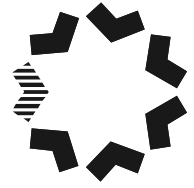


NATIONAL
COMPETITION
COUNCIL



Dawson Valley Pipeline

Application under the National Gas
Law for a revocation of coverage



**Draft Recommendation
Public (Non-confidential)
Version**

26 June 2014

Table of Contents

Abbreviations, definitions and glossary	2
1 Draft recommendation	3
2 Background	4
3 Revocation of coverage	8
Criterion (b).....	9
Criterion (c).....	11
4 Criterion (a) – material promotion of competition in a dependent market	12
Contentions regarding competition in dependent markets	12
The Council’s consideration	13
Conclusion on criterion (a)	16
5 Criterion (d) – access not contrary to the public interest	17
Approach to the assessment of criterion (d).....	17
The applicant’s position	19
The Council’s consideration	19
Conclusion on criterion (d)	20
Appendix A Information taken into account by the Council	21

Abbreviations, definitions and glossary

AER	Australian Energy Regulator
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
Council	National Competition Council
criterion (a)	Section 15(a) of the NGL
criterion (b)	Section 15(b) of the NGL
criterion (c)	Section 15(c) of the NGL
criterion (d)	Section 15(d) of the NGL
DVP	The Dawson Valley Pipeline (the subject of this application) running from the Dawson River Central gas processing facility and connecting with the QGP at the Jemena Moura meter station. This pipeline is owned by the Meridian JV and operated by Westside.
Gas Code	<i>National Third Party Access Code for Natural Gas Pipeline Systems</i> (Schedule 2 to the Gas Pipelines Access (South Australia) Act 1997)
Harcourt JV	A joint venture between MEPAU and two subsidiaries of PetroChina which produces gas in the vicinity of the DVP from a part of the Meridian Gas Field subleased from the Meridian JV
MEPAU	Mitsui E&P Australia Pty Ltd
Meridian JV	The joint venture owner of the DVP
Moura Pipeline (or ML Pipeline)	A pipeline running from the Hillview Compressor Station to the QGP via the QNP, also owned by the Meridian JV and operated by Westside
NGL	National Gas Law, set out in the Schedule to the <i>National Gas (South Australia) Act 2008</i> (SA) and applied as a law of South Australia by that Act and as a law of other States and Territories by an application Act in each jurisdiction
National Gas Rules or Rules	National Gas Rules, version 20
QGP	Queensland Gas Pipeline (Wallumbilla to Gladstone)
QNP	Queensland Nitrates Plant at Moura
Westside (or applicant)	Westside Corporation Limited

