



THE HON IAN MACFARLANE MP
MINISTER FOR INDUSTRY

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MC14-002690

Mr David Crawford
President
National Competition Council
GPO Box 250
MELBOURNE VIC 3001

Dear Mr Crawford

David

Thank you for your letter of 4 August 2014 concerning the National Competition Council's final recommendation on an application from WestSide Corporation Limited (Westside) under the National Gas Law for revocation of coverage for the Dawson Valley Pipeline (DVP) in Queensland. I understand that as the DVP is classified as a transmission pipeline and is located wholly in Queensland, in accordance with section 98 of the National Gas Law, I am the relevant Minister with responsibility for making the final determination on this matter.

I have decided to make a coverage revocation determination for the DVP. Please find enclosed a copy of my determination and statement of reasons. In making my decision I have carefully considered the pipeline coverage criteria, the National Gas Objective and the Council's final recommendations.

Given the two public consultation processes already undertaken by the Council, I did not seek further submissions. I have also written to WestSide, the Australian Energy Market Commission and the Queensland Minister for Energy and Water Supply, the Hon Mark McArdle MP, to advise them of my decision. Under the National Gas Rules, my decision and statement of reasons must be published on the Council's website. I would appreciate if you could arrange for this publication.

Yours sincerely

Ian Macfarlane

Encl (1).

MINISTER'S DETERMINATION

I, the Hon Ian Macfarlane MP, Minister for Industry, being the relevant Minister to make a coverage revocation determination on a gas transmission pipeline under section 106 of the National Gas Law (NGL), as it applies as a law of Queensland, make the following determination in relation to an application from WestSide Corporation Limited (WestSide) for the revocation of coverage of the Dawson Valley Pipeline (DVP).

The Application Process

On 15 May 2014, WestSide applied to the National Competition Council (the Council) for a coverage revocation determination in respect of the DVP (the application).

Following a public consultation process in which the Council did not receive any submissions, the Council published its draft recommendation on 26 June 2014. The Council's draft recommendation favoured revoking the coverage of the DVP.

Following a second round of public consultation, in which the Council received one submission (plus two attachments) from the applicant, WestSide, the Council released its final recommendation on 4 August 2014 recommending that I make a coverage revocation determination. The Council's draft and final recommendations, and the submission received, are available on the Council's website: www.ncc.gov.au.

In accordance with section 106 of the NGL, and rule 20 of the National Gas Rules made under the NGL, I am providing my determination to the applicant, the Council and the Australian Energy Market Commission within 20 business days of receiving the Council's final coverage recommendation. Considering there was opportunity for interested parties to provide submissions to the Council, I have not requested further submissions or comments in relation to the application.

Description of the Pipeline

My decision relates to the DVP (see Map 1 in **Attachment A**). The DVP transports gas produced in the Meridian SeamGas fields located approximately 160 kilometres west of Gladstone, Queensland. The DVP is located wholly in Queensland and is approximately 47 km long, 168mm in diameter, with a 3.7km long, 114mm off-take to an ammonium nitrate facility at Moura operated by Queensland Nitrates Pty Ltd (QNP). 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 two delivery points: the QNP facility, and the inlet to the QGP. A further description of the DVP is available on page 3 of WestSide's application, which is available to download on the Council's website: www.ncc.gov.au.

Decision

In accordance with Part 1 of Chapter 3 of the NGL, I am making a coverage revocation determination in respect of the DVP.

This decision is based on the initial application, the applicant's submission to the Council in response to its draft recommendation and the Council's draft and final recommendations.

In making my determination, I have given effect to the pipeline coverage criteria in section 15 of the NGL.

In deciding whether or not the pipeline coverage criteria are satisfied in relation to the pipeline, in accordance with section 107(1) of the NGL, I:

1. have had regard to the national gas objective in section 23 of the NGL;
2. have had regard to the Council's coverage revocation recommendation; and
3. took into account submissions and comments made to the Council by the public under the National Gas Rules in relation to the application.

In relation to the pipeline coverage criteria in section 15 of the NGL, I am satisfied that criteria (c) and (d) are satisfied in relation to the DVP, but I am not satisfied that criteria (a) and (b) are satisfied.

