MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC) IN SUPPORT OF AN APPLICATION FOR INTERIM AND FINAL AUTHORISATION UNDER SECTION 88(1) OF THE COMPETITION AND CONSUMER ACT 2010 (CTH)

23 APRIL 2020
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1. BACKGROUND AND REASONS FOR THIS APPLICATION

Industry associations representing participants in the Australian minerals industry urgently seek interim and final authorisation to enable the Australian minerals industry to work together to respond effectively to the COVID-19 pandemic.

The global COVID-19 pandemic and associated actions undertaken by Commonwealth, state and territory governments to contain its spread have resulted in existing and potential supply shortages and disruption to supply chains affecting critical services and supplies to the Australian minerals industry.

For the purpose of this application, critical services and supplies are those services and supplies required to maintain the operational integrity of mining operations while protecting the health and safety of the workforce. For example, these include:

- Personal protective equipment (PPE) required to continue safely operating sites (which is also mandated in regulatory approvals) and to allow the Australian minerals industry to manage the risk of COVID-19 on remote sites with a combination of preventative and reactive measures
- Maintenance inputs including parts and key maintenance personnel required to maintain machinery in a condition that ensures safe operation
- Critical consumables such as fuel, explosives and parts
- Other services or supplies critical to mining operations that may become supply constrained as global manufacturing and supply chains are further affected.

Because of the COVID-19 pandemic, the applicants (defined in section 2 of this application) seek authorisation on behalf of themselves and their members to engage in the proposed conduct (defined in section 3 of this application) for a period of 12 months from the date of a final determination by the ACCC, noting that the ACCC could under s.91B of the Competition and Consumer Act 2010 (Cth) (CCA) revoke the authorisation should there be a material change in circumstances.

The discussion and implementation of such measures may give rise to a contravention of sections 45, 45AD, 45AF, 45AG, 45AJ, 45AK, 46 and/or 47 of the CCA.
2. PARTIES TO THE PROPOSED CONDUCT

2.1 The applicants and participants to the proposed conduct

This application is made jointly to the ACCC by the following industry associations:

- the Minerals Council of Australia (MCA)
- the Queensland Resources Council (QRC)
- the NSW Minerals Council (NSWMC)
- the SA Chamber of Mines and Energy (SACOME)
- the Chamber of Mines and Energy of WA (CMEWA)
- the Tasmanian Minerals, Manufacturing and Energy Council (TMEC)
- the Association of Mining and Exploration Companies (AMEC)
- the Australian Aluminium Council (AMC)

(the applicants),

on behalf of:

- themselves
- entities who are full members of one of more of the applicants and are listed in the schedule, and
- any other entities participating in the Australian mining industry that wish to engage in the proposed conduct, provided the ACCC is notified in advance

(collectively the participants)

2.2 Description of the applicants and their members

MCA and its members and associate members

MCA is the national industry body for Australia’s world-leading minerals industry representing companies that produce most of Australia’s minerals output and generate export earnings worth more than $150 billion a year. The MCA’s membership is made up of:

- 51 full member companies, including many of Australia’s largest mining companies
- 29 associate member companies, including mining service providers, state chambers, energy and transport companies and consultancy firms.

The MCA publishes a list of its current members and associate members on its website at www.minerals.org.au.

QRC and its members, service members and associate members

QRC is a not-for-profit industry association representing the commercial developers of Queensland’s minerals and energy resources. The QRC’s membership is made up of:

- 78 full member companies including many of Australia’s largest mining and mining services companies
- 103 service members, who are mining services companies based in Australia
- 22 associate members, including government agencies or self-employed people who are directly or indirectly connected with the resources sector.
The QRC publishes a list of its member companies and associate member companies on its website at [www.qrc.org.au](http://www.qrc.org.au).

**NSWMC and its members and associate members**

NSWMC is the leading industry association for mining in NSW, with its membership including:

- 34 full member companies including many of Australia’s largest mining and mining services companies
- 53 associate member companies, including transport companies, mining services companies, energy companies, consulting and professional services firms and educational institutions.

