Draft Determination

Application for authorisation
lodged by
the Minerals Council of Australia;
the Queensland Resources Council;
the NSW Minerals Council;
the SA Chamber of Mines and Energy;
the Chamber of Mines and Energy of WA;
the Tasmanian Minerals, Manufacturing and Energy Council;
the Association of Mining and Exploration Companies;
the Australian Aluminium Council

in respect of cooperation between mining companies for the purpose of
safe and efficient operation during the COVID-19 pandemic

Authorisation number: AA1000504

Date: 5 August 2020
Commissioners: Rod Sims, Delia Rickard, Mick Keogh, Sarah Court, and Stephen Ridgeway
Summary

The ACCC proposes to grant authorisation to enable members of the mining sector to coordinate and collaborate to respond to disruptions in the supply of specified critical services and supplies caused by the COVID-19 Pandemic.

The proposed authorisation does not permit any collaboration between mining companies about limiting or reducing their production.

The ACCC proposes to grant authorisation subject to conditions until 30 June 2021.

The ACCC considers that the arrangements are likely to result in public benefits by ensuring the supply of critical services and supplies throughout the period of the Pandemic which will support the continuation of mining operations, which are important to the Australian economy.

The conditional interim authorisation already granted by the ACCC on 24 April 2020 will continue while the ACCC is considering the substantive application.

The ACCC invites submissions in relation to this draft determination by 20 August 2020 and will consider all such submissions before making its final decision in this matter.

The Applicants, or other interested parties may request that the ACCC hold a conference to allow oral submissions on the draft determination.

1. The application for authorisation

1.1. On 23 April 2020, the following organisations jointly lodged application for authorisation AA1000504 (the Application) with the Australian Competition and Consumer Commission (the ACCC):

- the Minerals Council of Australia
- the Queensland Resources Council
- the NSW Minerals Council
- the SA Chamber of Mines and Energy
- the Chamber of Mines and Energy of WA
- the Tasmanian Minerals, Manufacturing and Energy Council
- the Association of Mining and Exploration Companies
- the Australian Aluminium Council.

1.2. Authorisation is sought on behalf of themselves, their members (as set out in the schedule maintained on the ACCC’s public register in this matter), and other parties notified to the ACCC, to reach agreements to coordinate and collaborate to ensure that the mining industry can continue to operate safely and efficiently during the COVID-19 pandemic (the Pandemic).

1.3. This application for authorisation AA1000504 was made under subsection 88(1) of the Competition and Consumer Act 2010 (Cth) (the Act).

1.4. The Applicants seek authorisation for 12 months from the date of the ACCC’s final determination.
1.5. The ACCC may grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching competition law but are not harmful to competition and/or are likely to result in overall public benefits.

1.6. In seeking authorisation the Applicants note that many of the industry's key consumables are delivered on a just-in-time basis. They contend that because of this, disruptions to supply chain performance can have a disproportionate impact on mining operations.

1.7. The Applicants submit that it is unclear for how long and in what way the Pandemic may disrupt industry supply chains. They consider that facilitating a collective response to managing these disruptions will enable more efficient and safe allocation of available resources.

The Applicants

1.8. As noted above, the Application is made jointly by the following industry associations:

a) the MCA. The MCA is the national body for Australia’s minerals industry, representing companies that produce most of Australia’s minerals output and general export earnings worth more than $150 billion a year. The MCA’s membership comprises of 51 full member companies (including many of Australia’s largest mining companies) and 29 associate member companies (including mining service providers, state chambers, energy and transport companies and consultancy firms);

b) the Queensland Resources Council (QRC). The QRC is a not-for-profit industry association representing the commercial developers of Queensland’s minerals and energy resources, and has 78 full members, 103 service members and 22 associate members;

c) the NSW Minerals Council (NSWMC). The NSWMC is the leading industry association for mining in New South Wales, and has 34 full members and 53 associate members;

