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Attention Mr Luke Griffin

### **Authorisation for Boral Cement fly ash offtake agreement at Tarong Power Station**

I am writing on behalf of Independent Flyash Brokers (**IFB**) regarding Boral Cement Limited's (**Boral**) authorisation application (AA1000517) under the *Competition and Consumer Act 2010 (Cth)* (**CCA**).

IFB opposes Boral's application for authorisation.

#### **Submission**

IFB has reviewed Boral's authorisation application and accompanying submissions and considers that:

- 1 Boral misstates the facts. Boral is not a "new entrant" as it is simply replacing the previous operator at Tarong PS.
- 2 The benefits Boral claims arise from the proposed conduct are illusory, overstated or could be achieved by other means. The likely detriments are ignored.
- 3 A non-exclusive agreement or indeed a different Tarong PS operator would result in a vigorously more competitive outcome compared to the proposed conduct that is the subject of Boral's authorisation application. Without Boral at Tarong PS, an independent flyash supplier would eliminate the concerns about third party offtake and the economic incentives that arise when a vertically integrated firm controls an important input into a downstream competitive market (ie, concrete).
- 4 [Redacted].
- 5 Authorisation of a 10 year exclusive off-take arrangement at Tarong PS will ultimately result in a Queensland flyash duopoly resulting in higher concrete prices for end-consumers.
- 6 Stanwell's requirement for a "take or pay" and acceptance of Boral's 10 year exclusive term is driven by Stanwell's flyash disposal issues (ie, its ash dam is at capacity and the cost of mine void disposal is costly) and does not take into account the competition law considerations that arise from the combination of the two requirements.

These matters are discussed in detail in the following **Annexure**. IFB also notes and hereinafter responds to the matters identified in the ACCC's letter to interested parties dated 16 June 2020.

### **Confidentiality**

This letter and the Annexure contains information that is commercially sensitive to IFB. IFB requests that the Commission treat this information as being confidential, in accordance with its usual terms for handling confidential information and does not disclose this information to Boral or third parties.

IFB has separately provided a public version of this Letter and the Annexure with this information redacted for publication on the public register.

Yours faithfully

**On behalf of Independent Flyash Brokers Pty Ltd**



***Peter R Heffernan, Secretary***

## **A BORAL'S AUTHORISATION**

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- 1 Boral seeks authorisation from the ACCC for the exclusive right to take and purchase flyash from Tarong Power Station (**Tarong PS**) for 10 years. Boral's authorisation application is supported by a submission dated 3 June 2020 (**Submission**).
- 2 Facts that IFB considers relevant to Boral's authorisation application are as follows:
  - (a) Boral's application relates to the acquisition and supply flyash in the South East Queensland region (**SEQ**). The conduct should be assessed in light of its likely effect on competition for the supply of flyash and concrete in SEQ.
  - (b) Flyash is a replacement for cement. The replacement ratio is between 20%-35% depending on strength requirements.<sup>1</sup> There is no expectation that this ratio will increase.
  - (c) Demand for flyash is tied to construction. There is no reasonable expectation that existing demand for flyash will materially increase in the future. Rather, over the near term construction activity is expected to decline.
  - (d) The supply of flyash in SEQ significantly exceeds demand.
  - (e) New uses for flyash are frequently hyped. IFB is not aware of any new uses for flyash that would consume material volumes of flyash.
  - (f) It is not economic to transport flyash over long distances by road tanker.<sup>2</sup>
  - (g) In SEQ, at all relevant times between 2011-2021, three power stations have made flyash available for offtake: *Tarong PS* (variously, Pozzolanic, Coal Reuse and now Boral); *Tarong North* (Sunstate), and *Millmerran* (IFB).
  - (h) In respect of *Tarong PS*, between 2011 and 2014, Pozzolanic Enterprises Pty Ltd (a subsidiary of Cement Australia) had an exclusive arrangement to extract flyash from *Tarong PS*. In 2014 Cement Australia ceased off-taking flyash and removed its plant from site.<sup>3</sup> Between 2014-2020, Coal Reuse Pty Limited had the exclusive right to acquire Coal Combustion Products from Stanwell Corporation Limited (**Stanwell**) at *Tarong PS* although the company collapsed in 2016 without taking any appreciable quantities of flyash.<sup>4</sup>
  - (i) In the period 2021-2031, Boral has sought authorisation for the exclusive acquisition and supply of flyash from *Tarong PS*.
  - (j) While Cement Australia transports some flyash by rail from Central Queensland to SEQ, it does so primarily for its own consumption and can only do so because of its ownership of certain rail assets.

<sup>1</sup> Department of Transport and Main Roads, Technical Note 59, (Nov 2015) at p1. "Flyash replacements beyond 35% are problematical, high replacement levels of flyash lead to significantly lower rates of strength gain in the concrete and significantly increase the curing time required to achieve durable concrete".

<sup>2</sup> *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2013] FCA 909 at 22. "By reason of the geographic distances and transport costs involved, unprocessed flyash produced or supplied in places outside the SEQ region was not, in the period of the conduct in question, economically substitutable for unprocessed flyash produced or supplied in the SEQ region."

<sup>3</sup> See ACCC, "Determination: Application for authorisation lodged by Pozzolanic Enterprises Pty Ltd," 14 July 2011, Authorisation no: A91261.

<sup>4</sup> See ACCC, "Statement of Reasons in respect of an exclusive dealing notification lodged by Coal Reuse Pty Limited in relation to Coal Reuse acquiring Coal Combustion Products from Stanwell Corporation on condition that Stanwell will not, except to a limited extent under existing contracts, supply Coal Combustion Products to other parties," 26 November 2015, Notification no: N97609.