The NSW Minerals Council publishes a list of its member companies and associate member companies on its website at [www.nswmining.com.au](http://www.nswmining.com.au).

**SACOME and its members, service members and associate members**

SACOME is the industry body representing companies with interests in the South Australian minerals, energy, extractive and petroleum sectors, including those who provide services to these companies. SACOME’s membership is made up of:

- 25 resource industry members
- 90 service members, comprising companies that provide services to the resources sector, including law firms, consultancies, transportation companies and universities
- 14 associate members, including government agencies or self-employed people who are directly or indirectly connected with the resources sector.

**CMEWA and its members and associate members**

CMEWA is the peak resources sector representative body in Western Australia and is a member-funded, not-for-profit organisation with the following member categories:

- 69 ordinary members, who are companies directly involved in the resources sector in Western Australia
- 58 associate members, comprising companies that provide services to the resources sector, including law firms, consultancies, transportation companies and universities.


**TMEC and its members and associated members**

TMEC is the industry body representing companies with interests in the Tasmanian minerals, energy, extractive and petroleum sectors, including those who provide services to these companies. TMEC’s membership is made up of:

- 15 corporate members
- 65 associate members, including government agencies or self-employed people who are directly or indirectly connected with the resources sector.

**AMEC and its members and associated members**

AMEC is the peak industry body for the mining exploration industry, representing over 275 member companies from all around Australia, including explorers, emerging miners, producers and a wide range of businesses and service providers.
AAC and its members

The AAC is the peak industry association representing the Australian aluminium industry. The AAC has eight member companies who operate in bauxite mining, alumina refining, aluminium metal production and semi-fabricated aluminium production and distribution.

**Note:** As mining and mining services companies commonly hold memberships with multiple industry associations, there is considerable overlap between the memberships of the above industry associations.
3. PROPOSED CONDUCT TO BE AUTHORISED

3.1 The issues the proposed conduct seeks to address

Outside Australia's borders, governments all over the world have responded to manage the spread of COVID-19 in their respective nations. Shutdowns and operational constraints on manufacturing in countries which produce maintenance inputs and critical consumables have led to a shortage of some critical inputs to Australian mining operations, including inputs that are required to operate safely and consistent with regulatory requirements.

In addition, the rapid global increase in demand for COVID-19 related health and hygiene products and consumables has led to demand far exceeding supply and in some instances panic buying that has further impacted supply chains and availability.

Demand for general COVID-19 related PPE has also resulted in shortages of specialist PPE for the mining sector (e.g. masks of a specification suitable for workers underground) with immediate risks (i.e. will be realised in weeks not months) to the continued operation of some mines (and potentially downstream industries such as coal-fired power stations).

The urgency of individual inputs changes rapidly, as a consequence of just-in-time supply chains, limitations to the transit of specialist and emergency personnel and changes in manufacturing capacity.

Continued operation while avoiding panic buying can be supported by sharing information on suppliers, inventory and access to alternative supplier relationships.

The following are some examples of supply risks that have become apparent in relation to the mining sector:

- **Managing supply shortages for critical health, hygiene and safety products:**
  - Supply of masks, thermometers, test kits, hand sanitiser, cleaning chemicals and other standard infectious health related PPE is needed to reduce the risk of COVID-19
  - Other PPE which overlaps with this demand but has a specialist use, such as respiratory protection (masks) is needed in open cut or underground activities:
    - Respiratory protection is an essential component of PPE in the underground mining environment. It is even more critical when respiratory protection is an integral control mechanism being used to protect workers, particularly when being transported in vehicles underground.
    - A mine particularly when underground is unable to operate without respiratory protection. Respiratory protection products must comply with Australian standards.
    - Examples include both reusable and disposable products that meet specifications necessary to comply with applicable workplace health and safety laws and regulatory requirements applied to operations in each state are an urgent case in point.
    - Correctly specified masks (such as P2 and N95 valved masks) are mandatory for many underground operations with specifications varying by state and operation. The standards exist to protect workers, and prevent miners from inhaling gases, dust and organic compounds while working underground.
Some companies have reported difficulty securing confirmation of forward orders of this equipment, with a number of companies citing supplies held for the current month only. This has the potential to not only disrupt minerals supplies to overseas markets, but also disrupt energy supply in specific locations in Australia.

