



# Determination

Application for authorisation AA1000517

lodged by

Boral Cement Limited

in respect of

an Offtake, Operation & Maintenance Agreement and a Design and Construct Contract

Authorisation number: AA1000517

26 November 2020

Commissioners:      Keogh  
                                 Rickard  
                                 Court  
                                 Ridgeway

## Summary

The ACCC has decided to grant conditional authorisation for five years to enable Boral Cement Limited and Stanwell Corporation Limited to give effect to an Offtake, Operation & Maintenance Agreement (OOMA) (the Proposed Conduct).

Under the OOMA Boral will have the exclusive right to take fly ash from Stanwell's Tarong PS and an obligation to take, and pay for, at least a defined minimum monthly tonnage of fly ash. Fly ash is a waste by-product created during the coal burning process at coal-fired power stations which can be used as a partial substitute for cement when manufacturing concrete. The OOMA has an initial term of five years, renewable for a further five years if certain conditions are met.

Under a separate Design and Construct Contract (DCC), Boral is designing and constructing a new facility at Tarong PS to offtake this fly ash. The DCC is not subject to authorisation, construction of the new facility has commenced, and Stanwell will own the new offtake facility regardless of the OOMA.

The OOMA and DCC were entered following a tender process run by Stanwell.

To grant authorisation, the ACCC must be satisfied that the Proposed Conduct would not have the effect or likely effect of substantially lessening competition or would result or be likely to result in a public benefit that would outweigh the public detriment likely to result.

Boral submits that its purpose in entering the Agreements with Stanwell is to develop a fly ash supply business to supply both its own downstream (concrete) businesses and third parties in the concrete/construction industries.

The ACCC has considered whether there is a risk of a reduction in competition due to the possibility that Boral may seek to withhold supply of fly ash to its competitors in downstream concrete markets, or raise the cost of them acquiring fly ash. The ACCC considers, on balance, that the likelihood of a substantial lessening of competition is limited by alternative sources of fly ash available to Boral's competitors.

Further, the OOMA requires Boral, subject to fly ash availability at Tarong PS and its own needs, to make fly ash available to third parties without discrimination; using its best endeavours to maximise sales; on a non-exclusive basis and on reasonable commercial terms; disregarding its participation in any downstream market for fly ash; and not unreasonably refusing to supply fly ash to third parties or discouraging reasonable offers from third parties.

To address the lessening of competition that would be likely to result if Boral did not supply fly ash to third parties in accordance with its obligations under the OOMA, the ACCC has decided to impose a condition of authorisation the effect of which is that if Boral does not make fly ash available to third parties on these terms, its conduct in doing so will not have the legal protection provided by the authorisation.

The ACCC considers that there is some risk that the Proposed Conduct will facilitate coordination between industry participants in supplying fly ash in SEQ. However, the ACCC does not consider that there is a substantially greater likelihood of such coordination with the Proposed Conduct.

The Proposed Conduct will provide Boral with some information about the costs and volumes of fly ash acquired by some of its competitors in downstream concrete markets which the ACCC considers may, to some degree, soften competition between

them. However, the ACCC considers that any such lessening of competition is unlikely to be significant enough to constitute a substantial lessening of competition.

Therefore, on balance, the ACCC considers that the Proposed Conduct, engaged in in accordance with the condition of authorisation, would not have the effect, or would not be likely to have the effect, of substantially lessening competition.

Boral seeks authorisation for 10 years. Having regard to the initial five-year term of the OOMA and to the ACCC's conclusions about the likely impact on competition of the Proposed Conduct being based, in part, on Boral providing third party access to Tarong PS fly ash in accordance with the terms of the OOMA, the ACCC grants authorisation initially for five years. Should Boral and Stanwell wish to exercise the option to extend the OOMA for a further five years, they would be able to seek re-authorisation at that time.

## 1. The application for authorisation

- 1.1. On 3 June 2020, Boral Cement Limited (**Boral**) lodged application for authorisation AA1000517 with the Australian Competition and Consumer Commission (the **ACCC**). Boral is seeking authorisation for itself and on behalf of Stanwell Corporation Limited to give effect to the Offtake, Operation & Maintenance Agreement it has entered with Stanwell pursuant to which Boral will have the exclusive right to take and purchase fly ash from Tarong Power Station for 10 years (the **Proposed Conduct**).
- 1.2. This application for authorisation AA1000517 was made under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).

### The Applicants

- 1.3. Boral Cement Limited operates the cementitious materials business of Boral Australia, which is an integrated construction materials and building products manufacturer and supplier in Australia.
- 1.4. Stanwell is a Queensland Government-owned corporation who owns coal-fired power stations, namely Stanwell Power Station, Tarong Power Station (**Tarong PS**) and Tarong North Power Station (**Tarong North PS**). Stanwell generates a quarter of Queensland's electricity supply and sells electricity directly to large customers along the east coast. The Agreement with Boral relates only to Tarong PS.

### The Proposed Conduct

- 1.5. The Applicants have entered into an Offtake, Operation & Maintenance Agreement (**OOMA**) pursuant to which Boral will have the exclusive right to take and purchase fly ash from Tarong PS. Under a separate agreement, Boral is designing and constructing a new facility for this purpose (Design and Construct Contract, the **DCC**) and the exclusive rights under the OOMA are conditional on the practical completion of the facility. The new fly ash facility will be the property of Stanwell. Together, the OOMA and DCC comprise the agreement between Boral and Stanwell for which authorisation is sought (**Agreement**).
- 1.6. The Applicants are seeking authorisation to give effect to the OOMA for 10 years commencing from the Offtake Commencement Date. The primary provisions of the OOMA in relation to which Boral seeks authorisation are clauses 4.1 (exclusive right to take fly ash) and 4.2 (obligation to take fly ash), which set out the minimum volumes Boral must take and the payment obligations. The Offtake Commencement Date is

when all the conditions have been satisfied or waived and is likely to coincide with the practical completion date under the DCC, which is anticipated to be 15 March 2021.

- 1.7. The OOMA has an initial term of five years with an option to extend for a further five years if certain conditions are met. Boral submits that a minimum authorisation period of 10 years is appropriate given the substantial contribution Boral will make to the construction of the new facility and the establishment of a significant fly ash supply business in South East Queensland (**SEQ**).
- 1.8. The OOMA is expressed as conditional upon ACCC authorisation.

## 2. Background

### The Applicant

- 2.1. Boral Cement Limited is a vertically integrated entity within the following broader corporate structure:
  - Boral Limited: an international building products and construction materials group comprised of three divisions, listed on the ASX
  - Boral Australia: operates Boral Limited's Australian construction materials business. Boral Australia is an integrated, construction materials and building products manufacturer and supplier in Australia
  - Boral Cement Limited: operates Boral Australia's cement and supplementary cementitious materials business. Boral Cement Limited manufactures and supplies various construction, cement and supplementary cementitious materials and operates a network of cement manufacturing and distribution facilities in New South Wales, Victoria and Tasmania.
  - Boral Concrete: a collection of entities which supply concrete to industrial, commercial and residential customers, with 240 premix concrete plants around Australia.<sup>1</sup> The concrete is composed of aggregates (generally coarse gravel or crushed rocks from Boral Quarries, and finer materials such as sand) and cement (which is sourced as described in paragraph 2.2).<sup>2</sup>
- 2.2. Boral submits that while Boral Australia is a user of fly ash (via Boral Concrete), it currently has no direct access to fly ash. Instead, Boral Concrete currently acquires fly ash largely from Boral Cement's joint ventures, Sunstate Cement Ltd (**Sunstate**) in SEQ and Fly Ash Australia Pty Limited (**FAA**) (mainly in New South Wales and purchased via Boral Cement):
  - Sunstate is a 50:50 incorporated joint venture between Adelaide Brighton Limited and Boral. Sunstate is a cement manufacturer and distributor which provides a range of bulk and bagged cement products and related cementitious materials, including various fly ash and slag blended cements, to commercial customers in Queensland and Northern New South Wales.<sup>3</sup> Sunstate is operated independently of its shareholders, with a separate management team headed by its General Manager. Each shareholder has two directors on Sunstate's board.

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<sup>1</sup> [Application for authorisation](#), section 8.2; Boral, [Concrete](#).

<sup>2</sup> Boral, [Boral Concrete](#).

