfied that the requirement under r. 31(4) of the NGR is met.

The AER does not exempt the Applicants under s. 146 of the NGL from the ring fencing obligation under s. 141 of the NGL.

6 Draft decision

In accordance with s. 146(2) of the NGL, the AER's draft decision is that it:

- exempts the Applicants from the ring fencing obligation 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 CM of WestSide to continue carrying out marketing functions for the Meridian JV.

- does not exempt the Applicants from the ring fencing obligations under ss. 139 and 141 of the NGL. The AER is not satisfied that the requirements under rr. 31(3)(c) and 31(4) have been met.

The Applicants are required to submit a complete term sheet to the AER before the AER makes a final decision on the application. A full term sheet would enable the AER to complete its assessment under r. 31(3)(c) of the NGR.

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.

6.1.1 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 draft 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.