

20 May 2011

WATERFRONT PLACE 1 EAGLE STREET BRISBANE
PO BOX 7844 WATERFRONT PLACE BRISBANE QLD 4001 AUSTRALIA
DX 102 BRISBANE www.minterellison.com
TELEPHONE +61 7 3119 6000 FACSIMILE +61 7 3119 1000

BY EMAIL: jasmine.tan@accc.gov.au

Ms Jasmine Tan
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

Dear Ms Tan

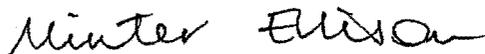
**Supplementary Submission
Pozzolanic Enterprises Pty Ltd's Application for Authorisation A91261**

We **enclose** Tarong Energy's supplementary submission following the pre-decision conference in relation to the Draft Determination made in respect of Pozzolanic Enterprises Pty Ltd's Application for Authorisation A91261.

On behalf of Tarong Energy, we request that paragraph 17 and the Annexure to the enclosed submission be excluded from the ACCC's public register. The Annexure identifies parties who are engaged in discussions with Tarong Energy in relation to the acquisition of ash from Tarong and/or Tarong North Power Stations. This information is confidential to Tarong Energy and the relevant party.

If you have any questions, please do not hesitate to contact me.

Yours faithfully
MINTER ELLISON



Contact: Kathryn Finlayson Direct phone: +61 7 3119 6380 Direct fax: +61 7 3119 1380
Email: Kathryn.finlayson@minterellison.com
Partner responsible: Justin Oliver
Our reference: KEXF JPO 40-5652962

enclosure

MINTER ELLISON GROUP AND ASSOCIATED OFFICES
ADELAIDE AUCKLAND BRISBANE CANBERRA DARWIN GOLD COAST HONG KONG
LONDON MELBOURNE PERTH SHANGHAI SYDNEY WELLINGTON

SUPPLEMENTARY SUBMISSIONS ON BEHALF OF TARONG ENERGY

1. On 17 May 2011, the Commission and TEC met to discuss matters arising from the pre-decision conference on 12 May. Following that meeting, the Commission requested TEC to provide supplementary submissions addressing a number of matters which the Commission identified as raising concerns or requiring clarification. These are TEC's supplementary submissions.

Operation of clause 4

2. Pozzolanica's rights under the Agreement are expressed as a right to take any and all fly ash it obtains from the Ash Transfer Points and removes from site.¹ The Ash Transfer Points are the connection points to certain passes and zones at Tarong Power Station and the connection points to the baghouse filter hoppers at Tarong North Power Station.
3. Pozzolanica's right is expressed as a right to take ash because of the nature of the product. Fly ash is a by-product produced when the power stations burn coal to generate electricity, TEC's primary business. TEC expressly does not guarantee the quantity or quality of any fly ash produced by the power stations.² For these reasons, take or pay contracts for particular volumes of ash are not appropriate.
4. While the literal words of clause 4 might be read as entitling Pozzolanica to purchase all ash produced at Tarong North, in practice, Pozzolanica's business model and the operations at the Tarong site are such that Pozzolanica does not in fact purchase all ash produced at Tarong North.
5. Pozzolanica has stated that, in practice, under normal operating conditions, at least 40 per cent of the ash produced at Tarong North Power Station is available at the Tarong North ash silo for purchase by third parties.³ This is consistent with TEC's understanding.

The Agreement facilitates third party access

6. The Agreement facilitates third party access in three ways.
7. First, Pozzolanica only has firm access at Tarong Power Station to connection points in certain passes and zones, namely passes 1A, 1B, 2A, 2B, 3A, 3B, 4A and 4B at zones 1-3. In the absence of third party interest, Pozzolanica has temporary access to connection points at pass 4A at zones 1-4 and passes 1A, 1B, 2A, 2B, 3A, 3B and 4B at zone 4. These connection points can be made available to third parties on 30 days' notice. Further, third parties may also acquire ash from pass 4B at zones 1-4 (subject to Nuash exercising its Option) and from zones 5 and 6.⁴

¹ Agreement, clause 4.1.

² Agreement, clause 11.

³ Attachment A to Pozzolanica's letter of 1 March 2011, pp 7-8; Pozzolanica's response to the Draft Determination, May 2011, p5.

⁴ TEC's submission in response to the Draft Determination, May 2011, pp4-5.