- (k) Boral has a 50/50 joint venture with Sunstate, yet Sunstate is competitor for the supply of flyash and cement in SEQ.
  - (l) Boral has a joint venture with Cement Australia in respect of Flyash Australia Pty Ltd (**Flyash Australia**) and acquires cement from Cement Australia, yet Cement Australia is a competitor for the supply of flyash and cement in SEQ.
- 3 The background to Stanwell's inclusion of a "take or pay" clause is that:
- (a) Stanwell disposes flyash in two locations: (i) as back-fill into the Meandu mine void; and (ii) into a purpose constructed ash dam.
  - (b) The cost of utilising the mine void is affected by the cost of operating the ash thickening plant, which requires use of a flocculent to separate the flyash and water (so as to enable re-use of the water). Utilising the ash dam is the cheaper option for Stanwell, but the dam is close to capacity and it is costly to prolong the life of the ash dam.
  - (c) Stanwell decided to incur the cost of installing an ash offtake facility in the with the objective of diverting flyash from the mine and ash dam and this it is submitted is overriding driver for the take or pay arrangement.

## **B BORAL MISSTATES THE FACTS**

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### **Boral misstates key facts relating to the benefits claimed to arise from authorisation.**

#### *New entrant*

- 4 Boral states it will "...become a *new entrant* into the market for the supply of fly ash".<sup>5</sup> Boral is not a new entrant. It is simply replacing the corporation that previously took flyash from Tarong PS. In that sense, Boral is maintaining the status quo of three SEQ power station suppliers as regards to flyash.
- 5 Even if Boral were to be characterised as a new entrant (which IFB does not accept), Boral's acquisition of an exclusive source of flyash in SEQ allows a vertically integrated supplier with close ties to two SEQ competitors to secure an important input, such that it will have an economic incentive to act in a way that benefits its own down-stream SEQ concrete business.
- 6 A true new entrant would be expected to vigorously compete with existing suppliers to win market share. Given Boral's existing concrete business and close ties to Cement Australia and Sunstate, Boral lacks the incentives that characterise a true "new" entrant.

#### *Demand*

- 7 Boral's says that its exclusive contract with Tarong PS will increase "*the supply of flyash within*" SEQ, "*enhancing competition in this market as well as downstream markets*"<sup>6</sup> and "*encourage ... greater offtake and use of fly ash*".<sup>7</sup>
- 8 Flyash produced by SEQ power stations significantly exceeds demand, and more flyash than is needed is already available to third parties in SEQ. Boral's operations at Tarong PS will do no more than transfer of the supply of flyash from one SEQ source to another SEQ source. This is not an increase in supply but a bare transfer.

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<sup>5</sup> Submission, p 3.

<sup>6</sup> Submission, p 3.

<sup>7</sup> Submission, p 4.

- 9 Demand for flyash is also capped by the 20-35% flyash/cement replacement ratio and closely tied to the construction industry. The replacement ratio is not expected to change and no new material demand for flyash is expected in SEQ over the coming years. Indeed, Boral's Annual Report for 2019 observed "*a marked decline in non-residential activity in Southeast Queensland (SEQ)*".<sup>8</sup> There is no factual basis for Boral's submission that authorisation will increase the supply of flyash in SEQ.

*On-supply to third parties*

- 10 Boral considers that "*a large portion of the fly ash it takes will be on-supplied to third parties*".<sup>9</sup>
- 11 Boral has 97 concrete facilities in Queensland.<sup>10</sup> Along with Cement Australia, Boral's footprint means that it is one of the largest users of flyash in SEQ. Third party independents which require flyash are generally much smaller concrete operators. It is difficult to see how relative to Boral's own flyash consumption, a "*large*" portion of flyash will be on-supplied to independent third party competitors in the concrete market (other than to Cement Australia [Redacted]).
- 12 Boral also says that it has a strong logistics fleet "*which will afford it a greater opportunity to sell Tarong PS fly ash both within SEQ and beyond*".<sup>11</sup> This raises two points.
- (a) The practical realities of transporting flyash were considered in detail by Greenwood J in the Cement Australia case, and his Honour concluded that:<sup>12</sup>
- "All of the other evidence in this case, relating to the logistics of transport and delivery, demonstrates that it was not practical or feasible on any sustained basis (other than for the purposes of interim holding over supply of flyash in urgent circumstances) to transport Gladstone ash or Central Queensland ash into SEQ for sale to Pozzolan's SEQ concrete customers ..."
- IFB considers that the economics of road transport limit the sale of Queensland produced flyash to the far North of NSW.
- (b) Within SEQ there is surplus third party tanker capacity at very competitive rates. The same transport outcome as that suggested by Boral can be achieved by a third party off-taker at Tarong PS using third party tankers, ie Boral's logistics fleet does not confer a unique flyash road transport advantage on Boral.
- 13 In IFB's long experience, transporting flyash interstate by road tanker reveals this is not economic. While flyash from Tarong PS will certainly be "available" this does not equate to supplying ash to third parties within or outside of SEQ.

*Reduce the quantity of flyash going to storage as a waste product*

- 14 Boral says that it will "*reduce the quantity of flyash going to storage as a waste product*".<sup>13</sup> This statement is manifestly false.
- 15 Flyash demand in SEQ is fixed and if Boral supplies flyash from Tarong PS to a customer, where that customer previously acquired flyash from another power station, all Boral has done is transfer the volume between power stations with the consequence that transferred flyash volume will now be dumped by the losing power station.

*Promote the use of flyash*

<sup>8</sup> Boral Limited 2019 Annual Report, p 14.

<sup>9</sup> Submission, p 3.

<sup>10</sup> Boral Limited 2019 Review, p 11 ([Link](#))

<sup>11</sup> Submission, 8.5 / p 19.

<sup>12</sup> *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2013] FCA 909At [3141]

<sup>13</sup> Submission, p 4.

16 Boral promises to “*further promote the use of flyash in the manufacture of concrete avoiding producing cement and the better use of waste products*”.<sup>14</sup> This statement appears unlikely for the following reasons:

(a) *Promote the use of flyash in concrete.* The Queensland Department of Main Roads notes that:<sup>15</sup>

“To ensure this minimum level of replacement is achieved it is recommended that suppliers aim for a 25% replacement level. This requirement has been in place since the mid 1990’s”

...

“Flyash replacements beyond 35% are problematical and high replacement levels of flyash lead to significantly lower rates of strength gain in the concrete and significantly increase the curing time required to achieve durable concrete.”