- **Managing supply shortages for critical consumables such as explosives, fuel and chemicals required for mining production, transport and refinement, and their raw materials:**
  The manufacture, transport, storage and specialist use of hazardous goods including fuel, explosives, acids and chemicals used in mining is highly regulated, and these goods are delivered on a just-in-time basis to minimise risk. Even a small supply disruption in relation to such products could severely impact mining operations.

- **Managing supply shortages for critical machinery and equipment parts and consumables, lubricants, fire suppression materials and tyres:**
  Mining relies heavily on large scale equipment that must be maintained to a high standard to ensure the safety and reliability of operations. The industry is experiencing shortages in the supplies of parts needed to keep the equipment operational, due to both a reduction in global manufacturing and delays in airborne and seaborne transport.

  Maintenance of mining equipment, servicing and breakdown management is critical to ongoing operations and the health and safety of workers. In addition to parts supply, any disruption to the supply of specialist services will also result in the scaling back of operations, and in some cases, the cessation of cease operations.

Given ongoing uncertainty about the length of time COVID-19 related impacts in Australia and globally will continue, it is not possible to specify the duration that supply shortages related to COVID-19 will persist. However, the potential consequences of mine closures and scale-backs will mean permanent regional job losses, long-lasting economic impacts on regional communities and broader economic impacts such as a weakened supply chains due to flow on effects on suppliers.

The identification and management of existing and potential supply shortages is an ongoing process currently being undertaken by individual companies. The cause and magnitude of the impact varies depending on the global supply chain, how it is affected by COVID-19 conditions, domestic and international management strategies by governments and supply and demand conditions. Facilitating a collective response management strategy will enable more efficient and safe allocation of available resources.

In addition to making sure that mining businesses are able to continue operating safely, the minerals industry recognises the special responsibility it has to ensure that vulnerable people in remote and regional communities are protected from the spread of COVID-19. This is consistent with the Australian minerals industry’s strong long-term partnerships with remote and regional communities, including Traditional Owner groups and Aboriginal and Torres Strait Islander communities.

As well as continuing existing direct services provisions (e.g power, emergency response capability and goods transportation) and partnership arrangements, the industry has mobilised significant additional resources to meet local housing, social and health needs arising from pandemic preparations. Key areas of support include food and essentials provision and transportation and hygiene essentials provision.

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Information on the measures the Australian minerals industry is taking to ensure the health of regional communities is detailed at www.minerals.org.au/communities.

3.2 Description of conduct to be authorised
In order to manage reductions in the availability of critical inputs as a result of COVID-19, to ensure mining operations can continue safely and efficiently, and to provide assistance where possible to communities and health facilities, the applicants seek authorisation for the participants to discuss, enter into, or give effect to, any contract, arrangement or understanding between them that has the purpose of:

- Collaborating to share inventories and of critical services and supplies required to maintain their operations safely and efficiently in the face of current and anticipated shortages of supplies that are critical to continued operations during the global COVID-19 pandemic
- Rationalising demand through cooperation and sharing to reduce the burden on supply chains, thereby improving the supply of critical services and supplies for the Australian mining sector and the community more broadly
- Identifying and sharing details of potential suppliers of COVID-19 related personal protective equipment (PPE) health and medical equipment, including with other governments, communities and industry to ensure the health and safety of their workforces, families and communities
- Minimising the risk of shortages of critical services and supplies by coordinating scheduling and supply chain activities including import, storage, trucking and delivery.

(the proposed conduct)

Examples of material agreements pursuant to the conduct proposed to be authorised include:

- Mining companies sharing information on inventories and distributing spare stock at cost to another miner or mine operator who requires such stock
- Mining companies sourcing stock from an existing supplier with whom they have a relationship on behalf of other mining companies and passing stock on at cost
- Mining companies sharing or swapping available services where border transit restrictions restrict access to interstate specialists
- Mining companies agreeing to pool their supplies of health and safety equipment to supply to a health service in a host regional community.

