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**Copy:** Mr Gavin Jones, Director Adjudication

Attention: Ms Miriam Kolacz

**Draft Determination: Application for authorisation AA1000517 (Draft Determination)**

On behalf of Independent Flyash Brokers Pty Ltd (**IFB**), I refer to the Australian Competition and Consumer Commission's (**Commission**) Draft Determination in respect of an application for authorisation lodged by Boral Cement Limited (**Boral**) to give effect to the Offtake, Operation & Maintenance Agreement and a Design and Construct Contract (**OOMA**) with Stanwell Corporation Limited (**Stanwell**)(**Proposed Conduct**).<sup>1</sup>

The Commission's Draft Determination considers two questions:

- whether the proposed OOMA results in a substantial lessening of competition; and
- whether, if there is a substantial lessening of competition, there are public benefits that outweigh the lessening such that the OOMA should be authorised.

In respect of the second question, IFB agrees with the Draft Determination that there are no public benefits arising from the OOMA. The benefits that Boral refers to are aspirational and, in any event, can be achieved without the Proposed Conduct.

The sole question is whether the Proposed Conduct is *likely* to result in a substantial lessening of competition. For the reasons set out below, IFB, considers that the Proposed Conduct is likely to result in a substantial lessening of competition in relevant markets. Given the Commission's conclusion that there are no public benefits, authorisation should not be granted.

If, despite IFB's submission, the Commission proposes to grant *conditional* authorisation to Boral and Stanwell to give effect to the OOMA, the condition proposed is ineffectual. IFB considers that the condition should be revised and additional conditions added to ensure the Proposed Conduct will not be likely to have the effect of substantially lessening competition (see [4.63]).<sup>2</sup>

To the extent that the Commission is inclined to authorise the Proposed Conduct, IFB supports the reduction of the term. Authorisation for half a decade is however excessive. IFB consider three years is more appropriate especially in light of the Commission's concerns in the Draft Determination (see [4.54], [4.63], [4.75], and [4.84]).

**PART A: COMMISSION'S CONCLUSIONS FROM THE DRAFT DETERMINATION**

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1 The Commission's Draft Determination concludes that:

- (a) Boral is vertically integrated and supplies concrete to industrial and residential customers (see [2.1]).

<sup>1</sup> Authorisation was sought under subsection 88(1) of the *Competition and Consumer Act 2010* (Cth) (CCA).

<sup>2</sup> A reference to a paragraph, is a reference to the relevant paragraph in the Draft Determination.

- (b) Boral acquires fly ash from every potential sources in SEQ via its Sunstate and FAA joint ventures, from IFB and now from Tarong (see [2.2]).
  - (c) The relevant markets are the market for: (i) the supply and acquisition of fly ash in SEQ; and (ii) the supply of concrete (see [4.11]).
  - (d) The offtake facility at Tarong PS will be built regardless of Boral (see [4.14]).
  - (e) The OOMA gives Boral the exclusive right to use fly ash from Tarong PS for itself. Boral otherwise has a contractual obligation to supply to third parties at prices determined by Boral (see [4.26]).
  - (f) Tarong PS fly ash is the best quality and greatest volume of fly ash in the SEQ region and are located closest to sources of demand (see [4.26]).
  - (g) The likely future without the OOMA is that Stanwell would re-engage with the market to find an alternative counterparty to operate and maintain the offtake facility on terms which provide Stanwell a return on its investment (see [4.19]) and which would be different to those offered by Boral (see [4.20]).
  - (h) The Commission previously concluded that a third party that did not itself require fly ash for the manufacture of downstream products, acting as a seller of fly ash to end users 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 including by exercising exclusive rights to sell the fly ash that Stanwell itself could otherwise sell (see [4.22]).
  - (i) The Commission considers that a third party with no interest in downstream markets, acting only as a 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 (see 4.37]).
- 2 Against this factual matrix, the Draft Determination considers whether the Proposed Conduct results in a substantial lessening of competition.