While Boral could “*promote*” higher flyash/cement replacement values, given the requirements of AS 3582.1 it does not appear credible to suggest concrete suppliers will suddenly use more flyash in their concrete.

(b) *Avoiding producing cement.* Boral’s 2019 Annual Report refers to cement revenue being up 7%, and higher external volumes.<sup>16</sup> While Boral’s Annual Report recognises the need reduce cement emission it says nothing about reducing its production or sale of cement.

(c) *Better use of waste products:* In 2011, Pozzolanic referred the ACCC to 13 new applications for flyash<sup>17</sup> and promised there would be environmental benefits from the reuse of flyash. The Coal Reuse Pty Limited exclusive dealing notification lodged with the ACCC also referred to new markets for coal combustion products (**CCPs**), news uses for CCPs and encouraging innovation.<sup>18</sup> The benefits Pozzolanic and Coal Reuse promised (and it would seem accepted by Stanwell), demonstrably did not materialise. Boral now makes the same promises.

17 In respect of Boral’s suggestion that it will grow the market through alternative uses of flyash, IFB considers there is no viable business case for alternative uses suggested, for the reasons set out in the table below.

Alternative use	IFB comment
Asphalt Filler	IFB had understood that no QLD flyash is suitable for use in asphalt due to performance issues
Roller Compacted Concrete	There is very little use in Queensland for this product. Moreover, flyash has always been readily available from existing sources within QLD, and this has not increased the limited demand for this product.
Flyash Bricks	IFB is not aware of any commercial application for this product. Indeed, this product is generally regarded as non-competitive with existing substitutes.
Construction Blocks	Flyash and bottom ash are already fully utilised in masonry block manufacture and IFB is not aware of any scope for a material increase in the demand for these blocks and therefore flyash.

<sup>14</sup> Submission, p 4.

<sup>15</sup> Department of Transport and Main Roads, Technical Note 59, (Nov 2015) at p 1 and 2.

<sup>16</sup> Boral’s Annual Report for 2019, p 16.

<sup>17</sup> ACCC, “*Determination: Application for authorisation lodged by Pozzolanic Enterprises Pty Ltd*,” 14 July 2011, Authorisation no: A91261 at 2.11

<sup>18</sup> See ACCC, “*Statement of Reasons in respect of an exclusive dealing notification lodged by Coal Reuse Pty Limited in relation to Coal Reuse acquiring Coal Combustion Products from Stanwell Corporation on condition that Stanwell will not, except to a limited extent under existing contracts, supply Coal Combustion Products to other parties*,” 26 November 2015, Notification no: N97609 at 2.5 and 2.9.

<b>Alternative use</b>	<b>IFB comment</b>
Lightweight Aggregate	Lightweight sintered flyash aggregates are not competitive against traditional quarry sourced aggregates and furthermore are more energy intensive to produce and not competitive in the Australian construction environment.
Soil Ameliorant	Agricultural trials have been undertaken over many years with ash from both Millmerran and Tarong PS. However, flyash has proven uneconomic due to the costs of transport and application and efficacy considerations.

**Boral misstates its rationale for the exclusive agreement.**

- 18 Boral asserts its rationale for entering into a long term exclusive with Stanwell are:<sup>19</sup>
- (a) *“.....a first step in building a flyash management and recycling business ..... that provides the opportunity for business growth”* and;
  - (b) *“ensure that it has a secure supply of classified ash for its own use”*.
- 19 In relation to (a), the flyash market is oversupplied (see paragraph 94 below) and there is no evidence of an opportunity for a material increase in the demand for the alternative uses of flyash (see paragraphs 16 and 17 above).
- 20 In relation to (b), this submission is disingenuous.
- (a) First, Boral asserts that it has “no direct access to flyash” but in its submission acknowledges that it has a 50% interest in Sunstate Cement. Arguably, Boral should have an economic incentive to source flyash from its own JV.
  - (b) Second, Boral has a flyash agreement with IFB, the details of which are confidential and market sensitive.<sup>20</sup>
  - (c) Third, the supply of flyash exceeds demand. Boral could, if it wished, secure flyash from an existing source without a 10 year exclusive agreement.
- 21 The rationale presented by Boral does not align with the facts.

**Boral misstates the effect of the “take or pay” sought by Stanwell.**

- 22 Stanwell, for reasons related to its flyash disposal costs and ash dam capacity issues, sought a take or pay from the ash off-taker at Tarong PS.
- 23 Boral submits that the take or pay will motivate it to supply to third parties and or develop markets for flyash. The latter submission is addressed above.
- 24 While IFB has not seen the terms of the relevant agreement, IFB considers that the take or pay gives rise to the following plausible scenarios.
- 25 [Redacted].
- 26 [Redacted].
- 27 [Redacted].
- 28 [Redacted].

<sup>19</sup> Submission, p 4.

<sup>20</sup> The relevant details can only be produced if compelled by law.



## C IMPACT ON COMPETITION

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**A non-exclusive arrangement or different bidder would result in vigorously more competition for the supply of flyash in SEQ compared to the proposed conduct that is the subject of the authorisation application.**

### *Principles*

- 29 Authorisation involves a forward-looking test comparing between the nature and extent of competition in the future with the acquisition and without the conduct in any market potentially affected by the authorisation.<sup>21</sup> This “*future with and without test*” involves appraising the future in which the conduct does take place in light of the alternative outcome, where the conduct does not take place.<sup>22</sup>
- 30 In performing the future with and without test, predictions about the nature and extent of competition in the future must be rooted firmly in past and present market conditions. As the Full Court recently observed “*Most markets have a history from which an assessment of substitution possibilities, concentration, barriers to entry and other commercial behaviours and conditions can be undertaken and reliable predictions about the future can be made.*”<sup>23</sup>