d) the SA Chamber of Mines and Energy (SACOME). The 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, and has 25 resource industry members, 90 service members and 14 associate members;

e) the Chamber of Mines and Energy of WA (CMEWA). The CMEWA is the peak resources sector representative body in Western Australia and is a member-funded, not-for-profit organisation with 69 ordinary members and 58 associate members;

f) the Tasmanian Minerals, Manufacturing and Energy Council (TMEC). The 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, and has 15 corporate members and 65 associate members;

g) the Association of Mining and Exploration Companies (AMEC). The AMEC is the peak industry body for the mining exploration industry, representing over 275 member companies around Australia, including explorers, emerging miners, producers and a wide range of businesses and service providers; and
h) the Australian Aluminium Council (AAC). The AAC is the peak industry association representing the Australian aluminium industry and has eight member companies,

(together, the Applicants)

on behalf of:

- themselves;
- entities who are full members of one or more of the Applicants and are listed in the schedule maintained on the ACCC’s public register¹; 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).

The Proposed Conduct

1.9. 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:

(a) collaborating to share inventories 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 Pandemic;

(b) 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;

(c) 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; and

(d) 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)

1.10. Critical services and supplies are defined as those services and supplies required to maintain the operational integrity of mining operations while protecting the health and safety of the workforce, including:

(a) 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;

(b) maintenance inputs including parts and key maintenance personnel required to maintain the machinery in a condition that ensures safe operation;

(c) critical consumables such as fuel, explosives and parts; and

(d) other services or supplies critical to mining operations that may be in short supply in the future as global supply chains are further affected,

(critical services and supplies).

1.11. The Applicants provide the following as examples of material arrangements that may fall within the Proposed Conduct:

- 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; and
- mining companies agreeing to pool their supplies of health and safety equipment to supply to a health service in a host regional community.

1.12. The Applicants submit that the Proposed Conduct has the following limitations:

- it does not include collaboration, discussion or negotiation over terms, conditions and prices in contracts of supply;
- it is not compulsory, and any of the Participants can opt out of the proposed collaboration under the authorisation;
- it is a temporary measure to deal with risks to supplies critical to mining arising from the Pandemic; and
- it will be subject to conditions requiring reporting, notification and the ability for the ACCC to request information, (as outlined in sections 4.1 and 4.2 of the Application). The relevant conditions are discussed in paragraphs 4.26 – 4.28 and 5.9 – 5.12 below.

Interim authorisation

1.13. On 24 April 2020, the ACCC granted conditional interim authorisation under subsection 91(2) of the Act. The conditional interim authorisation allows the Participants to commence the Proposed Conduct while the ACCC is considering the substantive application.
1.14. Interim authorisation is subject to the following conditions that require the MCA, on behalf of the Applicants, to notify the ACCC of the matters outlined below to ensure there is transparency over the arrangements:

**Condition 1 – reporting of material arrangements**

The MCA must notify the ACCC of any material arrangements entered into by Participants pursuant to the Proposed Conduct as soon as is practicable after they are made. 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 Participants who have agreed to the material arrangement
- when it is intended to take the steps pursuant to the material arrangement.

**Condition 2 – provision of information to ACCC on request**

The Applicants must provide any further information that the ACCC requests on a timely basis.

**Condition 3 – provision of regular updates**

The MCA must provide regular updates to the ACCC on the implementation of the Proposed Conduct, including any material arrangements, at a frequency agreed with the ACCC.

1.15. The interim authorisation granted on 24 April 2020 will remain in effect until it is revoked or the substantive authorisation comes into force.

2. Background

2.1. The ACCC recognises the significant challenges occurring as a result of the Pandemic. The Pandemic has caused a major disruption to society and the economy, with social distancing measures and travel bans affecting various sectors across the economy. In that context, the ACCC has received a large number of applications for authorisation, including interim authorisation, aimed at providing financial relief to businesses and individuals, facilitating the supply of goods and services (including medical products and services) and managing the financial impact of a significant economic shock.