<sup>3</sup> Sunstate, [About us – shareholders](#).

- FAA is a 50:50 incorporated joint venture between Boral Limited and Cement Australia Pty Ltd (**Cement Australia**) which focuses on the collection, processing, storage and distribution of quality fly ash products. FAA was formed in 1984 and has operations in New South Wales, South Australia and Western Australia and distributes its products throughout Australia.<sup>4</sup> FAA is independently operated. It has two directors appointed by each shareholder and a General Manager.

## The Fly ash industry

- 2.3. Fly ash is a waste by-product created during the coal burning process at coal-fired power stations. The primary use of fly ash in Australia is using cement grade fly ash as a partial substitute for cement in the manufacture of concrete, because it is cheaper and more readily available than other cement substitutes.<sup>5</sup>
- 2.4. Fly ash is a 'regulated waste' under the *Environmental Protection Regulation 2019* (Qld) which imposes obligations to ensure it is stored, transported and treated in an environmentally appropriate manner.
- 2.5. A key factor to determining the quality of fly ash is its fineness. Processes such as classification (separating finer particles using centrifugal force) and milling or grinding (grinding it into a finer product) are therefore often used to increase the fineness of fly ash.
- 2.6. The measurement of fineness of fly ash is based on the percentage that passes through a 45µm (micrometre) sieve. Fly ash products must meet Australian Standards for Grade 1 (minimum 75% passing) or Grade 2 (minimum 55% passing) in order to be sold and used as a cementitious material. Boral proposes to produce Grade 1 and Grade 2 fly ash from zones 1-3 at Tarong PS, with the majority of fly ash to be Grade 1.
- 2.7. The Applicants submit that the current sources of fly ash in SEQ and adjacent regions are as follows:

<b>Power station</b>	<b>Fly ash quality (compared to Tarong PS)</b>	<b>Current offtake agreement</b>
<b><u>SEQ</u></b>		
<b>Tarong PS</b>	-	None (discharged to mine)
<b>Tarong Nth PS</b>	Similar quality	Sunstate (grinds in offsite milling plant)
<b>Millmerran PS</b>	Similar quality	Independent Flyash Brokers Pty Ltd (marketed by Millmerran Flyash)
<b>Kogan Creek PS</b>	-	None (discharged to mine)
<b><u>Central Qld</u></b>		
<b>Stanwell PS</b>	-	-

<sup>4</sup> Stanwell, [About Stanwell](#).

<sup>5</sup> Alternative uses of fly ash include: asphalt filler; roller compacted concrete; construction materials such as bricks, construction blocks and lightweight aggregate; soft soil stabilisation and solidification; raw feed for cement clinkers; mine reclamation; flowable fill; and as soil ameliorant in agriculture.

<b>Callide A, B and C PSs</b>	Higher quality	Cement Australia
<b>Gladstone PS</b>	Higher quality	Cement Australia

## Rationale for the Proposed Conduct

- 2.8. Boral submits that it currently has no direct access to fly ash from any power station in SEQ and that:
- its only participation in a fly ash business in SEQ is via its Sunstate joint venture, which sources fly ash from Tarong North PS. Boral Concrete acquires fly ash from Sunstate for its own use and, occasionally, small volumes for on-supply to existing customers in SEQ, and
  - Boral also acquires fly ash in SEQ from Independent Flyash Brokers Pty Ltd (**IFB**). IFB is a processor and marketer of coal combustion products (**CCPs**) including graded fly ash and bottom ash, operating out of Millmerran Power Station in SEQ.
- 2.9. Boral considers fly ash to be a valuable resource that can be converted to reduce environmental concerns and generate sustainable construction products for the benefit of the fly ash, concrete mix and construction industries and the public at large.
- 2.10. Boral considers there is likely to be growth in the demand for fly ash given the general increase in demand for concrete in SEQ, and the increased proportions of fly ash being used in concrete production as businesses seek to improve their environmental footprint (including in preparing for potential environmental regulation). Boral submits that consistent with this, and given it does not have a direct SEQ fly ash position, it is looking to build a fly ash management and recycling business, with the key strategic rationale for its investment being:
- to build fly ash capacity and exposure to sustainable products
  - to more efficiently source fly ash for its own SEQ concrete business. Boral expects that Tarong PS fly ash may be used at some or all of Boral Concrete's locations across Queensland and Northern New South Wales, depending on the economic merit of supply ex-Tarong as compared with other available alternatives
  - to capture external sales, including potentially from SEQ premix / precast / masonry customers, wholesale trade, road bases / stabilisation and grouts. Boral proposes supplying Tarong PS fly ash in SEQ and is considering export from SEQ, and
  - to deliver innovations in fly ash to drive higher fly ash usage in premix concrete and other construction materials especially if carbon schemes are introduced.
- 2.11. A new facility is required in order to collect fly ash from Tarong PS and for some of the fly ash to be classified in order to meet Australia standards. There has been no facility at Tarong PS since 2014, when Pozzolanic Enterprises removed the fly ash equipment it had installed at the site. Since that removal newly generated fly ash has been stored in voids at Meandu Mine.<sup>6</sup>
- 2.12. Stanwell will be the owner of the new facility. Boral submits that this seeks to ensure that the plant can be used by any future operator if Stanwell's arrangements with Boral are unsuccessful i.e. Stanwell will be able to operate the facility itself to sell fly ash directly

<sup>6</sup> In August 2014 Stanwell entered a 10-year agreement with Coal Reuse for Tarong PS fly ash. Coal Reuse announced in July 2015 that it would construct a fly ash handling facility, however at the time Coal Reuse was placed into liquidation in September 2016 and the agreement was terminated, it had not commenced construction of this facility.

to customers, or enter into an agreement with a different third party for the operation and maintenance of the facility.

## **The OOMA and DCC**

2.13. The Agreements between Boral and Stanwell were executed following a competitive tender process conducted by Stanwell for the construction and ongoing management of a new fly ash facility in May – September 2018.

2.14. Stanwell submits that it entered into the Agreements with Boral because it was the preferred participant following the EOI process, and the terms of the Agreements are directed to the implementation of Stanwell's strategy for offtake of fly ash from Tarong PS. Stanwell submits that its current strategy for offtake of fly ash from Tarong PS, which is informed by its historical experience with the sale of CCPs including fly ash, involves:

- Stanwell entering into an arrangement with an appropriately qualified counterparty who can design, construct, operate, manage and maintain a fly ash offtake facility.
- Stanwell owning, funding the cost of construction, and approving the design of, that facility.
- The arrangement providing Stanwell with a return on its investment in the facility via the future sales of fly ash.
- Maximising offtake by the counterparty taking CCPs for its own demand requirements and supplying to third parties.
- A take or pay arrangement, primarily to address Stanwell's need for a reliable return on investment and to reduce offtake risk; and incentivise its counterparty to facilitate third-party access to fly ash.
- The counterparty having the ability to comply with Stanwell's policies, licences and regulations.

## ***The Offtake, Operation & Maintenance Agreement***

2.15. The OOMA has the following main provisions:

- (a) Exclusive right: Boral has the exclusive right to take fly ash from the precipitator hoppers, using the product silos and transfer points it constructs under the DCC. Boral does not have the right to take any other fly ash including surplus ash which is removed from the hoppers as part of the existing wet ash system.
- (b) Minimum offtake: Boral must use reasonable endeavours to take, and pay for, at least the defined minimum monthly tonnage (**MMT**) of fly ash. This requirement is supported by a 'take or pay' arrangement, which requires Boral to pay the price set for that MMT irrespective of whether it takes it. Boral submits that the minimum volumes under the OOMA exceed Boral Concrete's own requirements and this would give Boral an incentive to find additional third party users for the fly ash.
- (c) Third party sales: Boral must each month make fly ash available for sale to third parties, subject to fly ash availability and the consumption requirements of Boral and its related bodies corporate. In this regard, Boral must:
  - offer the fly ash to third parties on a non-exclusive basis and on reasonable commercial terms and use its best endeavours to maximise sales

- not unreasonably refuse to supply third parties or discourage reasonable offers from them
  - disregard its participation (and that of its related bodies corporate) in any downstream market for fly ash, and
  - include in third-party contracts terms for transport, audit, site access and use. Stanwell must approve these terms and must not withhold its approval where such terms are no less onerous than those applying to Boral under the OOMA.
- (d) Maintenance: Boral will provide Stanwell with operation and maintenance services in respect of the new facility.
- (e) Term: The OOMA runs for a five-year period, renewable at the option of either party for a further five years.