### *Relevant facts and observations*

- 31 In considering the likely counterfactual the following facts are relevant:
- (a) The market affected by authorisation is the market for the supply of flyash in SEQ.
  - (b) Stanwell issued an Expression of Interest (**EOI**) in May 2018 for installation of flyash offtake equipment at Tarong PS.
  - (c) Installation of flyash extraction equipment at Tarong PS is being funded by Stanwell.
  - (d) Stanwell’s EOI did not seek an “exclusive” off-take arrangement.
  - (e) With Stanwell funding the ash offtake equipment installation cost, as well as providing an operating and maintenance fee to Boral, the cost to for a party to operate and remove flyash from Tarong PS are low and the investment requirement is similarly low.
  - (f) Nucrush Pty Ltd (**Nucrush**)<sup>24</sup> and IFB responded to the EOI and each could viability and realistically operate an ash offtake facility at Tarong PS.
  - (g) Stanwell’s overriding incentive is to maximise flyash offtake from Tarong PS.
  - (h) Tarong PS is a source of high quality flyash.
  - (i) Tarong PS is located favourably to the Sunshine Coast, Fraser Coast and the north side of Brisbane.
- 32 IFB does not have exclusivity at Millmerran so theoretically the owners of Millmerran could approve another party to build and operate an offtake facility. Under the terms of its supply agreement it must be prepared to supply **any** customers with flyash. The owners of Millmerran PS at the time of entering into an offtake agreement with IFB, acting on legal

<sup>21</sup> *Australian Competition and Consumer Commission v Pacific National Pty Limited* [2020] FCAFC 77 at [216].

<sup>22</sup> See *Application for Authorisation of Acquisition of Macquarie Generation by AGL Energy Ltd* [2014] ACompT 1 (**Mac Gen**) at [169], *Application by Sea Swift Pty Ltd* [2016] ACompT9 (SeaSwift) at [44] and *Australian Competition and Consume Commission v Australian Competition Tribunal* [2017] FCAFC 150 at [56].

<sup>23</sup> *Australian Competition and Consumer Commission v Pacific National Pty Limited* [2020] FCAFC 77 at [218].

<sup>24</sup> NuCrush letter dated 6 July 2020 regarding Boral’s Authorisation.



advice were not prepared to offer exclusivity. IFB has subsequently invested in excess of \$17 million developing ash offtake infrastructure at Millmerran.

*Boral's counterfactuals*

- 33 Boral's suggests 3 alternatives to its 10 year exclusive agreement, each of which it discredits.<sup>25</sup> In respect of Boral's alternatives, IFB notes the following.
- 34 *No active offtaker from Tarong PS:*<sup>26</sup> This counterfactual is neither likely nor commercially realistic. At least two well-resourced and independent firms with SEQ flyash and concrete expertise responded to the EOI. Absent Boral, another industry participant would operate the Tarong PS off-take facility. Stanwell is funding the capital costs of the offtake equipment and with those costs absorbed by Stanwell it is highly foreseeable, credible and commercially realistic that another firm would operate the offtake facility at Tarong PS and most likely on a non-exclusive basis.
- 35 *Alternative bidder but less qualified than Boral:*<sup>27</sup> IFB has operated a classifier at Millmerran since 2008. IFB is no less qualified than Boral to install and then operate a flyash offtake facility. Indeed, considering IFB's long presence in SEQ, IFB is more qualified than Boral. IFB is an independent operator, not vertically integrated and therefore incentivised to supply any firm seeking to acquire flyash.
- 36 *Stanwell constructs and operates a facility:*<sup>28</sup> Boral accepts that Stanwell could itself construct the flyash offtake facility and then enter into one or more offtake agreements. Boral however considers this inconsistent with Stanwell's EOI. In IFB's view, an equally likely and commercially realistic scenario is that Stanwell contracts with a third party (which could be Boral) to install the offtake facility but then enters into one or more offtake agreements with various parties. In fact, considering Stanwell's incentives to remove as much flyash as possible, this is the more likely scenario.

*With Authorisation*

- 37 Boral is a vertically integrated business with clinker, cement, flyash and concrete operations. It also has contractual agreements and joint venture interests with its competitors in SEQ.
- 38 With exclusivity Boral will have:
- (a) a contractual right to discriminate against competitors; and
  - (b) an incentive to price discriminate against some customers by supplying flyash at higher prices than it supplies itself (or those parties which is closely aligned to). Doing so will impact competitors' downstream concrete prices and therefore their ability to compete with Boral in the far more lucrative market for the supply of concrete in SEQ.
- 39 Boral's response to the downstream discrimination risk is to suggest that certain of the terms in its agreement with Stanwell constrain Boral's ability to discriminate on price or terms against third parties with which it competes in the downstream concrete market.<sup>29</sup> In relation to this submission:
- (a) Absent exclusivity, the risk of discrimination does not arise and therefore this is a benefit that can be realised without the conduct Boral seeks to authorise.

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<sup>25</sup> Submission at 7.2 / p 15.

<sup>26</sup> Submission at 7.2 / p 15.

<sup>27</sup> Submission at 7.2 / p 15.

<sup>28</sup> Submission at 7.2 / p 15 and 16.

<sup>29</sup> Submissions at 8.4 / p 18.

(b) The very fact that the Boral/Stanwell agreement contains such terms is itself evidence that there is a real risk of price discrimination by Boral. At least one well-advised commercial party included such terms because they perceived this was a material risk that needed to be addressed.

(c) The prophylactic value of such contractual terms is itself questionable. Perram J recently observed in the context of commercial terms in an undertaking that:<sup>30</sup>

A profit maximising firm has strong incentives to locate and exploit any weaknesses it can discern in the text or practical operation of a behavioural undertaking. The question for the Court in assessing whether to accept such an undertaking will be whether it can be confident that the firm in question will fail to locate these weaknesses, despite its incentives to do so. It is a mistake in approaching that question to think that the only difficulties are those which the Commission has been able to formulate in the course of a hearing. The real problem lies not in those difficulties which are brought to light during the trial but rather in those which have not been foreseen by anyone and which become apparent only much later.

Boral will read any such agreement in the manner most favourable to its own commercial and economic interests.

(d) Boral's submissions also fail to identify whether and how any such obligations will be monitored, reviewed and enforced.

