Draft Determination

Application for authorisation

lodged by

Pozzolanic Enterprises Pty Ltd

in respect of

an agreement for the supply of fly ash from the Tarong and Tarong North Power Stations in Queensland

Date: 29 March 2011

Commissioners: Samuel Kell Schaper Dimasi Walker Willett

Authorisation no.: A91261

Public Register no.: C2010/1092
Summary

The ACCC proposes to deny authorisation to Pozzolanic Enterprises Pty Ltd’s proposed arrangements to make and give effect to the Fly Ash Supply Agreement. The ACCC considers that authorisation is not likely to provide any significant benefit to the public and is likely to result in public detriment constituted by a lessening of competition in a number of markets.

Pozzolanic Enterprises Pty Ltd (Pozzolanic) is a wholesale supplier of fine grade fly ash in the eastern states of Australia. It collects and processes fly ash produced at coal-fired power stations for use as a partial substitute for cement in the production of concrete and concrete products.

Pozzolanic has applied for authorisation on its own behalf and on behalf of Cement Australia Pty Ltd and Cement Australia Holdings Pty Ltd. Pozzolanic is wholly owned by Cement Australia Holdings.

Tarong Energy Corporation Limited (TEC) owns and operates Tarong Power Station. TEC also owns Tarong North Power Station but this station is operated by Tarong North Pty Ltd, a wholly owned subsidiary of TEC (Tarong North). Tarong Power Station and Tarong North Power Station are located near Nanango in south-east Queensland. Fly ash is produced as a waste by-product of the coal-fired electricity generated at these power stations.

Pozzolanic has applied for authorisation to make and give effect to its proposed Fly Ash Supply Agreement (the Agreement) with TEC and Tarong North. Under the Agreement, Pozzolanic would have access to almost all the fly ash available from Tarong Power Station. The Agreement would provide Pozzolanic with first right of access and the ability to take 70 per cent of the fly ash produced at Tarong Power Station (from the Standard Ash Transfer Points) and an entitlement to another 16 per cent of the fly ash (from the Temporary Transfer Points). In practice, Pozzolanic is also likely to have access to another 12.5 per cent of the fly ash produced at Tarong Power Station (from the remaining access points in zones 1-3 of each of the units at Tarong Power Station). Interested parties have submitted that it would be difficult to establish off-take equipment across these points and TEC has submitted it will not enter into contracts for small quantities. TEC has advised that Pozzolanic currently has use of the access points producing this fly ash. The Agreement would also grant Pozzolanic first right of access and the ability to take 100 per cent of the fly ash available from Tarong North Power Station. Pozzolanic seeks authorisation for the duration of the Agreement, which is proposed to run for approximately three years, until 1 March 2014.

Pozzolanic submits that authorisation of the proposed conduct is likely to result in environmental benefits, cost efficiency benefits, concrete performance benefits, efficient utilisation of existing assets, security of supply, and clarity, transparency and certainty in third party access. Pozzolanic submits that the conduct is unlikely to result in any significant public detriment.

The ACCC has considered the submissions received to date from the applicant and interested parties. Based on the information currently before it, the ACCC considers authorisation of the Agreement is unlikely to result in any significant benefit to the public. The ACCC considers that Pozzolanic has not demonstrated that its claimed benefits are likely to result directly from authorisation of the proposed conduct and would not be realised absent the Agreement. The ACCC considers that the Agreement (and therefore protection from the competition provisions of the Competition and Consumer Act 2010) is not necessary to achieve the claimed benefits.
Further, the ACCC considers that authorisation of the proposed Agreement is likely to result in public detriment. The ACCC considers the Agreement is likely to heighten barriers to entry and expansion for other fly ash acquirers in the south-east Queensland region by restricting the quantity of the fly ash available for sale to third parties from Tarong and Tarong North Power Stations. The ACCC considers that partially foreclosing or otherwise restricting the availability of fly ash in this way is likely to lessen competition, maintain fly ash prices above a competitive level and increase the cost of fly ash-related products to consumers in the south-east Queensland region.

The ACCC is currently not satisfied that, in all the circumstances, authorisation is likely to result in public benefits that will outweigh the likely detriment from the conduct. Therefore, the ACCC proposes not to grant authorisation for the proposed arrangements.

The ACCC will now seek further submissions from Pozzolanic and interested parties in relation to this draft determination prior to making a final decision. Pozzolanic and interested parties may also request that a conference be held to make oral submissions on the draft determination.
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List of abbreviations

2003 contract; 2003 agreement
Fly Ash Agreement TE303/02 for removal of fly ash from Tarong and Tarong North Power Stations, entered into by Pozzolanic and TEC on 26 February 2003. It expired on 14 July 2010, when it was superseded by the Interim Agreement

ACCC
The Australian Competition and Consumer Commission

the Act
Prior to 1 January 2011, the Trade Practices Act 1974 and, as of 1 January 2011, the Competition and Consumer Act 2010

Agreement
Fly Ash Supply Agreement, entered into on 19 November 2010, between Pozzolanic, TEC and Tarong North

bottom ash
Ash extracted from the bottom of a boiler

concrete-grade fly ash
Fly ash that is suitable for use as a partial substitute for cement in the making of concrete, being Fine, Medium, Coarse or Special Grade fly ash as defined by Australian Standard AS3582.1

Contestable Ash
Under Clause 4.3 of the Agreement, TEC may vary Pozzolanic’s right to take fly ash from any or all of the Temporary Ash Transfer Points upon 30 days notice to Pozzolanic and make this Contestable Ash (approximately 16 per cent of the total fly ash available per annum at Tarong Power Station) available to third party acquirers. However, third party acquirers will need to install their own off-take equipment and have the capacity to transport the fly ash

IFB
Independent Flyash Brokers, a consortium of independent concrete producers, including Wagners Concrete, Neilsen’s Concrete, Cordwells Concrete and Sunmix

fly ash
Solid material extracted from the flue gases of a boiler fired with pulverised coal that is not bottom ash or economizer grits

Interim Agreement
Interim Fly Ash Supply Agreement, entered into on 15 July 2010. It is an interim version of the Agreement that does not specify authorisation of the arrangements as a condition precedent. It is expected to be in place for the period between the expiry of the 2003 contract and the commencement of the Agreement (if the proposed arrangements are authorised), or until 30 June 2011 (if the arrangements are not authorised)

Nucrush
Nucrush Group, comprising two divisions: Nucon Concrete and Nucrush Quarries
Option The agreement between TEC and Nucrush that provides Nucrush with the ability to take all of the fly ash available from the access points at pass 4B in zones 1-3 of each of the units at Tarong Power Station. Nucrush would need to invest in processing equipment to be able to use this fly ash. To date, Nucrush has chosen not to exercise its Option.

Pozzolanic Pozzolanic Enterprises Pty Ltd

Reject Ash The component of fly ash separated out of Unprocessed Ash during processing that is too coarse or otherwise unsuitable for use as a partial cement substitute in concrete; the fly ash leftover after Unprocessed Ash has been classified and all the concrete-grade fly ash has been removed

Reserved Ash Fly ash not allocated to Pozzolanic under the Agreement, being fly ash from the access points in zones 1, 2 and 3 in pass 4B and all access points in zones 5 and 6 at Tarong Power Station

slag Ground granulated blast furnace slag

Sunstate Sunstate Cement Ltd

Surplus Ash Fly ash not taken by Pozzolanic in accordance with Clause 4.1 of the Agreement, which states that TEC agrees to sell and Pozzolanic agrees to buy any and all fly ash that Pozzolanic obtains from the Ash Transfer Points and removes from the site

TEC Tarong Energy Corporation Limited

Tarong North Tarong North Pty Ltd

third party A party other than the parties to the Fly Ash Supply Agreement; potential acquirers of unprocessed ash from Tarong or Tarong North Power Station other than Pozzolanic

unit An electric power generating unit of the kind found at a coal-fired power station

Unprocessed Ash Fly ash obtained directly from the hoppers at Tarong or Tarong North Power Stations, which has not been processed to separate concrete-grade fly ash from Reject Ash; also referred to as “run of station ash”

Unused Ash Ash that TEC may make available to third parties if Pozzolanic, in a period of three or more consecutive months, collects less than 50 per cent of the total amount of the fly ash available from the Ash Transfer Points (at Tarong Power Station and Tarong North Power Station combined) and is unable to satisfy TEC that it has the capacity and intention to use at least 50 per cent of the total amount of that fly ash in

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the following three months. This provision is set out at Clause 7 of the Agreement
1. **The application for authorisation**

1.1. On 7 December 2010, Pozzolanic Enterprises Pty Ltd (Pozzolanic) lodged application for authorisation A91261 with the ACCC.

1.2. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (the Act). The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether or not they support the application. Further information about the authorisation process is contained in Attachment A. A chronology of the significant dates in the ACCC’s consideration of this application is contained in Attachment B.

1.3. Application A91261 was made under sections 88(1A) and 88(1) of the *Trade Practices Act 1974* (now the Act)¹ to:

- make and give effect to a contract or arrangement, or arrive at an understanding a provision of which would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.

### The Applicant

1.4. Pozzolanic has applied for authorisation on its own behalf and on behalf of Cement Australia Holdings Pty Ltd and Cement Australia Pty Ltd. The two Cement Australia entities are referred to as Cement Australia.

1.5. Pozzolanic was established in Australia in 1966. In 2003, it became a wholly-owned subsidiary of Cement Australia Holdings Pty Ltd. Cement Australia is jointly owned by concrete suppliers Holcim Australia and Hanson Australia. Cement Australia manufactures, distributes and markets cement and cementitious products including bagged cement, bulk cement, fly ash, lime, and ground granulated blast furnace slag (slag) throughout eastern Australia. It has agreements with its shareholder customers to supply 100 per cent of their fly ash requirements.²

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¹ The title of the relevant trade practices legislation has changed. As of 1 January 2011, the *Trade Practices Act 1974* is now cited as the *Competition and Consumer Act 2010*.

² Pozzolanic Enterprises Pty Ltd, 3 December 2010, Submission in Support of the Application for Authorisation, pages 5-6. This document was dated 3 December 2010 by Pozzolanic. The ACCC received this document on 7 December 2010.
1.6. Pozzolanic collects and processes fly ash for sale and distribution to concrete manufacturers in the form of the following products: Australian Standard Concrete Grade Fly Ash, Flowable Fill, Run of Station Ash, Furnace Bottom Ash and Kaolite.3

1.7. Pozzolanic also provides a range of services to power stations, including ash handling, plant maintenance, down time reduction and improvements to ash handling and disposal systems.4

1.8. Pozzolanic’s main fly ash operations are located in Queensland. At the time of lodging this application for authorisation, Pozzolanic acquired fly ash from five Queensland power stations: Callide, Gladstone, Swanbank B, Tarong and Tarong North.5 Pozzolanic has since submitted to the ACCC that it has now ceased operations at Swanbank B Power Station and has transferred its customers over to Tarong and/or Tarong North Power Station.

1.9. Pozzolanic’s fly ash distribution plants are located in Rockhampton, Gladstone and Brisbane. Pozzolanic also has cement and fly ash terminals at other locations around the eastern states of Australia.

1.10. The ACCC notes that it is currently in litigation with Pozzolanic.6 The litigation relates to matters predating this assessment.