Given that I am not satisfied that all of the pipeline coverage criteria are satisfied in relation to the DVP, in accordance with section 107(2)(b) of the NGL, I must make a coverage revocation determination in relation to that pipeline.

My Statement of Reasons follows.

STATEMENT OF REASONS

In accordance with Rule 20(1) of the National Gas Rules, I provide this statement of reasons for my coverage revocation determination in respect of the Dawson Valley Pipeline (DVP).

Pipeline coverage criterion (a): That access (or increased access) to the 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.

NCC final conclusion on criterion (a): *The Council considers that criterion (a) is not satisfied.*

Ministerial Findings

The application for a coverage revocation determination in respect of the DVP (see Map 1 in **Attachment A**) is made by WestSide Corporation Limited (WestSide).

I understand that the DVP is owned by Meridian SeamGas Joint Venture (Meridian JV), comprised of WestSide CSG A Pty Ltd, WestSide CSG D Pty Ltd (subsidiaries of WestSide) and Mitsui E&P Australia Pty Ltd.

Meridian JV produces gas from the Meridian SeamGas fields, in or near Petroleum Lease 94, located approximately 160 kilometres west of Gladstone, Queensland. The DVP transports gas produced in the Meridian SeamGas fields.

Pipeline coverage criterion (a) requires that I be satisfied that access (or increased access) to the services provided by means of the DVP would materially enhance the opportunities or environment for competition in any dependent market, other than the market for the pipeline services provided by means of the DVP.

The Council found that the relevant dependent markets include:

- 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.

The first dependent market identified by the Council is an upstream market for gas production and sales from any field that is within the feasible scope of connection to the DVP. I agree with the Council's identification of this as a relevant dependent market and adopt its reasons for considering that a material increase in competition in this market is unlikely to occur by maintaining access to the services provided by means of the DVP, to which I add the following.

I understand that there are currently two gas producers within the vicinity of the DVP: the Meridian JV and Harcourt JV. While in most cases in Australia gas production and transmission are undertaken separately, Meridian JV is permitted to own the DVP and produce and sell gas because the Australian Energy Regulator in 2012 granted a waiver from the ring-fencing requirements of the NGL.

While the DVP currently has available capacity, when WestSide's 20 year gas sales arrangements with GLNG participants commence in 2015 it is unlikely there will be any unused capacity in the DVP that could be made available to third parties.

I understand that since the acquisition of the DVP in 2010, WestSide has not received any requests for access to the DVP. While additional capacity may be added to the DVP, this would likely involve looping rather than compression which is expected to involve greater costs.

The applicant submits that the cost of additional capacity on the DVP will not be significantly less than the cost of constructing a standalone pipeline. Even if DVP was expanded, capacity would only become available once the requirements of the Meridian JV are met.

Small tenement holders within a 100 kilometre corridor of the DVP have options to partner with LNG projects (APLNG, GLNG, QCLNG) and/or access the Queensland Gas Pipeline (QGP).

The possibility of another pipeline being developed by QNP to offer similar services to the DVP lessens the necessity for access to the DVP in order to maintain or enhance competition in the dependant markets and in particular the market for gas production and sales in the vicinity of the DVP. Continued access to the DVP will also not address the issues arising from the DVP having no excess capacity in the short term until another pipeline in the vicinity is built.

As such, I have determined that access to the DVP is unlikely to promote a material increase in competition in the upstream market for gas production and sales from any field that is within the feasible scope of connection to the DVP.

The second dependent market identified by the Council is a downstream gas sales market in Queensland, rather than a broader eastern Australian market. I agree with the Council's identification of this as a relevant dependent market and adopt its reasons for considering that, in the present case, the appropriate geographic extent of a dependent market for downstream gas is Queensland.

I consider the volumes of gas likely to be transported by the DVP are at such a level that access (or increased access) to that pipeline is unlikely to have a material effect on competition in the dependant downstream Queensland gas sales market.

I therefore agree with the Council's view that:

...the limited capacity likely to be available to third parties from 2015 onward together with the likely costs of providing additional capacity are such that it cannot [be] satisfied that access to the services provided by means of the DVP would promote a material increase in competition in any market.

The national gas objective, set out in s 23 of the NGL, 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'.