### ***The Design and Construct Contract***

- 2.16. Under the DCC, Boral Cement will design and install the new facility to draw fly ash from zones 1-3 of Tarong PS's existing hoppers.
- 2.17. It will include pneumatic raw feed collection from zones 1-3 of the precipitators of all four boiler units of Tarong PS, a classification mechanism to remove oversize material, and a mechanism to pneumatically convey fly ash to one of two fly ash storage silos over tanker loading and weighing capability for dispatch. The existing wet ashing system will continue removing fly ash from zones that are not connected to the facility. In this regard, Boral submits that it requires significant investment to connect pipework to each additional zone and plug that into the collection and classification plant.
- 2.18. The date for practical completion for the new fly ash facility is 15 March 2021.

### **Previous related matters**

- 2.19. The ACCC has previously considered a number of matters involving fly ash in SEQ.
- 2.20. *Cement Australia litigation (2008-2017)*: The ACCC brought proceedings against Cement Australia and its subsidiaries, with proceedings initiated in 2008. Cement Australia had entered contracts with the (then) only four coal-fired power stations in SEQ to acquire fly ash. The Federal Court held that the contracts had the purpose and effect of preventing a competitor from entering the market by preventing them from obtaining direct access to a source of fly ash in SEQ, and as a result, had the purpose and effect of substantially lessening competition. The Court noted that Pozzolanica Enterprises Pty Ltd (**Pozzolanica**) and Cement Australia Pty Ltd enjoyed such a substantial market share and exercised such a substantial degree of influence upon pricing in the SEQ concrete grade fly ash market, that the competitive impact of new entry by a competitor would have been significant. The Full Court of the Federal Court ultimately imposed penalties of \$20.6 million.
- 2.21. *Pozzolanica Enterprises authorisation (2010-2011) – granted*: Pozzolanica, a subsidiary of Cement Australia, sought authorisation for a three-year agreement granting it the first right to purchase 70% of concrete grade fly ash from Tarong PS and 100% from Tarong North PS. Pozzolanica withdrew its application after the ACCC proposed to deny authorisation due to concerns that the agreement was likely to heighten barriers to entry and expansion for other fly ash acquirers in SEQ. The ACCC ultimately granted authorisation to a subsequent application after Pozzolanica proposed amendments which significantly increased the amount of fly ash available to third



parties (reducing Pozzolanics's right of access to 33% at Tarong and 44% at Tarong North PS).

- 2.22. *Coal Reuse exclusive dealing notification (2014) – no further action:* Coal Reuse proposed to acquire CCPs (including fly ash, bottom ash and processed by-products such as cenospheres) from Stanwell's Tarong PS, Tarong North PS and Stanwell Power Station on an exclusive basis for resupply to third parties, for 10 years. Coal Reuse was a special purpose vehicle which had no interest in the industry or businesses that use CCPs and was intended to act solely as a CCP reseller. Coal Reuse was placed in liquidation in 2016 and the contract with Stanwell subsequently terminated.
- 2.23. *Envirospheres exclusive dealing notification (2017) – no further action:* The notified conduct related to Envirospheres acquiring cenosphere<sup>7</sup> harvesting rights and cenospheres from Stanwell at certain locations on condition that Stanwell not supply cenospheres or harvesting rights to any other person during the term of the agreement. The initial term of the contract was until 31 March 2020. The contract contained a mechanism to extend the term by a further year. The maximum term of the agreement would therefore end no later than 31 March 2021.

### 3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including major competitors, customers, relevant industry associations or peak bodies, and relevant state government and regulatory bodies.<sup>8</sup>
- 3.3. Prior to the draft determination, the ACCC received five submissions from interested parties in relation to the application.
- 3.4. Nucrush Group, who noted that it lodged an EOI to Stanwell's tender for Tarong PS fly ash, raised concerns with the arrangements. Nucrush submitted that access to fly ash continues to be difficult due to demanding commercial arrangements with power stations. Specifically, the high minimum take or pay for Tarong PS put Nucrush at a material disadvantage to larger players who (through vertical integration and sheer size) are more capable of making a much larger commitment. This limits the access of smaller players, reducing competition at this level of the value chain, and effecting the downstream market and end customer.
- 3.5. IFB, who noted that it also lodged an EOI under Stanwell's tender for Tarong PS fly ash, is opposed to the Proposed Conduct. Broadly, IFB submitted that:
- Boral misstates the facts. It is not a 'new entrant', as it is simply replacing the previous operator at Tarong PS; as the fly ash market is oversupplied, authorisation will not increase supply but result in a bare transfer; Boral is unlikely to 'further promote the use of fly ash' or grow the market through alternative uses, including because there is no viable business case for alternative uses suggested.

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<sup>7</sup> Cenospheres are small, hollow, hard-shelled, ultra low-density spherical particles in fly ash. Cenospheres float on top of water and are harvested from the ash dam or mine void. They can be used as a lightweight filler in the manufacture of construction, automotive and refractories materials and specialised surface coatings.

<sup>8</sup> A list of the parties consulted and the public submissions received is available from the ACCC's public register [www.accc.gov.au/authorisationsregister](http://www.accc.gov.au/authorisationsregister).

- The claimed benefits are illusory, overstated or could be achieved by other means. The likely detriments include the risk that having two vertically integrated fly ash suppliers in SEQ increases and the likelihood of coordinated effects, resulting in higher concrete prices for end-consumers.
  - A non-exclusive agreement or different operator would result in a vigorously more competitive outcome compared to the Proposed Conduct, as this would eliminate concerns about third-party offtake and Boral's economic incentives as a vertically integrated firm controlling an important input into the downstream concrete market.
  - Stanwell's requirement for a take or pay arrangement and acceptance of Boral's 10-year exclusive term is driven by Stanwell's fly ash disposal issues and does not take into account the competition law considerations that arise from the combination of the two requirements.
- 3.6. One interested party whose identify the ACCC has not disclosed at their request submits that Boral's economic incentive is not to become a cheap source of fly ash to third parties because this would both undermine its existing joint venture relationships and provide a cheap source of fly ash to Boral's competitors in downstream concrete markets. The interested party also raises concerns that Boral's contractual ties through its joint ventures will increase the risk of tacit collusion between Boral and other industry participants and reduce their incentives to compete.
- 3.7. The Ash Development Association of Australia (**ADAA**), which is composed of producers and marketers of power station ash and states its objectives are to investigate and foster economic market opportunities for the beneficial use of CCPs, submitted that it supports Boral's planned investment. ADAA submitted that the economic and employment benefits arising from the use CCPs are significant and substantial to the construction materials industry. It also considered that additional processing capacity to produce more 'graded' fly ash is essential to meet growing demand and supply chain inventory capacity.
- 3.8. The Queensland Department of State Development, Tourism and Innovation noted that it has no issues with the application.
- 3.9. On 22 October 2020, the ACCC issued a draft determination proposing to grant conditional authorisation for five years. The proposed condition required Boral to comply with clause 9.1 of the OOMA, which (broadly) requires Boral, subject to fly ash availability at Tarong PS and its own needs, to make fly ash available to third parties without discrimination; using its best endeavours to maximise sales; on a non-exclusive basis and on reasonable commercial terms; disregarding its participation in any downstream market for fly ash and to not unreasonably refuse to supply fly ash to third parties or discourage reasonable offers from third parties.
- 3.10. A pre-decision conference was not requested following the draft determination.
- 3.11. The ACCC received two submissions from interested parties in relation to the draft determination.
- 3.12. IFB submitted that authorisation should not be granted because:
- the Proposed Conduct is likely to result in a substantial lessening of competition as between the future with the Proposed Conduct (a single exclusive supplier of high quality fly ash from a power station location closest to the centre of growing demand, which has an interest in or control over all SEQ fly ash sources and is

vertically integrated) and the future without the Proposed Conduct (one or more non-exclusive suppliers), and

- there are no public benefits arising from the OOMA as the benefits referred to are aspirational and, in any event, can be achieved without the Proposed Conduct.