2.2. The Applicants have identified supply shortages in the Australian mining sector that have occurred due to disruptions to global supply chains and a rapid global increase in demand for COVID-19 related health and hygiene products. These include:
Supply shortages for critical health, hygiene and safety products, including the supply of masks used for respiratory protection. Certain types of these masks are mandatory for many underground operations. As at July 2020, the MCA has identified that an underlying shortfall of approximately 50,000 masks per month continues for P2 masks suitable for open cut and underground mining, processing and related industrial applications.

Supply shortages for critical machinery and equipment parts and consumables, lubricants, fire suppression materials and tyres. The industry experienced shortages in the supply of parts needed to keep equipment operation, due to a reduction in global manufacturing and delays in transport.

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 companies involved in various parts of the supply chain across the mining sector, state and federal governments and relevant regulatory bodies.²

3.3. Public submissions by the Applicants and interested parties are on the Public Register for this matter.

3.4. The submissions by interested parties and the Applicants are considered in section 4 of this draft determination.

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 a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of sections 45, 46 and 47 of the Act. Consistent with subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation in relation to this application unless it is satisfied, in all the circumstances, that 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 (authorisation test).

4.3. Authorisation is prospective, the ACCC may grant authorisation allowing parties to make and give effect to arrangements entered into from the date its determination takes effect and to give effect to arrangements entered into under the terms of any interim authorisation that has been granted.

4.4. The ACCC’s assessment of the Proposed Conduct is made in the context of the Pandemic. The Pandemic is impacting Australian consumers and businesses, with many businesses facing severe disruption. Maintaining competition in the long term will be critical to benefit both consumers and the economy. When considering applications for authorisation responding to the Pandemic, the ACCC is seeking to ensure that changes to the competitive landscape are, wherever possible, temporary.

² A list of the parties consulted and the public submissions received is available from the ACCC’s public register www.accc.gov.au/authorisationsregister.
4.5. In making its assessment of the Proposed Conduct, the ACCC has considered:

- the Application and other relevant information available to the ACCC; this has included information provided by the Applicants on a confidential basis as well as government announcements on managing the impacts of the Pandemic on the mining sector³;
- the relevant areas of competition likely to be affected by the Proposed Conduct. These areas of competition include the supply or acquisition of critical supplies and services in the Australian mining sector. This is likely to encompass a diverse range of relevant markets;
- the likely future with the Proposed Conduct that is the subject of the authorisation compared to the likely future in which the Proposed Conduct does not occur. Without the Proposed Conduct the ACCC considers that the Participants are likely to source critical supplies and services on an individual basis.

Public benefits

4.6. 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. ⁴

4.7. The Applicants submit that mining operations face a real and imminent risk of being shut down due to an inability to source critical inputs of services and supplies. They submit that the potential consequences of mine closures and scale-backs include permanent regional job losses, long lasting economic impacts on regional communities, and broader economic impacts such as weakened supply chains due to flow on effects on suppliers.

4.8. The Applicants submit that authorisation of the Proposed Conduct will facilitate a collective management strategy to respond to the Pandemic which will enable more efficient and safe allocation of available resources, avoid hoarding and free up some product lines for other uses. For example, the Applicants submit it can reasonably be expected that the overall demand for critical supplies and services by the mining sector working together would be significantly less than the demand in aggregate if each firm sought to independently secure its supplies. The Applicants submit that 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 allow the mining sector to provide any additional supplies to local communities and health services.

4.9. The Applicants emphasise the mining sector’s significant contribution to the Australian economy and society, including through generating substantial revenue, making substantial tax and royalty contributions and providing employment. They submit that a strong resources sector at the conclusion of the Pandemic will contribute to Australia’s economic recovery.