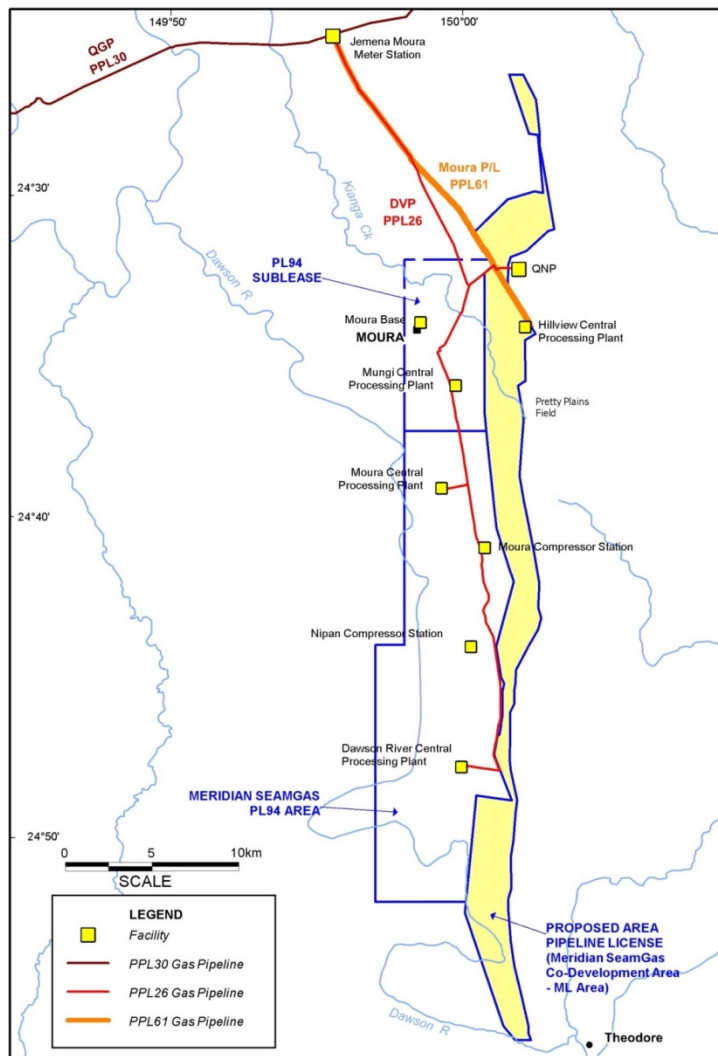
1 Draft recommendation

- 1.1 Westside Corporation Limited (**Westside**) has applied for revocation of coverage of the Dawson Valley Pipeline (**DVP**).
- 1.2 Under the National Gas Law (**NGL**), the Council is responsible for considering this application and making a recommendation to the relevant Minister.
- 1.3 The Council classifies the DVP as a transmission pipeline. It is located wholly within Queensland. As such the relevant Minister to consider the Council's recommendation and decide on Westside's application is the Commonwealth Minister for Industry; the Hon Ian Macfarlane MP.
- 1.4 Under the NGL the Council must recommend, and the Minister must make, a coverage revocation determination where one or more of the pipeline coverage criteria is not satisfied in relation to a pipeline. Where all the pipeline coverage criteria are met a revocation determination should not be made and a pipeline should remain covered.
- 1.5 On the basis of the information available at this stage the Council is not satisfied that criterion (a) is met and proposes to recommend that coverage of the DVP be revoked.
- 1.6 The Council now invites written submissions on this draft recommendation. The Council will consider these submissions before finalising its recommendation to the Minister.
- 1.7 Submissions in response to this draft recommendation should be provided to the Council by **5pm Monday 21 July 2014**.
- 1.8 Submissions should be emailed (in both MS Word and PDF formats) to gas@ncc.gov.au, with a hard copy sent to Dawson Valley Application, National Competition Council, GPO Box 250, Melbourne, Vic 3000. For ease of referencing all submissions should contain numbered paragraphs. Parties proposing to include confidential material in a submission should discuss this with Council staff prior to making the submission. All enquiries may be directed to the Council on 1800 099 470.

2 Background

- 2.1 On 15 May 2014, Westside applied to the Council under s 102 of the NGL for revocation of coverage of the DVP. Westside paid the appropriate fee. The effect of the revocation of coverage would be to terminate regulation of the price and other terms of access to the pipeline under the NGL.
- 2.2 The DVP is in Queensland. It is described in the application as approximately 47 km long, 168mm (6") diameter, with a 3.7km long, 114mm (4") off-take to the Queensland Nitrates Plant (QNP) at Moura. The pipeline starts at the Dawson River Central Gas Processing Facility and interconnects with the Queensland Gas Pipeline (QGP) at the Jemena Moura meter station. In addition to the Dawson River facility, gas is also received into the DVP at the Moura Processing Facility. The DVP has 2 delivery points – the QNP and the inlet to the QGP. A map of the DVP, including inlet and outlet points is shown in Figure 1.

