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12 June 2015

Mr Gavin Jones
Director
Adjudication Branch
Australian Competition and Consumer Commission
GPO Box 3131
CANBERRA ACT 2601

By email: gavin.jones@accc.gov.au

Dear Mr Jones

Re: N97609 – Coal Reuse (CR) (“CR Notification”)

I refer to the CR Notification and to CR’s response dated 28 April 2015 (**CR Response**).

In Summary

- A. After almost 12 months, CR has failed to fulfil its commitments set out in the CR Notification. This failure is the direct result of the following actions by CR:
- The failure to invest in material handling systems and distribution assets required to underpin the reliability of supply of CCPs;
 - The failure to demonstrate a functioning supply chain process;
 - The failure to demonstrate any quality assurance capability; and
 - The failure of CR to understand that their proposed market model as related to Cement Grade Fly Ash does not reflect the requirements of Australia’s infrastructure and construction industry and has therefore failed to attract buyers.
- B. As a result of CR’s failure to fulfil its commitments set out in the CR Notification:
- There has been a significant and ongoing loss of available product to the market; and
 - The arrangement has resulted in environmental detriments with at least an additional 200,000 tonnes of ash directed to landfill; and
- C. CR has changed its business model preventing competition for CCPs.
- In the Notification CR set out their business model to be a ‘reseller’ of product to the wider market and not a market participant. This was a means of justifying the exclusive supply arrangement. The intention of CR is clearly set out in the CR Response regarding cenospheres where CR is now both a seller and a market participant. The market price of ‘raw’ cenospheres is set in relation to the economic returns CR expect to achieve when selling processed cenospheres, effectively leaving no opportunity for any other participant to purchase raw cenospheres and extract a fair return.



- D. The ultimate outcome of CR's failure is the lack of sufficient public benefit to outweigh the anticompetitive detriment arising from the 10 year exclusive arrangement which prevents direct access to Tarong CCPs by other market participants.

As stated by the ACCC in the 2011 Pozzolanic authorisation decision:

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.

In that case, the ACCC was concerned with the original terms of the Pozzolanic contract with Stanwell, which the ACCC stated would give Pozzolanic practical first access to around 86% of the fly ash at Tarong power station (see paragraph 4.183). Using the same reasoning, a contract that gives CR an exclusive right to 100% of the fly ash from Tarong and Tarong North, plus 100% of the fly ash from Stanwell power station, subject only to Stanwell's right to continue to supply a limited and capped amount of CCPs under existing contracts for a limited period of time, must also raise competition concerns.

The following points provide further explanation of our key concerns:

1. CR's commitments in the Notification have failed to materialise

CR has received exclusive access to CCPs from Tarong and Stanwell power stations for almost one year and their commitments in the CR Notification have failed to materialise. Clause 4 of the Notification contends that CR will re-supply CCPs in accordance with "Open Market Principles" namely (a) access to commercial quantity; (b) physical access; (c) quality and (d) price. CR have failed to provide fine grade, quality assured product to the market during that time. As such they have reduced the availability of fly ash to the SEQ market and the ability to compete for CCPs from Tarong.

The CR Notification at paragraph 4.1 claims that CR will provide participants with access to quantities of CCPs "sufficient for their reasonable commercial purposes." This has clearly not transpired. To date, we are aware of only 2000 tonnes of uncertified fine grade material having been made available. Such a small quantity of uncertified ash is unlikely to be considered by end use customers as it would be uneconomic and impractical to change product silos and alter concrete mix designs for such a short production run.

The Notification also alleged that CR will "attract new users" of CCPs and "develop the market". Again, it appears that this has failed to eventuate. CR stated that there is a contractual obligation to remove up to 20,000 tonnes of CCPs free of charge each year to explore potential new markets and further beneficial uses of CCPs. Cement Australia is not aware of any evidence that this has occurred to date.

2. False assertions in relation to dealings with Cement Australia

The assertions that CR made an offer to acquire Cement Australia's equipment along with an "interim offer" to supply ash were addressed in our submission dated 2 September 2014 (**CA Submission**). Simply put, Cement Australia received one conditional offer for supply

of product for a short period of time on the basis that Cement Australia agreed to enter into negotiations to sell its Tarong assets to CR at approximately 10% of the asset value.

Not surprisingly, Cement Australia refused this offer as was its commercial prerogative. It is galling that CR now contend that their failure to make CCP sales is an outcome of our alleged “refusal” and that as a consequence CR have had to invest in facilities and obtain approvals. As with any business transaction, it is imprudent to enter into a long term contract without surety of the assets required to run the business, confirmation of all necessary approvals and an assured customer base. These are matters that CR should have addressed prior to entering into a binding commitment with Stanwell and cannot, in any part, be blamed on Cement Australia.

3. CR has failed to invest and has no demonstrated supply chain or quality assurance capability

CR has failed to invest to provide the material handling systems and distribution assets required to underpin the reliability of supply. CR advised Cement Australia on a number of occasions that it had the designs of a replacement system and the financial capacity to install new equipment at Tarong power station prior to the end of 2014. To date our observation is that little investment has occurred at the Tarong site and that the CR equipment installed has a production limitation of about 5% of the previous system.