40 A potential acquirer of flyash from Tarong PS would likely be deterred by the perception that Boral would have the ability and incentive to discriminate against it given Boral is also their direct and fierce competitor in the downstream concrete market.

41 Boral also submits that the Stanwell take or pay creates an incentive to on-sell flyash to third parties. For the reasons set out at paragraphs 24 to 28 above, IFB considers that the take or pay is more likely to harm, not promote, competition for the supply of flyash, including because in the long run, Boral through its control or direct visibility over the supply of all SEQ flyash will be incentivised to maximise its profits and protect its downstream position in the supply of concrete.

42 In IFB's view, the assessment of the effect on competition of an exclusive Boral / Stanwell offtake agreement with a take or pay should also take into account that:

(a) Independents will be excluded from directly sourcing high quality flyash from Tarong PS.

(b) [Redacted].

43 Authorisation will not create the economic incentives needed to promote competition in the market for the supply of flyash (i for the reasons set out at paragraphs 24 to 28 above).

#### *Without Authorisation*

44 The realistic and commercially likely alternative is that Boral constructs the ash offtake facility and does not have an exclusive agreement with Stanwell. Ie, ash offtake at Tarong PS is on a non-exclusive basis. In that scenario, third parties would have the ability and incentive to take and supply Tarong PS flyash.

45 Without authorisation but an offtake facility installed at Tarong PS:

(a) No offtake operator at Tarong PS would have the ability to discriminate against any other acquirer of flyash.

<sup>30</sup> *Australian Competition and Consumer Commission v Pacific National Pty Limited* [2020] FCAFC 77 at [437].

- (b) Given the quality and proximity of Tarong PS flyash, each supplier would have an incentive to compete vigorously to supply flyash knowing that if they were not competitive another supplier with exactly the same flyash would be.
- (c) Stanwell's objective of maximising flyash offtake from Tarong PS is achieved because the right economic incentives will exist across all potential off-takers.
- (d) Stanwell's off-take agreement would not include a take or pay clause. Stanwell's own submission to the Commission, in response to the Commission's question about the likely counterfactual, is that absent the Boral agreement it would re-engage "*with the market to identify an appropriate counterparty to operate and maintain the offtake facility on terms which provide Stanwell a return on its investment*".<sup>31</sup> Stanwell, does not say that the counterfactual would include exclusivity **or** a take or pay clause.
- (e) A more vigorously competitive market structure will result. Ensuring that independents, who unlike Boral are not vertically integrated or aligned with other competitors, have access to a high quality source of flyash proximate to certain regions in SEQ will enhance competition in both the supply of flyash and in the downstream market for the supply of concrete within SEQ.

#### Conclusions

- 46 In IFB's view, the commercially realistic alternative to authorisation is that flyash offtake at Tarong PS is non-exclusive and/or non-exclusive but with a different off-take operator.
- 47 The difference between the conduct sought to be authorised by Boral's authorisation and a world without that conduct is significant as the latter future state will be vigorously more competitive than with Boral's authorised conduct. Boral's conduct is likely to have the effect of substantially lessening competition in the relevant market.

## **D BORAL'S APPLICATION FAILS TO SATISFY THE REQUIREMENTS OF THE CCA**

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**The benefits Boral says arise from authorisation are either illusory, will not materialise or can be achieved without the authorisation.**

#### Principles

- 48 Section 88 of the CCA provides that the ACCC may grant authorisation to permit a person to engage in certain conduct despite the conduct being subject to one or more provisions of Part IV.
- 49 Section 90(7) provides:
  - (a) that the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition (s90(7)(a)); or
  - (b) that the ACCC must not make a determination granting an authorisation unless satisfied in all the circumstances that the conduct would result, or be likely to result, in a benefit to the public and the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct (s90(7)(a)).
- 50 In relation to requirement for a "benefit to the public":

<sup>31</sup> Stanwell submission to the Commission dated 16 July 2020, at paragraph 4.3.

- (a) This is “anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress”.<sup>32</sup>
- (b) A public benefit only arises if the benefit would not exist without the relevant conduct acquisition or if the conduct removes or mitigates a public detriment which would otherwise exist.<sup>33</sup>
- (c) If a claimed public benefit exists, in part, in a future without the proposal, the weight accorded to the benefit may be reduced appropriately.<sup>34</sup>
- (d) A benefit must also not involve a mere transfer. For example, an increase in a supplier’s revenue is not a public benefit. The “underlying source” of an increase in revenue may be an increase in consumer welfare, eg an improvement in the quality of a product. But, the change in the supplier’s revenue itself is no more than a transfer of welfare from one part of the Australian public to another.<sup>35</sup>

51 In relation to the requirement to consider any “detriment to the public”:

- (a) This includes a reduction in competition as well as other matters contrary to the goals pursued by society, including the goal of economic efficiency. While the notion of detriment is wider than anti-competitive effect, given the policy of the Act, the most important of potential detriments will normally be anti-competitive effects.<sup>36</sup>
- (b) The concept of “*competition*” was described by the Tribunal in QCMA as follows:<sup>37</sup>  

..., whether firms compete is very much a matter of the structure of the markets in which they operate. The elements of market structure which we would stress as needing to be scanned in any case are these:

  - (1) the number and size distribution of independent sellers, especially the degree of market concentration;
  - (2) the height of barriers to entry, that is the ease with which new firms may enter and secure a viable market;
  - (3) the extent to which the products of the industry are characterised by extreme product differentiation and sales promotion;
  - (4) the character of “vertical relationships” with customers and with suppliers and the extent of vertical integration; and
  - (5) the nature of any formal, stable and fundamental arrangements between firms which restrict their ability to function as independent entities.

52 In the last couple of years it has been reaffirmed by the Competition Tribunal that there must be a real chance, and not a mere possibility, of the benefit or detriment eventuating. The Tribunal has emphasised that ephemeral or illusory benefits or detriments should not be given any weight. Nor should benefits or detriments that are purely speculative.<sup>38</sup>

53 The “public” for the purposes of section 90(7)(b) is the Australian public and while benefits and detriments not widely shared may nevertheless be treated as being a benefit and/or

<sup>32</sup> *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481 (QCMA) at 510; Mac Gen at [161] and SeaSwift at [42].