## **PART B THE COMMISSION'S CONCLUSION ON SUBSTANTIAL LESSENING ARE MISGUIDED**

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### **Counterfactual**

- 3 The Draft Determination defines the counterfactual as follows: "... 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 ... a different mix of parties may seek to operate and maintain the facility, putting forward different terms to those offered through the previous process" (see [4.19 and [4.20]).
- 4 The Proposed Conduct involves the entry into the OOMA, an agreement which contains an exclusivity provision. The appropriate counterfactual is therefore the future situation **without** the proposed conduct for which authorisation is sought. That is, the counterfactual is the conduct the parties would engage in if they could not engage in the conduct in contravention of the CCA.
- 5 As Authorisation is sought for exclusivity, the relevant counterfactual is simply a non-exclusive agreement either with Boral or a third party (or multiple third parties potentially including Boral) and Stanwell. The Commission's task is to assess this "counterfactual" against the contravening conduct (ie, Boral having an exclusive right to acquire all Tarong PS fly ash).

**Authorisation will likely substantially lessen competition in the relevant markets**

- 6 Adopting the counterfactual in paragraph 5, which is the correct counterfactual, the proposed conduct would have or be likely to have a substantial lessening in competition because:
- (a) With the Proposed Conduct, Boral will acquire fly ash from every source in SEQ. That is, Boral will have exclusive right to acquire the best quality fly ash located closest to the centre of growing demand at Tarong PS, acquisition rights at Tarong North PS via its Sunstate JV and a contractual right to acquire fly ash at Millmerran. Boral can also acquire fly ash from Cement Australia via Gladstone.
  - (b) Boral is vertically integrated with significant downstream concrete interests.
  - (c) A third party (unlike Boral) will not be concerned about supplying an unrestricted volume of fly ash that could significantly impact the profitability of its Sunstate JV.
  - (d) As the Commission noted: “a third party with no interest in downstream markets, acting only as a 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” (see [4.37]). It is not in Boral’s downstream interests for its competitors to have access to a high quality source of fly ash proximate to demand on more competitive terms (see [4.33]).
  - (e) A third party (unlike Boral) will be unconcerned about supplying an unrestricted volume of fly ash to any party involved in alternative fly ash products.
- 7 If the counterfactual is appropriately defined there is likely a substantial lessening as between a single exclusive supplier of high quality fly ash from a power station located closest to the centre of growing demand<sup>3</sup> (which has an interest in or control over all SEQ fly ash sources as well as being vertically integrated) and one or more non-exclusive suppliers (see [4.22] and [4.37]).
- The market for the acquisition of fly ash in SEQ*
- 8 In the factual, Boral enters into an agreement with Stanwell to exclusively acquire all Tarong PS fly ash. In the counterfactual, Boral and/or one or more third parties enter into a non-exclusive agreement with Stanwell.
- 9 For the reasons given in paragraph 6, Boral will have substantial market power in the acquisition of fly ash in SEQ, while being vertically integrated in the downstream concrete market. This outcome is not alleviated by the Commission’s proposed condition (see Part C below). Without exclusivity, Boral will not have a substantial degree of market power in the acquisition of fly ash.
- The market for the supply of fly ash in SEQ*
- 10 The question is whether relative to a third party with no interest in any other SEQ source of similar quality fly ash, no exclusivity at Tarong PS, and no downstream interests, Boral’s exclusivity would have the effect, or would be *likely* to have the effect, of substantially lessening competition in the market for the supply of fly ash.
- 11 For the reasons given in paragraph 6, in the market for the supply of fly ash, the difference between the factual and counterfactual is such that there is likely a substantial lessening in the market for the supply of fly ash. To conclude otherwise requires a belief that Boral has no incentive to discriminate against downstream third parties to protect its own commercial interests and aspirations to market alternative fly ash products.
- 12 Millmerran fly ash is not located closest to sources of demand (unlike Tarong PS fly ash as the Commission noted at [4.26]), it also needs to be classified and therefore has a cost differential

<sup>3</sup> IFB notes that demand for fly ash in SEQ is not generally growing but that demand in Brisbane is growing.

compared to Tarong PS fly ash and Millmerran fly ash produces a darker colour concrete to that produced using Tarong PS fly ash (which matters in certain concrete applications) These are factual reasons why Millmerran is not the “answer” to the potential for a substantial lessening in the market for the supply of fly ash in SEQ.