In deciding whether pipeline coverage criterion (a) is satisfied in relation to the DVP, I have had regard to the national gas objective by considering whether there is a causal connection between the maintenance of access and the promotion of competition in a dependent market for the benefit of consumers.

Accordingly, I am not satisfied that criterion (a) is satisfied in relation to the DVP.

Pipeline coverage criterion (b): That it would be uneconomic for anyone to develop another pipeline to provide the pipeline services provided by means of the pipeline.

NCC final conclusion on criterion (b): *The Council considers that criterion (b) is not satisfied.*

Ministerial Findings

Pipeline coverage criterion (b) requires that I be satisfied that it would be uneconomic for anyone to develop another pipeline to provide the pipeline services provided by means of the DVP.

The coverage criteria in section 15 of the NGL serve the same function as the declaration criteria in sections 44G and 44H of the *Competition and Consumer Act 2010* (Cth) for the National Access Regime in Part IIIA of that Act. The 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. Accordingly, case law concerning declaration criterion (b) in the National Access Regime is relevant to the interpretation of pipeline coverage criterion (b) in the NGL.

Consistently with the decision of the High Court of Australia in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379; [2012] HCA 36 (*Pilbara Infrastructure*), criterion (b) requires me to be satisfied that there is not anyone (including existing and possible future market participants) for whom it would be profitable to develop another pipeline to provide the relevant pipeline services. I note that this decision has overturned previous interpretations of criterion (b) which focussed on the presence of natural monopoly characteristics or on net social benefits.

The High Court in *Pilbara Infrastructure* explained the test as follows:

The better view of criterion (b) is that it uses the work “uneconomical” to mean “unprofitable”. It does not use that word in some specialist sense that would be used by an economist. Further, criterion (b) 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. It is not to be read as requiring the testing of an abstract hypothesis: if someone, anyone, were to develop another facility. When used in criterion (b) “anyone” should be read as a wholly general reference that requires the decision maker to be satisfied that there is no one, whether in the market or able to enter the market for supplying the relevant service, who would find it economical (in the sense of profitable) to develop another facility to provide that service (at [77]).

The High Court further noted:

... the central assumption informing and underpinning this construction of criterion (b) is that no one will develop an alternative service unless there is sufficient prospect of a sufficient return on funds employed to warrant the investment (at [83]).

In discussing the application of the above test the High Court further considered:

It would not be economical, in the sense of profitable, for someone to develop another facility to provide the service in respect of which the making of a declaration is being considered unless that person could reasonably expect to obtain a sufficient return on the capital that would be employed in developing that facility. Deciding the level of that expected return will require close consideration of the market under examination. What is a sufficient rate of return will necessarily vary according to the nature of the facility and the industry concerned. And if there is a person who could develop the alternative facility as part of a larger project it would be necessary to consider the *whole* project in deciding whether the development of the alternative facility, as part of that larger project, would provide a sufficient rate of return. But the inquiry required by criterion (b) should be whether there is *anyone* who could profitably develop an alternative facility (at [104]).

The DVP, which starts at the Dawson River Central Gas Processing Facility and interconnects with the QGP at the Jemena Moura meter station, has 2 delivery points – an ammonium nitrate facility at Moura operated by Queensland Nitrates Pty Ltd (QNP), and the inlet to the QGP.

The QNP facility is currently provided with gas via the DVP and the Moura Pipeline (an uncovered pipeline that runs from the Hillview Compressor Station to the QGP via the QNP facility). WestSide has advised that beyond 2015 the DVP and the Moura pipelines will no longer be available for transporting gas to the QNP facility.

I understand that the QNP facility relies on natural gas in its production process. QNP is proposing to construct a gas pipeline from the QNP facility to interconnect with the QGP and thereby provide certainty of gas supply to the QNP facility. QNP has undertaken studies to identify the land required for the pipeline and has been granted a Petroleum Survey Licence by the Queensland Department of Natural Resources and Mines.

The issue of whether it would be economical (in the sense of profitable) for QNP to develop the proposed pipeline must be considered in the peculiar context of the consequences the planned curtailment of spare capacity on the DVP and Moura Pipeline from 2015 will have for the QNP facility.