CR have not followed through on their commitment to invest adequately and in doing so have effectively reduced the supply of Fine Grade Fly Ash to the market.

Furthermore, CR remain unwilling or unable to provide documentation regarding the quality assurance, supply chain processes, staff capability and competence of their business. As a consequence they fail to meet the requirements of any supplier to Cement Australia as set out in our Procurement Policies.

While these may appear secondary issues they are in fact core to the ability of a customer to take product from a supplier. Prior to the exclusive supply arrangement Cement Australia had a supply chain system in place that included product quality assurance, road delivery assets, intermediate silo storage (at Darra, Yatala and Bulwer Island) required to manage the short term volatility in supply and demand and the technical know how to support the use of product by end use customers. It is clear to Cement Australia that not only have Coal Reuse failed to invest in on site recovery of product at Tarong they have also failed to invest in a functioning reliable supply chain that is required by the market end users.

It is our strong view that the fine grade ash and cenosphere production and supply chain delays are entirely due to the lack of investment by CR. CR initially asserted that the market needed an “independent manufacturer with suitable plant...to be able to produce CCPs that can be used across multiple industries, rather than for use in cement production alone” (Notification, p9). This “suitable plant” is yet to materialise and accordingly there has been a loss of available product to the market.

4. The proposed market model does not reflect the requirements of Australia’s infrastructure and construction industry and has failed to attract buyers

As outlined in the CA Submission, in the infrastructure and construction industry customers tender for project work on an ongoing but ad hoc basis with time frames between any tendering process and physical supply often stretching out years. Due to the nature of large

projects and other influencing factors, demand at any given time is rarely linear. Before submitting a tender, customers need surety of supply, guarantee of product quality and a known price.

CR's proposed market model fails to deal with this requirement and accordingly CR has failed to attract buyers of CCPs. CR state that a limited test tender for ash products was completed in December 2014 and that no products were ultimately taken. It is difficult to understand how a market test that results in no sales can be considered a success.

The current on-line price offer for Fine Grade Fly Ash provides a further example of the failings of CR's so called "open market principles". Prospective ash purchasers can currently only buy small ash quantities on-line directly from CR at a price stipulated on the CR website which is set by CR and subject to change every three minutes. Products are only available on an "ex gate basis" as CR's offering does not provide any supply chain assets or storage required for end users of fly ash products.

For prospective purchasers who are unwilling to purchase Tarong ash on this basis, there is unfortunately no alternative. Unlike the previous arrangement, there is no provision for commercial ash volumes to be available directly from Stanwell's power stations. Hence at this time a key source of fine grade fly ash for the South East Queensland market has effectively been removed.

The lack of demand for Tarong cement grade fly ash is indicative of the fact that prospective purchasers consider that the price of the CR product is too high and/or that the risk in the supply chain – quality, quantity, delivery, intermediate storage is unacceptability high.

5. Change in CR Business Model – prevents competition for CCP supply

The cornerstone of CR's approach as outlined in the Notification was that it would ensure open competition by selling to the market without being a participant. Upon review of the CR Response, Cement Australia is concerned that CR are now redefining their market model to include processing and competing directly with the downstream market participants. This represents a significant shift from what was originally proposed and introduces an obvious constraint on competition.

This is best demonstrated in the way CR are dealing with cenospheres. Specifically, by setting the market price for "raw" cenospheres as well as processing and selling processed cenospheres in direct competition with the purchasers of raw cenospheres CR is incentivised to price raw cenospheres to maintain their economic advantage.

CR state that the price of "raw" cenospheres is in fact based on the returns they are able to gain in their own distribution business. These returns are dependent on the competence, or otherwise, of CR's operations. If they are a high cost producer to maintain their returns they must increase the price. This has an obvious flow on effect to purchasers of raw cenospheres who wish to process them for on-sale.

This constrains the ability of low cost producers to compete in the supply of processed cenospheres and results in a higher product price to the end user. This practice is inconsistent with CR's "open market" philosophy as the market for cenospheres can hardly be considered "open" when there is a player competing as both a wholesaler and a retailer.



6. Conclusion

As outlined in the CA Submission, Cement Australia firmly submits that the ACCC should revoke the Notification. The 10 year exclusive engagement of an operator that, after 12 months, has failed to demonstrate the capability set out in their Notification to provide reliable, quality assured fly ash supply in South East Queensland cannot foreseeably result in any measurable public benefits. It is clear that the impediments to access at Tarong power stations created by the CR arrangement have substantially impacted on competition for fly ash in the south-east Queensland region.

We look forward to receiving the ACCC's determination on the Notification shortly. We are happy to discuss this matter further if this would be of assistance to the ACCC.

Yours faithfully,

A handwritten signature in blue ink, appearing to read "Rob Davies", is positioned above the typed name.

Rob Davies
Chief Executive Officer