The Agreement

1.11. Pozzolanic has applied for authorisation of the Fly Ash Supply Agreement between Pozzolanic, Tarong Energy Corporation Limited (TEC) and Tarong North Pty Ltd (Tarong North), entered into on 19 November 2010, for the sale of fly ash from the Tarong Power Station and the Tarong North Power Station to Pozzolanic (the Agreement).

1.12. Clause 2.1 of the Agreement provides that the Agreement does not come into force and effect unless and until authorisation is granted on terms and conditions satisfactory to TEC, or TEC has notified Pozzolanic that it is satisfied that authorisation is not required. If authorisation is granted, the Agreement will come into effect on the first day of the calendar month commencing after authorisation is granted and will continue until 1 March 2014 unless terminated earlier under the Agreement. Pozzolanic seeks authorisation for the duration of the Agreement. Either Pozzolanic or TEC may terminate the Agreement in accordance with the Agreement.

1.13. The ACCC notes that Pozzolanic lodged a similar authorisation application (A91245) on 28 July 2010 (the July 2010 Application), in relation to another fly ash supply agreement. Pozzolanic withdrew application A91245 on 9 November 2010.7

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3 For more information about these products, please see http://www.cemaust.com.au/driver.asp?page=%2Fproducts+and+services%2Ffly+ash.
7 A copy of authorisation application A91245 and related public documents are available from the ACCC’s public register at http://www.accc.gov.au/content/index.phtml/itemId/940089/fromItemId/565475.
1.14. Pozzolanic submits that the current Agreement is almost identical to the previous fly ash supply agreement that was the subject of the July 2010 Application. It submits that the only difference is the date at which TEC or Pozzolanic may terminate the Fly Ash Supply Agreement if Pozzolanic has not obtained authorisation or has not obtained authorisation on terms and conditions satisfactory to TEC.8 This date has changed from 31 December 2010 to 30 June 2011.

1.15. The ACCC notes that it conducted a consultation process in respect of the current application and received several submissions. The ACCC considers that, as there are no substantial differences between the current application and the July 2010 Application, submissions made in respect of the July 2010 Application are relevant to the consideration of the current application for authorisation.

1.16. Pozzolanic submits that the current Agreement would allocate to Pozzolanic first access rights to approximately 70 per cent of the fly ash available at Tarong Power Station and “a sizeable portion” of the fly ash available at the Tarong North Power Station.9

1.17. Under Clause 4.1 of the Agreement, TEC agrees to sell to Pozzolanic, and Pozzolanic agrees to buy, any and all fly ash that Pozzolanic obtains from the “Ash Transfer Points” (being Standard Ash Transfer Points and Temporary Ash Transfer Points) and to remove it from the relevant power station site.

1.18. Specifically, Pozzolanic publicly submits10 that Clause 4 of the Agreement will entitle it to take any and all fly ash from the:

(i) Standard Ash Transfer Points, being:

• the connection points in respect of units 1, 2, 3 and 4, passes 1A, 1B, 2A, 2B, 3A and 3B at zones 1, 2 and 3 at the Tarong Power Station hoppers,

• all of the eight connection points depositing fly ash into the Tarong North Power Station baghouse filter hoppers, being hoppers A1, A2, A3, A4, B1, B2, B3 and B4, and

• any other points approved in writing by TEC or Tarong North, and

(ii) Temporary Ash Transfer Points, being, in respect of units 1, 2, 3 and 4 at Tarong Power Station:

• pass 4A at zones 1, 2, 3 and 4, and

• passes 1A, 1B, 2A, 2B, 3A, 3B and 4B at zone 4.

1.19. The ACCC considers that, in practice, the Agreement will result in Pozzolanic having first right of access to around 98.5 per cent of the total fly ash available from Tarong Power Station and 100 per cent of the fly ash suitable for use in concrete manufacture from that power station. The ACCC notes that:

the Agreement would grant Pozzolanic the ability to take 70 per cent of the fly ash produced at Tarong Power Station (from the Standard Ash Transfer Points),

- the Agreement would grant Pozzolanic the ability to take another 16 per cent of the fly ash produced at Tarong Power Station (from the Temporary Ash Transfer Points), and

- in practice, Pozzolanic is likely to have access to another 12.5 per cent of the fly ash produced at Tarong Power Station from the connection points in zones 1-3 of pass 4B of each of the four units. Interested parties have submitted that it would be difficult to establish off-take equipment across these points and TEC has submitted it will not enter into contracts for small quantities. TEC has advised that Pozzolanic currently has use of these access points.

1.20. The Agreement would also grant Pozzolanic first right of access and the ability to take 100 per cent of the fly ash available from Tarong North Power Station.

1.21. Configuration of the Tarong and Tarong North Power Stations is discussed in Chapter 2 of this draft determination. A diagram illustrating the Ash Transfer Points and the Temporary Ash Transfer Points at Tarong Power Station is included at paragraph 2.34.

1.22. TEC retains the rights to all fly ash not taken by Pozzolanic and can sell this fly ash to third parties, that is, persons that are not party to the Agreement (“third parties”).

1.23. Pozzolanic submits\(^\text{11}\) that, pursuant to clause 9 of the Agreement, third parties may acquire three types of ash:

- **Contestable Ash**, which represents approximately 16 per cent of the total fly ash available per annum at Tarong Power Station. TEC may vary Pozzolanic’s right to take fly ash from any or all of the Temporary Ash Transfer Points upon 30 days’ notice to Pozzolanic and make this Contestable Ash available to third party acquirers.\(^\text{12}\) However, third party acquirers need to install their own off-take equipment and have the capacity to transport the fly ash.

- **Surplus Ash**, being fly ash not taken by Pozzolanic in accordance with Clause 4.1 of the Agreement, which obliges Pozzolanic to buy any and all fly ash that it obtains from the Ash Transfer Points and removes from the site.\(^\text{13}\) TEC may make this Surplus Ash available to third parties.

- **Unused Ash**, being ash that TEC may make available to third parties if Pozzolanic, in a period of three or more consecutive months, collects less than 50 per cent of the total amount of the fly ash available from the Ash Transfer Points (at Tarong Power Station and Tarong North Power Station combined) and is unable to satisfy TEC that it has the capacity and intention to use at least 50 per cent of the total amount of

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\(^{13}\) Pozzolanic Enterprises Pty Ltd, 3 December 2010, Submission in Support of the Application for Authorisation, page 20.
that fly ash in the following three months.\textsuperscript{14} This provision is set out at Clause 7 of the Agreement.

1.24. Although not provided for in the Agreement, Pozzolanic submits that third parties can also gain access to \textbf{Reserved Ash}, being the remaining fly ash not contracted out to Pozzolanic. Reserved Ash is available from access points in zones 1, 2 and 3 in pass 4B and all access points in zones 5 and 6 across units 1 to 4 at Tarong Power Station. Pozzolanic submits that this represents approximately 14 per cent of the total fly ash available at Tarong Power Station.\textsuperscript{15}

- TEC has advised the ACCC that it has signed an agreement with Nucrush Group (Nucrush) for an option to take all of the fly ash available from the connection points at pass 4B in zones 1-3 of each of the units at Tarong Power Station (\textbf{Option}). To date, Nucrush has chosen not to exercise its Option.\textsuperscript{16}
- TEC has advised that these access points are “reserved” in case Nucrush decides to exercise its Option.\textsuperscript{16}
- TEC has also advised that these access points are currently available to Pozzolanic. TEC submits that these access points would not be made available to parties other than Pozzolanic or Nucrush because they are already allocated to parties in accordance with the Agreement and the Option.

1.25. Pozzolanic, TEC and Tarong North entered into an interim version of the Agreement on 15 July 2010, called the \textbf{Interim Fly Ash Supply Agreement} (Interim Agreement). The Interim Agreement replaced an existing contract between Pozzolanic and TEC, signed in 2003, that allowed Pozzolanic to purchase and remove fly ash from the Tarong and Tarong North Power Stations. This 2003 contract expired on 14 July 2010.\textsuperscript{17}

1.26. The Operation of the Interim Agreement is similar to the Agreement but does not require authorisation as a condition precedent. Pozzolanic intends that the Interim Agreement will be in place for the period between the expiry of the 2003 contract and the commencement of the Agreement (if the proposed arrangements are authorised), or until 30 June 2011 (if the arrangements are not authorised).\textsuperscript{18}

1.27. Pozzolanic submits that it also has a range of other supply agreements in place with other power stations in Queensland.\textsuperscript{19}

1.28. As noted above, the Agreement provides for either Pozzolanic or TEC to terminate the Agreement in certain circumstances, such as failure to acquire and retain ACCC authorisation under acceptable circumstances.\textsuperscript{20}

\textsuperscript{14} Pozzolanic Enterprises Pty Ltd, 3 December 2010, Submission in Support of the Application for Authorisation, page 20.
\textsuperscript{15} Pozzolanic Enterprises Pty Ltd, 3 December 2010, Submission in Support of the Application for Authorisation, page 20.
\textsuperscript{16} Tarong Energy Corporation Limited, 10 January 2011, Submission to the Australian Competition and Consumer Commission, page 18.
\textsuperscript{17} Tarong Energy Corporation Limited, 10 January 2011, Submission to the Australian Competition and Consumer Commission, page 15.
\textsuperscript{18} \textit{Ibid.}, page 15.
\textsuperscript{19} \textit{Ibid.}, page 4.
\textsuperscript{20} \textit{Ibid.}, page 16.
Other parties

1.29. Under section 88(6) of the Act, any authorisation granted by the ACCC is automatically extended to cover any person named in the authorisation as being a party or proposed party to the conduct. The ACCC notes that Pozzolanic Enterprises has named TEC and Tarong North as being parties to the proposed conduct.
2. **Background to the application**

**Other parties to the Agreement**

**TEC**

2.1. TEC is a Queensland Government Owned Corporation and a public company under the *Corporations Act 2001*. It was established on 1 July 1997, following the disaggregation of AUSTA Electric.

2.2. TEC sells electricity into the National Electricity Market and provides ancillary services to the Australian Energy Market Operator through the Tarong, Tarong North and Wivenhoe Power Stations. It has the capacity to deliver approximately 25 per cent of Queensland’s electricity needs through coal-fired and hydro generators.

2.3. TEC owns the following power stations:

(i) Tarong Power Station, located near Nanango in the South Burnett region: a coal-fired, base load station with four electric power generating units ('units') with a gross generating capacity of 1 400 MW. It also has a liquid-fuel-fired emergency plant with a gross generating capacity of 15 MW. Tarong Power Station is operated by TEC.

(ii) Tarong North Power Station, located adjacent to Tarong Power Station: a supercritical coal-fired, baseload station with a gross capacity of 443 MW. Tarong North Power Station is operated by Tarong North.

(iii) Wivenhoe Power Station, located at Wivenhoe Dam approximately one hour west of Brisbane: a hydro-electric power station. It has two units that can generate a gross capacity of 500 MW. Because it is not a coal-fired power station, Wivenhoe Power Station does not produce fly ash.

2.4. Ash is TEC’s biggest waste product. Until recently, it stored most of the ash produced at its power stations in an ash dam. TEC currently stores its ash in disused mine voids at its Meandu Mine, which is located adjacent to Tarong Power Station.