<sup>33</sup> SeaSwift at [42].

<sup>34</sup> SeaSwift at [42].

<sup>35</sup> Tabcorp 2 at [230], referring to and adopting Tabcorp 1 at [482], [483], [486].

<sup>36</sup> QCMA at 509.

<sup>37</sup> QCMA at 512.

<sup>38</sup> See SeaSwift at [45-46]; Mac Gen at [164].

detriment to the public the more limited the section of the community that receives a benefit or detriment, the less weight it should receive.<sup>39</sup>

- 54 The ACCC in authorising conduct, like the Tribunal in a review application, must make a robust and commercially realistic judgment of the claimed public benefits and public detriments.<sup>40</sup>

#### *Benefits*

- 55 Taking into account the facts at paragraph 2 and the factual inaccuracies discussed in Section B, IFB considers that the claimed benefits are illusory, speculative or achievable without authorisation.
- 56 *Boral claims that less flyash will be dumped:* Absent a step-change in SEQ demand for flyash, with and without the Boral contract the demand profile for flyash is the same and the only difference is the location of the flyash offtake as between Tarong PS, Tarong North and Millmerran. If Tarong PS supplies more flyash, Millmerran will dump more flyash.<sup>41</sup>
- 57 *Boral claims authorisation will promote further use of flyash in place of cement:* IFB is not aware of any change to AS 3582.1-that would promote a real increase in the use of flyash in place of cement.
- 58 *Boral says authorisation will encourage investment in and greater offtake and use of flyash:* Over the past 9-10 years no new significant use for flyash has emerged sufficient to require a material increase in the off-take of flyash from power stations.<sup>42</sup> Boral has also failed to confirm whether it will itself invest capital (and if so the quantum) in new flyash applications and research.
- 59 Another way of describing Boral's entry is to consider the situation as being a 'nil sum' game whereby flyash volume transfers from one supplier in a market of relatively fixed demand for flyash in SE Qld. Despite Boral's suggestions, there is no additional demand for flyash about to materialise as a result of Boral entering the market. The research for new uses for and extensions to existing flyash applications has been ongoing for many years through various institutions including the CRC for Low Carbon Living (from 2012 to 2019) and The Ash Development Association of Australia (since 1991). This research will continue, but there have been no breakthrough findings which have significantly added to flyash consumption. 'Green' (low carbon) concrete using a greater proportion of flyash and less cement has been experimented with for many years. Boral markets the concrete product 'Envisia' based on these principles and the Wagner group in Queensland has commercialised a geopolymner product 'Earth Friendly Concrete' that is completely devoid of any cement. The added cost of these products is the main inhibitor to wider uptake.
- 60 Based on its experience and expertise in flyash, IFB does not believe that there is a commercially realistic basis for many of the benefits claimed by Boral.
- 61 Authorisation allowing Boral to exclusively supply flyash from Tarong PS involves a bare transfer. It is a bare transfer of flyash volumes from one power station to another and it is also a bare transfer of revenue from one supplier to another.

<sup>39</sup> *Qantas Airways Limited* [2004] ACompT 9 at [185] (**Qantas**); *Mac Gen* at [168]; *SeaSwift* at [42].

<sup>40</sup> *Mac Gen* at [172]; cf *Re Qantas* at [206]-[210]

<sup>41</sup> Submission at 9.1 / p 20.

<sup>42</sup> Submission at 9.1 / p 20.

*Benefits can otherwise be achieved*

- 62 Even if the ACCC were to accept some of Boral's claimed benefits, these benefits can be achieved without authorisation. Ie, a non-exclusive offtake agreement will realise the same benefits.
- 63 For example, Boral claims as a benefit the "*increased availability and security of fly ash to third parties*".<sup>43</sup> This benefit can equally and just as easily be achieved without an exclusive contract. For example, if Boral's contract was non-exclusive such that any third party could use the off-take equipment that Stanwell is paying to install to remove flyash, this would result in the "*increased availability and security of fly ash to third parties*". Authorisation is not needed to increase the availability of flyash.
- 64 Boral relies on environmental benefits of reduced carbon emission in the use of flyash in the production of cement.<sup>44</sup> The same benefits are not unique or contingent on Boral having exclusivity at Tarong PS and will arise if the agreement is non-exclusive or another party is present as an off-take operator at Tarong PS.

*Detriments*

- 65 The entry of Boral as a supplier is not in itself anti-competitive however when that entry is structured as a 'take or pay' contract for supply by Stanwell abetted by an exclusivity arrangement (one cannot exist without the other) and when one takes into account Boral's existing commercial relationships with key industry participants, IFB considers that authorisation gives rise to a number of detriments, which Boral omits from its Submission.
- 66 First, in a world without exclusivity, it is commercially plausible and likely that an independent operator would establish itself at Tarong PS and/or remove flyash from Tarong PS (see Section E below).
- 67 Secondly, authorisation will raise barriers to entry. The height of barriers to entry is vital to competition in an industry.<sup>45</sup> Boral seeks a contract for 10 years. Tarong PS is scheduled to close in around 2035-36. Authorisation will foreclose the potential for entry until 2030. Thereafter, given the short period for the power station's remaining operation it does not seem commercially realistic that an entrant would enter the market for the supply of flyash in SEQ knowing it only had 4 years (or less) at Tarong PS. Authorisation completely raises the barriers to any new or future entrant via the Tarong PS.
- 68 [Redacted].
- 69 Fourthly, contrary to Boral's submission that it is an "entrant" promoting a competitive market structure, authorisation will result in a market structure that includes two large vertically integrated suppliers (Boral and Cement Australia) who have commercial ties outside of SEQ.
- 70 A 10 year exclusive contract for the supply of flyash from Tarong PS is not detriment free.

*Summary*

- 71 In IFB's view, taking a robust and commercially realistic view of the claimed benefits will show that they are illusory or will not be substantial. On that basis, Boral's application does not result in a net public benefit and does not satisfy section 90(7)(b) of the CCA.