Figure 1

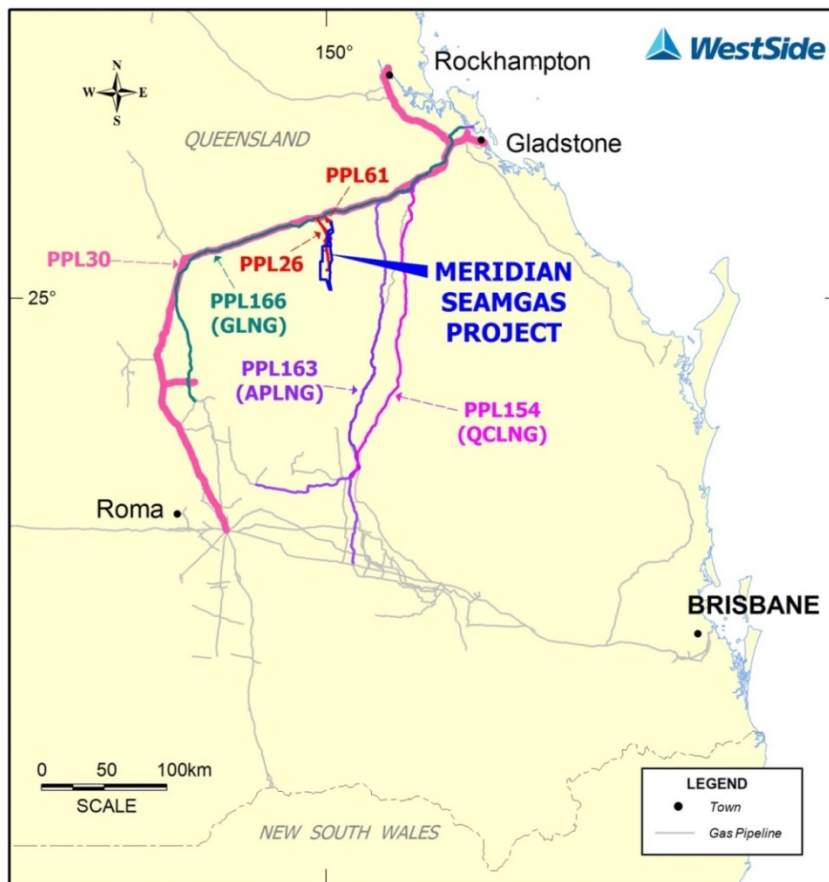


Source: Application, Attachment B (i), page 25

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- 2.3 The DVP has a current approximate maximum capacity of 21TJ per day. The applicant advises that for operational reasons current capacity is 18TJ per day.¹ The Council understands that there are options available to increase capacity.
- 2.4 The pipeline is owned by a joint venture (**Meridian JV**) between Westside CSG A Pty Ltd, Westside CSG D Pty Ltd and Mitsui E&P Australia Pty Ltd (**MEPAU**). The Meridian JV also produces gas from the Meridian Gas Field adjacent to the DVP (see Figure 1).
- 2.5 Westside is the operator of the DVP. Westside is a listed Brisbane-based coal seam gas explorer and producer with a portfolio of projects in Queensland. The Westside participants in the Meridian JV are wholly owned subsidiaries of Westside. MEPAU is a subsidiary of Mitsui & Co Limited of Japan. MEPAU has interests in a number of oil and gas fields in Australia.
- 2.6 As well as the DVP, the Meridian JV owns another pipeline in close proximity to the DVP, known as the Moura Pipeline. The Moura Pipeline runs from the Hillview Compressor Station to the QGP via the QNP. This pipeline is approximately 21 km long, 220mm (8") diameter, with a short off take to the QNP. The location of the Moura Pipeline is shown in Figure 1. The Moura Pipeline is not a covered pipeline under the NGL.
- 2.7 Other pipelines in the vicinity of the DVP are shown in Figure 2.

¹ The AER reports the capacity of the DVP as 30TJ per day (AER 2013). The discrepancy appears to be due to different injection points and pressure levels used in the various calculations. The difference does not appear to be material to this recommendation.

Figure 2



QD_006.wor
Copyright Westside Corporation Limited, 2014

Source: Application, Attachment C, page 27

- 2.8 The APLNG, QCLNG and GLNG pipelines included in Figure 2 are each subject to 15 year no-coverage determinations which preclude these pipelines being subject to coverage under the NGL until 2025 in the earliest case.
- 2.9 Ordinarily operators of covered pipelines are prohibited from carrying on a “related business” including producing natural gas (see NGL sections 137-148). The Meridian JV’s involvement in both gas production and processing and ownership of a gas pipeline is permitted because the Australian Energy Regulator (**AER**) in 2012 granted the JV a waiver from the ring-fencing requirements of the NGL.²
- 2.10 The DVP transports gas produced by the Meridian JV from its own activities in the Meridian Gas Field and gas sourced from the Harcourt JV which subleases

²

The AER’s decision granting the ring fencing waiver is available at: http://www.aer.gov.au/sites/default/files/AER_Final_decision_%E2%80%933_WestSide_and_Meridian_JV_ring_fencing_exemption_application_-_July_2012.pdf. This decision granted a waiver from the prohibition on carrying on a related business (NGL s139) and in relation to sharing of marketing staff (NGL s140). The waiver does not extend to the requirement to keep separate accounts (NGL s 141).

part of the Meridian Gas Field from the Meridian JV. The Harcourt JV participants are MEPAU and two subsidiaries of PetroChina.

- 2.11 Various arrangements between the Meridian and Harcourt joint ventures result in all gas extracted from the subleased part of the Meridian Gas Field being owned by the Meridian JV prior to delivery of that gas into the DVP. This gas amounts to less than 2 per cent of the current capacity of the DVP. [Confidential Information redacted].
- 2.12 The Meridian JV also acquires gas produced by degassing operations associated with coal mines adjacent to the DVP.
- 2.13 Gas delivered into the QGP from the DVP is currently acquired by AGL and is sold for use at the QNP or enters the broader Queensland gas pipeline system for onward transmission and sale. These sales arrangements are subject to an ongoing dispute but are expected to continue until the end of 2014.
- 2.14 The applicant advises that the Meridian JV has recently entered into a 20 year gas sales agreement with the GLNG project participants which will commence from 2015. As a result of this agreement the Meridian JV intends to significantly increase its gas production over time. Under this agreement gas produced by the JV [Confidential information redacted] will be delivered to GLNG along both the DVP and the Moura Pipeline to a new connection to the GLNG Pipeline. The existing connection from the DVP to the QGP will be retained. The applicant advises as production ramps up there will be no spare capacity on either the DVP or the Moura Pipeline. There is however some scope to continue to expand capacity.
- 2.15 The DVP was initially covered from 1998 due to its inclusion in the original Schedule A list of covered pipelines under the *Gas Code*.³ Coverage was revoked in 2000 but then reimposed in 2006. The DVP is currently covered and subject to full regulation under the NGL. Westside contends that the key elements in determining that the pipeline should be covered in 2006 are no longer present and that more generally the situation is materially different from 2005-06. Westside states that despite being subject to full regulation no third party gas is transported on the DVP and no party has sought to use the pipeline. Westside also notes that in granting the ring-fencing waiver in 2012 (see 2.9 above) the AER accepted the absence of likely third party users for the DVP.
- 2.16 The DVP is currently classified as a transmission pipeline. This classification is not disputed by any party. The pipeline is wholly located within Queensland. As a result of the network's classification and location, the relevant Minister to consider the Council's recommendation and decide on Westside's application is the Commonwealth Minister for Industry; the Hon Ian Macfarlane MP.