3.13. However, IFB submitted that to the extent the ACCC is inclined to grant authorisation:

- the proposed condition is ineffectual and should be revised to ensure it does not have the effect of substantially lessening competition (as discussed in paragraphs 4.48–4.49 below), and
- three years is the more appropriate term for which to grant authorisation, as the five years proposed is excessive (as discussed in paragraphs 4.94–4.95 below).

3.14. The Queensland Department of State Development, Tourism and Innovation provided a submission noting that it had no issues with the application.

3.15. In response, Boral submitted that IFB's submissions do not raise any new material issues or concerns and are based on:

- a mischaracterisation of the views expressed by the ACCC in the draft determination. For example, IFB's submission refers to the 'Commission's conclusion that there are no public benefits' – a conclusion which was never in fact made
- a counterfactual that is not credible or supported by evidence, and
- a belief that the term should be three years instead of the 10 years sought (or the five years proposed by the ACCC) purely on the basis that the ACCC has the ability to grant authorisations of short duration.

3.16. These submissions are elaborated on, as relevant, in the ACCC's assessment of the Proposed Conduct below.

3.17. Public submissions by the Applicant and interested parties are on the Public Register for this matter.

## 4. ACCC assessment

4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.

4.2. The Applicants have sought authorisation for Proposed Conduct that would or might constitute exclusive dealing within the meaning of section 47 of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsection 90(7) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that:

- the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition, or
- the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would result or be likely to result from the conduct,

(the **authorisation test**).

## Relevant areas of competition

- 4.3. Defining the areas of competition likely to be affected by the Proposed Conduct enables the ACCC to assess the likely effect of the Proposed Conduct, including whether the Proposed Conduct would have or be likely to have the effect of substantially lessening competition in a market.
- 4.4. The Applicants submit the ACCC has previously considered the markets for the supply and acquisition of unprocessed fly ash and concrete grade fly ash in SEQ,<sup>9</sup> although the ACCC has also noted that the market may be broader than SEQ.<sup>10</sup> In relation to this application, Boral submits that:
  - the 'acquisition and supply of fly ash' is the relevant product market, because the distinction between unprocessed fly ash and concrete grade fly ash is not particularly meaningful in analysing the competitive effects, and
  - the geographical scope of the market is now broader than previously considered by the ACCC. Fly ash's geographical range of economic supply is related to transport costs; fly ash to cement replacement efficiency; and the cost of local supply of cement, fly ash and slag. Boral proposes supplying in SEQ and is considering export and understands that Cement Australia is currently supplying from North Queensland to South Australia, Victoria and New South Wales and from SEQ to Northern New South Wales).
- 4.5. Stanwell also notes that proximity reduces transport costs, but that Queensland-produced fly ash is also used and sold interstate (for example, Cement Australia has shipped to southern states).
- 4.6. In particular, Stanwell submits that it understands that the lack of fly ash source in Victoria and the inconsistent availability of fly ash from sources in New South Wales mean that demand for cement grade fly ash in New South Wales and Victoria is greater than the supply of fly ash in those states, resulting in the export of fly ash from Queensland to those states. For example, Boral understands that in 2019 Cement Australia shipped via the Port of Gladstone around 300kt of fly ash from the Gladstone and Callide power stations to locations in New South Wales, Victoria and South Australia.
- 4.7. IFB submits that excluding a minimal supply to users in the far northern part of New South Wales, the only Queensland produced fly ash shipped to southern states is via Cement Australia's Fisherman's Landing facility in Gladstone and this is only possible due to Cement Australia's ownership of receival facilities in southern states and its access to guaranteed markets through Cement Australia's shareholders. The same facilities do not exist at Tarong PS and transporting fly ash over such distance is not economic.
- 4.8. Having regard to these matters, the ACCC considers that the geographic scope of the market for the supply of fly ash may be broader than SEQ.
- 4.9. However, for the purpose of assessing whether the Proposed Conduct would have the effect or likely effect of substantially lessening competition in a market, the ACCC has adopted a narrow market definition on the basis that if the Proposed Conduct is

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<sup>9</sup> ACCC, [Final Determination – Application for Authorisation lodged by Pozzolanic Enterprises](#), 14 July 2011, [4.23].

<sup>10</sup> ACCC, [Statement of Reasons – Coal Reuse Pty Limited – Notification – N97609](#), 26 November 2015, [5.7].

unlikely to substantially lessen competition in a narrowly defined market, it would be even less likely to raise concerns if the market were defined more broadly.

- 4.10. Accordingly, the ACCC has assessed the effect or likely effect of the Proposed Conduct on the supply and acquisition of fly ash in SEQ.
- 4.11. The ACCC also considers that because fly ash is used as an input in concrete, the Proposed Conduct may affect the market(s) for supply of concrete.

## Future with and without the Proposed Conduct

- 4.12. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 4.13. Boral submits that there are three possible future scenarios, and that in any of them, Boral would be unlikely to enter the fly ash market as an active fly ash supplier within SEQ:
  - The status quo, where Tarong PS has no active off taker of fly ash and no new facility would be built, resulting in Stanwell continuing to deposit fly ash via its wet ashing system into the mine void at the Meandu Mine or onsite ash dam.
  - Stanwell entering into an agreement for the construction of the facility and subsequent offtake with an alternative bidder. The alternative bidder may be less qualified or require a higher volume for self-consumption than Boral, therefore reducing supply to third parties; alternatively the alternative bidder may have an existing fly ash business, resulting in some consolidation in this market.
  - Stanwell constructs the fly ash offtake facility itself and enters an agreement with a third party/parties to take and purchase Tarong PS fly ash, though this would be inconsistent with Stanwell's decision to go to tender to build the facility.
- 4.14. Stanwell submits that the facility is already being constructed, because the DCC is not subject to authorisation, and that Stanwell will own it regardless of the OOMA. Stanwell submits that without arrangements with Boral, it would likely continue to seek to maximise the sale of fly ash produced at Tarong PS in accordance with its long-term rationale and strategy. This rationale includes maximising the volume of fly ash moved to productive use (that is, beneficially reused in accordance with the relevant regulatory requirements), while providing revenue to Stanwell, reducing Stanwell's costs in relation to fly ash management and reducing storage requirements on site.
- 4.15. Stanwell submits that on the basis that the offtake facility is constructed, this may involve re-engaging with the market to identify an appropriate counterparty to operate and maintain the offtake facility on terms which are acceptable to Stanwell commercially and in the context of the operations at the power station. In the absence of acceptable arrangements to sell fly ash produced at Tarong PS via the new offtake facility (when constructed), Stanwell would continue to manage unsold fly ash by depositing it in the mine voids at the adjacent Meandu Mine and in the Tarong Ash Dam, along with other CCPs.
- 4.16. Stanwell states that it and its predecessor in law, Tarong Energy Corporation, have sold CCPs produced from Tarong PS almost continuously since the 1980s and it has no interest in expanding its business to encompass the management and operation of a fly ash offtake facility, and believes a counterparty involved in the facility's design and construction is best placed to manage and operate it.

