Decision

1. The Australian Competition and Consumer Commission (the ACCC) has granted conditional interim authorisation in respect of the application for authorisation AA1000504, lodged by the Minerals Council of Australia (MCA) on 23 April 2020.

2. The MCA has applied for authorisation on behalf of itself and seven other mining and exploration industry associations, their members (as set out in the schedule maintained on the public register), and other parties notified to the ACCC to reach agreements to collaborate to share inventories of and rationalise demand for critical supplies and services, to coordinate scheduling and supply chain activities of those supplies and services, and to share details of potential suppliers of PPE, to ensure that the mining industry can continue to operate safely and efficiently during the COVID-19 pandemic (the Pandemic).

3. The ACCC has granted conditional interim authorisation for the conduct described at paragraph 10 of this Interim Authorisation decision document.

4. Interim authorisation commences immediately and remains in place until it is revoked or the date the ACCC’s final determination comes into effect.

The application for authorisation

The Applicants

5. The MCA is the national industry body for Australia’s 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 comprises 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.

6. The application for authorisation is made jointly by the following industry associations:

   - the MCA
   - 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
   - the NSW Minerals Council (NSWMC). The NSWMC is the leading industry association for mining in NSW, and has 34 full members and 53 associate members
   - 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

- 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
- 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
- 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
- the Australian Aluminium Council (AAC). The AAC is the peak industry association representing the Australian aluminium industry and has eight member companies (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).

7. The ACCC notes that none of the Applicants have yet provided the names of the full member entities to be included in schedule and therefore parties to the application, but intend to do so shortly. Until such time, only the Applicant associations are parties to the authorisation and therefore have protection to engage in the conduct defined in paragraph 10.

8. For the industry bodies listed at paragraph 6 above:
  - their members are mining companies and mining services companies (including many of the largest in Australia), and
  - their associate members include government agencies, transport companies, mining services companies, energy companies, consulting and professional services firms (such as law firms) and educational institutions.

9. The MCA notes that there is considerable overlap between the memberships of the above industry associations, as mining and mining services companies commonly hold memberships with multiple industry associations.

The Proposed Conduct

10. 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 critical services and supplies (as defined in paragraph 11) 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
• 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

• 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

• 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).

11. 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:

• 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 the machinery in a condition that ensures safe operation

• critical consumables such as fuel, explosives and parts, and

• 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).

12. The Applicants provide the following as examples of material arrangements pursuant to 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.

13. The Applicants submit that the Proposed Conduct:

• does not include collaboration, discussion or negotiation over terms, conditions and prices in contracts of supply

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

• is a temporary measure to deal with risks to supplies critical to mining arising from the Pandemic

• will be subject to conditions requiring reporting and the ability for the ACCC to request information, as outlined in section 4.1 and 4.2 of the application. These conditions are discussed in paragraphs 24-29 below.
14. The Applicants are seeking authorisation for 12 months from the date of a final determination by the ACCC.

Rationale and public benefits

15. The Applicants submit that they seek to engage in the Proposed Conduct in order to:

- manage reductions in the availability of critical inputs as a result of COVID-19
- ensure mining operations can continue safely and efficiently, and
- provide assistance where possible to communities and health facilities.

16. The Applicants submit that the Pandemic has disrupted the supply chains for certain critical supplies and services in the following ways:

- government shutdowns, transport delays, and operational constraints on manufacturing in certain countries have created supply shortages for critical consumables such as lubricants, fire suppression materials and tyres
- the rapid global increase in demand for COVID-19 related health and hygiene products and consumables (such as masks, thermometers and hand sanitiser), including instances of panic buying, has created supply shortages for these products, and
- demand for COVID-19 related PPE has created shortages of specialist PPE for the mining sector (e.g. masks that meet the health and safety specifications for workers underground), with immediate risks to the continued operation of some mines (and potentially downstream industries such as coal-fired power stations).

17. The Applicants submit that mining operations face the real and imminent risk of being shut down due to an inability to source critical inputs of services and supplies. They further submit that 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 weakened supply chains due to flow on effects on suppliers.

18. The Applicants submit that currently, the identification and management of existing and potential supply shortages is an ongoing process being undertaken by individual companies. They suggest that facilitating a collective response management strategy will enable more efficient and safe allocation of available resources, 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. 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 provide any additional supplies to local communities and health services.

The authorisation process

19. Authorisation provides protection from legal action for conduct that may otherwise breach the competition provisions of the Competition and Consumer Act 2010 (Cth) (the Act). Broadly, the ACCC may grant authorisation if it is satisfied that the benefit to the public from the conduct outweighs any public detriment, including from a lessening of competition. The ACCC conducts a public consultation process to assist it to determine whether proposed conduct results in a net public benefit.
Interim authorisation

20. The ACCC may, where it considers it appropriate, grant an interim authorisation which allows parties to engage in proposed conduct while the ACCC is considering the substantive application.