3.3 Qualifications of the authorisation
The proposed conduct outlined in this application does not include collaboration, discussion, or negotiation over terms, conditions and prices in contracts of supply.

The proposed conduct is not compulsory, and any participant can opt out of the proposed collaboration under the authorisation

For the avoidance of doubt, the proposed conduct is a temporary measure to deal with risks to supplies critical to mining arising from the COVID-19 pandemic.

3.4 Proposed duration of the authorisation
Authorisation is sought for a period of 12 months from the date of a final determination by the ACCC, noting that the ACCC could under s.91B of the CCA revoke the authorisation should there be a material change in circumstances (for example, where access to critical services and supplies is no longer constrained by supply and demand shocks related to COVID-19).
This is consistent with the duration of authorisations the ACCC has granted to other industries arising out of circumstances caused by the COVID-19 pandemic.

3.5 Provisions of the CCA that may relate to the proposed conduct

Mining companies compete in relation to the acquisition of supplies related to mining, transport and logistics services, professional services such as legal, technological and engineering services, skilled employees and in relation to the supply of commodities to local and international markets. Mining equipment, technology and services (METS) firms compete to supply professional services and technologies to support mining operations.

In the absence of authorisation, the proposed conduct risks non-compliance with the CCA, including the provisions relating to cartel conduct inasmuch as material arrangements may have the purpose or effect of fixing, controlling or maintaining prices, discounts, allowances, rebates or credit in relation to goods or services acquired or supplied (or likely to be acquired or supplied) or conduct that has the purpose or would have or be likely to have the effect of substantially lessening competition.

3.6 Urgency requires interim authorisation

The MCA also applies for interim authorisation for the period up until the ACCC has granted final authorisation in light of the rapidly deteriorating access to global and domestic supplies resulting from COVID-19 impacts on manufacturing, transport and demand for critical supplies and services inputs.

Relief is urgently required to enable the participants to manage the supply chain of these services and supplies in Australia and prevent shortages shutting down operations.

Mining operations face the real and imminent risk of being shut down due to an inability to source specific health and safety equipment, parts, consumables and specialist services required for the operational integrity of mining operations. Updates on the situation for mining are provided weekly to Commonwealth, state and territory resources ministers, the national co-ordination committee and key portfolios.

A mine shutdown would not only make its workforce unemployed and reduce revenue to government to fund essential services. It would also devastate local communities and small and regional businesses that rely on the mine while reducing export income and the ability of the Australian economy to recover strongly following the health crisis as outlined in the draft application.

In one current situation, a mine supplying coal to an electricity generator has sufficient masks to operate for the remainder of April 2020. Failure to source masks for next month will stop the mine and therefore the supply of coal to the generator.

Statements by the Prime Minister and national resources ministers have highlighted the essential nature of the resources sector and the priority need to keep mining operations open. The joint State and Commonwealth Resource Ministers’ communiqué of 24 March 2020 made a clear and unambiguous statement that the resources industry is essential to the Australian and State economies.

Ministers also recognised that resources sector operations are a key priority along with the implementation of new health measures. Ministers recognised that maintaining a strong resources sector will be critical to ensuring that communities and the wider Australian economy is well positioned to bounce back when the global economy recovers from the COVID-19 pandemic.

An urgent interim authorisation would enable members to co-operate, source and allocate services, parts, equipment and consumables efficiently.
4. **ACCC OVERSIGHT**

The ACCC will have oversight over the proposed conduct based on these conditions:

4.1 Participants who become party to a material arrangement that relies on the authorisation sought by this application will nominate a party to be responsible for notifying the ACCC of the material arrangement as soon as is practicable after it is made. The nominated party will be responsible for updating the ACCC in relation to any substantial changes to the arrangement, and commit to being the ACCC’s key point of contact for all communications regarding the material arrangement. Material arrangements are arrangements entered into by one or more participants pursuant to the proposed conduct that are:

- Likely to be of commercial or economic significance
- May have a material impact on the supply of critical services and supplies

with such notification to include:

- The protocols and guidelines for the steps to be taken pursuant to the material arrangement
- A description of the nature of the steps to be taken pursuant to the material arrangement
- The applicants who have agreed to the material arrangement
- When it is intended to take the steps pursuant to the material arrangement.