³ National Third Party Access Code for Natural Gas Pipeline Systems—set out in Schedule 2 to the now repealed *Gas Pipelines Access (South Australia) Act 1997*.

3 Revocation of coverage

- 3.1 Under s 102 of the NGL a person may apply for a determination that a covered pipeline no longer be a covered pipeline. Such an application is made to the Council which must then make a recommendation to the relevant Minister as to whether the pipeline should continue to be a covered pipeline.
- 3.2 In making its recommendation the Council:
- (a) must give effect to the pipeline coverage criteria; and
 - (b) in deciding whether or not the pipeline coverage criteria are satisfied, must have regard to the national gas objective (NGL, s 105(1)).
- 3.3 The pipeline coverage criteria and national gas objective are set out in sections 15 and 23 of the NGL respectively. For ease of reference these sections are reproduced in Figure 3.

Figure 3: Pipeline coverage criteria and the national gas objective (ss 15 and 23 of the NGL)

<p>15—Pipeline coverage criteria</p> <p>The pipeline coverage criteria are—</p> <p>(a) that access (or increased access) to pipeline services provided by means of the pipeline would promote a material increase in competition in at least 1 market (whether or not in Australia), other than the market for the pipeline services provided by means of the pipeline;</p> <p>(b) that it would be uneconomic for anyone to develop another pipeline to provide the pipeline services provided by means of the pipeline;</p> <p>(c) that access (or increased access) to the pipeline services provided by means of the pipeline can be provided without undue risk to human health or safety;</p> <p>(d) that access (or increased access) to the pipeline services provided by means of the pipeline would not be contrary to the public interest.</p> <p>23—National gas objective</p> <p>The objective of this Law is to promote efficient investment in, and efficient operation and use of, natural gas services for the long term interests of consumers of natural gas with respect to price, quality, safety, reliability and security of supply of natural gas.</p>
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- 3.4 The NGL further provides (in s 105(2)) that:
- (2) The NCC gives effect to the pipeline coverage criteria as follows:
 - (a) if the NCC is satisfied that all the pipeline coverage criteria are satisfied in relation to the pipeline—the recommendation must be in favour of the pipeline continuing to be a covered pipeline;
 - (b) if the NCC is not satisfied that all the pipeline coverage criteria are satisfied in relation to the pipeline—the recommendation must be in favour of the pipeline no longer being a covered pipeline.

- 3.5 The provisions in the NGL relating to coverage do not distinguish between transmission and distribution pipelines.
- 3.6 The Council must apply the *standard consultative procedure* set out in the National Gas Rules (Rule 8) in considering applications for revocation of coverage. This procedure requires that the Council generally provide its recommendation within a 4 month timeframe (see Rule 19).
- 3.7 As required the *standard consultative procedure* has been used in relation to this application:
- Public notice of the application was published in *The Australian* on Tuesday 22 May 2014.
 - Written submissions on the application were sought with a closing date of 13 June 2014.
 - The Council received no submissions on the application.
 - Submissions are now invited in response to this draft recommendation. This will provide the applicant and other interested parties with a final opportunity to provide information to the Council before it finalises its recommendation. These submissions should be provided to the Council before **5pm Monday 21 July 2014**.
 - After considering these submissions the Council will finalise its recommendation to the relevant Minister. The Council's final recommendation will be published at the time the Minister's decision is announced.
- 3.8 On receipt of the Council's recommendation the relevant Minister must decide whether to make a coverage revocation determination. In doing so the Minister is bound by the same requirements to those applying to the Council in making its recommendation.
- 3.9 In essence, the Council must recommend, and the Minister must make, a coverage revocation determination where one or more of the pipeline coverage criteria is not satisfied.
- 3.10 In its application, Westside argues that the DVP does not satisfy criteria (a) and (d) and therefore coverage should be revoked. These coverage criteria are considered further in sections 4 and 5 of this recommendation.
- 3.11 The other coverage criteria were not the focus of this application. The Council has are considered them briefly below.

Criterion (b)

- 3.12 In previous recommendations in relation to the DVP, criterion (b) was not in issue and was found to be satisfied. However, all these recommendations

predate the High Court's *Pilbara Rail appeal* decision.⁴ In that decision the High Court considered how declaration criterion (b) (in Part IIIA of the Competition and Consumer Act 2010 (CCA)) should be interpreted and held that the provision 'is to be read as requiring the decision maker to be satisfied that there is not anyone for whom it would be profitable to develop another facility' (at [77]). In doing so the High Court overturned previous interpretations of this criterion, which had focussed on the presence of natural monopoly characteristics.