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4.10. The ACCC considers that without the Proposed Conduct, mining companies would attempt to address shortages in critical services and supplies independently of each other. This could result in higher overall demand for these supplies, when compared to a collective management of supply shortages. Higher overall demand for critical services and supplies in circumstances where supply is already limited due to the Pandemic could lead to unavailability of critical services and supplies. This could result in a heightened risk of suspension or closure of mining operations.

4.11. The ACCC considers that in these unprecedented circumstances of the Pandemic, the Proposed Conduct will result in the following public benefits:

- assisting the Participants to quickly identify supply chain issues for critical services and supplies and coordinate to address those issues. This is likely to enable more efficient allocation of critical services and supplies and increase the ability of supply chains to meet broader demand. The ACCC notes that under interim authorisation a working group was formed by a group of the Participants to identify opportunities to meet supply shortages. As part of this, the working group identified further potential suppliers to redress the shortfall of masks, including co-ordinating with an Australian manufacturer on the design and fit testing of masks and discussions on a potential material arrangement to underwrite an emergency supply of masks for similar industry participants;
- enabling mining operations to continue safely and efficiently, including preventing mine shut downs and the detrimental impacts such shutdowns would likely have on employment, local communities and the Australian economy; and
- providing assistance where possible to communities and health facilities, such as by sharing details of potential PPE suppliers with other governments or communities, or providing them with additional PPE supplies where possible. The ACCC notes that under interim authorisation an opportunity was identified to supply 10,000 masks to Aboriginal health services in need, which was responded to by one of the Participants.

Conclusion on public benefit

4.12. The ACCC considers that the Proposed Conduct is likely to result in public benefit by facilitating an efficient response by Participants to actual and potential shortages of critical services and supplies arising from the circumstances of the Pandemic. This will support the continuation of mining operations through the duration of the Pandemic, which is important to the Australian economy.

Public detriments

4.13. 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.5

4.14. An interested party raised concern that the Proposed Conduct, by allowing Participants to share inventory of critical supplies, has the potential to result in public detriment if it results in Participants disclosing information that is commercially sensitive to a third party supplier. The interested party was also concerned that the Proposed Conduct

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5 Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.
may allow collaboration between mining companies for inputs whose supply chains are not affected by the Pandemic.

4.15. The MCA has noted that any agreement between Participants about the price of inputs that could be shared between them under the Proposed Conduct will be a matter for bilateral negotiation between those Participants. It notes that the examples provided in the application for authorisation are intended to convey that under the Proposed Conduct Participants should not seek to profit when collaborating to maintain supply. The MCA does not anticipate that Participants reaching such arrangements would share details that would identify the particulars of past contracts linking the supplier, purchaser, sale price, quantities, and date of purchase of supplies. It further notes that the scope of the Proposed Conduct is sufficiently limited by requirements that the Proposed Conduct is ‘solely for the purpose of dealing with risks to supplies critical to mining arising from the Pandemic’ and is subject to reporting conditions.

4.16. The Applicants submit in relation to public detriments that:

- There is limited potential for competitive detriments from the Proposed Conduct as it is framed to respond to a breakdown in efficient operation of the markets that can no longer balance supply and demand solely as a result of the Pandemic, and government interventions to manage it.

- Any reduction in competition will only be temporary and is limited to reduced competition for some critical services and supplies 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, and there has been strong rises in price as a result of the Pandemic.

4.17. The Proposed Conduct allows Participants to share information and act collectively across a diverse range of goods and services and will impact a diverse range of markets. The Proposed Conduct allows the Participants to remove competitive tension between them. Without the Proposed Conduct, this competitive tension provides important signals to the market about how society’s resources should be allocated, this may include signalling to the market that innovation is required. The reduction or removal of competition between the Participants to acquire goods and services is likely to result in public detriment.

4.18. In addition, agreements between competitors can give rise to competition concerns if the horizontal agreement makes coordination (rather than competition) between firms beyond the terms of the authorised agreement more likely and also across the market more generally.