2.5. TEC is able to sell some of the fly ash produced at Tarong Power Station to fly ash processors and distributors, as well as to concrete manufacturers. The sale of fly ash reduces the amount of waste ash that TEC would otherwise store as landfill in its disused mine voids, ash dams or other storage areas. TEC’s ability to sell its fly ash also reduces the fees that TEC would have to pay to the Queensland Government for the disposal of ash pursuant to the *Environmental Protection Regulation 2008* (Qld) and *Environmental Protection (Waste Management) Regulation 2000* (Qld).

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21 The information in this section is based on information provided to the ACCC by TEC in its public submission of 10 January 2011.
Tarong North

2.6. In relation to the National Electricity Market, TEC acts as intermediary for Tarong North Power Station. As of 2009, Tarong North is wholly owned by TEC and operates the Tarong North Power Station on TEC’s behalf.

The fly ash industry

Fly ash

2.7. Fly ash is a waste by-product of the coal burning process. It is primarily the non-combustible mineral component of black coal. As such, only coal-fired power stations, such as Tarong and Tarong North Power Stations, produce fly ash.

2.8. Coal-fired power stations produce two types of ash: fly ash and bottom ash. Australian Standard 3582.1-1998 (AS3582.1) defines fly ash as “solid material extracted from the flue gases of a boiler fired with pulverised coal” that is not “ash extracted from the bottom of a boiler (bottom ash) or economizer grits”.

2.9. Fly ash is obtained by separating fly ash particles out of the exhaust gas (flue gas) produced during the combustion of coal. This is done by passing the flue gas through electrostatic precipitators or fabric filters (a baghouse), or a combination of both. Ash extracted from the flue gases using the electrostatic precipitators or baghouse filters falls down into hoppers below the filters or precipitators.

2.10. Larger fly ash particles are separated out first and finer particles last. This allows the separated ash to fall into hoppers roughly in order of size, where it is collected by fly ash acquirers.

2.11. Fly ash takes the form of a fine powder and can vary in colour. Fineness and grades of fly ash suitable for use as a cementitious material in concrete and mortar are defined in AS3582.1.

2.12. When of suitable quality, fly ash may be used as a partial substitute for cement in the manufacture of concrete. This type of fly ash is known as ‘concrete-grade fly ash’, being fly ash that meets the requirements of AS3582.1.

2.13. Fly ash is attractive as a partial substitute for cement in concrete because it is cheaper and more readily available than other cement substitutes and has comparable binding qualities. Fly ash can also improve properties of concrete such as strength, drying shrinkage, resistance to sulphate, chloride and alkali-silica reaction, and workability of the product.

2.14. Some applications for fly ash include:
   - Portland cement and grout
   - Embankments and structural fill

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22 AS3582.1, Supplementary Cementitious Materials for Use With Portland and Blended Cement, Part 1 – Fly Ash
23 Tarong Energy Corporation Limited, 10 January 2011, Submission to the Australian Competition and Consumer Commission, page 8.
- waste and/or soft soil stabilisation and solidification
- raw feed for cement clinkers
- mine reclamation
- flowable fill
- mineral filler in asphaltic concrete
- cellular concrete
- geopolymers
- roofing tiles
- paints
- metal castings, and
- filler in wood and plastic products.

2.15. Interested parties advise that only certain colours of fly ash are suitable for the manufacture of high-end cement products because the colour of the fly ash affects the colour of the end product.24

**Fly ash produced at Tarong and Tarong North Power Stations**

2.16. Interested parties submit that the Tarong and Tarong North Power Stations produce the best quality and greatest volume of fly ash in the south-east Queensland region. They are also located closest to sources of demand.25

2.17. TEC estimates that together, Tarong and Tarong North Power Stations produce approximately 1.9 million tonnes of fly ash each year as a by-product of coal combustion. As previously noted, if the fly ash is not removed by sale or transfer to another person, it must be disposed of at a cost to the producer (in this case, TEC).

2.18. In its 2010 Request for Expressions of Interest TE1973, TEC estimated that approximately 300 000–400 000 tonnes of concrete-grade fly ash from Tarong Power Station is sold each year. TEC estimates that approximately 160 000 tonnes of concrete-grade fly ash from Tarong North Power Station is sold each year. This represents a combined total of approximately 460 000–560 000 tonnes of concrete-grade fly ash from Tarong and Tarong North Power Stations being sold each year. This implies that, on average, at least 24-29 per cent of fly ash produced each year at Tarong and Tarong North Power Stations is concrete-grade.

2.19. The ACCC notes that the provisions of the Agreement relating to Unused Ash require Pozzolanic to take 50 per cent of the combined total quantity of ash produced at the Tarong and Tarong North Power Stations.

2.20. The ACCC also notes that Clause 4.1 of the Agreement obliges Pozzolanic to pay only for fly ash that it takes from the Ash Transfer Points and removes from the site. The ACCC notes that Pozzolanic does not generally remove Reject Ash from Tarong North

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Power Station, but deposits it into the fly ash silo owned by Tarong North and located at Tarong North Power Station (Tarong North silo). Reject Ash from Tarong Power Station is deposited into the ash disposal system.

**Fly ash available from power stations in the south-east Queensland region**

2.21. There are currently five coal-fired power stations in the south-east Queensland region:
- Kogan Creek Power Station
- Millmerran Power Station
- Swanbank B Power Station
- Tarong Power Station, and
- Tarong North Power Station.

2.22. As previously noted, Swanbank B Power Station is in the process of closing and will not be a source of fly ash supply in the future.

2.23. While the ACCC notes Kogan Creek Power Station does not currently supply fly ash to acquirers in south-east Queensland, the ACCC considers that it is still a potential source of fly ash for use in concrete.

2.24. The ACCC notes that Millmerran Power Station is currently supplying a large quantity of fly ash to the south-east Queensland region.

2.25. While some interested parties have indicated to the ACCC that they prefer fly ash from Tarong or Tarong North Power Station, the ACCC considers that Millmerran Power Station and Kogan Creek Power Station are also potential sources of fly ash.

**Power station configuration**

**Tarong Power Station**

2.26. Tarong Power Station has four generating units from which acquirers can source fly ash. Connected to each unit are two double-pass electrostatic precipitators for separating the fly ash passing through the unit. The passes on each precipitator are labelled ‘A’ and ‘B’. Pozzolanic identifies the passes as 1A, 1B, 2A, 2B, 3A, 3B, 4A and 4B.

2.27. Fly ash is blown out of the units and through the passes. The ash is attracted to the electrical charges and ‘sticks’ to the plates. From time to time, the metal plates are mechanically rapped and the fly ash falls into the hoppers located below the precipitators. Fly ash can then be removed directly from these hoppers.

2.28. The hoppers connected to each pass are configured into six rows, with each row called a ‘zone’. The zones indicate the grade of fly ash they contain. In general, coarser, heavier fly ash tends to fall predominantly into the first row of hoppers (zone 1), while

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26 Information in this section is based upon the information provided by Pozzolanic in its 3 December 2010 Submission in Support of the Application for Authorisation, pages 10-14; and TEC’s 10 January 2011 submission to the ACCC, available at http://www.accc.gov.au/content/index.phtml/itemId/961019/fromItemId/278039.
progressively finer, lighter fly ash particles tend to fall into the rear hoppers (zones 2 to 6).

2.29. Approximately 60 per cent of the fly ash produced at Tarong Power Station falls into the hoppers in zone 1. Fly ash in zone 1 needs to be classified to separate the concrete-grade fly ash from Reject Ash that is too coarse for use in concrete. Reject Ash may subsequently be ground using a mill/grinder to produce 100 per cent concrete grade fly ash.

2.30. Approximately 34 per cent of the fly ash produced at Tarong Power Station falls into the hoppers in zones 2 and 3. Fly ash in zones 2 and 3 is naturally concrete-grade and does not need to be processed.

2.31. Approximately 4 per cent of the fly ash produced at Tarong Power Station falls into the hoppers in zone 4. Fly ash in zone 4 needs to be processed to remove concrete-grade fly ash from ash that is too fine for use in concrete.

2.32. Approximately 2 per cent of the fly ash produced at Tarong Power Station falls into the hoppers in zones 5 and 6. The ACCC understands that fly ash in these zones is generally unsuitable for use in concrete. It contains a large proportion of fly ash that is so fine that it is difficult to handle and may be a health hazard.

2.33. Pozzolanic tends to remove its fly ash requirements first from zones 2 and 3 (which do not require processing and are ‘ready to go’), then zone 1, then zone 4. Pozzolanic classifies the fly ash it takes from zones 1 and 4. Any Reject Ash is pumped into either TEC’s Meandu Mine void or the ash dam. Currently, any fly ash not removed from the hoppers is also disposed of in the mine void or the ash dam.

2.34. *Figure 1: Diagrammatic representation of the Ash Transfer Points and Temporary Ash Transfer Points at Tarong Power Station*
Tarong North Power Station

2.35. Tarong North Power Station has a single generating unit. Fly ash produced in this unit is filtered out using fabric ‘baghouse’ filters rather than electrostatic precipitators. The flue gas exiting the boiler is passed through thousands of filter bags inside the ‘baghouse’. Fly ash particles collect on the surface bag and then fall naturally into the hoppers below.

2.36. Fly ash collected at Tarong North Power Station is not segregated according to particle size to the same extent as fly ash produced at Tarong Power Station.

2.37. Currently, under the Interim Agreement, Pozzolanic has direct and exclusive access to all of the eight hoppers under the single unit at Tarong North Power Station. The Agreement would entitle Pozzolanic to continue this arrangement for the duration of the Agreement.

2.38. All fly ash not taken directly from the hoppers by Pozzolanic is pumped into the Tarong North silo, owned by Tarong North, where it can be accessed for commercial use by third parties. Sunstate Cement Ltd (Sunstate) currently purchases fly ash from the Tarong North silo under contract.

Fly ash off-take facilities

Pneumatic pumps

2.39. Fly ash is moved through pneumatic pumps to ensure that no dust escapes or sends hazardous emissions into the air.

2.40. At Tarong Power Station, Pozzolanic has installed and attached pneumatic pumps to the hoppers to remove the fly ash it requires. Fly ash removed from the hoppers is pumped to one of Pozzolanic’s two transfer stations installed on site. One transfer station services the passes for units 1 and 2 and the other services units 3 and 4.

2.41. The transfer stations then pump the fly ash to Pozzolanic’s fly ash processing and dispatch facility, approximately 600m away. The ash pumped into this facility may be processed by a classifier, or deposited directly into one of several product silos where it is blended before being dispatched.

2.42. At Tarong and Tarong North Power Stations, equipment for the off-take of fly ash directly from the hoppers is owned by Pozzolanic.

Surge silos

2.43. The Tarong North silo holds 700 tonnes of ash.

2.44. Pozzolanic has also installed five of its own small 200-tonne product silos at Tarong Power Station. Product stored in these silos is pumped into road tankers using Pozzolanic’s dispatch facility.
**Fly ash processing methods**

*Classification*

2.45. A classifier is a processing machine into which a feedstock of Unprocessed Ash is pumped. Unprocessed Ash is fly ash obtained directly from the hoppers at Tarong and/or Tarong North Power Stations, which has not been accessed or processed by any party to separate concrete-grade fly ash from Reject Ash (‘Unprocessed Ash’).