21. The Applicants submit that they are seeking interim 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. The Applicants further submit that relief is urgently required to enable them to manage the supply chains of these services and supplies in Australia and avoid shortages shutting down operations.

Consultation

22. The ACCC has not conducted a public consultation process in respect of the request for interim authorisation.

23. The ACCC will conduct a public consultation process on the substantive application for authorisation, and how the proposed conduct is operating under the Interim Authorisation. Details about how to make a submission will be available on the ACCC’s authorisations public register.

Conditional interim authorisation

24. The Applicants proposed that the ACCC have oversight of the Proposed Conduct based the following conditions:

(a) 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.

(b) 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.

25. The ACCC considers that, given the breadth of the Proposed Conduct, it is appropriate for there to be sufficient transparency over the various discussions had, agreements reached, strategies implemented and information shared.
26. The ACCC therefore grants interim authorisation for the Proposed Conduct (described at paragraph 10 in this Interim Authorisation Decision document) subject to the following conditions:

**Condition 1 – reporting of material arrangements**

27. 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**

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

**Condition 3 – provision of regular updates**

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

**Conduct not authorised**

30. The Proposed Conduct does not extend to any contracts, arrangements or understandings between Participants that limit or reduce production by any of them.

**Reasons for decision to grant conditional interim authorisation**

31. The ACCC has granted Interim Authorisation to the Proposed Conduct described at paragraph 10 of this Interim Authorisation decision document solely for the purpose of dealing with risks to supplies critical to mining arising from the Pandemic, and subject to the Applicants complying with the conditions described at paragraphs 27-29.

32. In granting interim authorisation, the ACCC recognises the urgency of the request for interim authorisation in light of the urgent need manage the supply chains of these services and supplies in Australia and avoid shortages shutting down operations due to the Pandemic.

33. While the breadth of the Proposed Conduct and the potential number and range of mining and exploration industry participants might normally give rise to concerns regarding the extent to which it might substantially lessen competition in a market, the ACCC considers that it is unlikely that the Proposed Conduct will significantly impact competition in the long term due to the following factors:

- The Proposed Conduct, and interim authorisation, is a temporary measure. Authorisation is only sought for 12 months from the date of the ACCC’s final
determination and the Proposed Conduct can be discontinued if the effects of the Pandemic subside at an earlier date.

- The Proposed Conduct relates only to those supplies and services that are critical to operations continuing through the Pandemic, such 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, only apply to arrangements for the purposes set out in 3.2 of the application for authorisation, 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.

- While the Proposed Conduct may have some potential to result in public detriments in the form of reduced competition between the Applicants due to them working collectively to share information, the extent of such detriment is likely to be limited by the fact that:
  - the Proposed Conduct is limited to sharing stock or information that is not competitively sensitive, and does not enable the Applicants to collaborate, discuss or negotiate over terms, conditions or prices in supply contracts
  - the potential for collaboration between the Applicants to influence price is low because of the current global supply shortages for critical services and supplies. In this regard, the Applicants submit that as the demand for some inputs has outstripped supply, this 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.

- The conditions regarding the reporting of material arrangements, provision of regular updates, and enabling the ACCC to request information, along with authorisation only extending to members specifically listed by MCA or parties notified to the ACCC, provide transparency and ACCC oversight of the conduct being engaged in under the interim authorisation and the identity of parties involved. If major concerns are identified, the ACCC is able to revoke the authorisation (including substituting a new authorisation with narrower authorised conduct or imposing different conditions) or seek changes to the measures being implemented under it.

- The information that will be shared under the Proposed Conduct will predominantly be time-limited, so will lose relevance following the cessation of the Proposed Conduct.

- It is not compulsory for Participants to participate in the Proposed Conduct.

- The ACCC may review its decision to grant interim authorisation at any time, including in response to feedback as the Proposed Conduct is implemented. If relevant industry participants have concerns regarding the Proposed Conduct during interim authorisation, they are encouraged to advise the ACCC.

34. The ACCC further considers that there are likely to be significant public benefits in the current unprecedented circumstances, including:

- assisting the Applicants to quickly understand supply chain issues for critical services and supplies and coordinate to address those issues. Such coordination is likely to enable more efficient allocation of critical services and supplies and increase the ability of supply chains to meet broader demand, as compared to the Applicants separately seeking to find alternate suppliers or separately develop solutions with importers, storage or transport providers. For example,
matching stock and its use will support more efficient stock allocation, avoid hoarding and free up some product lines for other uses

- enabling mining operations to continue safely and efficiently, including preventing mine shutdowns 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.

Reconsideration of interim authorisation

35. The ACCC may review a decision on interim authorisation at any time, including in response to feedback raised following interim authorisation. The ACCC’s decision in relation to the interim authorisation should not be taken to be indicative of whether or not the final authorisation will be granted.