*The market for the supply of concrete in SEQ*

- 13 Given the matters outlined in paragraph 6, with exclusivity Boral will have the ability and incentive to discriminate on price and/or terms for fly ash supplied from Tarong PS. Even a small relative change in the input cost to downstream suppliers drives a material change in their ability to compete with Boral (and/or its aligned JV partners like Cement Australia) resulting in a substantial lessening in this market.

### **The Commission’s Stanwell analysis is misguided**

- 14 The Commission’s assessment of Stanwell is misguided.
- 15 First, the Draft Determination notes that one of the reasons why (perhaps the key reason) Stanwell entered into the OOMA is because “*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*” (see [2.14]). The Draft Determination also notes that one of the reasons why Boral requires exclusivity is “... *to support Stanwell’s investment [in the offtake facility] 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*” (see [4.18]). Boral’s rationale for exclusivity is contingent on Stanwell’s need for a certain commercial return (and certain offtake volumes) but if third parties can provide, in aggregate, that certainty then the rationale for authorising exclusivity falls away.
- 16 IFB’s view is that Stanwell’s desire for a commercial return is met in the counterfactual and therefore there is no need for exclusivity. Absent authorisation, non-exclusive arrangements at Stanwell would be just as likely to provide the commercial certainty that Stanwell requires because:
- (a) Stanwell could enter into multiple arrangements with Boral and other third parties (ie, not just with Boral as Boral submits (see [4.18])). Tarong PS fly ash is high quality and the closest source to the centres of demand (see [4.26]) and there is no submission that third parties will be unable to sell Tarong PS fly ash.
  - (b) If Boral is correct regarding the opportunity to sell fly ash for alternative uses and export fly ash from SEQ then Boral could enter into a contract with Stanwell that is not exclusive and yet have confidence that it can satisfy Stanwell’s desire for commercial certainty.
  - (c) If Boral seeks to enter the SEQ market to create business opportunities for the export of fly ash to other States and promote alternative uses of fly ash, even if Boral did not enter into a contract with Stanwell but one or more third parties did do so on a non-exclusive basis there would be price competition to supply Boral with the fly ash it needs to achieve these objectives, which in turn would meet Stanwell’s objective.
- 17 Second, the Commission states that “*Stanwell is incentivised to enforce the terms of the OOMA ...*” (see [4.40]). IFB does not believe that it is commercially realistic to suggest that Stanwell will enforce the relevant terms of the OOMA against Boral because:
- (a) Stanwell through the take or pay receives a commercial return regardless of Boral’s conduct and therefore Stanwell’s commercial objective is met.
  - (b) There is sufficient disposal space in the mine void where Stanwell has been disposing fly ash for the past 5-6 years. Kogan Creek PS currently disposes all of its fly ash to a mine void. Disposal alone is not a sufficiently strong factor for Stanwell to enforce its contractual obligations against Boral.

- (c) If Stanwell writes to Boral asking Boral to comply with the terms of the OOMA that seems unlikely to change Boral's conduct. That leaves Stanwell with the option of taking proceedings against the party operating its ash offtake equipment. Proceedings which may not be resolved in Stanwell's favour. Given the take or pay Stanwell has suffered no "loss" and with nothing to gain financially compared to the risks inherent in taking proceedings it is highly speculative to suggest that Stanwell will embark on costly litigation to enforce the terms of the OOMA.

18 In IFB's view, exclusivity is not needed to meet Stanwell's commercial certainty objective and Stanwell has no incentive to take the proceedings that would be needed to "enforce" the terms of the OOMA against Boral.

**The Commission accepts a substantial lessening is likely but relies on the terms of the OOMA to ameliorate this conclusion**

19 The Draft Determination concludes (see [4.39]):

*"... 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".*

20 IFB does not accept that the Commission can rely on the terms of the OOMA to overcome the substantial lessening of competition that results from authorising Boral's exclusive right to acquire all Tarong Ps fly ash.