The fact QNP proposes to develop an alternative pipeline is a consideration relevant to my assessment, under criterion (b), of whether it would be uneconomic for *anyone* to develop another pipeline. However, I understand the QNP pipeline as presently proposed appears intended to replicate only part of the DVP and it may not, therefore, provide the same pipeline services as presently provided by means of the DVP. It nevertheless may tend to suggest that it might be profitable to build a larger pipeline that may more readily be considered as providing the pipeline services provided by the DVP.

The Council found that:

...the prospects of development of another pipeline by QNP, available interconnection options for onward carriage of gas, and more generally the likely costs of developing another pipeline as an alternative to the DVP the Council cannot be affirmatively satisfied that it is uneconomic for anyone to develop another pipeline to provide the services provided by the DVP.

I agree with and adopt this view of the Council. For the reasons cited above, I cannot be positively satisfied, as is required under criterion (b), that it is uneconomic for anyone to develop a pipeline that would provide the pipeline services provided by means of the DVP.

In deciding whether pipeline coverage criterion (b) is satisfied in relation to the DVP, I have had regard to the national gas objective (set out above) by considering the efficient investment in and competition for the provision of pipeline services.

As such, I am not satisfied that criterion (b) is satisfied in relation to the DVP.

Pipeline coverage criterion (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.

NCC final conclusion on criterion (c): *The Council's view is that criterion (c) is satisfied.*

Ministerial Findings

I am satisfied that access (or increased access) to the pipeline services provided by means of the DVP can be provided without undue risk to human health or safety. I note that in its application WestSide accepts that this criterion is satisfied. No submissions from the applicant or other parties, including the Council, presented any opinions to suggest this criterion is not satisfied. I also note that the gas industry in Australia is characterised by the safe use of pipelines through appropriate operator practice and regulation.

In deciding whether pipeline coverage criterion (c) is satisfied in relation to the DVP, I have had regard to the national gas objective (set out above) particularly in relation to the efficient operation and use of natural gas pipeline services in the long term interests of consumers.

Therefore, I am satisfied that criterion (c) is met in relation to the DVP.

Pipeline coverage criterion (d): That access (or increased access) to the pipeline services provided by means of the pipeline would not be contrary to the public interest.

NCC final conclusion on criterion (d): *The Council's view is that criterion (d) is satisfied.*

Ministerial Findings

Pipeline coverage criterion (d) requires me to be satisfied that access (or increased access) to the pipeline services provided by means of the DVP would not be contrary to the public interest. Criterion (d) allows for coverage to be revoked where access would be contrary to the public interest, notwithstanding that the other coverage criteria may be satisfied.

The High Court in *Pilbara Infrastructure* considered 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' (at [42]). Furthermore, the High Court in that case considered that declaration criterion (c) in the CCA, which is on the same terms as pipeline coverage criteria (d), 'may also direct attention to matters of broad judgment of a generally political kind', as distinct from the sort of judgment involved in consideration of other of the declaration criteria which it regarded as of 'a more technical kind' (at [44]).

I therefore consider that pipeline coverage criterion (d) may extend to a broad range of matters including but not limited to: consideration of economic efficiency, regulatory costs, disruption effects and costs and investment effects, as well as any public interest issues relevant to consideration of the national gas objective.

In the present case, the only matter identified by any party which may suggest that maintaining access to the DVP may be contrary to the public interest is the cost of regulation. The Council did not identify any other relevant matter. The Council found that '*[w]hile the costs of regulation are not insignificant, in the Council's view they are not unusual or remarkable*'. I agree with the Council that the costs of regulation, which the applicant contends is approximately \$120,000 per year if the DVP remains covered, are not such that, assuming the other coverage criteria were satisfied, it would be contrary to the public interest for the DVP to be covered.

In deciding whether pipeline coverage criterion (d) is satisfied in relation to the DVP, I have had regard to the national gas objective (set out above) by considering whether the maintenance of access, which inevitably involves some regulatory cost, is in the public interest and whether the benefits from regulated access outweigh the costs.

Therefore, I am satisfied that criterion (d) is satisfied in relation to the DVP.

Given that I am not satisfied that all of the pipeline coverage criteria are satisfied in relation to the DVP, in accordance with 107(2)(b) of the NGL, I must make a coverage revocation determination.