4.2 At the request of the ACCC, any participants who are party to a material arrangement undertake to provide information and clarification in relation to any proposed conduct enabled by the proposed authorisation in a manner that is timely and efficient.
5. **SIGNIFICANT PUBLIC BENEFITS**

The global COVID-19 pandemic has resulted in significant disruption to the availability of critical supplies that will be necessary to safely continue mining operations at Australian mining sites.

The Commonwealth and state and territory governments have recognised that:

- The resources sector plays an essential role in maintaining a strong Australian economy
- There is a need for a coordinated national approach to managing the impacts of COVID-19 in the resources sector
- The maintenance of resource sector operations in parallel with the implementation of health measures is a key priority for government
- The resources sector will play a lead role in Australia’s economic recovery from the COVID-19 pandemic.

It is essential mining continues during this period as long as it is safe to do so because families, communities and small businesses across regional Australia and in our major cities depend on the mining industry.

Australian mining also supports manufacturing supply chains and mining, equipment, technology and services (METS) companies in both regional and metropolitan areas.

Mining continues to make a significant contribution to the Australian economy and society. In 2019 mining generated $290 billion in export revenue (59 per cent of total export revenue), the highest wages in Australia with an average of $141,000 a year, significant tax and royalties contributions of $31 billion annually to underpin national prosperity and strong regional communities and directly employed 240,000 people in highly-paid, highly skilled jobs.

Mining has accounted for the highest share of GDP growth since 2008-09 and together with its supply chains in the mining, equipment, technology and services (METS) sector supports more than 1.1 million jobs nationally.

Australian mining has always been responsive and responsible in providing an economic platform for governments to meet their obligation to protect the community.

When Australia emerges from the COVID-19 pandemic, a strong resources sector, a safe and healthy workforce and thriving regional communities will ensure Australia’s economic recovery is delivered speedily and widely.

Without critical inputs of services and supplies, mining operations will shut down.

Critical inputs and their supply chains have been constrained by COVID-19 in terms of manufacturing capacity, logistics and increased demand. This is evident, for example, in the supply of tyres and some consumables. It is also evident in the shortage of N95 masks required to work in an underground environment where demand for all grades of mask has exceeded supply capacity.

Collaboration and allocation of available stocks – for example, of specific masks versus general medical grade – will help avoid panic buying and take pressure off supply capacity.

Some product lines needed to protect workers from COVID-19 and the broader critical health and safety risks associated with mining have come under supply pressure through increased demand and the generalisation of product specifications.

Increasing the efficiency of supply allocation by better matching stock and its use will support more efficient stock allocation, avoid hoarding and free up some product lines for other uses. For example, it can be reasonably expected that the overall demand for critical supplies and services by the minerals sector working together would be significantly less than the demand in aggregate if each firm sought to independently secure its supplies.
On that basis, the proposed conduct would be likely to improve rather than limit the ability of health and other critical services to source PPE for their own purposes and provide any additional supplies to local communities and health services.

It is important to note that the participants do not seek authorisation to collectively bargain contract terms or prices with suppliers. The objective is to share information on potential alternate suppliers and make agreements about the distribution of critical services and supplies among the participants.
6. LIMITED POTENTIAL FOR COMPETITIVE DETRIMENTS

The potential competitive detriments from the proposed conduct would not result in any substantial lessening of competition in Australia as the proposed conduct is framed to respond to a breakdown in the efficient operation of the market that can no longer balance supply and demand solely as a result of COVID-19 and government interventions to manage it.

In addition, any reduction in competition will only be temporary to allow the Australian minerals industry to continue to safety and efficiently operate during the COVID-19 pandemic (and therefore will not have a substantial impact on the market).

The potential competitive detriments from the proposed conduct are limited to temporarily reduced competition for some critical supplies and services arising from participants working collectively to share information that is not competitively sensitive and stock at cost.