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<sup>43</sup> Submission at 9.2 / p 21.

<sup>44</sup> Submissions at 9.3 / p 20.

<sup>45</sup> QCMA at 510; Mac Gen at [161] and SeaSwift at [42].



**E ENHANCED PROSPECTS FOR ANTICOMPETITIVE COORDINATED EFFECTS**

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**Authorisation will result in two vertically integrated flyash suppliers in SEQ increasing the likelihood of coordinated effects.**

*Principles*

- 72 Authorisation will impact the structure of the market in such a way that firms that previously did not coordinate their behaviour, are now significantly more likely to coordinate and raise prices or otherwise harm effective competition.
- 73 The ACCC's Merger Guidelines provide:<sup>46</sup>
- “Interdependence arises when a market is characterised by a small number of firms (an oligopoly or a duopoly), with each firm anticipating the response of the other firms and devising their commercial strategies accordingly. ... the repeated nature of the competitive interaction can result in a range of coordinated conduct, from muted competition through to tacit or explicit agreement between firms not to compete. Although firms may have the ability to engage in effective competition, they may not have the incentive if they recognise that any short-term benefits from competing will likely be eroded by lost sales once other firms respond.”
- 74 One of the ways that coordinated effects concern arise is when industry conditions change in a way which makes coordination between firms much more likely. Coordination need not involve explicit agreements or communication. Rather, the question is whether industry participants could achieve a degree of symmetry of incentives to mute competition between them.
- 75 The market conditions accepted as being conducive to coordination include the following:<sup>47</sup>
- (a) the number of firms in a market, since it is easier to coordinate among a few players than among many;
  - (b) the existence of frequent and regular orders, which make it easier to coordinate and to detect deviations from the terms of coordination;
  - (c) the homogeneity of the products, since it is easier to coordinate on terms such as price when competing products are substantially the same;
  - (d) the homogeneity of the firms, especially in terms of symmetry of market shares,
  - (e) the similarity of cost structures, levels of vertical integration, and the impact that such homogeneity may have on their ability or incentives to coordinate;
  - (f) the degree of transparency of important information that could provide a focal point for coordination, such as information concerning prices, output, capacity, customers; served, territories served, discounts, new product introductions, etc;
  - (g) cross-shareholdings and other links that may make it easier for competitors to exchange information on terms of coordination, and may reduce their incentives to compete; and,
  - (h) other market conditions: for instance, it is easier to coordinate on price when demand and supply conditions are relatively stable than when they are frequently changing; and
  - (i) The presence of the same firms in several markets is a further factor that can be relevant to this analysis.

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<sup>46</sup> ACCC, Merger Guidelines, (2008) at 6.3.

<sup>47</sup> ICN Recommended Practice for Merger Analysis, at 9 24.



- 76 In undertaking a coordinated effects analysis, the extent to which existing competitive constraints and other factors would likely deter or disrupt effective coordination are relevant. For example, the ability of a new firm to enter the market is key consideration.

*Relevant background facts*

- 77 IFB considers that authorisation will raise the risk of coordinated effects between Boral, Cement Australia and potentially Sunstate.

Cement Australia

- 78 Cement Australia has a flyash offtake agreement with the Callide and Gladstone power stations in Central Queensland.

- 79 It also has cement production facilities located throughout Australia, notably in CQ (Gladstone), SEQ (Brisbane) and NSW (Wollongong) and supplies cement to the construction industry in SEQ.

- 80 Cement Australia covers its flyash demand in SEQ by railing ISOs of ash from their Gladstone plant to Brisbane and by purchasing flyash from IFB (a material quantity and proportion of IFB's volume sold). While Cement Australia freights flyash into SEQ, very small and limited quantities of flyash are sold outside of their shareholders Hanson and Holcim.

- 81 Cement Australia is one of the largest consumers of flyash in SEQ. While IFB is a supplier of flyash to Cement Australia the remainder is self-sourced from its Gladstone and Callide plants.

- 82 Cement Australia is also one of the largest suppliers of cement, and related construction materials in Australia.

Boral

- 83 With authorisation Boral will have an exclusive flyash offtake right at Tarong PS in SEQ.

- 84 Boral owns cement production facilities throughout Australia, notably in NSW (Newcastle, Sydney and Wollongong) and supplies concrete to the construction industry in SEQ.

- 85 Boral is one of the largest suppliers of building construction materials in Australia.

Boral and Cement Australia contractual and joint venture ties

- 86 The Australian cement industry is characterised by various participants being both suppliers and competitors to each other. Boral and Cement Australia are 50/50 joint venture partners in Flyash Australia. Flyash Australia has operations in NSW at Eraring, Bayswater, and Mt Piper power stations as well as SA and WA.

- 87 Cement Australia also supplies cement to Boral's plants in the North of Queensland and in SEQ. In October 2019, Boral entered a cement supply agreement with Cement Australia in respect of SEQ, reducing the amount of cement acquired from Sunstate Cement (its own cement joint venture with Adelaide Brighton).<sup>48</sup> Cement Australia will accordingly supply Boral with a substantial portion of its demand for cement.

