MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (ACCC) ON INTERIM AUTHORISATION AA000504 RESPONDING TO A SUBMISSION FROM AN INTERESTED PARTY

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1. OVERVIEW

The purpose of MCA’s application for interim authorisation was to ensure shortages in the availability of supplies critical to mining operations that have emerged as a result of the COVID-19 pandemic (‘the pandemic’) could be mitigated through industry cooperation.

The interim authorisation granted by the ACCC on 24 April 2020 is solely for the purpose of ensuring physical access to critical supplies needed to keep operations running during the COVID-19 pandemic and support regional and remote communities. The interim authorisation is not intended to influence market power, price or bargaining power between suppliers and mining companies.

The issue the authorisation seeks to address is the breakdown in supply chains caused by one or more of the following issues:

- Sharp increases in demand for some health and safety related products limiting availability of supply
- Manufacturing of respirator masks, filters and specialist safety equipment visors not keeping up with demand globally and in Australia
- The shutdown of borders and disruption of people movement and freight in Australia and globally.

These issues have compromised access to supplies that are critical to the safe and efficient continued operation of mines and the safety of workers, their families and communities. They have also increased the risk that reduced access to expert personnel and key products (such as explosives, chemicals and fuels) that are needed on a just-in-time basis will undermine operational integrity and safety.

This submission responds to a submission made by an anonymous interested party to the ACCC on 29 April that recommends modifications to the interim authorisation on the basis that long term competition might be impacted, primarily through the disclosure of price information for critical supplies to mining operations between industry participants.
2. RESPONSES TO SUBMISSIONS MADE BY THE INTERESTED PARTY

Interested party's claim regarding the bargaining positions of suppliers and mining companies

The interested party's submission states that the existing dynamic in these markets is one in which there is an imbalance of power between customer and supplier and that the imbalance of power will only be exacerbated by this authorisation.

MCA response

The interim authorisation has been sought and granted to enable the industry to respond to extraordinary circumstances where physical supply of inputs has been disrupted. The authorisation was not sought to seek price relief. Largely caused by the global nature of the supply constraints, this physical supply challenge has been difficult for all mining companies and many service providers to the industry to maintain their operations.

The MCA notes that the length of the COVID-19 pandemic has challenged the suppliers of inputs and forced a reduction in inventory for some miners to levels that are threatening the operational integrity of some mines. The proposed conduct seeks to ensure, to the extent possible, that mine operators have the products required for safe and efficient continued operations by allocating available stocks in a market environment that has failed to supply at any price.

As the MCA is not aware of the sector represented by the interested party submission, it is difficult to address this issue in a comprehensive manner without understanding the nature of the concerns, including the impact of sharing product specifications. The MCA would be happy to provide additional detail should the ACCC be in a position to share the nature of the sector represented by the interested party submission.

It is evident that in the context of the COVID-19 pandemic, the change in bargaining power between suppliers and consumers of critical supplies and services has shifted significantly in favour of suppliers. We have noted, for example, reports of some PPE being sold at up to ten times the pre-pandemic market price.

This is because of the nature of the supply shock, which has been caused by a combination of sharp increases in demand for certain products, factory closures in compliance with government health requirements and supply impacts caused by the implementation of border restrictions in Australia and overseas.

As noted in paragraph three of the interim authorisation decision, the demand for some inputs has outstripped supply. This has seen price gouging, prices rising strongly on the back of forward orders and in some cases poor quality stock provided.

The failure of supply to meet demand is currently – after the health related effects of the pandemic – the greatest risk to mining operations and the safety of workers.

Some products would be unobtainable other than through the interim authorisation allowing the proposed conduct which connects participants in the scheme to share available resources in the short term and share information and advice on potential suppliers with certified product, stock on hand, capacity to manufacture or source supplies.

It is in the public interest – and in the long term interests of suppliers – to preserve mining operations by ensuring these pandemic-related supply constraints can be mitigated. Many miners facing supply issues are looking to develop longer-term relationships with domestic Australian suppliers and manufacturers to reduce their exposure to similar risks in the future.

Interested Party’s concerns regarding disclosure of commercially sensitive information
The Interested Party’s submission notes that the Interim Authorisation is likely to result in the release of sensitive information of suppliers (in particular relating to pricing and specifications) to their detriment.

The submission includes the following statements:

- The Interim Authorisation is likely to result in the release of sensitive information of suppliers (in particular relating to pricing and specifications) to their detriment
- While the ACCC seems to be alert to the risks of sharing of competitively sensitive information, it appears unavoidable that a member of the MCA that does engage in conduct permitted by the Interim Authorisation will disclose information that is among the most sensitive information for our businesses – namely, the sale price of their goods or services (as the authorisation permits these goods or services to be shared at cost price) and their specifications
- The release of this commercially sensitive information is likely to unfairly disadvantage suppliers
- This ongoing distortion of established pricing is likely to last far longer than the 12 month period of the authorisation and is, in our view, not in the public interest.

**MCA response**

The MCA considers that the determination of a cost price for supplies should be a matter for negotiation between parties seeking to enter into a material arrangement. The examples provided at paragraph 12 of the interim authorisation, involving passing on of stock ‘at cost’, are intended to convey that participants in the proposed conduct should not seek to profit from a material arrangement.