2.46. The classifier separates fine fly ash particles out of the Unprocessed Ash, leaving behind the coarser fly ash particles to produce a product that is suitable for use as a partial substitute for cement in concrete. To an extent, a processor can vary the yield of concrete-grade fly ash that a classifier will extract from a feedstock of Unprocessed Ash.

*Grinding*

2.47. Unprocessed Ash can also be ground into a finer product using a mill (grinder), usually of the kind used to manufacture cement. This process does not generate any Reject Ash, as it enables 100 per cent of the Unprocessed Ash to be turned into concrete-grade fly ash. However, grinders require significant capital investment.

2.48. Sunstate is the only acquirer of Unprocessed Ash in the southeast Queensland region that currently uses a grinder to process its ash.
3. **Submissions received by the ACCC**

3.1. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. To this end, the ACCC aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application.

3.2. Broadly, Pozzolanic submits\(^{27}\) that authorisation should be granted for the Agreement because it will provide significant public benefits. Pozzolanic submits that the key benefit of the Agreement is that it will provide clarity and transparency with regard to third party access to fly ash at Tarong and Tarong North Power Stations. It submits that the Agreement has been structured to minimise any possible detriments by providing for third party access to fly ash at Tarong Power Station and Tarong North Power Station.

3.3. Pozzolanic also submits that the Agreement has been designed to benefit the environment, improve cost efficiency to Pozzolanic, TEC and Tarong North, and to improve the performance of concrete produced and used in eastern Australia. It submits that the clarity and transparency provided by the Agreement will increase the size of the above benefits. Further, Pozzolanic submits that any anti-competitive effects of the conduct would be mitigated by the presence of other suppliers of fly ash within the industry.

3.4. As a party to the Agreement, TEC also provided a submission to the ACCC in relation to the application for authorisation. TEC supports the application, submitting that the Agreement is in the public interest. TEC submits that if it is unable to properly dispose of its ash it will have to curtail operations, increasing the likelihood of power outages and interruptions, particularly in south-east Queensland during the peak Summer demand period of November to February.

3.5. The ACCC sought submissions from around 35 interested parties potentially affected by the application, including competing fly ash suppliers, fly ash consumers, industry associations and other power stations in Queensland. The following parties provided public submissions:

- the Queensland Government Department of Transport and Main Roads (TMR)
- Nucrush, and
- Sunstate.

3.6. TMR plans, manages and delivers Queensland's integrated transport environment to achieve sustainable transport solutions for road, rail, air and sea. TMR opposed the application for authorisation. It raised concerns that if Pozzolanic were granted authorisation for the proposed arrangements, it may prevent others obtaining supply of fly ash from Tarong North Power Station, thereby reducing competition.

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\(^{27}\) Pozzolanic Enterprises Pty Ltd, 3 December 2010, Submission in Support of the Application for Authorisation; Pozzolanic Enterprises Pty Ltd, 1 March 2011, Response to ACCC request for further information.
3.7. Nucrush lodged a submission opposing authorisation of the Agreement in its current form. Nucrush’s primary concern was that the provision for first right of access to the baghouse filter hoppers at Tarong North Power Station and the configuration of Pozzolanic’s machinery would have the effect of limiting the number of competitors for off-take fly ash at Tarong North Power Station.

3.8. Sunstate is a fly ash acquirer operating in south-east Queensland in competition with Pozzolanic. Sunstate currently sources fly ash from the Tarong North silo and uses its grinder to process this ash into concrete-grade fly ash. Sunstate also opposes the application in its current form. Sunstate submits that the proposed arrangements are likely to prevent or hinder producers of fly ash products other than Pozzolanic from obtaining fly ash and reduce competition in the south-east Queensland fly ash market without generating any public benefit. Sunstate suggested that it would not oppose the arrangements if the Agreement were amended to provide certain and fair third party access to fly ash from Tarong North Power Station.

3.9. The views of Pozzolanic and interested parties are outlined in the ACCC’s evaluation of the application for authorisation in Chapter 4 of this determination. Copies of public submissions may be obtained from the ACCC’s website (www.accc.gov.au/AuthorisationsRegister) by following the links to this matter.
4. **ACCC evaluation**

4.1. The ACCC’s evaluation of the proposed conduct is in accordance with tests found in:

- sections 90(6) and 90(7) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
  - the provision of the proposed contract, arrangement or understanding in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public and
  - that benefit, in the case of section 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of section 90(7) has resulted or is likely to result from giving effect to the provision.

- sections 90(5A) and 90(5B) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:
  - the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public and
  - that benefit, in the case of section 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of section 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

4.2. For more information about the tests for authorisation and relevant provisions of the Act, please see [Attachment C](#).

**The relevant area of competition**

4.3. The first step in assessing the effect of authorising the proposed conduct is to consider the relevant area(s) of competition affected by the conduct.

*Pozzolanic’s submission*

4.4. Pozzolanic submits that the relevant markets for the ACCC’s assessment of the matter are those for the supply of cementitious products including cement, fly ash and granulated slag in eastern Australia. Pozzolanic is also of the view that the impact of the proposed conduct on the electricity industry should be considered.

4.5. Pozzolanic submits that there are several markets that may be relevant to the application:

(i) a market for cementitious products (including fly ash, cement, and slag) along the eastern coast of Australia, and
(ii) a market for fly ash for use in concrete which could, geographically, be as narrow as southeast Queensland, or as broad as the east coast of Australia.

4.6. Pozzolanic submits that, were the ACCC to consider that the assessment of the proposed arrangement should be considered from the perspective of a narrower market definition, such as the supply and acquisition of fly ash in south-east Queensland, the public benefits of the Agreement are substantial and would still outweigh the public detriments likely to flow from the conduct.

4.7. While Pozzolanic accepts it is the largest acquirer and on-seller of fly ash in the relevant markets, it submits that it competes with the following companies:

- Sunstate, which is jointly owned by Adelaide Brighton and Boral and has supplied fine grade fly ash since 2007. Sunstate acquires fly ash from the silo at Tarong North Power Station (being Unprocessed Ash and/or Reject Ash) and then grinds this coarse fly ash into fine grade fly ash using its cement mixing facilities

- Independent Fly Ash Brokers (IFB), a cooperative of independent companies (Wagners Concrete, Neilsen’s Concrete, Cordwells Concrete and Sunmix), which Pozzolanic understands procures fly ash from the Millmerran Power Station in Queensland, and

- Nucon Concrete, part of the Nucrush Companies owned by the Neumann Group. Pozzolanic submits Nucon Concrete has purchased fly ash from Bayswater Power Station near Newcastle in eastern New South Wales since 2002 and is likely to use it for its own pre-mix concrete products rather than on-selling it.

4.8. Pozzolanic submits that concrete grade fly ash can be used as a replacement for Portland cement at levels of between 20-30 per cent of the total cementitious material.

Interested party submissions

4.9. Nucrush has submitted to the ACCC that Pozzolanic is by far the dominant competitor in south-east Queensland. Nucrush submits that Independent Flyash Brokers also has a significant share of the relevant market and Sunstate has a small share. Nucrush buys and sells only a small amount of fly ash from Tarong and Tarong North Power Stations.

4.10. The ACCC notes that Sunstate commented on the area of competition in its submission on the July 2010 Application.

4.11. Sunstate submitted that the area of competition relevant to this assessment is the supply of fly ash in south-east Queensland. Sunstate notes that fly ash can differ by colour, texture and quality and this affects Sunstate's ability to produce cement products required by customers. In considering substitutes to fly ash, Sunstate submits that slag is not readily available in south-east Queensland and is uneconomical as a replacement for fly ash in the production of cement.

4.12. Sunstate also submitted that the cost associated with transporting fly ash from power stations outside the south-east Queensland region to Sunstate’s production location prevents those sources from being commercially viable options. In particular, Sunstate submitted that the cost of transporting fly ash from plants such as Callide, in central Queensland, and Bayswater, in eastern New South Wales, is prohibitively high.
4.13. TMR submits that it mandates the use of a minimum of 20 per cent of approved fly ash (typically 25 per cent is used) in all concrete. It has approved the use of fly ash from Swanbank, Gladstone, Tarong, Tarong North, Callide and Millmerran power stations.

The ACCC’s view

4.14. The ACCC notes that the Agreement relates to the off-take of Unprocessed Ash from Tarong Power Station and Tarong North Power Station. (That is, fly ash obtained directly from the hoppers at Tarong and/or Tarong North Power Stations, which has not been accessed or processed by any party to separate concrete-grade fly ash from Reject Ash).

4.15. The ACCC understands that this Unprocessed Ash is taken for the purposes of processing it into a product suitable for sale to concrete manufacturers. Unprocessed Ash may be classified or ground and may be sold in pure form or mixed with cement to create a product that is ready to add to concrete.

4.16. Concrete-grade fly ash is the only type of fly ash suitable for use as a partial substitute for cement in the manufacture of concrete. Interested parties submissions indicate that cement is significantly more expensive than fly ash. Acquirers can obtain concrete-grade fly ash produced at Tarong or Tarong North Power Station by: classifying or grinding Unprocessed Ash; acquiring Unprocessed Ash from zones 2 and/or 3 of Tarong Power Station (which is naturally concrete-grade); or by purchasing concrete-grade fly ash from another acquirer.

4.17. Slag is also a partial substitute for cement in the manufacture of concrete, and potentially a substitute for concrete-grade fly ash. However, the ACCC understands that the supply of slag in South-East Queensland is insufficient to act as a close substitute for concrete-grade fly ash available in the region.

4.18. Therefore, the ACCC considers the areas of competition for cement and slag are not relevant to this assessment.

4.19. Fly ash is a bulky, low value good. Thus, it is not commercially feasible to transport unprocessed fly ash over long distances. This makes it unlikely that suppliers of Unprocessed Ash located outside the south-east Queensland region would be alternatives to supply from Tarong or Tarong North Power Stations.

4.20. The ACCC notes that Nucrush operates in south-east Queensland and sources some of its fly ash inputs from Bayswater Power Station in eastern NSW. However, the ACCC notes that Nucrush acquires only concrete-grade fly ash from Bayswater Power Station. Nucrush does not currently acquire Unprocessed Ash from any power station.

4.21. The ACCC considers that Nucrush is only able to transport concrete-grade fly ash from Bayswater Power Station because of the extensive trucking facilities of the Nucrush Group and its ability to backload.28 Thus obtaining supply of concrete-grade fly ash from Bayswater Power Station, or other regional areas of Queensland, would not generally be a viable option for other purchasers.

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28 Backloading involves loading outbound cargo onto a truck on an outbound trip and using the same truck to bring inbound cargo in on the return trip so that each load incurs costs in only one direction.
4.22. The ACCC notes that there is a high level of vertical integration and cross-ownership amongst fly ash acquirers in the south-east Queensland region. In particular, the ACCC notes that Pozzolanic is the manufacturing arm of Cement Australia and transfers title of the fly ash it obtains to Cement Australia for use by Cement Australia and related entities such as Holcim Australia and Hanson Australia in downstream sectors. These vertical relationships mean that the Agreement may also impact on the supply of downstream products that use fly ash as an input.