4.19. The ACCC considers that in the absence of the extraordinary circumstances created by the Pandemic, the detriment to the public from the Proposed Conduct could be significant.
4.20. However, the ACCC considers that, in the current circumstances, the likely public detriment from the Proposed Conduct is likely to be limited by a number of factors:

- The Proposed Conduct relates only to those supplies and services that are critical to operations continuing through the Pandemic, and have experienced supply disruption because of the Pandemic.

- Authorisation of the Proposed Conduct is limited to arrangements for the purposes set out at paragraph 1.9 above, which are broadly, to share inventories and services of, and rationalise demand for, critical services and supplies; identify and share details of potential PPE suppliers; and coordinate scheduling and supply chain activities including import, storage, trucking and delivery.

- The Proposed Conduct does not provide for collaboration between the Participants on matters such as limiting or reducing production.

- In the current environment, any information shared under the Proposed Conduct is likely to lose relevance within a short period.

- The Proposed Conduct provides a temporary response to the Pandemic, the measures are not designed or intended to provide a permanent restriction on competition. The Proposed Conduct can be discontinued during the period of authorisation in the event that the effects of the Pandemic subside.

**ACCC conclusion on public detriment**

4.21. The ACCC considers that the Proposed Conduct is likely to result in public detriment in the form of reduced competition between the Participants for the acquisition of critical services and supplies in the Australian mining sector. The public detriment is likely to be limited by a number of factors.

**Balance of public benefit and detriment**

4.22. The ACCC considers that the Proposed Conduct is likely to result in public benefit by facilitating an efficient response by the Participants to actual and potential shortages of critical services and supplies. This will support the continuation of mining operations through the duration of the Pandemic, which is important to the Australian economy.

4.23. The ACCC also considers that the Proposed Conduct is likely to result in public detriment in the form of reduced competition between the Participants for the acquisition of critical services and supplies in the Australian mining sector. In the absence of the extraordinary circumstances created by the Pandemic, the detriment to the public from the Proposed Conduct could be significant. However, in the circumstances the ACCC considers that the reduction of competition is likely to be limited by a number of factors.

4.24. As discussed below, the ACCC is proposing to impose conditions on the proposed authorisation. The conditions provide transparency about the conduct being engaged in under authorisation and the identity of parties involved. This transparency is particularly important given the broad nature of the Proposed Conduct.

4.25. Overall, the ACCC considers that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.
Proposed conditions of authorisation

4.26. The ACCC may specify conditions in an authorisation. The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.

4.27. In the interim authorisation granted in April 2020, the ACCC imposed conditions requiring the MCA to provide reports to the ACCC on behalf of the Applicants about the conduct occurring under interim authorisation on a regular basis and in relation to each material arrangement entered into. The conditions also require the ACCC be notified of any proposed additional participants in the Proposed Conduct. These conditions provide important transparency in relation to the Proposed Conduct and the parties protected by the interim authorisation.

4.28. The ACCC considers that the transparency provided by the conditions is an important part of monitoring the Proposed Conduct. The ACCC considers that the conditions imposed under the interim authorisation have been effective. Therefore, the ACCC proposes to continue these conditions as part of the substantive authorisation (see paragraphs 5.9 – 5.12 below).

Length of authorisation

4.29. 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.

4.30. In this instance, the Applicants seek authorisation for 12 months from the date of the ACCC’s final determination.

4.31. The ACCC considers that there is a careful balance to be struck in ensuring that applications for authorisation responding to the Pandemic are granted for an appropriate period. The ACCC is proposing to grant authorisation until 30 June 2021.

4.32. The ACCC will further consider the appropriate length of the authorisation, including any submissions it receives, when it makes its final decision.