21 First, terms such as "without discrimination", "best endeavours", "disregard", "not unreasonably refusing to supply" are vague and lack objectivity (which the Commission accepts (see [4.41])). Given the factual, more than a collection of vague and flexible obligations are needed to address the uncertainty around Boral incentives noted by the Commission at paragraph [4.33] of the Draft Determination.

22 Second, the OOMA contains no term that enables a third party to monitor, review, report or challenge Boral's compliance with these requirements (at least that is IFB's understanding given the OOMA terms have not been made public). Boral and Stanwell, the proponents of these terms, are the sole arbiters of whether, when, and how these terms are satisfied.

23 In relation to the terms identified by the Commission:

- (a) **Non-discrimination:** There are a multitude of ways in which Boral can subtly but effectively discriminate against downstream rivals. For example Boral can rely on transport costs, credit risk issue, volume contracts, and/or "operational" issues to discriminate on volume and/or price as between itself and third parties. In particular, IFB considers there are a multitude of "operational" issues that could be raised as reasons for discriminating against third parties including that a unit is down so there is no fly ash available when the third party arrives to remove fly ash or that a precipitator is clogged so the available volumes are reduced. These forms of discrimination will not be transparent or clear.

In Brookfield's proposed acquisition of Asciano (2015), the Commission was concerned about Brookfield's comprehensive "non-discrimination" undertaking as it considered that there were a host of ways in which discrimination could occur undetected

- (b) **Using best endeavours:** This requirement is vague and can be easily "complied with" by Boral without clear evidence to the contrary. The subjective nature of this requirement makes it nearly impossible for Stanwell to challenge Boral under this requirement.
- (c) **Reasonable commercial terms:** Boral will have a plethora of reasons (transport cost, order size, supplier credit risk, operational risk, delivery times) why it is "reasonable" that a third party that it competes with in the downstream market should receive a "higher" price for fly ash. For example, payment on thirty days seems reasonable but may be unreasonable relative to Boral giving a related Boral entity sixty days. Also, given the commercial terms will presumably be confidential as between Boral and a third party how will that party know whether its terms are reasonable relative to others?
- (d) **Disregarding its participation:** The Draft Determination does not clarify what this means in practice. The inherent vagueness around what is required by this clause will allow Boral the flexibility to discriminate on matters other than price, eg payment terms, collection times, etc which will impact its competitors without breach this obligation.
- (e) **Unreasonably refusing:** As above.

24 Each term suffers from an inherent vagueness. Further, apart from by Stanwell, the terms cannot be monitored or enforced by the parties who will be most affected. In these circumstances, the Commission's reliance on these terms to support the conclusion that exclusivity would not be likely to substantially lessen competition is not supported.

### Conclusion

25 The Commission should not authorise Boral's Proposed Conduct. When the appropriate counterfactual is considered, the Proposed Conduct would have or is likely to have the effect of substantially lessening competition in the relevant markets.

## PART C CONDITIONS

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- 26 The Draft Determination states that: "*that there may be a reduction in competition as a result of the Proposed Conduct ... 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 proposed by the ACCC*" (see [4.60]).
- 27 For the reasons set out above, IFB considers that the Proposed Conduct is likely to have the effect of substantially lessening competition in the relevant markets. If the Commission is nonetheless minded to authorise Boral's conduct subject to a condition, the condition should be strengthened and additional conditions added.
- 28 The proposed condition is set out at [4.78] of the Draft Determination (**Condition**).
- 29 The Condition mirrors the terms of the OOMA and, for the reasons set out in paragraph 23, the Commission's Condition is vague, subjective and entirely too broad. The consequence is that it will be so difficult as to be impossible for Commission, let alone a third party, to assess and challenge Boral's compliance with the Condition.
- 30 If the Commission is so concerned about the impact on competition resulting from authorisation that it believes a Condition to the authorisation is needed, IFB proposes that the Authorisation include, at the least, the following:



- (a) **An independent audit requirement:** Authorisation should be subject to a requirement that Boral and Stanwell fund an independent auditor assess Boral’s compliance with the Condition. Such a requirement is common in other resolutions accepted by the Commission. For example, an independent auditor could report on whether fly ash supplied by Boral was supplied to third parties without discrimination.
- (b) **An annual reporting condition:** The independent auditor should provide an annual report to the Commission and any third party acquiring fly ash from Boral on Boral’s compliance with the Condition. Such a report could be anonymised but indicate whether relative to other prices for fly ash in the SEQ region, Boral has made fly ash available on “reasonable commercial terms”.
- (c) **A ring fencing condition:** The Commission noted that Boral will have access to competitively sensitive information (see [4.57]). It is very common for vertically integrate business who both supply and compete in related markets to be subject to ring-fencing obligations.
- (d) **A dispute resolution condition:** Boral is required not to unreasonably refuse to supply fly ash to third parties. If a party approaches Boral for supply and Boral refuses to supply fly ash to that party, there must be a mechanism for the third party to complain to an independent party and/or the Commission and resolve their concern. This would ensure that when the independent auditor came to review Boral’s compliance, any such incidents would be captured, assessed and reported on. A better and cost effective tool is to include a mechanism where a third party can raise a “dispute” with an independent party to review and determine whether Boral has discriminated against the complainant. Absent any such condition, the onus is on the Commission to investigate and, if discrimination is evident, take proceedings.
- (e) **An OOMA variation reporting condition:** If Boral and Stanwell, at any time, vary the terms of the OOMA, IFB considers that there should be a requirement that Boral must immediately update the Commission and the independent auditor.

31 The Commission’s position is that but for the Condition exclusivity will likely result in a lessening of competition (see [4.77]). For the reasons set out above, the proposed Condition is ineffectual, which means there is a serious risk that the proposed conduct will have the likely effect of resulting in a substantial lessening of competition in the relevant markets.

**PART D LENGTH OF AUTHORISATION**

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- 32 IFB agrees that the length of authorisation should be reduced.
- 33 The CCA allows the Commission to grant authorisation for a limited period of time and a short authorisation enables the Commission to review the authorisation and the detriments that have resulted after an appropriate time. Where the Commission has had concerns with an authorisation, the Commission has previously considered that a short duration authorisation is appropriate, as shown below.

Authorisation	Date	Period (years)
<a href="#">Gladstone Regional Council &amp; Ors<sup>4</sup></a>	21 October 2020	3 years (Application sought 4 years)

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<sup>4</sup> AA1000524-1

Authorisation	Date	Period (years)
<a href="#">Australasian Performing Right Association Limited<sup>5</sup></a>	13 July 2020	4 years (Application sought 5 years)  The Commission noted that “ <i>However, given the significance of the concerns that the conditions are intended to mitigate, the ACCC considers that an earlier review of the authorisation, and the public benefits and detriments that have resulted, than the five years for which APRA sought authorisation is appropriate. Accordingly, the ACCC has decided to grant conditional authorisation for a further four years</i> ” (p.5).
<a href="#">Mortgage and Finance Association of Australia<sup>6</sup></a>	28 February 2020	2 years (Application sought 2 years)  The Commission noted that “ <i>The Act allows the ACCC to grant authorisation for a limited period of time. 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.</i> ” ([4.38])

34 In IFB’s view:

- (a) Five years is a long time for conduct to go unchecked in a market, especially in circumstances where the Commission has concluded there is a lessening but for Boral’s compliance with the proposed Condition.
- (b) The Commission has expressed concerns regarding the authorisation throughout the Draft Determination (see [4.54], [4.63], [4.75], and [4.84]).
- (c) A shorter period is sufficient for Boral to establish itself in SQE and achieve the objectives promised in its submissions.

35 For these reasons, IFB considers that a three year authorisation is appropriate.

Yours faithfully

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



**Peter R Heffernan, Secretary**

<sup>5</sup> AA1000433-1

<sup>6</sup> AA1000432-1