



Determination

Applications for authorisation A90974

lodged by

The Tasmanian Forest Contractors Association Ltd

in relation to collective bargaining arrangements between its members and various Tasmanian wood companies

Date: 22 February 2006

Authorisation no. A90974

Public register no. C2005/1079

Commissioners:

Samuel
Sylvan
King
Martin
McNeill
Smith
Willett

Executive Summary

On 30 June 2005, the Tasmanian Forest Contractors Association Ltd (TFCA), on behalf of its members, lodged applications for authorisation A90973 and A90974.

The arrangements for which TFCA is seeking authorisation broadly involve collective bargaining between its members that carry out silviculture, harvesting and transport services (collectively known as forest contractors) with a number of wood companies.

The authorisation process

A key objective of the *Trade Practices Act 1974* (the TPA) is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service. The TPA, however, allows the Australian Competition and Consumer Commission (ACCC) to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.

Broadly, the ACCC may ‘authorise’ businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment. Before the ACCC may grant authorisation to an arrangement it conducts a public consultation process, including publishing a draft determination. This document is the final determination in respect of the TFCA’s proposed arrangements.

ACCC assessment of benefits and detriments

Based on the information provided by the TFCA and interested parties, the ACCC understands that a significant feature of the Tasmanian forest industry is that it requires forest contractors to carry out a wide range of tasks, many of which may be specialised or unique to a certain wood company or to a particular area (known as a coupe). In particular, the ACCC understands that the diversity of coupes means that individual forest contracting businesses often compete to differentiate themselves in order to win particular contracts from the wood companies based upon individual skills, experience and available equipment. The ACCC considers that a natural consequence of this diversity is the need for varied, and flexible, contractual arrangements.

Having considered the information provided by the TFCA and interested parties, the ACCC is concerned that, given the lack of commonality between forest contractors in terms of their business set ups, size and capabilities, and the differing requirements of the wood companies for forest contractor services, the proposed collective bargaining arrangements, if given effect to, have the potential to result in a loss of efficiency by inappropriately standardising work practices.

The ACCC is also concerned that there is scope for cross representation between the proposed collective bargaining groups which may serve to further the anti-competitive detriments associated with the potential loss of efficiencies.

The ACCC is concerned that, on balance, the proposed collective bargaining arrangements are likely to generate a level of anti-competitive detriment which, while not of substantial weight, is also not insignificant.

The TFCA has submitted that a number of benefits to the public would flow from the proposed collective bargaining arrangements. Having considered the information provided to it, the ACCC considers that, on balance, the potential benefits to the public of the TFCA's proposed arrangement are likely to be small. In particular the ACCC is concerned that, given the circumstances presented, the arrangements are unlikely to result in transaction costs savings, nor are they likely to improve the effectiveness of the input of forest contractors into their contracts.

Having considered the information provided by the TFCA and interested parties, the ACCC is of the view that the likely benefits to the public of the proposed collective bargaining arrangements would not outweigh their potential anti-competitive effect. The ACCC considers that, while the use of conditions may serve to lessen the anti-competitive detriment of the arrangements to some extent, the level of public benefit that may arise from the proposed arrangements is still likely to be insufficient to outweigh the remaining detriment. Accordingly the ACCC does not grant authorisation to the TFCA's application.

The ACCC considers however that industry associations, such as the TFCA, can play a valuable role in facilitating the exchange of information and discussing issues of common concern to participants in an industry. The ACCC supports such representations, particularly in respect of small businesses, when, for example, this is likely to lead to better informed markets. The ACCC considers that, up to a certain point in the negotiation process, the TFCA contributing to the relationship between its members and wood companies does not necessarily give rise to concerns about possible contraventions of the TPA. Indeed, an industry association such as the TFCA can represent and assist members in matters such as ensuring its members have access to appropriate legal and/or financial services, or even making representations to major suppliers in relation to issues of concern (for example, safety issues or identifying issues that members may wish to consider during negotiations) to members, *without* the need for authorisation.

The ACCC also notes that, absent authorisation, contracts between the wood companies and forest contractors will still be formed on the basis of the Forestry Fair Contracts Code 2003 (the FFCC). The FFCC provides that, among other things, forest contracts must include access to a periodic performance and rate review. The FFCC also provides a dispute and grievance procedure for forest contractors, which includes access to mediation and arbitration processes.