5. Draft determination

The application

5.1. On 23 April 2020 the following organisations lodged application AA1000504 with the ACCC, seeking authorisation under subsection 88(1) of the Act:

- the Minerals Council of Australia;
- the Queensland Resources Council;
- the NSW Minerals Council;
- the SA Chamber of Mines and Energy;

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6 Section 88(3) of the Act.
7 Section 88(3) of the Act.
8 Subsection 91(1) of the Act.
• the Chamber of Mines and Energy of WA;
• the Tasmanian Minerals, Manufacturing and Energy Council;
• the Association of Mining and Exploration Companies;
• the Australian Aluminium Council.

5.2. The Applicants seek authorisation on behalf of themselves, entities who are full members of one or more of the Applicants and are listed in the schedule⁹ 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 (the Participants).

5.3. 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:

(a) collaborating to share inventories 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 Pandemic;

(b) 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;

(c) 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; and

(d) 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).

5.4. Critical services and supplies are defined as those services and supplies required to maintain the operational integrity of mining operations while protecting the health and safety of the workforce, including:

(a) 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;

(b) maintenance inputs including parts and key maintenance personnel required to maintain the machinery in a condition that ensures safe operation;

(c) critical consumables such as fuel, explosives and parts; and

(d) other services or supplies critical to mining operations that may be in short supply in the future as global supply chains are further affected

(critical services and supplies).

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5.5. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

5.6. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation in relation to application for authorisation AA1000504 unless it is satisfied in all the circumstances that the Proposed Conduct would result or is 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 Proposed Conduct.

5.7. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Proposed Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.

5.8. Accordingly, the ACCC proposes to grant authorisation.

Proposed conditions of authorisation

5.9. The ACCC may specify conditions in an authorisation.\(^{10}\) The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.\(^ {11}\)

5.10. The ACCC may specify conditions in circumstances where, although the relevant public benefit test is met, without the conditions the ACCC would not be prepared to exercise its discretion in favour of the authorisation.\(^ {12}\)

5.11. In this instance, the ACCC proposes to grant authorisation subject to the following conditions:

Condition 1 – reporting of material arrangements

The MCA must notify the ACCC of any material arrangements entered into by Participants pursuant to the Proposed Conduct as soon as is practicable after they are made. 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 Participants who have agreed to the material arrangement
- when it is intended to take the steps pursuant to the material arrangement.

\(^{10}\) Section 88(3) of the Act.

\(^{11}\) Section 88(3) of the Act.

\(^{12}\) Application by Medicines Australia Inc (2007) ATPR 42-164 at [133].
**Condition 2 – provision of information to ACCC on request**

The Applicants must provide any further information that the ACCC requests on a timely basis.

**Condition 3 – provision of regular updates**

The MCA must provide regular updates to the ACCC on the implementation of the Proposed Conduct, including any material arrangements, at a frequency agreed with the ACCC.

5.12. These proposed conditions are the same as those that currently apply under the Interim Authorisation granted on 24 April 2020.

**Conduct which the ACCC proposes to authorise**

5.13. The ACCC proposes to grant conditional authorisation AA1000504 to permit the Participating Parties to engage in the Proposed Conduct only so far as it is for the sole purpose of dealing with disruptions to the supply of critical services and supplies arising from the Pandemic.

5.14. The ACCC proposes to grant authorisation in relation to the following provisions of the Act:
   a. Division 1 of Part IV of the Act,
   b. section 45 of the Act,
   c. section 46 of the Act, and
   d. section 47 of the Act.

5.15. The ACCC proposes to grant conditional authorisation AA1000504 until 30 June 2021.

5.16. This draft determination is made on 5 August 2020.

**Conduct which the ACCC proposes not to authorise**

5.17. The proposed authorisation does not permit any contracts, arrangements or understandings between Participants that limit or reduce production by any of the Participants.

**6. Next steps**

6.1. The ACCC now invites submissions in response to this draft determination. In addition, consistent with section 90A of the Act, the Applicants or an interested party may request that the ACCC hold a conference to discuss the draft determination.