4.23. The ACCC notes that Nucrush has sought to acquire Unprocessed Ash from Tarong Power Station (in the south-east Queensland region) and entered into a contract with TEC for an option to take Unprocessed Ash. However, Nucrush has not yet exercised this Option. The ACCC notes that Nucrush does not currently have its own fly ash processing facilities and that it would need to make a significant investment in the capital required to process this ash. The ACCC also notes that demand for fly ash appears to have fallen in recent years. However, the ACCC considers that Nucrush may seek to exercise its Option if demand increases.

4.24. The ACCC also notes that Sunstate currently acquires Unprocessed Ash from the Tarong North silo, which it processes using its grinder. While Independent Flyash Brokers does not currently acquire fly ash from Tarong or Tarong North Power Station, the ACCC notes that it acquires a significant amount of fly ash for use in concrete from Millmerran Power Station, in the south-east Queensland region. The ACCC understands that other fly ash acquirers are also able to acquire fly ash from Millmerran Power Station.

4.25. The ACCC considers that Sunstate, Independent Flyash Brokers and Nucrush are all competitors to Pozzolanic.

4.26. The ACCC notes that other parties, such as Transpacific Waste, currently source fly ash from power stations in the south-east Queensland region for uses other than addition to concrete. The ACCC considers that other parties could potentially expand into providing concrete-grade fly ash for use as a partial cement substitute. The ACCC considers that these parties are potential competitors to Pozzolanic for the acquisition of Unprocessed Ash in south-east Queensland.

4.27. On the basis of this information, the ACCC considers the areas of competition relevant to this assessment are:
   (i) the supply and acquisition of unprocessed fly ash, and
   (ii) the supply and acquisition of concrete-grade fly ash in the south-east Queensland region.

4.28. The ACCC considers that small variations in the precise definition of the relevant areas of competition will not alter the outcome of this assessment.
The counterfactual

4.29. The ACCC applies the ‘future with-and-without test’ established by the Australian Competition Tribunal (the Tribunal) to identify and weigh the public benefit and public detriment generated by conduct for which authorisation has been sought.29

4.30. Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant area(s) of competition will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.

4.31. When assessing the likely public benefits and public detriments generated by the conduct proposed to be authorised, the ACCC will consider what is likely to happen in the relevant area(s) of competition if authorisation is not granted.

Pozzolanic and TEC’s submissions

4.32. In its most recent submission to the ACCC, Pozzolanic highlighted its uncertainty as to the counterfactual, submitting that TEC is best placed to advise the ACCC on the counterfactual.30 Pozzolanic has submitted that the counterfactual depends on TEC and third parties.

4.33. Pozzolanic submits that authorisation is a condition precedent for the commencement of the Agreement. However, Pozzolanic and TEC have each suggested that TEC could waive the condition precedent in the event that authorisation is not granted.31 Pozzolanic submits that it has not discussed the commercially likely scenarios with TEC.

4.34. TEC notes that it is likely to undergo restructuring as a result of the 25 November 2010 Queensland Government Shareholder Review of Queensland Government Owned Corporation Generators (Shareholder Review). As a result, TEC is unlikely to exist in its current form after 1 July 2011. TEC submits that:

following the Shareholder Review, the decision as to the most likely [course] of action should authorisation not be granted will be a matter for the management of the new owner of the Tarong and Tarong North Power Stations taking into account the relevant context.32

4.35. However, TEC submits that “the new owner of Tarong and Tarong North Power Stations is unlikely to adopt a different position [in respect of the Agreement] in the short to medium term”.33

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31 Ibid.; TEC, 10 January 2011, Submission in relation to application for authorisation A91261, page 22.
32 TEC, 10 January 2011, Submission in relation to application for authorisation A91261, page 7.
33 TEC, 10 January 2011, Submission in relation to application for authorisation A91261, page 22.
4.36. TEC submits that it will “continue to seek to maximise the sales of its [coal combustion products] to the highest commercially credible and firm bidders via periodic open market tenders”, taking into account the ACCC’s rationale for any decision not to authorise the Agreement. TEC has indicated to the ACCC that if authorisation is not granted, it is likely to re-tender for the sale of Unprocessed Ash from Tarong and Tarong North Power Stations, subject to any ACCC requirements. However, TEC considers that the outcome of the tender is likely to be same as the current situation and has noted that it is not interested in entering into contracts for the sale of ‘trivial’ quantities of fly ash from Tarong and/or Tarong North Power Stations.

4.37. TEC has also commented that, if it is unable to properly dispose of its ash, it would be likely to curtail operations, increasing the likelihood of power outages and interruptions, particularly in south-east Queensland during the peak Summer demand period of November to February. However, the ACCC notes that TEC has not submitted that it will be unable to properly dispose of its ash absent authorisation.

4.38. In considering the potential counterfactuals set out by TEC, Pozzolanic submits that if authorisation were not granted and TEC were to waive the condition precedent, there would be no negative impact on competition in respect of access to fly ash from Tarong Power Station. Further, Pozzolanic submits that if authorisation were not granted and TEC waived the condition precedent, there would be no impact on competition and the status quo would be preserved.

4.39. Pozzolanic also submits that if authorisation were not granted and the condition precedent was waived it would pay the same price to access and/or acquire the fly ash produced at Tarong and Tarong North Power Stations as set out under the Agreement.

4.40. In respect of TEC’s suggestion that, absent the Agreement, it may re-tender for access to fly ash from Tarong and/or Tarong North Power Station, Pozzolanic submits that “little would alter from the status quo” although the terms on which access to fly ash would be granted would depend on the outcome of any new tender arrangements and are thus unknown at this stage.

Interested party submissions

4.41. Nucrush submits that, if authorisation were not granted, Pozzolanic would be likely to attempt to renegotiate the Agreement with TEC and Tarong North.

4.42. If other parties were guaranteed access to some of the hoppers at Tarong North Power Station and another silo was put in for Pozzolanic’s Reject Ash, Nucrush would no longer have concerns with the application for authorisation.

4.43. The ACCC understands that, if demand increased, Nucrush would take fly ash from Tarong North Power Station rather than Bayswater Power Station if it had some guaranteed access to supply from the hoppers at Tarong North Power Station.

34 TEC, 10 January 2011, Submission in relation to application for authorisation A91261, page 22.
35 TEC, 10 January 2011, Submission in relation to application for authorisation A91261, page 4.
4.44. In considering the counterfactual, TMR referred to the likely impact of the proposed conduct on Sunstate Cement Ltd (Sunstate) and Wagners (a member of Independent Flyash Brokers). TMR submitted that:

If Pozzolanic gain[s] approval to supply from Tarong North it may prevent others being supplied for the same source, this may directly impact on Sunstate Cement which already uses this source. Effectively there would then only be two suppliers of fly ash; Pozzolanic and Wagners. TMR is concerned that such a situation would be harmful to the existing competitive market for the supply of fly ash [a]s it would in effect create a near monopoly situation with one very large supplier and only one other very small supplier being in the market.39

The ACCC’s view

4.45. As previously noted at paragraph 1.25, Pozzolanic, TEC and Tarong North currently have in place an Interim Agreement. The Interim Agreement runs from 15 July 2010 to the earlier of the commencement of the Agreement or 30 June 2011 and does not specify authorisation as a condition precedent. The Interim Agreement is otherwise substantially the same as the proposed Agreement.

4.46. Pozzolanic has not sought interim authorisation for the Interim Agreement.

4.47. The ACCC understands that the current situation is that Pozzolanic has access to all of the hoppers at Tarong North Power Station and all of the hoppers in zones 1-4 of Tarong Power Station. No other acquirers of fly ash for use in concrete currently have access to any of the hoppers at either station. Nucrush is the only other party that currently has an Option to access fly ash directly from the hoppers at Tarong Power Station but has not exercised that Option to date.

4.48. The ACCC also understands that Pozzolanic has not put any commercial fly ash supply proposals to TEC other than that which led to the current Agreement.40

4.49. Based on submissions provided by Pozzolanic and TEC, the ACCC considers that, if authorisation were not granted, TEC would be likely to re-tender for access to the fly ash produced at Tarong and Tarong North Power Stations. However, TEC and Pozzolanic have each indicated that, all things being equal, the same parties are likely to make the same offers for access to the fly ash, resulting in a situation similar to the status quo, except that the parties to the Agreement may choose to amend the Agreement to be less restrictive. The parties to the Agreement may also decide not to make any new supply agreement conditional upon receiving authorisation from the ACCC. Any such arrangement would be subject to the Act and therefore may need to be authorised (depending on its terms) in order to obtain statutory protection from legal action.

4.50. On the basis of submissions from Pozzolanic and TEC, the ACCC considers that the most likely outcome absent authorisation is that Pozzolanic, TEC and Tarong North would reach a new fly ash supply agreement. Based on TEC’s claims that it would take into account the ACCC’s reasons for any decision not to grant authorisation, the ACCC considers it likely that any such agreement would be less restrictive than the current

39 Queensland Government Department of Transport and Main Roads, 6 January 2011, Submission in relation to application for authoristion A91261.
40 This proposal was made in response to TEC request for tender TE1159 (2007).
Agreement. However, the ACCC considers that any new agreement would still be likely to grant Pozzolanic access to the majority of fly ash produced at the Tarong and Tarong North Power Stations.

4.51. While the parties suggested that they may enter into the agreement the subject of the authorisation (or an agreement on the same or substantially the same terms) even without authorisation, the ACCC does not consider that this will be likely.

4.52. Accordingly, the ACCC considers the likely counterfactual in which to assess the conduct sought to be authorised is one where Pozzolanic and other parties have access to fly ash produced at Tarong and Tarong North Power Stations pursuant to terms that are less restrictive than those sought to be authorised.

Public benefit

4.53. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.41

4.54. Pozzolanic submits the proposed conduct will deliver the following public benefits:

- environmental benefits
- cost efficiency benefits
- concrete performance benefits
- efficient utilisation of existing assets
- security of supply benefits, and
- clarity, transparency and certainty to third parties in respect of access arrangements to Tarong and Tarong North Power Stations.

Environmental benefits

Pozzolanic’s submission

4.55. Pozzolanic submits that its acquisition and sale of fly ash for use as a cementitious substitute offers the following benefits, in both the practical and economic sense, to the environment and to the Queensland community as a whole:

- less hazardous waste requiring disposal by the power stations or storage in ash dams or other landfills, and
- the use of fly ash as a substitute for cement in concrete will result in less cement being manufactured, which will in turn reduce the environmental costs related to the production of concrete, including the depletion of finite natural resources such as limestone.

4.56. Further, Pozzolanic submits that environmental benefits may be amplified through the Agreement where Pozzolanic is able to find a commercially viable use for fly ash that results in the off-take of more fly ash from Tarong and Tarong North Power Stations.

**TEC’s submission**

4.57. TEC submits that the sale and reuse of fly ash from the Tarong and Tarong North Power Stations results in a number of environmental benefits, including the following environmental benefits from the reuse of fly ash identified by the Ash Development Association of Australia:

- waste stream and associated land fill reductions
- conservation of resources such as gypsum, limestone and natural gas, which would otherwise be used in cement production, and
- use as a cement replacement results in a reduction in greenhouse gases of almost one tonne of carbon dioxide per tonne of cement.

**Interested party submissions**

4.58. Sunstate agrees that the use of fly ash as a cementitious substitute offers environmental benefits. However, Sunstate submits the proposed arrangement, which restricts the access of operators other than Pozzolanic to fly ash from Tarong and Tarong North Power Stations, does not in and of itself result in any environmental benefit. Sunstate considers that environmental interests are best served by allowing a number of operators to obtain fly ash and recycle it in the manufacture of cement and other products.