Determination

Pursuant to section 88 of the TPA the ACCC denies authorisation to application A90974.

TABLE OF CONTENTS

1	Introduction.....	1
2	Industry background.....	2
	The Tasmanian Forest Industry	2
	The Tasmanian Forest Contractors Association	2
	The forest contractors	3
	The wood companies	4
	The role of government.....	5
3	The TFCA’s application.....	7
	Collective bargaining	7
	Collective boycotts.....	7
	Parties to the proposed arrangements	8
	The proposed arrangements	8
	Interim authorisation.....	9
4	Submissions received in relation to the application.....	11
	The TFCA’s submission in support of its application	11
	Submissions from interested party received before the draft determination	15
	Interested party submissions on the TFCA’s claimed public benefits.....	19
	The TFCA’s submission in response	20
5	Submissions received post draft determination	21
6	Collective boycotts	25
7	Statutory provisions.....	27
8	The relevant markets and the counterfactual	29
	The ACCC’s consideration of the likely counterfactual	31
9	ACCC assessment – Effect on competition.....	33
	The ACCC’s assessment of anti-competitive detriment.....	33
10	ACCC assessment – Public benefits	40
	Reduced transaction costs	40
	More effective input into contracts	41
	Improved occupational health and safety standards	44
	Employment and training.....	45
	Improvement in social wellbeing.....	46
11	The balance of benefits and detriments	47
12	The determination.....	48

1 Introduction

- 1.1 The Australian Competition and Consumer Commission (the ACCC) is the Australian Government agency responsible for administering the *Trade Practices Act 1974* (the TPA). A key objective of the TPA is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2 The TPA, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’. Broadly, the ACCC may ‘authorise’ businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.
- 1.3 The ACCC conducts a comprehensive public consultation process before making a decision to grant or deny authorisation. Upon receiving an application for authorisation, the ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this. The TPA requires that the ACCC then issue a draft determination in writing proposing either to grant the application (in whole, in part or subject to conditions) or deny the application. In preparing a draft determination, the ACCC will take into account any submissions received from interested parties.
- 1.4 Once a draft determination is released the applicant, or any interested party, may request that the ACCC hold a conference. A conference is generally called by a party dissatisfied with the ACCC’s decision and provides interested parties with the opportunity to put oral submissions to the ACCC. The ACCC will also invite written submissions on the draft.
- 1.5 The ACCC then reconsiders the application taking into account the comments made at the conference and any further submissions received and issues a written final determination. Should the public benefit outweigh the public detriment the ACCC may grant authorisation. If not, the authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the public benefits and decrease the detriment.
- 1.6 This document is the final determination for application for authorisation A90974 lodged by the Tasmanian Forest Contractors Association Ltd (the TFCA). Application A90974 concerns a proposed collective bargaining arrangement for the TFCA’s member forest contractors.

2 Industry background¹

- 2.1 The ACCC notes that, while the Tasmanian forest industry is a large, complex and diverse sector of the economy, this section of the determination will only include information which the ACCC considers to be directly relevant to the evaluation of the applications for authorisation lodged by the Tasmanian Forest Contractors Association Ltd (TFCA).

The Tasmanian Forest Industry

- 2.2 Nearly half of Tasmania is covered by forest (3.3 million hectares) making it Australia's most densely wooded state. The forests grow on privately owned land, world heritage areas, national parks and state forests.² These forests form wilderness and conservation areas that provide a habitat for many species and are also used for tourism purposes. Trees growing in state and privately owned forests may also be harvested for use in wood products.

Types of wood harvested

- 2.3 Once harvested, wood is categorised as being either sawlog or pulpwood depending on its quality. Sawlogs are a type of harvested timber that is suitable for various uses such as construction, furniture making and wood veneers. Pulpwood is harvested timber which is processed to extract wood fibre for use in paper manufacture. Sawlogs are derived from higher quality timber than pulpwood. Sawlogs are sold to both domestic and international buyers, while pulpwood is mostly exported to buyers in Asia.