- 88 [Redacted]

<sup>48</sup> See <https://www.afr.com/companies/infrastructure/boral-wins-against-wagners-on-cement-deal-20200604-p54zf0>

*Application*

89 In terms of the market conditions that facilitate coordinated effects noted in paragraph 75 above, IFB notes the following:

<i>The number of firms in the SEQ market</i>	<p>With authorisation, there will be three flyash suppliers located in SEQ. Boral, Sunstate, and IFB. Boral has a 50/50 JV interest in Sunstate. Two of the three SEQ flyash suppliers have a shared commercial interest.</p> <p>In respect of Cement Australia, it brings flyash to SEQ primarily for its own consumption and otherwise has a 50/50 JV interest with Boral in Flyash Australia. Boral and Cement Australia have or will have supply agreements with each other. [Redacted].</p> <p>Three of the four industry participants in QLD are involved in a joint venture and/or have supply contracts with each other.</p>
<i>Frequent and regular orders, which make it easier to coordinate</i>	[Redacted].
<i>The homogeneity of the products</i>	Flyash, cement and concrete are largely homogenous products with some variation for specialised products.
<i>The homogeneity of the firms</i>	Boral and Cement Australia are largely homogenous, both are vertically integrated firms owning upstream inputs (eg flyash) and downstream manufacturing facilities (eg, cement facilities). Each also own concrete plants (Cement Australia via it's shareholders Hanson & Holcim, Boral via Boral Construction Materials)
<i>The degree of transparency of important information</i>	[Redacted].
<i>Cross-shareholdings and other links</i>	Boral and Cement Australia have a shared joint venture (Flyash Australia) and other contractual links.
<i>The presence of the same firms in several markets.</i>	Boral and Cement Australia are present in the same product and geographic markets. For example, both have cement plants in NSW will supply concrete in NSW and SEQ.
<i>Likelihood of disruption, eg new entry</i>	Tarong PS is scheduled to close in 2036-37. Boral's exclusive agreement will take it through to around 2030, with little or no prospect that a "new entrant" will seek to enter the market via a power station that only has 4-5 years remaining.

90 The SEQ flyash market is already plausibly conducive to coordination, ie Boral's interest in Sunstate and its 2019 cement supply agreement with Cement Australia. Authorisation will [Redacted] make coordination more likely, stable, or complete.

91 [Redacted].

**F SPECIFIC ISSUES IDENTIFIED IN THE COMMISSION'S LETTER DATED 16 JUNE 2020**

92 IFB generally agrees with the information provided by Declan Mackle of NuCrush in their submission to the Commission dated 6 July 2020, subject to the following comments:<sup>49</sup>

**Question 1:** *Is a 10 year Term of Authorisation necessary to support Boral's investment and what impact is a 10 year term likely to have on ability of market participants to obtain access to flyash?*

93 IFB understands that Stanwell has funded the construction of the Tarong offtake facility. Boral has not invested such sums as would require or justify a long term exclusive contract. By comparison IFB, funded by its shareholders, invested around \$17.2 million on its offtake and classification facility at Millmerran. IFB was however refused exclusivity in its ash supply contract with Millmerran PS due to competition law concerns.

**Question 2:** *For each power station in Queensland including Tarong, Tarong North, Millmerran, Kogan Creek, Stanwell in Rockhampton, Callide A, B, and C, and Gladstone: (a): How much fly ash is currently produced per year?*

94 NuCrush, in its submission, set out a table detailing RoS (run of station) flyash production and flyash utilisation per annum. IFB considers that the following table more accurately represents Queensland flyash production and utilisation and shows the oversupply of flyash.

Power Station	ROS Flyash produced (tonnes pa)	Tonnes Utilised	Marketer	Process Equipment
Tarong	750,000	0	N/A	Nil
Tarong North	350,000	140,000	Stanwell Corp – Major Customer Sunstate Cement	Nil
Millmerran	1,170,000	260,000	IFB	2 x Metso (Buell) C102 Classifiers
Stanwell CQ	440,000	Not known	Stanwell Corp – Major Customer Cement Australia	Nil
Kogan Creek	561,000	0	N/A	Nil – not suitable for concrete & distance from market is uneconomic
Gladstone	700,000	400,000	Cement Australia	1 x Buell C72 Classifier bypassed as all ash is cement grade from the plant
Callide B & C	1,100,000	170,000	Cement Australia	1 x Metso (Buell) C102 Classifier
<b>TOTAL</b>	<b>5,071,000</b>	<b>970,000</b>		

95 Two key differences between the Nucrush statistics and those presented above, which understate the available flyash in SEQ, are that:

- (a) Millmerran production at 1.17 million tpa is more than double the NuCrush figure of 500,000 tpa; and
- (b) Gladstone and Callide B & C are estimated to produce 1.8 million tpa compared to the NuCrush estimate of 1 million tpa.

**Question 3:** *Details of each supplier of fly ash to end users in Queensland and/or other east coast locations, what processing of fly ash they do, what type/grade of fly ash do they supply to end users, how much do they supply per year, and to which end users is the fly ash supplied.?*

96 The following table reflects IFB's understanding of the end users of flyash.

<sup>49</sup> Responding to the Commission's letter to interested parties dated 16 June 2020.

Flyash User	Power Station / Supplier
Millmerran JV Partners Wagners, Neilsens, Cordwells, Sunmix	Millmerran
Boral	Millmerran/Tarong North via Sunstate, 50/50
Cement Australia (Hanson & Holcim)	Millmerran/Cement Australia CQ Ash, 40/60
Hy-Tec	Millmerran
Nucon	Millmerran
Boodles	Millmerran
Zanows	Cement Australia CQ Ash
Grahams (Northern NSW)	Not a flyash user (use cement blend supplied by Cement Supplier)
Brims	Millmerran
Mansell	Millmerran/CS Callide ROS, 40/60
Austmix	Cement Australia CQ Ash
Corbets	Cement Australia CQ Ash
National Masonry	Tarong North via Zanows
Cleanaway	Tarong North via Sunstate

**G COMMENTS ON STANWELL'S SUBMISSION DATED 14 JULY 2020**

- 97 IFB notes that the extent of redactions in the Stanwell submission make it difficult for IFB to provide an objective response to key sections of their submission, in particular in relation to the counterfactual.
- 98 Stanwell's submission does however suggests that it is viable for flyash produced in Queensland to be economically transported to Southern States.<sup>50</sup> This broad statement is factually incorrect. Excluding a minimal supply to users in the far Northern part of NSW, the only Queensland produced flyash shipped to Southern States is via Cement Australia's Fisherman's Landing facility in Gladstone and this is only possible due to cement Australia's ownership of receival facilities in Southern States and its access to guaranteed markets through Cement Australia's shareholders. The same facilities do not exist at Tarong PS and transporting flyash over such distance is not economic.

<sup>50</sup> Stanwell submission dated 14 July 2020, at [7.2]