- 3.13 The wording of declaration criterion (b) and coverage criterion (b) is essentially the same. Furthermore, Part IIIA of the CCA and the NGL share a similar genesis, as do the declaration and coverage processes and criteria contained in each. In the Council's view there is no basis for distinguishing the interpretation of coverage criterion (b) from that given to declaration criterion (b) by the High Court.
- 3.14 Coverage criterion (b) therefore requires consideration of whether anyone could profitably develop another pipeline to provide the pipeline services provided by the DVP.
- 3.15 Westside made no submissions in its application in relation to criterion (b). Implicitly it accepts that this criterion is satisfied, although on the basis that the DVP should not be covered due to other coverage criteria not being satisfied.
- 3.16 To conclude that criterion (b) is satisfied, the Council must be affirmatively satisfied that it would be uneconomic (unprofitable) for anyone to develop another pipeline to provide the pipeline services provided by the DVP.
- 3.17 In the Council's view it is unlikely that any new pipeline developed to provide the same services as the DVP would be profitable on a stand-alone basis. Such a new pipeline would be likely to attract only small volumes of gas. Furthermore such a pipeline would be required to compete with an established pipeline with a significantly higher level of utilisation and established interconnection arrangements. The established pipeline also has available capacity either as currently configured, or as a result of expansion opportunities, that would involve low costs relative to construction of a new pipeline.
- 3.18 However, the Council notes that a new pipeline developed to provide the same or similar services as the DVP would be relatively short. It might be possible for the QNP or a party seeking to produce and sell gas from the vicinity of the DVP to profitably develop a pipeline to connect to another pipeline in the area (including the QGP) in conjunction with its existing business or as part of a broader development.⁵ If so criterion (b) would not be satisfied. At this stage

⁴ *The Pilbara Infrastructure Pty Limited v Australian Competition Tribunal* [2012] HCA 36.

⁵ As with the Meridian JV and Westside, a waiver from the ring-fencing requirements of the NGL would be required for a gas producer to also operate a gas pipeline (see para 2.9).

no party has indicated any consideration of, or intention to, develop a pipeline on such a basis. This suggests that such a pipeline may be unprofitable even as part of a broader development.

- 3.19 At this stage, the Council is of the view that criterion (b) is likely to be satisfied. The Council would, however, appreciate any information regarding options for developing an alternative to the DVP and the likely profitability of such a development.

Criterion (c)

- 3.20 Criterion (c) requires that access to the services provided by the DVP can be provided without undue risk to human health and safety. In its application Westside accepts that this criterion is satisfied.
- 3.21 Given the obligations in relation to safety which apply to gas pipelines in Australia irrespective of whether the pipeline is covered or not, the Council is satisfied that criterion (c) is met in respect to the DVP.

4 Criterion (a) – material promotion of competition in a dependent market

- 4.1 Criterion (a) requires that access (or increased access) to the pipeline services provided by means of the pipeline [to which an application relates] would promote a material increase in competition in at least 1 market (whether or not in Australia), other than the market for pipeline services provided by means of the pipeline.
- 4.2 This criterion allows for coverage to be revoked where access would not materially enhance the conditions or environment for competition in any market.

Contentions regarding competition in dependent markets

- 4.3 In the application, Westside identifies three dependent markets:
 - A downstream retail gas market in Queensland and/or eastern Australia
 - an eastern Australian upstream market for the production and sale of gas
 - a market for gas transmission services in eastern Australia.
- 4.4 The applicant contends that coverage of the DVP would not promote a material increase in competition in any of these markets. Its reasoning is essentially that the volumes of gas transported on the DVP (let alone the incremental volumes that might result from access or increased access) are so small relative to the volumes of gas produced, transported and sold in these dependent markets that whether or not access is available will not materially promote competition.
- 4.5 According to the applicant the volume of gas delivered by the DVP in the 2013 financial year is less than 1 per cent of the production of gas in Queensland [Confidential information redacted] and would make up a still smaller percentage of a broader eastern Australian retail market.
- 4.6 The applicant also draws parallels with the Council's conclusions in its 2005 recommendation on coverage of the DVP and in recommendations relating to coverage of the South Eastern Pipeline System and the Wagga Wagga Gas Distribution System.⁶ The applicant contends that the Council's approach to considering criterion (a) in these matters supports its view that the volumes of

⁶ Final recommendations dated August 2005, 8 April 2013 and 8 August 2013 respectively. These recommendations are available on the Council's website. The Council's 2005 final recommendation in relation to the DVP should be considered in conjunction with its Supplementary Advice to the Minister dated 31 October 2005.

gas that might be transported on the DVP are too low to have a material effect on competition in any dependent market.

- 4.7 The applicant contends that the AER's conclusion in relation to its ring fencing waiver that "*the ability of the Applicants and potential upstream competitors to influence prices in the Queensland gas market is minimal*" also supports its arguments (AER 2012a, at p 19). The applicant contends that this conclusion also applies to its ability to influence prices in an upstream market.