- 4.17. IFB disagrees with each of Boral's future scenarios. It agrees with Boral that scenario three is inconsistent with Stanwell's EOI. However, it submits that absent the Proposed Conduct – and given Stanwell is already absorbing the capital costs of the offtake equipment, and has an incentive to remove as much fly ash as possible – the more likely scenario is that another industry participant would operate the Tarong PS offtake facility on a non-exclusive basis. In support of this, IFB notes that at least two well-resourced and independent firms with SEQ fly ash expertise responded to the EOI.
- 4.18. IFB further submitted, in response to the draft determination, that because the Proposed Conduct involves the entry into the OOMA, which contains an exclusivity provision, the appropriate future without the Proposed Conduct is the conduct the parties would engage in if they could not engage in the conduct in contravention of the Act. That is, a non-exclusive agreement between Stanwell and either Boral or a third party (or multiple third parties potentially including Boral).
- 4.19. In addition, IFB submitted that Stanwell's desire for a commercial return is met in IFB's postulated future without the Proposed Conduct and therefore there is no need for exclusivity. IFB submits that non-exclusive arrangements would be just as likely to provide the commercial certainty that Stanwell requires.
- 4.20. Boral submits that an offtake agreement with Stanwell that is non-exclusive and has no take or pay arrangement is uneconomic – because due to Stanwell's decision to retain ownership of the facility in light of its experience with Cement Australia, to support Stanwell's investment it requires the certainty of return provided by the take or pay obligations; and in turn, Boral cannot agree to the take or pay without certainty of access to fly ash, provided by the exclusivity.
- 4.21. The ACCC considers that the likely future without the Proposed Conduct is that Stanwell would attempt to re-engage with the market to find an alternative counterparty to operate and maintain the facility on terms which provide Stanwell a return on its investment. The ACCC considers that the fact Stanwell chose to run the EOI process, and that it has had various fly ash offtakers and run various EOI process in respect of Tarong PS in the past, support this intention.
- 4.22. The ACCC notes that Stanwell re-engaging with the market would be in a different context to that in which the tender process that lead to Stanwell entering into the Agreement with Boral took place. Stanwell would be re-engaging with the market in circumstances where an offtake facility had already, or was being, built. With whom, and on what terms Stanwell would likely enter into an agreement in these circumstances is uncertain. In these changed circumstances a different mix of parties may seek to operate and maintain the facility, putting forward different terms to those offered through the previous process.
- 4.23. Given the uncertainty about who Stanwell would likely enter into an agreement with and on what terms if the current arrangement with Boral did not proceed and Stanwell re-engaged with the market, the ACCC has adopted a conservative approach to identifying the likely future without the Proposed Conduct for the purpose of assessing the impact on competition of the Proposed Conduct.
- 4.24. In this respect, the ACCC has previously concluded that a third party that did not itself require fly ash for the manufacture of downstream products, that is, a party that was only seeking to act as a seller of fly ash to end users operating the offtake facility would, where the third party did not also have rights to fly ash at other sites in SEQ, be unlikely to raise competition concerns. The third party would be acting as an

intermediary between Stanwell and end users – exercising exclusive rights to sell the fly ash that Stanwell itself could otherwise sell.<sup>11</sup>

- 4.25. If the ACCC is satisfied that Boral having exclusive rights to Tarong PS fly ash is unlikely to substantially lessen competition compared to this future without the Proposed Conduct, then the Proposed Conduct is also unlikely to substantially lessen competition when considered against the range of other possible outcomes that may result from Stanwell re-engaging with the market.
- 4.26. In this respect, the ACCC notes that this future without the Proposed Conduct is not materially different to the future without the Proposed Conduct submitted by IFB. The ACCC considers that whether Stanwell itself retained the exclusive rights to sell Tarong PS fly ash to third parties on a non-exclusive basis, or appointed a third party that did not itself require fly ash for the manufacture of downstream products and did not also have rights to fly ash at other sites in SEQ, is unlikely to materially impact the ACCC's assessment of whether the Proposed Conduct is likely to result in a substantial lessening of competition.

### Effect or likely effect of substantial lessening of competition

- 4.27. The ACCC has considered the following factors as relevant to whether the Proposed Conduct may result in a substantial lessening of competition:
- Potential for Boral to withhold supply of fly ash to competitors in downstream concrete markets or raise the cost of them acquiring fly ash.
  - Increased risk of coordination between Boral and other industry participants and/or reduced incentives to compete.
- 4.28. For the reasons set out below, the ACCC considers that the Proposed Conduct would not, and is not likely to, have the effect of substantially lessening competition.

### Potential to withhold supply in downstream concrete market(s)

- 4.29. Under the Proposed Conduct, Boral will have the exclusive right to use itself, and to supply to third parties, fly ash from Tarong PS. As noted, cement grade fly ash is used as a partial substitute for cement in the manufacture of concrete, because it is cheaper and more readily available than other cement substitutes. In submissions in relation to previous matters, interested parties have noted that Tarong PS and Tarong North PS<sup>12</sup> produce the best quality and greatest volume of fly ash in the SEQ region and are located closest to sources of demand. In relation to the current application, IFB and NuCrush also submit that Tarong PS fly ash is high quality and the site is favourably located.
- 4.30. Accordingly, Boral may have the ability and incentive to withhold supply of fly ash to its downstream competitors in concrete market(s). Boral could seek to deny access to third parties to the fly ash at Tarong PS, or offer to it on terms that increased their costs, including potentially to the point that made it uneconomical for third parties to acquire Tarong PS fly ash.
- 4.31. IFB raises the following concerns about Boral's potential to withhold supply to third parties:

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<sup>11</sup> See the ACCC's [Statement of reasons in respect of an exclusive dealing notification lodged by Coal Reuse Pty Ltd](#), 26 November 2015.

<sup>12</sup> The Proposed Conduct does not include fly ash from Tarong North PS.

- The Proposed Conduct is likely to result in a substantial lessening of competition in the market for the supply of fly ash when compared with IFB's future without the Proposed Conduct, where Stanwell enters into non-exclusive agreements with customers to offtake Tarong PS fly ash.
- Boral's incentive is to act in a way that benefits its own downstream SEQ concrete business, including by discrimination against third parties seeking to access Tarong PS fly ash rather than vigorously compete for market share in the supply of fly ash.
- It is difficult to see how, given Boral is one of the largest users of fly ash in SEQ, it would supply a 'large proportion' of fly ash to independent third party competitors in the concrete market.
- In relation to the terms of Boral's agreement that constrain it from discriminating in supplying to third parties, Boral will read these in a manner most favourable to its own commercial and economic interests, and has also failed to identify whether and how any such obligations will be monitored, reviewed and enforced.
- Of the alternative sources of supply of fly ash, Milmerran fly ash is not as valuable as it is not as close to fly ash customers, needs to be classified (creating a cost differential) and produces a darker coloured concrete (which matters in certain concrete applications).

4.32. One interested party whose identity the ACCC has not disclosed at their request submits that Boral's economic incentive is not to become a 'cheap' source of fly ash because this would undermine its existing joint ventures and provide cheap fly ash to competitors in downstream concrete markets. It submits that Boral's economic incentive is to control a key source of fly ash in a way that minimises price competition to preserve its commercial relationships and maximise the downstream price for concrete (Boral's more profitable and primary market). This interested party further submits that there is the potential that Boral could pay the Stanwell 'take or pay', but only remove the amount of fly ash Boral requires – effectively paying Stanwell to exclude its competitors from accessing the fly ash. Boral's agreement with Stanwell, which requires it to supply to third parties without discrimination, would not assist if Boral is not actually on-supplying fly ash to third parties.

4.33. In response, Boral submits that it has no incentive or ability to withhold supply of Tarong fly ash for the following reasons:<sup>13</sup>

- Boral's strategy is to grow the market for fly ash and develop a thriving fly ash supply business. As Boral is effectively a new entrant because it lacks direct access to fly ash from any other power station, the Agreement will not result in any consolidation in markets for the supply of fly ash. It is Boral's intention to build a fly ash business which meets current demand and stimulate further demand (including by delivering innovations that increase fly ash's attractiveness). Given this purpose, Boral is economically incentivised to access a more economically efficient source of fly ash for its own needs and to find users of fly ash, in order to give effect to its business case and maximise its return on investment.
- For the same reasons, Boral does not have an economic incentive to protect its joint venture interests or commercial relationships at the expense of its wholly Boral-owned (emerging) businesses. It submits that this is supported by the internal documents and modelling provided to the ACCC which demonstrate that Boral considers various categories of independent third parties are key potential

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<sup>13</sup> [Application for authorisation](#), sections 8.2-8.5; Joint supplementary submission, section 5.



customers for fly ash, and has assessed that independent concrete producers as likely to acquire from it.<sup>14</sup>

- Boral and Sunstate are operated as entirely independent businesses and are not related bodies corporate; and while Boral has an incentive to ensure that its investment in these joint ventures perform well, it has a greater interest in promoting the success of wholly Boral-owned businesses.
- Boral has limited (if any) ability to stockpile fly ash given it has no direct cement position in SEQ nor fly ash assets in Central Queensland, Northern New South Wales or Victoria.
- Boral is incentivised to sell fly ash to third parties because the OOMA:
  - contractually obliges Boral to supply to third parties (including independent concrete producers) without discrimination. Boral must use its best endeavours to maximise sales and make fly ash available for sale to third parties on a non-exclusive basis and on reasonable commercial terms; must disregard its participation (and that of related bodies corporate) in any downstream market for fly ash; and must not unreasonably refuse to supply fly ash to third parties or discourage reasonable offers from third parties. This reflects Stanwell's objectives as outlined in paragraph 4.34 below
  - includes minimum take or pay requirements which exceed its own internal requirements (i.e. Boral Concrete's requirements), which would strongly incentivise Boral to find additional users, including by actively marketing and selling to third parties (including competitors in the cement and concrete mix industries), and
  - specifies that if Boral does not meet its contractual obligations during the initial five-year term, Stanwell can decide not to renew the OOMA.