We do not anticipate that parties to a material arrangement would share detail that would identify the particulars of past contracts linking the supplier, purchaser, sale price, quantities, and date of purchase of supplies.

Where material arrangements are in the process of being negotiated, the MCA is assisting participants by working to identify where surpluses and shortages of supplies exist, and facilitating discussions on material arrangements.

We anticipate these arrangements would include the provision of critical supplies on the basis of product exchanges, promises to supply the same or similar products at a later date, and/or reimbursement at an agreed ‘cost price’.

The applicants and participants in the scheme are also sharing information about suppliers that have relevant products to supply, which would tend to work in favour of suppliers through potentially broadening their customer bases.

In all discussions regarding material arrangements, the MCA is ensuring compliance with the boundaries of the authorised conduct, including that the 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.

In addition, the MCA has operated on the principle that as little information should be shared as possible while ensuring supply challenges can be met.

Even if the parties did, through a material arrangement, become aware of the costs of items under past contracts, this would likely only have a minimal effect on long term bargaining power. This is because the prices of critical supplies are highly variable (reports of price increases of more than ten times) especially in pandemic conditions, and the cost price for items purchased during or before the pandemic would be a poor guide to determining prices post-pandemic.
The interim authorisation is conditional on regular reporting to the ACCC in relation to material arrangements, and under the interim authorisation the MCA, along with the participants have obligations to provide further information, including on the details of conversations and arrangements entered into between companies discussing the potential to or entering into material arrangements under the interim authorisation.

These oversight requirements are sufficient to ensure that where there are concerns in relation to any particular material arrangement steps can be taken to mitigate any alleged long-term adverse effects on suppliers.

The public interest is best served by maintaining the operational integrity of mining operations, and thereby sustaining the Australian economy, the communities in which mining operates as well as the more than 1 million people employed in the mining and METS (mining equipment, technology and services) sectors. Access to supplies such as PPE ensures that the resources sector is able to continue to support the health and safety of the workforce and communities as well as the sustainability of the economy.

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.

**Interested Party’s submission recommends that ‘the ACCC could apply conditions that minimise these adverse impacts’**

The interested party’s submission states that the ACCC could minimise the risk of disclosure of commercially sensitive information by ensuring that each required protocol and guideline that applies to a material arrangement under the authorisation (see paragraph 27 of the Interim Authorisation) includes measures that protect the competitive position of suppliers, such as:

- ensuring that each protocol includes an express requirement for parties not to disclose the identity of the supplier or any unique or commercially sensitive specifications of products
- mandating that rather than products being sold at cost price, that the relevant parties enter into a swap arrangement that requires an equal quantity of the same product to be supplied by the recipient of the swap at a later time when the stock is available, to avoid any need to disclose the cost price of those products; or
- the cost price being required to be disclosed only on an aggregated or averaged basis.

**MCA response**

The MCA considers that the interested party’s recommendations would undermine the flexibility required to rapidly respond to emerging supply shortages. For example, if there was a requirement that certain specifications not be shared, it may present difficulties for determining whether one mining company has equipment that is suitable for the purposes of another.

This information is critical to identifying standards, certifications, design requirements, whether an item is fit for use in an operational context and ensure alignment with regulatory approvals and industry best practice. For example, a P2 mask meeting AS1716-2012 may or may not meet the requirements needed to protect the health and safety of underground coal miners, including ensuring the materials used do not provide a fire ignition risk.

The proposal to not disclose the identity of suppliers including unique specifications that would allow the supplier to be identified would not of itself add any legitimate protection to suppliers, however would negate any capacity to address the current market failure for supplies impacted by COVID-19.

The oversight and notification mechanisms in the interim authorisation decision are sufficient controls to ensure that any material arrangement will result in a net public benefit. In addition there is support
being provided by the MCA, which is solely focused on ensuring the Australian minerals industry can safely and efficiently continue to operate and support the Australian economy both during and after the COVID-19 pandemic, and is not an interested party to any material arrangements.

The use of an aggregated cost would require a party to the interim authorisation to aggregate all prices paid by participants before and during the pandemic, and provide an average to applicants and participants as a basis for exchange.

This would potentially lock in inflated prices that have been set by suppliers in a supply constrained market. In any event, it is unlikely that participants competing for supply during other times will voluntarily share the prices that they have been willing to pay.

**Interested party’s submission that the authorised conduct should be narrowed**

The interested party’s submission states that the authorised conduct should only be permitted where there is both: (a) a demonstrable risk of supply chain interruption as a consequence of Covid-19; and (b) a corresponding material benefit in sharing information, inventories and services or supplies

**MCA response**

The MCA considers that the scope of conduct authorised is sufficiently limited by paragraph 31 of the Interim Authorisation, which states:

> 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 (emphasis added).

The MCA does not consider that it is necessary to impose a requirement to demonstrate the relationship of each supply shortage to the circumstances of the pandemic and the related material benefit.

This would create an unnecessary burden on those seeking to rapidly negotiate material arrangements in a supply constrained environment, in circumstances where the oversight and notification mechanisms in the interim authorisation are sufficient to deal with any concerns arising.

**Conclusion**

On the basis outlined above, the concerns raised in the interested party’s submission do not detract from the net public benefit of the authorised conduct.

It is proposed that the submission be rejected.