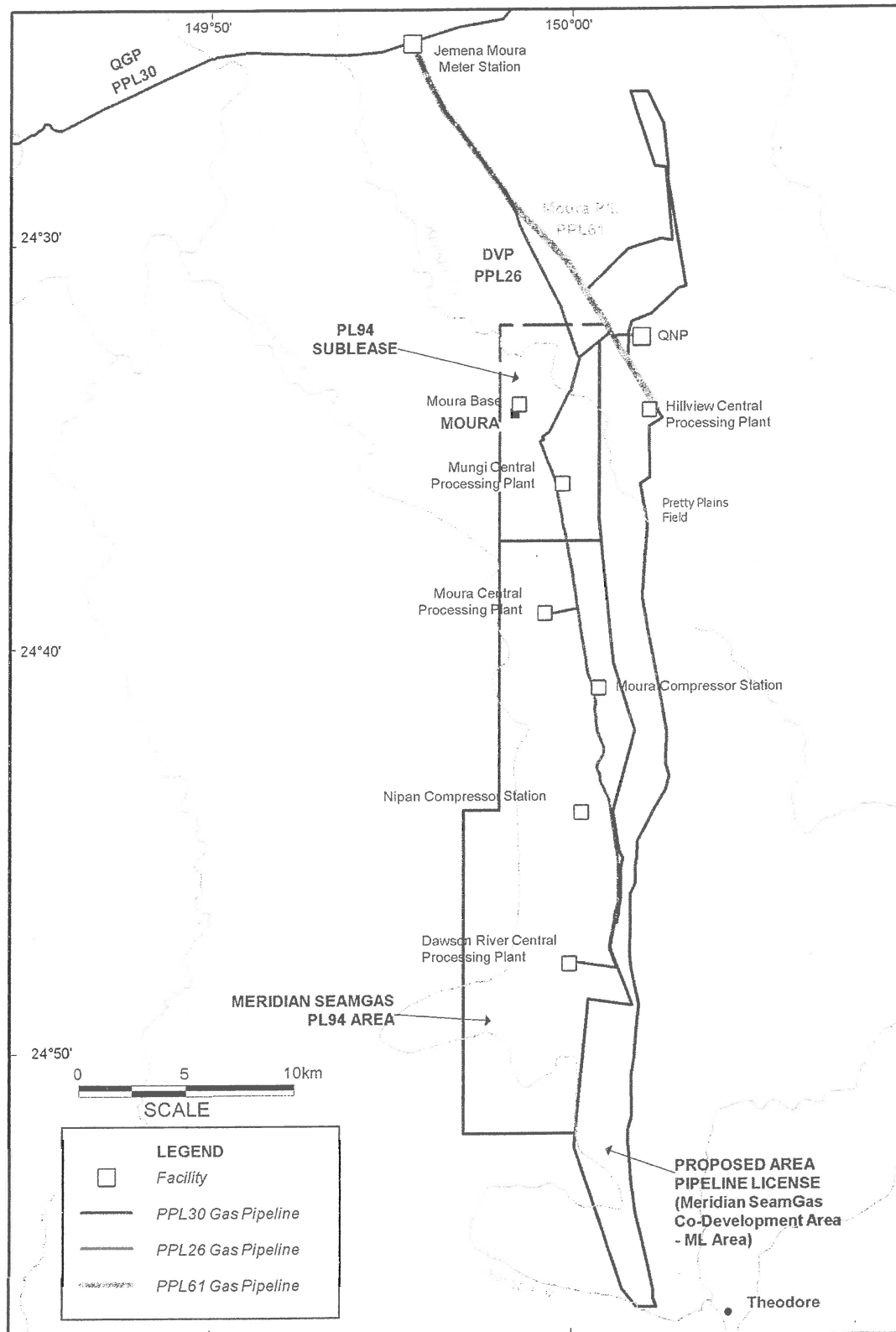
This determination takes effect from the date of this determination set out below.

A handwritten signature in dark ink, appearing to read 'Ian Macfarlane', written in a cursive style.

The Hon Ian Macfarlane MP
Minister for Industry

2 / 9 / 2014

Map 1: Dawson Valley Pipeline (red), Moura Pipeline (orange), PL24 and Co-Development Area



Source: Page 25 of the application from Westside Corporation Limited