From: [Redacted]
Sent: Wednesday, 29 April 2020 8:51 PM
To: adjudication@accc.gov.au

Subject: Attention: Daniel McCracken Hewson, Acting General Manager, Adjudication

Minerals Council of Australia
Covid 19 ACCC Interim Authorisation [Redacted]

Dear Daniel

Following on from our telephone conversation on Thursday 23 April, I am writing in response to the ACCC’s interim authorisation dated 24 April 2020 (Interim Authorisation) in respect of application for authorisation AA1000504 lodged by the Minerals Council of Australia (MCA).

This email provides some feedback on the Interim Authorisation on behalf these affected businesses and identifies some points of concern that do not appear to have been taken into consideration by the ACCC in granting the Interim Authorisation. Appreciating that you have a large volume of material to review, we have kept our comments brief but would be happy to elaborate on any point if it would assist your consideration of the issues raised:

- **The existing dynamic in these markets is one in which there is an imbalance of power between customer and supplier.** As the ACCC notes in paragraph 5 of the Interim Authorisation, the MCA represents “companies that produce most of Australia’s minerals output.” Its members are among the largest customers of the affected businesses and – prior to the outbreak of Covid 19 – by reason of their purchasing volumes and financial strength, already had significantly greater bargaining power than the suppliers of the critical services and supplies referred to in the Interim Authorisation.

- **This imbalance of power will only be exacerbated by this authorisation.** [Redacted] has a concern that an authorisation of this conduct, even for a 12 month period, will further entrench the disadvantaged position of our affected businesses (and that of other suppliers that compete with our businesses) relative to their customers and may have permanent, and substantial, adverse consequences on the affected markets, as outlined below.

- **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.** Some of the relevant examples provided by the ACCC of conduct that would be covered by the Interim Authorisation (see paragraph 10 of the Interim Authorisation) are:
  - mining companies sharing information on inventories and distributing spare stock at cost to another miner or mine operator who requires such stock; and
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.

The ACCC has stated in the Interim Authorisation that the authorised conduct does not include collaboration, discussion or negotiation over terms, conditions and prices in contracts of supply (paragraph 13 of the Interim Authorisation) and has observed that the authorised 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” (paragraph 33 of the Interim Authorisation).

However, there is an inherent contradiction in the Interim Authorisation. 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. For example, one mining company customer who purchases a product from another mining company at cost price will be able to identify if the other company is able to purchase an identical or substitute product at a lower unit price and so will inevitably seek to have that lower price applied in future supply negotiations.

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.

The ACCC could apply conditions that minimise these adverse impacts. While we don’t see a complete solution to this problem, other than the ACCC not granting the final authorisation, 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. This will ensure that even if the cost price of the product is disclosed it cannot, at least for more generic products, be linked to a particular supplier. We acknowledge, however, that this will be of minimal benefit where the identity of the supplier is self-evident (such as on the labelling of the product or its packaging) or if particular characteristics or specifications of products are apparent without written specifications being disclosed;

- 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 and averaged basis. Of course, this would only work if there is more than one supplier of a particular product or service or if a single supplier has supplied a number of substitutable products that fall within the category of a “critical service or supply” so that the pricing across those products can be aggregated and averaged.

- The breadth of the authorised conduct should be narrowed. 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.

The authorisation is capable of being read very broadly and so should be strictly limited to actions that are necessary solely to address actual or anticipated interruptions or shortages in supply. For example, it is conceivable that a shortfall in the supply of on the east coast of Australia could be used as a justification for mining companies to co-operate and share information about
supplies on the west coast of Australia, even if an interruption or shortage is unlikely in the west coast. We think it is therefore important that narrowing language be applied to the authorised conduct to limit the potential for it to have unintended consequences that damage the position of suppliers.

Please contact me if you would like to discuss this feedback in more detail or if you have any questions.

Regards