The Council's consideration

- 4.8 In assessing whether criterion (a) is satisfied, the Council:
- identifies relevant dependent market(s) where access (or increased access) to the DVP might affect competition
 - confirms that the dependent markets are separate from the market for the pipeline services (in order to meet the requirement in the last clause of criterion (b)), and
 - assesses the effect of access (or increased access) on competition in each dependent market in order to determine whether access (or increased access) to the DVP would materially promote competition in that market.
- 4.9 In its 2005 consideration of coverage of the DVP the Council identified two dependent markets of relevance to its assessment of criterion (a).⁷ These were:
- an upstream market for gas production and sales from any field (...) that is within the feasible scope of connection to the DVP, and
 - a downstream Queensland gas sales market.
- 4.10 The second of these markets is the same as that identified by the applicant as one of the alternative downstream markets relevant to this application (see para 4.3).
- 4.11 The first is however a dependent market not considered by the applicant. It is not the same as the broader eastern Australian gas market. In the Council's view it is in relation to this market that any material increase in competition is likely to occur and satisfaction of criterion (a) is likely to be determined.
- 4.12 Before moving to consider the upstream market for gas production and sales from fields in the vicinity of the DVP, it is convenient to consider the effect of access or increased access on the other possible dependent markets: namely:
- a downstream market for sale of gas
 - a broad upstream gas market and
 - a market for gas transmission services.

⁷ NCC 2005a para 7.24.

Market for downstream gas sales

- 4.13 In relation to downstream sale of gas the Council considers that the appropriate geographic extent of this market is Queensland rather than a broader eastern Australian market. The Council does not consider that the physical interconnectedness of pipelines in eastern Australia or the commercial and economic linkages between various sources and uses of gas (including the increasingly important export of gas as LNG) have (perhaps yet) developed sufficiently to allow for competition issues to be considered in a context that encompasses the whole of eastern Australia.
- 4.14 Even within a narrower Queensland geographic context the Council considers that the volumes of gas likely to be transported through the DVP are at such a level that access or increased access would be unlikely to have a material effect on competition in downstream gas sales.

Broad upstream gas market

- 4.15 For the same reason the Council considers that it is unlikely that access or increased access to the DVP would have a material effect on competition in a broadly defined upstream market.

Market for gas transmission services

- 4.16 In relation to the market for gas transmission services in eastern Australia proposed by the applicant, the Council considers that gas transmission services are more appropriately considered in terms of the pipeline or pipelines necessary to transport gas between required points. On such a basis the relevant services here would be those provided by the DVP, which are not separate from the service for which coverage is sought. Such a market would not be a market other than the market for the pipeline services provided by the pipeline as required by the final clause of s 15 (a) of the NGL.
- 4.17 Alternatively, if a broader market for transmission services is considered the services provided by the DVP would form part of that broader market (which may or may not be separate to the market in which the services of the DVP are provided) but would in any event be such a small part that access or increased access would appear unlikely to have a material effect on competition.

Upstream market for gas production and sales from fields in the vicinity of the DVP

- 4.18 Identifying dependent markets provides a basis for illuminating relevant issues, enabling an assessment of the effects of access on competition. Identification of an upstream market for gas production and sale in the vicinity of the DVP serves to enable a proper examination of the effects of access on producers other than the applicant in that area.

- 4.19 The Council acknowledges that this market is necessarily a smaller subset of a broader market for gas production and sale in Queensland. However, there is no requirement in s 15(a) that dependent markets be large.⁸
- 4.20 There are currently two producers of gas within the vicinity of the DVP: the Meridian JV and the Harcourt JV. Meridian of course owns the DVP (and the Moura Pipeline) and is also allowed to produce and sell gas by virtue of the ring fencing exemption noted at para 2.9.
- 4.21 Lest it be considered that involvement of the Meridian JV in operation of the DVP and production and sale of gas in the same area means that these functions are not separate and the market for gas production and sales from fields in the vicinity of the DVP is not an appropriate market to consider under s15(a), the Council notes that in most situations in Australia gas production and transmission are undertaken separately and that in the vicinity of the DVP the Harcourt JV produces and sells gas without any involvement in transmission. In the Council's view markets for production and sale of gas are functionally distinct from gas transmission.
- 4.22 The question is then whether access or increased access to the gas transmission services of the DVP will materially increase competition in the upstream market for gas production and sales from fields in the vicinity of the DVP.
- 4.23 As noted earlier the DVP currently has available capacity. However, that situation will change markedly when the applicant's gas sales arrangements with GLNG commence in 2015 (see para 2.14). From 2015 it appears unlikely that there will be any latent capacity in the DVP which might be made available to third parties. Additional capacity might be added but this would only become available to third parties once the requirements of the Meridian JV as the pipeline owner are met. Third parties would also be required to fund the additional capacity they require. At this point the Council has no information as to likely third party use of the DVP on this basis.
- 4.24 The limited capacity on the DVP that might be made available to third parties may also have implications for the construction of a new pipeline to transport gas produced in this area.
- 4.25 In addition to the QGP (which will now miss out on at least some of the gas currently transmitted by the Meridian JV given the JV's commitments to GLNG), the GLNG and several other pipelines serving Gladstone LNG production are reasonably proximate to the area currently served by the DVP (see Figure 2). It may be that the prospects of a pipeline linking production to one of these represents a competitive alternative for Harcourt and any other potential gas

⁸ The Council is not suggesting this is a deficiency in the NGL.

producer in this area.⁹ To the extent that such prospects exist this will also limit the implications of access to the DVP for competition in this market.