4.34. Consistent with Boral's submissions, Stanwell submits that its own strategy for the offtake of Tarong PS fly ash is to maximise offtake by the counterparty taking CCPs for its own demand requirements and by supplying to third parties; and in particular, requiring that the arrangements enable competitive access by third-party buyers. Stanwell submits that its strategy also involves a take or pay arrangement, which is primarily to address Stanwell's need for a reliable return on investment, but will also incentivise the counterparty to facilitate third-party access to the extent take or pay exceeds its own usage requirements.

#### *ACCC view in draft determination*

4.35. Under the Proposed Conduct, Boral will have exclusive rights to fly ash at Tarong PS for its own use and to sell to third parties. Fly ash that is made available to other end users will, subject to the terms of the OOMA discussed at paragraph 2.15, be available on terms set by Boral, which itself competes with other end users in the downstream markets in which the fly ash is used.

4.36. In its draft determination, the ACCC considered that Boral will have competing incentives in supplying fly ash to third parties. In particular:

- It is not in the interest of Boral's downstream concrete business for its competitors to have access to a source of fly ash on more competitive terms than they are currently able to source it.

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<sup>14</sup> [Joint supplementary submission](#), section 5.1-5.2.

- Maximising the profitability of Boral's fly ash business (as opposed to Boral's overall profitability) is best supported by making Tarong PS fly ash available on terms that are competitive with those offered by alternative suppliers.
- 4.37. The ACCC considered that, all else being equal, the overall impact of these competing incentives on the terms on which Boral would offer fly ash to third parties is unclear.
- 4.38. Boral has submitted that it intends to seek to grow demand for fly ash and/or export it, as well as servicing its own requirements, as the rationale for the Proposed Conduct.
- 4.39. In addition, confidential information provided by Boral supported its submission that the OOMA includes minimum take or pay requirements which exceed Boral's own internal requirements.
- 4.40. Notwithstanding this, the ACCC considered that a third party with no interest in downstream markets, acting only as an exclusive seller of Tarong PS fly ash would have stronger incentives to provide unrestricted access to fly ash to all end users, on competitive terms, than Boral does.
- 4.41. However, in considering Boral's incentives, and the likely impact on competition in downstream concrete markets if Boral was to withhold supply to third parties, the ACCC noted IFB's submission that there is currently an oversupply of fly ash in SEQ notwithstanding that no fly ash from the Tarong PS is currently being made available.
- 4.42. On balance, the ACCC considered, having regard to the alternative sources of supply of fly ash in SEQ as described at paragraph 2.7, that if Boral were to supply fly ash to third parties in accordance with its obligations under the OOMA, that is, subject to fly ash availability and its own consumption requirements, making fly ash available to third parties:
- without discrimination
  - using its best endeavours to maximise sales
  - on a non-exclusive basis and on reasonable commercial terms
  - disregarding its participation (and that of related bodies corporate) in any downstream market for fly ash, and
  - not unreasonably refusing to supply fly ash to third parties or discouraging reasonable offers from third parties
- the Proposed Conduct would be unlikely to result in a substantial lessening of competition in the form of Boral withholding supply of Tarong PS fly ash from third parties or raising their costs of acquiring fly ash.
- 4.43. In this respect, the ACCC considered that Stanwell is incentivised to enforce the terms of the OOMA given Stanwell's rationale is to maximise the volume of fly-ash moved to productive use while providing it with revenue, and reducing its costs of fly ash management and storage.
- 4.44. However, as submitted by IFB, how strictly terms of this nature are enforced can be open to question and there is a degree of subjectivity about concepts such as 'best endeavours' and 'reasonable commercial terms.'
- 4.45. Therefore while, on balance, the ACCC considered that the Proposed Conduct would be unlikely to result in a substantial lessening of competition, the ACCC proposed to

impose a condition of authorisation to address the lessening of competition that would be likely to result if Boral did not supply fly ash to third parties in accordance with its obligations under the OOMA.

4.46. The proposed condition required Boral to comply at all times with clause 9.1 of the OOMA which addresses the supply of fly ash to third parties in the manner summarised at paragraph 4.42. This condition means that if Boral does not make fly ash available to third parties in accordance with this clause, its conduct in doing so will not have the legal protection provided by the authorisation.

#### *Following the draft determination*

4.47. In response to the draft determination, IFB submitted that it did not consider that the ACCC could rely on the terms of the OOMA to overcome the substantial lessening of competition that IFB considers would otherwise result from the Proposed Conduct because:

- certain terms of clause 9.1 are vague and lack objectivity such that Boral could still comply with it while effectively discriminating against downstream rivals on price or non-price matters (such as transport costs, operational issues and payment terms). These terms include 'without discrimination', 'reasonable commercial terms', 'using best endeavours', 'disregarding its participation' and 'not unreasonably refusing to supply', and
- it is not commercially realistic to suggest that Stanwell will enforce the relevant terms of the OOMA because:
  - Stanwell through the take or pay receives a commercial return regardless of Boral's conduct and therefore Stanwell's commercial objective is met
  - there is sufficient disposal space in the mine void where Stanwell has been disposing fly ash for the past 5-6 years, and
  - Stanwell requesting that Boral comply with the terms of the OOMA seems unlikely to change Boral's conduct; and it is highly speculative to suggest that Stanwell will embark on costly litigation to enforce the OOMA, given Stanwell has suffered no 'loss' (due to the take or pay) and has nothing to gain financially compared to the risks inherent in taking proceedings.

4.48. IFB submits that if, notwithstanding these concerns, the ACCC grants authorisation it should be subject to conditions require at least: an independent auditor to assess Boral's compliance and report annually to the ACCC or any third party acquiring fly ash from Boral; ring fencing conditions; a dispute resolution mechanism for third parties to complain to an independent party and/or the ACCC if Boral refuses to supply fly ash to them; and a requirement that Boral and Stanwell update the ACCC/auditor immediately if they vary the terms of the OOMA.

4.49. The ACCC does not consider it necessary to alter the condition proposed in the draft determination in the way submitted by IFB. The ACCC considers that the existing condition is sufficient to address the lessening of competition that would be likely to result if Boral did not supply fly ash to third parties in accordance with its obligations under the OOMA.

4.50. As noted above, the ACCC considers that Stanwell is incentivised to enforce the terms of the OOMA given Stanwell's rationale is to maximise the volume of fly-ash moved to productive use while providing it with revenue, and reducing its costs of fly ash

management and storage. The ACCC considers that the condition of authorisation proposed in the draft determination further incentivises Stanwell to enforce the terms of the OOMA, given the consequences of Boral's non-compliance. That is, if Boral did not make fly ash available to third parties in accordance with this clause its conduct in doing so would not have the legal protection provided by the authorisation, which could have consequences for the commercial agreement in place between Stanwell and Boral. The ACCC considers that this similarly incentivises Boral to ensure that it complies with the requirements of the OOMA.

4.51. With respect to variations to the OOMA, as outlined in paragraph 5.8 below, any changes to the arrangement during the term of the proposed authorisation would not be covered by the authorisation.

4.52. The ACCC has therefore decided to impose the same condition proposed in the draft determination. The condition is discussed in more detail at paragraphs 4.84 to 4.87.

### **Increased risk of coordination and reduced competition**

4.53. As noted, Boral Cement has a 50% share in joint ventures with:

- Adelaide Brighton, Sunstate, which sources fly ash from Tarong North PS. Boral Concrete acquires fly ash from Sunstate for its own use and, occasionally, small volumes for on-supply to existing customers in SEQ.
- Fly Ash Australia Pty Limited (the other 50% being owned by Cement Australia) which has operations in New South Wales, South Australia and Western Australia and distributes its fly ash products throughout Australia.

4.54. Boral Concrete also acquires fly ash from IFB in SEQ.

4.55. Each of Sunstate, IFB, Cement Australia and Boral Cement (if the Proposed Conduct Proceeds) has/will have fly ash offtake agreements with power stations in Queensland – in the case of Cement Australia, in central Queensland rather than SEQ.