**The ACCC’s view**

4.59. The ACCC accepts that using fly ash in the production of concrete results in substantial environmental benefits. These arise from a reduced need to dispose of waste fly-ash. The ACCC also understands that the use of fly ash in the production of concrete generates less carbon emissions than the use of alternatives.

4.60. However, the ACCC is not satisfied that these benefits would be greater under the Agreement than in the counterfactual. In particular, Pozzolanic has not demonstrated why the Agreement is necessary to realise these environmental benefits. In other words, Pozzolanic has not demonstrated why it is necessary to enter into a restrictive agreement that provides Pozzolanic first right to any and all fly ash from most of the direct access points at Tarong and Tarong North Power Stations in order to achieve the claimed environmental benefits.

4.61. The ACCC notes that Pozzolanic has not demonstrated that TEC would be likely to sell less fly ash without authorisation of the proposed conduct and thus that more fly ash would need to be disposed of as waste rather than used as an input in downstream sectors. Indeed TEC has submitted that absent the Agreement it would continue to seek to maximise the sale of its coal combustion products (CCPs), which include fly ash.\(^{42}\)

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\(^{42}\) TEC, 10 January 2011, Submission in relation to application for authorisation A91261, page 22.
4.62. Further, Pozzolanic submits that it does not currently use all of the fly ash that it takes from Tarong and Tarong North Power Stations. Some of this is returned to the silo at Tarong North and is available for third parties to access. Pozzolanic retains the right to any fly ash that it removes from the Ash Transfer Points and may make this available to third parties at its discretion.

4.63. The ACCC understands that Pozzolanic does supply to third parties from time to time. However, the ACCC considers that the Agreement provides Pozzolanic with the right to access most of the fly ash produced at both stations and thus creates the ability for Pozzolanic to either withhold supply to third parties or to supply on less favourable terms and conditions than would likely be available absent the Agreement. Thus the ACCC considers that the Agreement may restrict the use of concrete-grade fly ash by Pozzolanic’s competitors and thus reduce the extent to which the environmental benefits of such use are realised compared with the counterfactual.

4.64. Based on the information currently before it, the ACCC is of the view that it is not clear that authorisation of the Agreement is necessary to achieve the claimed environmental benefits.

Cost efficiency benefits

Pozzolanic’s submission

4.65. Pozzolanic notes that one tonne of fly ash used in the production of concrete displaces a tonne of cement that would otherwise be used. As fly ash is generally a lower cost input than cement, its use in concrete production, all things being equal, reduces the total cost of production for producers. Pozzolanic submits that this in turn enables concrete producers to compete more vigorously and ultimately reduces the prices of concrete products for end consumers. Pozzolanic submits that this benefit is attributable to the proposed conduct.

4.66. Pozzolanic also submits that the proposed conduct benefits power stations by reducing cost and burden in the removal and disposal of fly ash. It suggests that the revenue that power stations receive for the sale of fly ash may enable them to bid into the National Electricity Market at lower prices, passing cost benefits on to electricity retail customers.

TEC’s submission

4.67. TEC submits that achieving the beneficiated reuse of fly ash via sales to third parties has allowed it to delay large capital expenditures and has provided TEC with a significant additional revenue stream.

Interested party submissions

4.68. Sunstate agrees that the inclusion of fly ash in concrete products makes the end product more cost effective to manufacture and sell. Additionally, Sunstate accepts that fly ash disposal through supply to concrete manufactures will result in some operational cost savings for the power stations. However, Sunstate submits that the proposed arrangement in and of itself does not result in any cost efficiency benefit. Rather, Sunstate is of the view that the restriction on third party access under the arrangement
will result in fly ash become more costly, which may result in less fly ash being used and fewer cost efficiencies being achieved.

The ACCC’s view

4.69. The ACCC considers that in certain circumstances, the use of fly ash in the production of concrete has cost efficiency benefits. However, Pozzolanic has not provided the ACCC with any information that demonstrates the relationship between the proposed arrangement and the achievement of any cost efficiency benefits. Based on the information before it, the ACCC is not satisfied that any cost efficiency benefits are likely to flow from the proposed arrangement.

4.70. Further, as noted above the ACCC considers that the Agreement may enable Pozzolanic to restrict the supply of fly ash to third parties. This may reduce the use of fly ash in the production of concrete and thus reduce the cost efficiency benefits compared with the counterfactual.

4.71. Pozzolanic also refers to cost savings to the Tarong and Tarong North Power Stations from the avoidance of waste disposal fees. As noted above, TEC has not raised any concerns that it will sell less fly ash absent authorisation of the Agreement.

Concrete performance benefits

Pozzolanic’s submission

4.72. Pozzolanic submits that fly ash brings additional properties to a concrete mix and provides superior performance for certain applications. In particular, fly ash may enhance the strength, durability and longevity of concrete. It may also reduce the time required for concrete to set, thereby improving construction times and productivity.

4.73. Pozzolanic submits that, by providing a framework for third parties to access fly ash from Tarong and Tarong North Power Stations, the Agreement enables third parties to access the efficiency benefits of concrete produced with fly ash substituted for cement.

TEC’s submission

4.74. TEC agrees that using fly ash as a partial cement replacement has the potential to enhance the properties of concrete and other building materials. It notes the example that fly ash can improve concrete density, act as a water reducing agent to mitigate against cracking and can reduce the heat generated during curing.

Interested party submissions

4.75. Sunstate, while agreeing that fly ash has concrete performance benefits in some circumstances, does not accept that Pozzolanic’s proposed third party access arrangements will enable other parties to share this benefit. Sunstate submits that Pozzolanic has not demonstrated that its claimed public benefits will result from entering into or giving effect to the Agreement in its present form.
4.76. Sunstate submits that Pozzolanic’s claimed benefits would potentially result from any agreement to use and collect fly ash, not necessarily from an exclusive agreement of the type for which Pozzolanic is seeking authorisation.

The ACCC’s view

4.77. The ACCC accepts that the use of fly ash in concrete may improve the performance features of that concrete. However, the ACCC is not satisfied that these performance benefits will occur directly and as a result of authorisation of the proposed conduct. The ACCC is also not satisfied that the magnitude of performance benefits will be greater with the proposed conduct than without. In particular, the ACCC notes its concern that the Agreement may enable Pozzolanic to restrict the supply of fly ash to competitors and thus reduce their ability to realise the claimed concrete performance benefits.

4.78. It is not clear to the ACCC that any gains in third party access or a resultant increase in concrete performance benefits are likely to flow from authorisation.

Efficient utilisation of existing assets

Pozzolanic’s submission

4.79. Pozzolanic submits that the Agreement will enable it to continue using its existing facilities at Tarong and Tarong North Power Stations. Pozzolanic suggests that it may cease operating at Tarong and Tarong North Power Stations if the Agreement does not proceed. In this case, Pozzolanic submits that dismantling its assets would result in “unnecessary economic costs and risks”. Pozzolanic also submits that the utilisation of assets that have depreciated over time may assist in the maintenance of a lower wholesale per tonne price for fly ash than if this capital investment were required to be incurred again by an alternative off-taker.

Interested party submissions

4.80. Sunstate submits that the proposed arrangement will enable Pozzolanic to effectively utilise the existing assets at Tarong and Tarong North Power Stations. However, it submits that this is unlikely to result in public benefits to customers or third parties. It submits that the proposed arrangement and utilisation of the assets will enable Pozzolanic to control fly ash from Tarong and Tarong North Power Stations.

4.81. Sunstate also notes that Pozzolanic’s submission in support of the current application for authorisation A91261 states that Pozzolanic’s historical practical off-take from Tarong North Power Station has comprised less than 50 per cent of the fly ash taken from the Ash Transfer Points. Sunstate submits that this implies that having a legal entitlement to 100 per cent of the available fly ash from Tarong North Power Station is not required to support efficient investment by Pozzolanic in collection and classification facilities at Tarong North Power Station.

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44 Sunstate Cement Ltd, 14 February 2011, Submission in response to application for authorisation A91261, page 5.
The ACCC’s view

4.82. The ACCC accepts that if there are economies of scale in production, there may be scope for only a small number of suppliers in a market and thus potentially a justification for exclusive arrangements to facilitate the efficient use of assets. However, in such circumstances a lessening of competitive constraint may mean that assets are not utilised as efficiently as possible. The ACCC considers it is not clear that the proposed arrangements will result in the efficient utilisation of Pozzolanic’s existing assets, that the use of Pozzolanic’s existing assets results in a lower wholesale price of fly ash, or even whether use of Pozzolanic’s existing assets would provide more benefit to the public than the use of other assets.

4.83. In any case, if there are economies of scale in production, the Agreement would not be necessary to realise the associated benefits as absent the Agreement competitors would be unlikely to establish their own (higher-cost) off-take facilities – instead relying on third party supply from Pozzolanic. As Pozzolanic enjoys the benefits of incumbency, the ACCC considers that Pozzolanic is unlikely to cease taking fly ash from Tarong and Tarong North Power Stations in the absence of the Agreement. The ACCC notes that these power stations provide a large supply of high quality concrete grade fly ash and that this represents one of the only practical sources from which acquirers can obtain access to adequate quantities of an appropriate type of fly ash from a location proximate to south-east Queensland. Pozzolanic also has a significant competitive advantage from the establishment and depreciation of its existing assets.

4.84. The ACCC considers that Pozzolanic has not demonstrated that authorisation is necessary for it to be able to efficiently utilise its existing assets over the term of the authorisation that Pozzolanic has proposed.

4.85. Therefore, the ACCC considers that authorisation is unlikely to result in benefits from the efficient utilisation of existing assets that are greater than those that could be realised in the counterfactual.

Security of supply

Pozzolanic’s submission

4.86. Pozzolanic submits that authorisation would provide it with a secure and reasonably consistent source of supply. Pozzolanic also submits that this security of supply will assist it to continue to operate competitively and to make more efficient and informed investment decisions in the medium term.

4.87. Pozzolanic submits that it considers it valuable and necessary to obtain a first right to access sufficient quantities of sufficient quality fly ash to ensure it can meet its daily

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demand requirements in the face of supply difficulties. In particular, Pozzolanic submits that its need for security of supply is driven by:

- the variable nature of daily demand
- power station constraints that may reduce output of fly ash, such as maintenance shutdowns, changes to the coal used or changes to load profile
- water restrictions or other constraints that may reduce fly ash output
- unavoidable losses/operating inefficiencies such as contamination, size constraints, high hopper levels, full silos and mechanical failures
- variations in the quality and quantity of fly ash available from the Ash Transfer Points from time to time and as between the Ash Transfer Points, and
- changes in power station operating processes, introduction of new technology, that vary the quality and/or quantity of fly ash produced.

**Interested party submissions**

4.88. Sunstate submits that the proposed arrangement will provide Pozzolanic with security of supply at the expense of third parties obtaining fly ash supply from the Tarong and Tarong North Power Stations. It submits that any third party access that exists under the arrangement is likely to be at Pozzolanic’s discretion.