The potential to influence price through collective action, increased co-ordination and information-sharing between the participants, including in relation to the logistics and operation of the distribution of critical supplies, is extremely low because current demand substantially outstrips supply.

Given global supply shortages, there is a very low likelihood that the collaboration will have any impact on prices. The current situation, where the demand for some inputs has outstripped supply, has seen price gouging, prices rising strongly on the back of forward orders and poor quality stock provided. Further, the proposed conduct would reduce the risk of panic buying and the pressure that such a response will add to already stressed supply chains.

As the proposed conduct is to occur for a short period and is limited to sharing information that is not competitively sensitive and allocating surplus critical health, safety and operational inputs to other mining companies, any such potential detriments are significantly outweighed by the public benefits that would arise from the proposed conduct.

The likely impact is that available services and supplies will be allocated more efficiently to keep the mining industry operating safely and increase the ability of supply chains to meet broader demand.

The applicants submit that the proposed conduct will result in limited public detriment, which will nevertheless be outweighed by the public benefits set out above.

The applicants submit that the proposed conduct will not result in any substantial lessening of competition in any relevant market in Australia as the proposed conduct is specifically to address only the impact of and uncertainty caused by the current COVID-19 pandemic, and therefore the proposed conduct will cease once the current pandemic passes.
7. **THE PUBLIC BENEFITS OUTWEIGH ANY COMPETITIVE DETRIMENTS**

The applicants submit that it is unlikely that interim authorisation will alter the competitive dynamics in any market, and markets will be able to return to substantially their current state once the emergency circumstances subside. In particular:

- The proposed conduct is a temporary measure which can be discontinued by the ACCC as set out in 3.3 above
- The proposed conduct relates only to those supplies and services that are critical to operations continuing through the COVID-19 pandemic so that those operations can support the restarting of a strong and competitive economy when the effects of the pandemic abate
- The proposed conduct and interim authorisation will only apply for the purposes set out in s.3.1 above
- The ACCC will have oversight of all material arrangements entered into pursuant to the proposed conduct
- It is not compulsory for participants to participate in the proposed conduct.

For the reasons set out above, the applicants submit that any competitive detriments that may arise from the proposed conduct are significantly outweighed by the public benefits that arise.
8. CONCLUSION

For the reasons set out above, the applicants apply for:

- Authorisation to enable the participants to discuss, enter into, or give effect to, any arrangement between them for the purposes specified in s.3.1
- Interim authorisation until the final authorisation comes into effect to enable the participants to enter the above.
9. CONSENT

This application is made with the consent of the undersigned on behalf of their respective associations:

Tania Constable  
Chief Executive  
Minerals Council of Australia

Ian Macfarlane  
Chief Executive  
Queensland Resources Council

Stephen Galilee  
Chief Executive  
NSW Minerals Council

Rebecca Knol  
Chief Executive Officer  
SA Chamber of Mines and Energy

Paul Everingham  
Chief Executive Officer  
Chamber of Mines and Energy of WA
Ray Mostogl
Chief Executive Officer
Tasmanian Minerals, Manufacturing and Energy Council

Warren Pearce
Chief Executive Officer
Association of Mining and Exploration Companies

Marghanita Johnson
Executive Director
Australian Aluminium Council
10. SCHEDULE

The Minerals Council of Australia (MCA)
The Queensland Resources Council (QRC)
The NSW Minerals Council (NSWMC)
The SA Chamber of Mines and Energy (SACOME)
The Chamber of Mines and Energy of WA (CMEWA)
The Tasmanian Minerals, Manufacturing and Energy Council (TMEC)
The Association of Mining and Exploration Companies (AMEC)
The Australian Aluminium Council (AMC)
Declaration by Applicant(s)

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned undertake(s) to advise the ACCC immediately of any material change in circumstances relating to the application.

The undersigned are aware that giving false or misleading information is a serious offence and are aware of the provisions of sections 137.1 and 149.1 of the Criminal Code (Cth).

Signature of authorised person

Chief Executive Officer

Office held

Tania Constable

(Print) Name of authorised person

This 23rd day of April 2020