4.56. IFB submits that authorisation will result in two vertically integrated fly ash suppliers in SEQ, increasing the risk of coordinated effects between Boral, Cement Australia and potentially Sunstate. It submits that the market is already plausibly conducive to coordination due to various market conditions, and that authorisation will make coordination more likely, stable or complete. In particular, IFB submits:

- Three of the four industry participants in Queensland are involved in a joint venture and/or have supply contracts with each other.
- Fly ash, cement and concrete are largely homogenous products.
- Boral and Cement Australia are largely homogenous, vertically integrated firms, owning upstream fly ash inputs and downstream (concrete) manufacturing facilities; and both are present in the same product and geographic market.

4.57. One interested party whose identify the ACCC has not disclosed at their request submits that Boral's vertical integration and contractual ties with other industry participants may increase the risk of tacit coordination between Boral and other industry participants and/or reduce their incentives to compete.

4.58. Boral submits in response that:

- IFB and the anonymous submission misrepresent the market structure and the role of players within this market. Boral submits that Cement Australia is no more

vertically integrated than IFB and it is unclear how IFB considers the OOMA increases the risk of coordinated conduct between Boral and Cement Australia, how this relates to their vertical interests, or why IFB's incentives vis-à-vis its shareholders are different to those of Cement Australia.

- Boral acquires fly ash from its FAA joint venture in New South Wales and Victoria, and from IFB and its Sunstate joint venture in SEQ; but that its business decision to enter the OOMA is made based on the economic interests of Boral, independent of all of these interests, and will affect these existing arrangements to varying degrees.
- The OOMA will have the effect of increasing the number of competitors that supply fly ash within SEQ (not reducing it), thus reducing market consolidation – which is not usually associated with an increased risk of coordinated conduct.
- The market for the supply of fly ash is not well-suited to pricing coordination, given the prices available for fly ash sourced in different geographic areas and under different contracts vary significantly, and given the role of long-term supply agreements.
- The increased capacity in SEQ makes it more likely that suppliers of fly ash will compete for customers and less likely that a coordination strategy would be successful.

4.59. Boral considers that the OOMA will have the effect of disrupting the status quo and requiring IFB, and other existing off-takers, to work harder to secure customers for their fly ash.

4.60. Boral submits that it does not have a direct cement position in SEQ nor fly ash assets anywhere in Australia. Boral submits that while Boral Cement has two nominee directors on Sunstate's board, Sunstate is operated independently of Boral Cement. In this respect Boral submits that while Boral Australia is a user of fly ash (via Boral Concrete), it does not currently have access to a direct source of fly ash and the Proposed Conduct is aimed at building a 'fly ash management' and 'recycling' business and ensuring that it has a secure supply of classified fly ash for its own use.

#### *ACCC view*

4.61. The ACCC notes Boral's submission that it does not have an economic incentive to protect its joint venture interests or commercial relationships at the expense of accessing what it characterises as a more economically efficient source of fly ash for its own downstream needs and to on-supply to a range of customers as part of an emerging business.

4.62. However, the ACCC considers that Boral's joint venture interests and interest in downstream concrete market(s) will inevitably be a consideration in respect of its supply of fly ash to third parties if the Proposed Conduct proceeds. That is, Boral will act in accordance with its overall interests.

4.63. A relevant question for the ACCC to consider is to what extent there is an increased risk of coordination, thereby reducing competition, if Boral is the exclusive offtaker of fly ash from Tarong PS, as opposed to if an alternative counterparty held those rights.

4.64. The ACCC considers that the risk of coordination (tacit or otherwise) is likely to be lower if the offtaker did not have existing agreements (joint venture and/or supply agreements) with other market participants. However, the ACCC does not consider that there is a substantially greater likelihood of such coordination under the Proposed

Conduct, particularly as these existing agreements are arm's length commercial agreements.

- 4.65. The ACCC also notes that the Proposed Conduct will provide Boral with some information about the costs and volumes of fly ash acquired by some of its competitors in downstream concrete markets. This information could inform Boral Concrete's tendering for contracts, softening competition between it and these competitors. For example, such information may provide Boral with a greater understanding of its competitors' costs which could inform the prices and terms Boral offers in seeking to win business from them.
- 4.66. However, the ACCC notes that Tarong PS is one of a number of sources of fly ash in SEQ; fly ash is one input, used in some cases, into the production of concrete; and the additional information about some of its competitors production costs and volumes potentially available to Boral as a result of the Proposed Conduct will accordingly be limited.
- 4.67. This information could also potentially be a conduit to support coordination amongst competitors in downstream markets for the supply of concrete. However, as with coordination in the market for the supply of fly ash in SEQ, the ACCC considers that while there is some greater risk of such coordination with the Proposed Conduct, the ACCC does not consider that there is a substantially greater likelihood of such coordination. As noted above, the additional information about some of its competitors potentially available to Boral as a result of the Proposed Conduct will be limited.

### **Conclusion in relation to substantial lessening of competition**

- 4.68. The ACCC considers that there may be a reduction in competition as a result of the Proposed Conduct due to the possibility that Boral may seek to withhold supply of fly ash to competitors in downstream concrete markets, or raise the cost of them acquiring fly ash. However, the ACCC considers, on balance, that the likelihood of a substantial lessening of competition is limited by alternative sources of supply and otherwise addressed by the condition of authorisation imposed by the ACCC.
- 4.69. The ACCC considers that there is some risk that the Proposed Conduct will facilitate coordination between industry participants in supplying fly ash in SEQ. However, the ACCC does not consider that there is a substantially greater likelihood of such coordination, thereby reducing competition, with the Proposed Conduct.
- 4.70. The Proposed Conduct will provide Boral with some information about the costs and volumes of fly ash acquired by some of its competitors in downstream concrete markets which the ACCC considers may, to some degree, soften competition between them. However, the ACCC considers that any such lessening of competition is unlikely to be significant enough to constitute a substantial lessening of competition.
- 4.71. Therefore, on balance, the ACCC considers that the Proposed Conduct, engaged in in accordance with the condition of authorisation, would not have the effect, or would not be likely to have the effect, of substantially lessening competition.

### **Public benefits and detriments**

- 4.72. Although, for the reasons above, the ACCC is satisfied that the Proposed Conduct would not have or be likely to have the effect of substantially lessening competition, which is sufficient to satisfy the legal test to grant authorisation, for completeness the ACCC has provided a summary of its preliminary views about the public benefits and detriments likely to result from the Proposed Conduct. The ACCC has not formed a

view about whether any public benefit likely to result from the Proposed Conduct would outweigh any likely detriment to the public including that constituted by any lessening of competition.

## Public benefits

4.73. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*<sup>15</sup>

4.74. Broadly, the Applicants submit that the Proposed Conduct will:

- reduce the quantity of fly ash going to storage as a waste product
- promote further the use of fly ash in place of cement in the manufacture of concrete, generating considerable environmental benefits including avoiding producing cement and the better use of waste products
- encourage investment and greater offtake and use of fly ash more broadly, facilitating the realisation of cost efficiencies, and
- if the OOMA is terminated or expires, provide Stanwell with the ability to switch offtakers or sell concrete-grade fly ash directly to customers on a competitive and demand-driven basis, securing the long-term efficient supply of fly ash to industry for reuse.

4.75. As discussed above, the ACCC considers that without the Proposed Conduct it is likely another party would operate the offtake facility. Accordingly, the realisation of the public benefits submitted by Boral is primarily dependent on Boral generating additional demand for fly ash by end users beyond that which another party operating the facility would, by either making fly ash available at lower cost and/or promoting additional uses for fly ash.

4.76. Boral submits that it is heavily invested in supplementary cementitious material technology and has a strong innovation culture, having developed additives that beneficiate fly ash. Innovation and development into alternative uses of fly ash (beyond being a partial substitute to cement) could further increase the use of fly ash more generally into the industry, further reducing fly ash going into storage (and the associated environmental concerns). Boral states that it is its intention to commercialise new products that utilise high volumes of fly ash into the future. It is also Boral Cement's intention to export fly ash out to regions where there are currently shortages and increase fly ash usage via new demand-based innovation that may allow for an increase in the total proportion of fly ash (as a percentage of total supplementary cementitious material).