**The ACCC’s view**

4.89. The ACCC accepts that the availability of fly ash can vary from day to day depending on a number of factors and that security of supply over the longer term is important to purchasers in order to balance supply with demand. Contractual arrangements can improve security of supply. However, the ACCC considers that the Agreement provides Pozzolanic with surety of supply to more fly ash than it has historically required. The ACCC also considers that the demand for fly ash is derived from the demand for downstream products that use fly ash as an input and is thus subject to fluctuations in line with general economic conditions. Pozzolanic has not demonstrated why, to ensure security of supply, it needs a supply agreement based on the proportion of fly ash produced at the Tarong and Tarong North Power Stations rather than an agreement based on the tonnage that Pozzolanic needs to meet demand for its products. The ACCC considers that third party fly ash acquirers are likely to face similar constraints to those faced by Pozzolanic in accessing consistent supply from Tarong and/or Tarong North Power Station.

4.90. The ACCC considers that security of supply is not likely to flow from authorisation of the proposed conduct. However, the ACCC considers that, even if authorisation of the conduct did result in security of supply for Pozzolanic, it is not clear that this would be a benefit to the public.

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Clarity, transparency and certainty of third party access

Pozzolanic’s submission

4.91. Pozzolanic submits that, in addition to the public benefits it claims in its submission in support of application for authorisation A91261:

- certain additional benefits are likely to arise from authorisation, including increased certainty and transparency providing confidence to third parties that the access provisions in the Agreement will remain as they are on a continuing basis for the term of the Agreement.  

4.92. Pozzolanic submits that the main benefit that authorisation will provide is transparency in third party access arrangements. Pozzolanic submits that these access arrangements will be clearer and understood by third parties, thereby providing certainty for third parties. Transparency from the Agreement will increase the size of the other benefits claimed by Pozzolanic and these benefits will be more likely to occur with authorisation.

4.93. Pozzolanic submits that the Agreement has been designed to facilitate third party access to fly ash from Tarong Power Station and Tarong North Power Station. As evidence of this, Pozzolanic notes the inclusion of clauses in the Agreement that provide for third party access to Contestable Ash, Surplus Ash and Unused Ash. Pozzolanic also notes that Reserved Ash would be available to third parties.

4.94. Pozzolanic submits that if the proposed arrangements are not authorised, any future regime for third party access will not be scrutinised through the ACCC’s authorisation process.

Interested party submissions

4.95. The Queensland Government Department of Transport and Main Roads submits that authorisation is unlikely to provide third parties with access to fly ash at Tarong and/or Tarong North Power Station.

4.96. Sunstate has submitted that the proposed arrangement does not provide certainty to third parties. It is concerned that:

- If the Agreement is authorised in its present form, Pozzolanic would be legally entitled to take 100% of fly ash output from Tarong North [Power Station] for a period of 3 years, effectively granting Pozzolanic the ability to foreclose Sunstate’s sole practically and economically viable source of run-of-station fly ash.

4.97. Sunstate has submitted that it would consent to the ACCC authorising the Agreement if it were amended to provide certain and fair third party access to fly ash produced by TEC.

4.98. Nucrush submits that it has particular concerns about third party access to supply of concrete-grade fly ash from the Tarong North Power Station. Nucrush notes that the exclusive access to the baghouse filter hoppers at Tarong North Power Station provided

for by the Agreement is likely to have the effect of limiting the number of competitors for off-take of fly ash at Tarong North Power Station.

4.99. Nucrush submits that its concerns would be substantially reduced if the proposed agreement were amended to address the issues of contamination of fly ash at Tarong North Power Station and the lack of the provision in the Agreement for Pozzolanic to relinquish control of Ash Transfer Points at Tarong North Power Station. Nucrush also submits that Pozzolanic should give undertakings to ensure third party access to fly ash.50

The ACCC’s view

4.100. The ACCC notes Pozzolanic’s submission that authorisation of the Agreement will provide third parties with clarity and transparency concerning their ability to access fly ash from the Tarong and Tarong North Power Stations.

4.101. The ACCC notes that Pozzolanic has claimed that Clause 7 of the proposed Agreement, which relates to Unused Ash, will provide one mechanism for third party access. Clause 7 provides that if, in each of three or more consecutive months during the term of the Agreement Pozzolanic removes less than 50 per cent of the total amount of fly ash from the Ash Transfer Points and cannot satisfy TEC that it has the capacity and the intention to use at least 50 per cent of the total amount of fly ash available from the Ash Transfer Points for the following three months, then TEC may request that Pozzolanic use reasonable endeavours to permit third parties to have access to the Ash Transfer Points to remove Surplus Ash.

4.102. However, the ACCC considers that Clause 7 of the Agreement is unlikely to provide third parties with any certainty of access to fly ash from Tarong or Tarong North Power Station.

4.103. In relation to the operation of Clause 7 of the Agreement concerning Unused Ash, the ACCC notes that neither TEC nor Pozzolanic has considered any way of measuring the combined total amount of fly ash produced at Tarong and Tarong North Power Station or whether Pozzolanic has taken less than 50 per cent of this fly ash in three or more consecutive months.51 The ACCC is not confident that the parties to the Agreement, and other parties, will have any way of knowing whether Clause 7 of the Agreement has been or could be triggered.

4.104. In relation to the availability of Reject Ash to third parties, the ACCC notes Reject Ash is only available from the Tarong North silo. The ACCC also notes that third parties do not have any certainty about how much Reject Ash will be deposited into the Tarong North silo. This lack of certainty is significant because a large deposit of Reject Ash can significantly reduce the yield of concrete-grade fly ash from a batch of fly ash sourced from the Tarong North silo, and this in turn will significantly increase an acquirer’s input costs.

50 Nucrush Group, 22 December 2010, Submission in response to application for authorisation A91261.
4.105. The ACCC notes that Reserved Ash comprises fly ash from Tarong Power Station from:

- the access points that are reserved for Nucrush in accordance with the Option (but are currently being used by Pozzolanic), and
- fly ash from zones 5 and 6, which is difficult and/or hazardous to handle.

4.106. The ACCC considers that Reserved Ash is likely to be either: unavailable to third parties other than Nucrush; or unsuitable for use in concrete.

4.107. In respect of Surplus Ash, Pozzolanic has noted that it is not practical for it to take all of the fly ash available from Tarong and Tarong North Power Stations without depositing some into the Tarong North silo. Nevertheless, the ACCC notes that the Agreement provides that Pozzolanic has first right of access to any and all fly ash available from the Ash Transfer Points and the Agreement does not set out any requirements that Pozzolanic must relinquish any of this fly ash at any time.

4.108. The ACCC considers that it remains a possibility that Pozzolanic may take all of the fly ash produced by Tarong North Power Station, with the result that third parties are unable to acquire any fly ash from Tarong North Power Station that may be used in the manufacture of concrete. The ACCC considers that this is a possibility especially in times of fly ash shortages.

4.109. The ACCC notes that Pozzolanic submits that Clause 11 of the Agreement provides no guarantee to Pozzolanic of the quality or quantity of fly ash available.\footnote{Pozzolanic Enterprises Pty Ltd, 3 March 2011, Further Response to Information Request dated 18 February 2011, page 2.} However, the ACCC also notes that third parties do not have any guarantees of quality or quantity of fly ash available either.

4.110. The ACCC notes that the Agreement provides TEC with the ability to vary the Ash Transfer Points and specify new Ash Transfer Points for any reason. Pozzolanic suggests that TEC can use the relevant provisions to deny Pozzolanic access to 100 per cent of the fly ash produced at Tarong Power Station. However, the ACCC considers that these provisions appear to have been designed to provide a mechanism for Pozzolanic to continue to take fly ash in the face of potential maintenance and operational issues.

4.111. The ACCC notes that there is no restriction on TEC increasing the number of Ash Transfer Points Available to Pozzolanic.

4.112. The ACCC also notes Pozzolanic’s submission that authorisation of the Agreement will provide third parties with certainty about their ability to access fly ash at the Tarong and Tarong North Power Stations over the term of the Agreement.

4.113. However, the ACCC notes that the Agreement would provide Pozzolanic with first right of access to any and all fly ash from the Ash Transfer Points, providing Pozzolanic with the ability to take as little or as much fly ash as it wishes on any given day.

\footnote{Pozzolanic Enterprises Pty Ltd, 3 March 2011, Further Response to Information Request dated 18 February 2011, page 2.}
4.114. Based on the information before it, the ACCC considers that authorisation of the conduct is unlikely to result in clear or transparent access arrangements for third parties. The ACCC considers that authorisation of the conduct is unlikely to result in any certainty benefits to third parties.

ACCC conclusion on public benefits

4.115. The ACCC considers that Pozzolanic has not demonstrated that its claimed benefits are likely to result directly from authorisation of the proposed conduct and would not be realised absent the Agreement.

4.116. The ACCC considers that authorisation of the proposed arrangements is not likely to result in any significant benefit to the public.

Public detriment

4.117. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

…any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.53

Pozzolanic’s submission

4.118. Pozzolanic submits that the proposed conduct will result in minimal public detriment for the following reasons:

- the entitlement to collect fly ash is non-exclusive
- the Agreement provides for third party access to fly ash, and
- the Agreement does not provide Pozzolanic with exclusive use of the Licensed Area where fly ash is collected.

4.119. The views of interested parties and the ACCC regarding the likely public detriment from the proposed conduct are set out below.

Barriers to third party access to fly ash

Interested party submissions

4.120. Interested parties submit that the Agreement is likely to impose or reinforce numerous barriers to third party access to fly ash from Tarong and Tarong North Power Stations.

4.121. Sunstate submits that the conduct is likely to foreclose or materially constrain Sunstate’s future access to the only economically viable source of fly ash that it can re-sell in competition with Pozzolanic/Cement Australia.54

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53 Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.
54 Sunstate Cement Ltd, 14 February 2011, Submission in response to application for authorisation A91261, pages 4-5.
4.122.  Sunstate also submits that collecting fly ash from Tarong Power Station would be difficult because collection infrastructure is currently owned by Pozzolanic and/or Cement Australia and the requirement for third parties to supply their own off-take equipment would necessitate dismantling or modifying Pozzolanic’s facilities and installing collection equipment below each Temporary Ash Transfer Point, which would require significant capital investment.\(^{55}\)

4.123.  Sunstate submits that Pozzolanic has overrepresented the amount of fly ash that will be available to third parties pursuant to the Agreement.

4.124.  Nucrush also raised concerns that, under the Agreement, Pozzolanic would continue to deposit Reject Ash into the silo at Tarong North Power Station, where it will continue to be mixed with Unprocessed Ash. This would reduce the value of this fly ash to third party acquirers and prevent third parties that do not have grinders from acquiring fly ash from Tarong North silo.

4.125.  Nucrush notes that the Agreement provides Pozzolanic with access to all connection points to the baghouse filter hoppers at Tarong North Power Station and does not provide for variation to this access.

4.126.  Interested parties have raised concerns that although Pozzolanic does not currently extract its full entitlement to 100 per cent of the fly ash produced at Tarong North Power Station, if it chose to extract this entitlement, it could exclude third parties from accessing fly ash from the Tarong North silo. Pozzolanic would then be able to force out third parties who currently source ash from Tarong North Power Station.

4.127.  Interested parties also submit that the Agreement is likely to make it difficult for third party fly ash acquirers to obtain long term supply contracts with TEC and/or Tarong North for fly ash from Tarong and/or Tarong North Power Stations. Supply contracts are essential for a third party to operate in the south-east Queensland region.