8. Second, TEC retains the right to sell to third parties any ash not taken from the Ash Transfer Points under the Agreement and purchased by Pozzolanica.⁵
9. Third, in the event that Pozzolanica takes less than 50% of the total amount of fly ash available from the Ash Transfer Points for three consecutive months and cannot demonstrate to TEC's satisfaction that it intends to acquire at least 50% of the total amount of fly ash available for the following three months, at TEC's request, Pozzolanica must use reasonable endeavours to permit third parties to access the Ash Transfer Points to remove ash. Subject to its own requirements and payment of a reasonable fee, Pozzolanica must facilitate the sale of that ash including by classifying the ash at its plant and loading ash into trucks for the third party.⁶

Tarong Energy has a history of conducting open, public competitive tenders for the sale of fly ash

10. TE1159, the tender which resulted in the Agreement, was the second of three successive open, public competitive tenders for the sale of fly ash which TEC has conducted since corporatisation in 1997. The first tender, EOI TE363/01, was issued in August 2001 for contracts for the period 2002 – 2005. The second tender, EOI TE1159, was issued in May 2006 for contracts for the periods 2007 – 2008, 2008 – 2010 and 2010 – 2013. The third tender, EOI TE1973, was issued in June 2010 for contracts for the period 2011 – 2013.⁷
11. Upon corporatisation in 1997, TEC inherited a long term fly ash contract with Pozzolanica. Upon expiry of that contract on 31 August 2001, TEC and Pozzolanica entered into a further one year contract to facilitate the continued sale of fly ash while TEC conducted a public, open competitive tender for the ongoing sale of ash. Following a detailed review of the tender proposals received and lengthy negotiations, TEC and Pozzolanica entered into a five year agreement for the sale of fly ash on 26 February 2003.⁸
12. As previously stated,⁹ upon expiry of the Agreement the subject of the authorisation application, TEC will most likely issue a further open, public competitive tender for the sale of fly ash for the five year period commencing on or about 1 July 2014. Currently, TEC anticipates that the tender will issue during 2013.

TEC is open to opportunities to sell fly ash to third parties at any time

13. TEC's key concern is to ensure that it is able to dispose of as much of its fly ash as possible on credible commercial terms, subject to legal, safety, environmental, security and other operational considerations.
14. TEC is open to opportunities to sell fly ash to third parties at any time. For example, in early 2005 between issuing its first and second tenders, TEC invited third parties who were not at that time acquiring fly ash from Tarong to take ash for testing purposes. Following that invitation, TEC entered into contracts for the purchase of test quantities of fly ash on an 'as available' basis with Sunstate Cement, Independent Fly Ash Brokers, Transpacific Industries, Global Cement and Nucon.

⁵ Agreement, clause 9.1.

⁶ Agreement, clauses 9.5 and 9.6.

⁷ For more detail, please see TEC's submission in support of the application, January 2011, pp 13-16.

⁸ Between 1 September 2002 and 26 February 2003, the one year contract which commenced 1 September 2001 was twice extended for a three month period to allow TEC and Pozzolanica to conclude their negotiations of the five year agreement.

⁹ TEC's submission in response to the Draft Determination, May 2011, p9.

Clarification of factual matters

15. Under normal operating conditions, it takes approximately 12 hours to fill the hoppers in Zone 1 at Tarong Power Station and 4 hours to fill the bag filter hoppers at Tarong North Power Station. To ensure that the build up of fly ash does not threaten the operation of the power stations, TEC retains the right in each fly ash contract to clear the hoppers, the ash transfer points and the ash disposal system at Tarong and the Tarong North ash silo at any time in their absolute discretion.¹⁰
16. TEC is involved in discussions with almost thirty parties in relation to the acquisition of ash from Tarong and/or Tarong North Power Stations for a variety of potential uses. **Confidential Annexure A** lists the companies with whom TEC has had discussions and the potential use of ash the relevant company has foreshadowed.

17.

**EXCLUDED FROM
PUBLIC REGISTER**

Conclusion

18. TEC submits that:
- (a) the benefits of the Agreement outweigh any actual detriment it is likely to cause, which detriment is denied. The Agreement provides certainty that substantial volumes of fly ash will be sold and acquired and used as a cementitious substitute, thus avoiding disposal and achieving a benefited re-use.
- Further, the Agreement facilitates third party access and, if authorised, will provide certainty to those third parties that the terms of the Agreement will remain the same for its duration.
- (b) the Commission should:
- (i) recognise the pro-competitive utility of TEC's regular open, public competitive tenders in determining the market for the acquisition of fly ash produced at Tarong and Tarong North Power Stations at the time they are conducted; and
- (ii) give weight to TEC's willingness to enter into additional contracts for the sale of ash to third parties who are interested in acquiring ash on credible commercial terms at any time, including during its normal tender cycle.

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¹⁰ For example, see the Agreement, clause 11.3.