4.77. The ACCC notes that Boral's business plan, provided to the ACCC on a confidential basis, supports these ambitions to increase demand for fly ash. The ACCC considers based on the information currently before it that whether, and to what extent, these goals will be realised and the extent to which Boral would be better able to realise

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<sup>15</sup> Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

them than an alternative offtaker, is uncertain. Accordingly, the extent of any public benefit likely to be realised as a result of greater use of fly ash is also uncertain.

- 4.78. However, given the ACCC's assessment that the Proposed Conduct is unlikely to have the effect of substantially lessening competition in any market, the ACCC has not examined this question in detail.
- 4.79. In respect of securing the long-term efficient supply of fly ash to industry for reuse, the ACCC notes that the Tarong PS offtake facility is being built, and will be owned by Stanwell, whether or not the Proposed Conduct proceeds.

## Public detriments

- 4.80. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...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.*<sup>16</sup>

- 4.81. As summarised at paragraph 4.65, the ACCC considers that there is some risk that the Proposed Conduct will facilitate a degree of coordination between industry participants, thereby reducing competition between them in supplying fly ash in SEQ.
- 4.82. While the ACCC does not consider that there is a substantially greater likelihood of such coordination with the Proposed Conduct, the ACCC does consider that any reduction in competition would be likely to result in a public detriment. In this respect, a lessening of competition does not have to be substantial to constitute a public detriment.<sup>17</sup>
- 4.83. The ACCC also considers that the Proposed Conduct will provide Boral with some information about the costs and volumes of fly ash acquired by some of its competitors in downstream concrete markets which may, to some degree, soften competition between them. Any such lessening of competition would also constitute a public detriment.

## Condition of authorisation

- 4.84. The ACCC may specify conditions in an authorisation.<sup>18</sup> The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.<sup>19</sup>
- 4.85. To address the lessening of competition that would be likely to result if Boral did not supply fly ash to third parties in accordance with its obligations under the OOMA the ACCC has decided to impose the condition set out at paragraph 5.9.
- 4.86. This condition is intended to ensure that Boral complies with its obligations under the OOMA in relation to supplying fly ash to third parties. That is, Boral must each month make fly ash available for sale to third parties, subject to fly ash availability and the consumption requirements of Boral Cement and its related bodies corporate and in making fly ash available to third parties must do so:

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<sup>16</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

<sup>17</sup> See, for example, *Australian Competition and Consumer Commission v Australian Competition Tribunal* [2017] FCAFC 150 at [11]: 'mandatory consideration in the Tribunal's assessment of an acquisition will include any non-trivial competitive detriment which will result, or is likely to result, from the acquisition whether it occurs on a market-wide basis or not.'

<sup>18</sup> Subsection 88(3) of the Act.

<sup>19</sup> Subsection 88(3) of the Act.



- without discrimination
- using its best endeavours to maximise sales
- on a non-exclusive basis and on reasonable commercial terms
- disregarding its participation (and that of related bodies corporate) in any downstream market for fly ash, and
- not unreasonably refusing to supply fly ash to third parties or discouraging reasonable offers from third parties

4.87. The effect of this condition would be that if Boral did not make fly ash available to third parties in accordance with this clause its conduct in doing so would not have the legal protection provided by the authorisation.

### Length of authorisation

4.88. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>20</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

4.89. Boral seeks authorisation for 10 years. The OOMA has an initial term of five years with an option to extend for a further five years if certain conditions are met. Boral submits that a minimum authorisation period of 10 years is appropriate given the substantial contribution Boral will make to the construction of the facility and the establishment of a significant fly ash supply business in SEQ.

4.90. IFB submits that Tarong PS is scheduled to close in around 2035-36 (with Boral noting that it understands this will be around 2037). IFB submits that authorisation will therefore foreclose the potential for entry until 2030. Thereafter, given the short period for the power station's remaining operation, it does not seem commercially realistic that an entrant would enter the market for the supply of fly ash in SEQ knowing it only had four years (or less) at Tarong PS. IFB submits that a 10-year authorisation would completely raise the barriers to any new or future entrant via the Tarong PS.

4.91. In its draft determination, the ACCC proposed to grant authorisation for five years, rather than the 10 years sought by Boral. The ACCC noted that the facility will be constructed irrespective of whether the Proposed Conduct proceeds. This, along with the initial term of the OOMA being five years, suggested that a 10-year authorisation is not necessary to support the 'substantial contribution Boral will make to the construction of the facility and the establishment of a significant fly ash supply business in SEQ.'

4.92. Further, as discussed above, the ACCC's conclusions in the draft determination about the likely impact on competition of the Proposed Conduct were based, in part, on Boral providing third party access to Tarong PS fly ash in accordance with the terms of the OOMA.

4.93. The ACCC considered that in these circumstances an earlier review of the Proposed Conduct than the 10 years sought by Boral was appropriate.

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<sup>20</sup> Subsection 91(1)

- 4.94. Following the draft determination, IFB submitted that if the ACCC did grant authorisation it should be for a shorter period of three years. IFB submitted that:
- five years is a long time for conduct to go unchecked, especially in circumstances where the ACCC has concluded there is a lessening of competition but for Boral's compliance with the proposed condition
  - the ACCC has expressed concerns regarding the Proposed Conduct in the draft determination. In previous matters where the Commission has had concerns with proposed conduct, it has considered that a short duration authorisation is appropriate, and
  - a shorter period is sufficient for Boral to establish itself in SEQ and achieve the objectives promised in its submissions.
- 4.95. In response, Boral submitted that while it requested authorisation for a 10-year period, a minimum of five years is required. The initial commercial term of the OOMA is five years, which is commensurate with the broader parameters of the deal (including Boral's investment in the offtake facility and take-or-pay requirements under the OOMA).
- 4.96. The ACCC considers that a term of five years is appropriate to provide commercial certainty over the term of the OOMA in circumstances where it is otherwise satisfied that the Proposed Conduct, engaged in in accordance with the condition of authorisation, would not have or be likely to have the effect of substantially lessening competition. The ACCC has therefore decided to grant authorisation for five years.
- 4.97. Should the parties wish to exercise the option to extend the OOMA for a further five years, they can seek re-authorisation at that time.

## 5. Determination

### The application

- 5.1. On 3 June 2020, the Applicant lodged application AA1000517 with the ACCC, seeking authorisation under subsection 88(1) of the Act.

### The authorisation test

- 5.2. Under subsections 90(7) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct:
- would not have the effect, or would not be likely to have the effect, of substantially lessening competition, or
  - is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 5.3. For the reasons outlined in this determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition.
- 5.4. Accordingly, the ACCC has decided to grant authorisation.

## Conduct which the ACCC authorises

- 5.5. The ACCC has decided to grant authorisation AA1000517 to enable the Applicant to give effect to the OOMA as described in paragraph 1.1 and defined as the Proposed Conduct.
- 5.6. The Proposed Conduct may constitute exclusive dealing within the meaning of section 47 of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.
- 5.7. The ACCC has decided to grant authorisation AA1000517 for five years commencing from the Offtake Commencement Date (which is when all the conditions of the OOMA have been satisfied or waived).
- 5.8. The authorisation is in respect of giving effect to the OOMA included in the application for authorisation lodged by the Applicants on 3 June 2020. Giving effect to any changes to the OOMA during the term of the authorisation would not be covered by the authorisation.

## Condition of authorisation

- 5.9. The ACCC has decided to grant authorisation subject to the following condition:
  - **Condition 1:** Boral Cement Limited must comply with clause 9.1 of the OOMA, in the form provided to the ACCC with the application for authorisation lodged on 3 June 2020.
- 5.10. Clause 9.1 requires that Boral must each month make fly ash available for sale to third parties, subject to fly ash availability and the consumption requirements of Boral Cement and its related bodies corporate and in making fly ash available to third parties must do so:
  - without discrimination
  - using its best endeavours to maximise sales
  - on a non-exclusive basis and on reasonable commercial terms
  - disregarding its participation (and that of related bodies corporate) in any downstream market for fly ash, and
  - not unreasonably refusing to supply fly ash to third parties or discouraging reasonable offers from third parties.

## 6. Date authorisation comes into effect

- 6.1. This determination is made on 26 November 2020. If no application for review of the determination is made to the Australian Competition Tribunal it will come into force on the OOMA Offtake Commencement Date (which is when all the conditions of the OOMA have been satisfied or waived).