4.128.  Further, interested parties have suggested that any ability for Pozzolanic to legally take any and all fly ash from the Ash Transfer Points under an authorised Agreement would enable Pozzolanic to monopolise the south-east Queensland market for the supply of fly ash. Pozzolanic may then seek to resupply this fly ash to its competitors and would be able to charge a significantly higher price for fly ash from Tarong and Tarong North Power Stations than these parties would normally pay to TEC for the same fly ash. Cement Australia could then under cut its competitors’ prices in the relevant downstream concrete markets.

The ACCC’s view

4.129.  The ACCC notes that TEC has indicated that it is not interested in entering into contracts for the sale of trivial quantities of fly ash from Tarong and/or Tarong North Power Station. This suggests that if the Agreement is authorised competitors who wish to obtain small amounts of fly ash from Tarong and/or Tarong North Power Station would need to rely on uncontracted supply from the power station (if surplus ash is available) or obtaining third party supply from Pozzolanic.

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\(^{55}\) Sunstate Cement Ltd, 6 September 2010, Submission in relation to application for authorisation A91261, pages 5-6.
4.130. TEC has indicated to the ACCC that Pozzolanic currently has use of all of the connection points at both Tarong and Tarong North Power Stations. The ACCC understands that the only other party with an option to access fly ash direct from the hoppers at either of these stations is Nucrush. The ACCC therefore considers that impediments to access are likely to be high for other parties seeking fly ash at Tarong and Tarong North Power Stations.

4.131. The ACCC notes that the supply of fly ash at Tarong and Tarong North Power Stations comprises a significant proportion of the available supply of fly ash in south-east Queensland. The ACCC considers that impediments to access at the Tarong and Tarong North Power Stations will impact upon competition for fly ash in the south-east Queensland region.

4.132. The ACCC considers that such parties are unlikely to be able to acquire secure access to a sufficient volume of high quality fly ash at Tarong or Tarong North Power Station to make investment in the necessary processing equipment profitable. These other parties are therefore unlikely to be able to enter the market during the term of the Agreement.

4.133. The ACCC considers that the practical effect of the Agreement is that Pozzolanic’s entitlement to collect any and all fly ash from the Ash Transfer Points is likely to exclude third parties from accessing suitable fly ash directly from the hoppers at Tarong and/or Tarong North Power Stations.

4.134. In practice, all third parties other than Nucrush will be partially foreclosed from accessing useable fly ash directly from the hoppers at Tarong Power Station and all third parties will be foreclosed from accessing fly ash directly from the hoppers at Tarong North Power Station.

4.135. The ACCC considers that the proposed conduct is likely to restrict access to fly ash at Tarong and Tarong North Power Stations, which represent a significant portion of the supply of fly ash in south-east Queensland. Importantly, the ACCC also considers that authorisation of the proposed conduct is likely to heighten barriers to third party entry into the south-east Queensland region. The ACCC understands that if it sanctioned the Agreement, TEC would be likely to roll the contract over upon expiry. However, if the Agreement was not authorised, Pozzolanic, TEC and Tarong North may re-negotiate a less restrictive agreement.

4.136. The ACCC also considers that, if it authorised the Agreement, third parties and others would be less likely to challenge the Agreement and Pozzolanic would be less likely to seek to maintain and/or improve third party access to fly ash at the Tarong and Tarong North Power Stations in the future.

4.137. The restrictions on access to fly ash from Tarong and Tarong North Power Stations are likely to heighten barriers to entry and/or expansion, thereby partially foreclosing and/or reducing competition in the relevant area of competition. This is likely to impact upon prices in downstream markets and, ultimately, prices to consumers in the south-east Queensland region.
ACCC conclusion on public detriments

4.138. The ACCC considers the proposed arrangements are likely to result in public detriments constituted by lessening of competition as a result of heightened barriers to entry and expansion, reduced and/or partially foreclosed competition in the relevant areas of competition and prices that are above the competitive level for fly ash concrete products.

Balance of public benefit and detriment

4.139. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the proposed conduct is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.

4.140. In the context of applying the net public benefit test in section 90(8)\(^56\) of the Act, the Tribunal commented that:

\[\text{... something more than a negligible benefit is required before the power to grant authorisation can be exercised.}^57\]

4.141. For the reasons outlined in this chapter, the ACCC considers that Pozzolanic has not demonstrated that statutory protection for a potentially anti-competitive agreement is required to achieve the claimed benefits. The ACCC considers that authorisation of the proposed arrangements is not likely to result in any significant benefit to the public. Further, authorisation is likely to result in public detriment in the form of heightened barriers to third party entry and/or expansion in the supply of fly ash in the south-east Queensland region that will partially foreclose and/or reduce competition, resulting in prices above the competitive level for fly ash and cementitious products that use fly ash as an input.

4.142. As noted above, the ACCC considers that authorisation of the conduct is not likely to result in any significant benefit to the public. Therefore, the likely public benefit cannot and does not outweigh the likely public detriment from authorisation of the conduct. The ACCC is therefore not satisfied that the tests in sections 90(6), 90(7), 90(5A) or 90(5B) are met.

\(^{56}\) The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

\(^{57}\) Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.
5. Draft determination

The application

5.1. On 7 December 2010, Pozzolanic Enterprises Pty Ltd lodged application for authorisation A91261 with the Australian Competition and Consumer Commission (the ACCC).

5.2. Application A91261 was made using Form B Schedule 1, of the Competition and Consumer Regulations 2010. The application was made under subsection 88 (1A) and 88(1) of the Act to:

- make and give effect to a contract or arrangement, or arrive at an understanding a provision of which would be, or might be, a cartel provision (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.

5.3. In particular, Pozzolanic seeks authorisation for the Fly Ash Supply Agreement.

5.4. Pozzolanic applied for authorisation on its own behalf and on behalf of Cement Australia Pty Ltd and Cement Australia Holdings Pty Ltd.

5.5. Tarong Energy Corporation Limited and Tarong North Pty Ltd are parties to the Fly Ash Supply Agreement. Under section 88(6) of the Act, any authorisation granted by the ACCC would automatically be extended to cover any person named in the authorisation as being a party or proposed party to the conduct.

5.6. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

5.7. For the reasons outlined in Chapter 4 of this draft determination, the ACCC is not satisfied that:

- the conduct for which authorisation is sought is likely to result in a benefit to the public, and
- the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition arising from the conduct.

5.8. The ACCC therefore proposes to deny authorisation to application A91261.
Conduct for which the ACCC proposes to deny authorisation

5.9. The ACCC proposes to deny authorisation for Pozzolanic to make and give effect to the proposed Fly Ash Supply Agreement between Pozzolanic Enterprises Pty Ltd, Tarong Energy Corporation Limited and Tarong North Pty Ltd.

5.10. This draft determination is made on 29 March 2011.

5.11. The attachments to this document are part of the draft determination.

Further submissions

5.12. The ACCC will now seek further submissions from interested parties. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.
Attachment A — the authorisation process

The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Competition and Consumer Act 2010* (the Act). A key objective of the Act is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.

The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.

The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.

The ACCC conducts a public consultation process when it receives an application for authorisation. The ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.

After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.

Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.

The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.
Attachment B — chronology of ACCC assessment for application A91261

The following table provides a chronology of significant dates in the consideration of the application by Pozzolanic.

<table>
<thead>
<tr>
<th>DATE</th>
<th>ACTION</th>
</tr>
</thead>
<tbody>
<tr>
<td>7 December 2010</td>
<td>Application for authorisation lodged with the ACCC.</td>
</tr>
<tr>
<td>10 January 2011</td>
<td>Closing date for submissions from interested parties in relation to the substantive application for authorisation.</td>
</tr>
<tr>
<td>14 February 2011</td>
<td>Additional interested party submission received.</td>
</tr>
<tr>
<td>18 February 2011</td>
<td>ACCC provides interested party submissions to the applicant and request a response.</td>
</tr>
<tr>
<td>21-25 February 2011</td>
<td>ACCC requests additional information from the applicant, TEC and Nucrush.</td>
</tr>
<tr>
<td>15 March 2011</td>
<td>All requested information received from Pozzolanic, TEC and Nucrush.</td>
</tr>
<tr>
<td>29 March 2011</td>
<td>Draft determination issued.</td>
</tr>
</tbody>
</table>
Attachment C — the tests for authorisation and other relevant provisions of the Act

**Competition and Consumer Act 2010**

**Section 90—Determination of applications for authorisations**

(1) The Commission shall, in respect of an application for an authorization:

(a) make a determination in writing granting such authorization as it considers appropriate; or

(b) make a determination in writing dismissing the application.

(2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

(4) The Commission shall state in writing its reasons for a determination made by it.

(5) Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

(5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:

(a) that the provision would result, or be likely to result, in a benefit to the public; and

(b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:

(i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and

(ii) the provision were given effect to.

(5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:

(a) that the provision has resulted, or is likely to result, in a benefit to the public; and

(b) that the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.

(6) The Commission shall not make a determination granting an authorization under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to
the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:

(a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;

(b) the proposed covenant were given, and were complied with; or

(c) the proposed conduct were engaged in;

as the case may be.

(7) The Commission shall not make a determination granting an authorization under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.

(8) The Commission shall not:

(a) make a determination granting:

(i) an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or

(ii) an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or

(iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or

(iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

(b) make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

(9) The Commission shall not make a determination granting an authorization under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

(9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):

(a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):

(i) a significant increase in the real value of exports;
(ii) a significant substitution of domestic products for imported goods; and

(b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

**Variation in the language of the tests**

There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).

The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition but the test under section 90(8) is not so limited.58

However, the Tribunal has previously stated that regarding the test under section 90(6):

> [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.59

Consequently, when applying either test, the ACCC can take most, if not all, public detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7). Further, as the wording in sections 90(5A) and 90(5B) is similar, this approach will also be applied in the test for conduct that may be a cartel provision.

**Conditions**

The Act allows the ACCC to grant authorisation subject to conditions.60

**Future and other parties**

Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

- persons who become party to the contract, arrangement or understanding at some time in the future61

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58 *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers’ Boycott Authorisation* [2006] AcompT9 at paragraph 67.


60 Section 91(3).
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.  

**Six-month time limit**

A six-month time limit applies to the ACCC’s consideration of new applications for authorisation. It does not apply to applications for revocation, revocation and substitution, or minor variation. The six-month period can be extended by up to a further six months in certain circumstances.

**Minor variation**

A person to whom an authorisation has been granted (or a person on their behalf) may apply to the ACCC for a minor variation to the authorisation. The Act limits applications for minor variation to applications for:

- a single variation that does not involve a material change in the effect of the authorisation.

When assessing applications for minor variation, the ACCC must be satisfied that:

- the proposed variation satisfies the definition of a ‘minor variation’ and
- if the proposed variation is minor, the ACCC must assess whether it results in any reduction to the net benefit of the conduct.

**Revocation; revocation and substitution**

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation. The ACCC may also review an authorisation with a view to revoking it in certain circumstances.

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place. The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.

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61 Section 88(10).
62 Section 88(6).
63 Section 90(10A).
64 Subsection 91A(1).
65 Subsection 87ZD(1).
66 Subsection 91B(1).
67 Subsection 91B(3).
68 Subsection 91C(1).
69 Subsection 91C(3).