Conclusion on criterion (a)

4.26 At this stage, the Council considers that criterion (a) is not satisfied.

⁹ The Council notes that a new pipeline connecting gas production in the area to newly constructed pipelines serving Gladstone LNG plants would in most cases involve a different service to that provided by the DVP. However, to the extent a new pipeline provides the same services as the DVP (in particular connection to the QGP) there would also be implications for the assessment of criterion (b).

5 Criterion (d) – access not contrary to the public interest

- 5.1 For criterion (d) to be met it is necessary that access (or increased access) to the pipeline services provided by the DVP not be contrary to the public interest.
- 5.2 This criterion allows for coverage to be revoked (or denied—when considering a coverage application) where access would be contrary to the public interest, notwithstanding that the other coverage criteria may be met.¹⁰

Approach to the assessment of criterion (d)

- 5.3 The coverage criteria in s15 of the NGL serve the same function as the declaration criteria in ss44G and 44H of the CCA. Satisfaction of the declaration criteria allows for infrastructure services to be subject to access regulation in the same way as satisfaction of the coverage criteria in the NGL allows for coverage (and hence access regulation) of pipeline services. Despite some wording differences, Australian Competition Tribunal and court decisions in respect of one set of criteria have been routinely cited and applied in relation to the equivalent provisions of the other.¹¹ Declaration criteria (a) and (b) in the NGL are the equivalent to coverage criteria (a) and (b) in the CCA. Declaration criterion (f) is the equivalent to coverage criterion (d).
- 5.4 In its *Pilbara Rail appeal* decision,¹² the High Court overturned the previous interpretation of declaration criterion (b)¹³ which had linked the word “uneconomical” to the presence of natural monopoly characteristics in the supply of a service. Instead the High Court held that “uneconomical” meant “unprofitable” and that:
- [109] If the Minister is satisfied that it would be uneconomical (in the sense of unprofitable) for anyone to develop an alternative facility, criterion (b) is met.
- 5.5 The Council sees no basis for distinguishing the interpretation of coverage criterion (b) from the effect of the High Court’s interpretation of declaration criterion (b) or for not taking into account the implications of the *Pilbara Rail* decision for the declaration process as a whole in considering the coverage process in the NGL.

¹⁰ This criterion does not allow for coverage of a pipeline on ‘public interest grounds’ when any other coverage criterion is not satisfied; it can only operate to override coverage being available in situations where all other coverage criteria are satisfied.

¹¹ Some key precedents in relation to regulation of gas pipelines predate the NGL and relate to the coverage criteria contained in the *Gas Code* (see footnote 3). Those criteria are identical to those in s 15 of the NGL.

¹² *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 290 ALR 750.

¹³ Sections 44G(2)(b) and 44H(4)(b) of the CCA.

- 5.6 The Council is satisfied criterion (b) is met in relation to the DVP (see paragraph 3.18). However, when one turns to the consideration of whether access (or increased access) to the DVP is contrary to the public interest under coverage criterion (d), the scope of benefits that can be taken to arise from access due to the satisfaction of criterion (b) is, as a result of the High Court's interpretation, narrower than would have been the case under the previous interpretation, where avoidance of the costs from the unnecessary duplication of infrastructure facilities would likely have resulted in a significant public benefit from access.
- 5.7 Alternatively a fuller examination of the benefits of access may be required if coverage criterion (d)¹⁴ is to involve a fully developed cost benefit analysis. However, this latter approach seems inconsistent with other statements by the High Court in the *Pilbara Rail* decision.
- 5.8 In the *Pilbara Rail* decision the High Court also directly considered the application of declaration criterion (f). In particular, the Court stated:
- [42] ... It is well established that, when used in a statute, the expression "public interest" imports a discretionary value judgment to be made by reference to undefined factual matters. As Dixon J pointed out in *Water Conservation and Irrigation Commission (NSW) v Browning*, when a discretionary power of this kind is given, the power is "neither arbitrary nor completely unlimited" but is "unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view". It follows that the range of matters to which the NCC and, more particularly, the Minister may have regard when considering whether to be satisfied that access (or increased access) would not be contrary to the public interest is very wide indeed. And conferring the power to decide on the Minister (as distinct from giving to the NCC a power to recommend) is consistent with legislative recognition of the great breadth of matters that can be encompassed by an inquiry into what is or is not in the public interest and with legislative recognition that the inquiries are best suited to resolution by the holder of a political office.
[footnotes omitted]
- 5.9 The High Court also noted that, like declaration criterion (c) in the CCA (which deals with the national significance of an infrastructure facility), consideration of declaration criterion (f) "may also direct attention to matters of broad judgment of a generally political kind" (*Pilbara Rail* [43]). The High Court contrasted this sort of judgment with that involved in consideration of other of the criteria which it regarded as of "a more technical kind" (*Pilbara Rail* [44]).
- 5.10 The Council considers that a detailed technical examination of the costs and benefits of access is inconsistent with the High Court's view of the judgment

¹⁴ And declaration criterion (f).

involved in considering declaration criterion (f) and by implication the equivalent public interest provision in the NGL– coverage criterion (d).

- 5.11 The Council also questions whether a situation where one criterion is not satisfied simply because another criterion is also not satisfied is consistent with the schemes for determining coverage under the NGL and declaration under the CCA. This is particularly the case where the costs or difficulties associated with regulated access are unremarkable and would not alone engage criterion (d).
- 5.12 Furthermore, in circumstances where access would not promote competition coverage or declaration will not be available because the criterion that addresses that issue (criterion (a)) will not have been satisfied. In the Council’s view it is unnecessary and inappropriate to also find that criterion (d) is not satisfied, only because criterion (a) is unable to be satisfied.
- 5.13 The Council considers that the preferable approach to coverage criterion (d)¹⁵ is to seek generally to identify any matter that could mean access (or increased access) might be contrary to the public interest and then assess whether the likelihood and consequences of that matter make access contrary to the public interest.¹⁶ The Council considers that this approach is more consistent with the *Pilbara Rail* decision in that it involves a judgment that the Council is able to advise on, and a Minister is well placed to make, rather than a detailed technical examination of costs and benefits for which only partial information is likely to be available.

The applicant’s position

- 5.14 The applicant contends that, consistent with its position that criterion (a) is not satisfied, there will not be a public benefit resulting from a material increase in competition in any market.
- 5.15 Based on comparisons with estimates of regulatory costs provided in other applications, the applicant considers that it will face annual regulatory costs of approximately \$120,000 if the DVP remains covered.
- 5.16 On the basis of these costs and its assessment of the benefits to competition from coverage the applicant submits that criterion (d) is not satisfied.

The Council’s consideration

- 5.17 As noted in paragraph 5.13 the Council considers that the most appropriate approach to considering criterion (d) is to seek generally to identify any matter

¹⁵ And declaration criterion (f).

¹⁶ Ultimately it will be for a Court to determine the proper interpretation of the coverage criterion (d) (and declaration criterion (f)) and the approach to be taken to assessing whether those criteria are satisfied.

that could mean access (or increased access) might be contrary to the public interest and then assess whether the likelihood and consequences of that matter make access contrary to the public interest.

5.18 In this case the only potential matter that has been identified by any party which might mean that access or increase access would be contrary to the public interest is the cost of regulation. The Council itself has not identified any other matter which might mean access or increased access to the DVP would be contrary to the public interest.

5.19 While the costs of regulation are not insignificant, they are not unusual or remarkable. Furthermore, it seems to the Council that in this case—where there is only one third party that seems likely to want access to the DVP (the Harcourt JV)—the prospects of light regulation being available are high.¹⁷ The application of light regulation to the DVP would be likely to significantly reduce the costs of regulation from the estimates provided by the applicant.

Conclusion on criterion (d)

5.20 The Council's preliminary view is that criterion (d) is satisfied.

¹⁷ See NCC 2013c Chapter 4 - Form of Regulation.

Appendix A Information taken into account by the Council

A.1 Application and submissions

Author	Date	Title	Confidentiality
Westside Corporation Ltd	15 May 2014	<i>Application for Coverage Revocation Determination in respect of Dawson Valley Pipeline</i>	In part. Separate confidential and publication versions.

A.2 References

Author	Date	Title	Confidential
AER 2013	2013	<i>State of the Energy Market 2013</i> (http://www.aer.gov.au/node/23147)	No
AER 2012a	6 June 2012	<i>Draft Decision, Meridian SeamGas Joint Venture and Westside Corporation Limited Ring fencing exemption application</i> (http://www.aer.gov.au/sites/default/files/Draft%20Decision%20June%202012%20-%20Meridian%20JV%20and%20WestSide%20ring%20fencing%20exemption%20application%20%5BPUBLIC%5D.pdf)	No
AER 2012b	25 July 2012	<i>Final Decision, Meridian SeamGas Joint Venture and Westside Corporation Limited Ring fencing exemption application</i> (http://www.aer.gov.au/sites/default/files/AER%20Final%20decision%20%E2%80%93%20WestSide%20and%20Meridian%20JV%20ring%20fencing%20exemption%20application%20-July%202012.pdf)	No
NCC 2005a	August 2005	<i>Dawson Valley Pipeline: Coverage Application under the National Gas Code – Final recommendation</i>	No
NCC 2005b	31 October 2005	<i>Dawson Valley Pipeline: Application for coverage under the National Gas Code by Molopo Australia Limited – Supplementary advice</i>	No
NCC 2013a	8 April 2013	<i>Final recommendation – South Eastern Pipeline System</i>	No
NCC 2013b	8 August 2013	<i>Final recommendation – Wagga Wagga Gas Distribution Network</i>	No
NCC 2013c	October 2013	<i>Gas Guide</i>	No

A.3 Legal sources

Tribunal and court decisions
<i>The Pilbara Infrastructure Pty Limited v Australian Competition Tribunal</i> [2012] HCA 36 (Pilbara Rail appeal)
Legislation
<i>Competition and Consumer Act 2010</i> (Cth) (CCA)
<i>National Gas Rules 2009</i> (version 20)
<i>National Gas (South Australia) Act 2008</i> (SA) (NGL)