The Tasmanian Forest Contractors Association

- 2.4 The Tasmanian Forest Contractors Association (the TFCA) is a not-for-profit industry body that represents Tasmania's forest contractors at all levels of industry and government. The TFCA was originally founded in 1963 as the Tasmanian Timber and Log Haulier's Association. It was known as the Tasmanian Logging Association from 1978 to 2004. From 2004 onwards it has been known as the TFCA. The TFCA submits that its membership accounts for 85 per cent of the total wood flows produced by forest contractors within Tasmania.
- 2.5 In its submission, the TFCA states that, while the majority of its members are involved in harvesting or transport activities, it represents contractors from all sectors of the forest industry such as those involved in silviculture, site preparation, road construction and quarrying. The TFCA states that it actively works on behalf of its membership base with the objective of ensuring the profitability and safety of forest contracting businesses.

¹ Much of the information in this section is sourced from the TFCA's submission in support of its application

² Forestry Tasmania < <http://www.forestrytas.com.au/forestrytas/pages/forests.html> >

The forest contractors

- 2.6 The TFCA states that employment statistics released by ‘Grist, Tran and Ball’ in 2000 indicated that there were 2788 people working within the harvesting and plantation establishment sectors of the Tasmanian forest industry at that time. The TFCA submits that it is reasonable to assume, based on the age of the data and the fact that it does not include contractors involved in the transport of logs, that the number of forest contractors currently employed within Tasmania is likely to be closer to 4000.
- 2.7 The forest contractors that are relevant to this determination are those involved in silviculture, harvesting and transport. A brief description of each is provided below.

Silviculture contractors

- 2.8 Silviculture is the practice of growing and maintaining trees. Silviculture contractors carry out tasks such as planting, thinning, pruning and fertilising trees. Silviculture contractors may also undertake pest control, fire management, weed management and site preparation activities. The TFCA states that silviculture work is labour intensive, with equipment usually limited to crew vehicles, all terrain motorcycles, planting and pruning hand tools. Many tasks carried out by silviculture contractors will, however, require the use of heavy or expensive machinery. For example, site preparation may require the use of tractors and earth moving equipment, while fertilising may involve the use of a helicopter for aerial spraying.
- 2.9 The TFCA submits that most silviculture contractors attempt to concentrate their services into a single geographical region in order to minimise expenses associated with travel and accommodation. The TFCA submits that it is common for silviculture contractors to work for multiple customers in a single area.
- 2.10 The typical size of a silviculture operation will vary due to the seasonal nature of the work. Larger silviculture operators may have 30 to 100 employees during a peak period while a smaller operator may have between five and 20 employees.

Harvesting contractors

- 2.11 Harvesting contractors provide the service of selecting, felling, processing and segregating mature trees into a form that is ready for transport. The TFCA states that there are approximately 130 harvest contracting businesses operating 240 individual harvesting operations across Tasmania. The annual turnover of a typical harvest contract business is between \$600 000 and \$3 million. Collectively, these businesses will harvest approximately five million tonnes of timber each year. Total industry investment in harvesting equipment and fixed infrastructure is estimated at \$500 million.

- 2.12 Harvesting contracts range in size from 20 000 to 80 000 tonnes of timber per year. A typical harvesting crew employs approximately five people and is contracted to harvest 35 000 tonnes of timber each year. The TFCA submits that these businesses will generally have between \$1 and \$2 million invested in heavy machinery.

Transport contractors

- 2.13 Transport contractors provide the service of carting harvested logs from the bush to mills for processing. The typical size of a transport contractor will vary, with some businesses utilising as few as two trucks, while larger businesses may operate a fleet of up to 50 trucks. Trucks used vary in size and configuration, ranging from six-axel prime mover and semi-trailer to nine axel B double configurations. The average cartage distance travelled by a transport contractor is 150 kilometres one way.
- 2.14 Transport contracting services are provided in a number of ways. Some harvesting businesses will carry out their own transport while others will subcontract the work to owner-drivers or transport fleet operators.

The wood companies

- 2.15 According to the TFCA, there are five major wood companies³ operating within Tasmania. The wood companies supply wood to processors such as saw and pulp mills to be converted into processed wood products. Many of the wood companies also operate their own processing services. A brief description of each of the wood companies that may potentially be affected by the TFCA's application is provided below.

Gunns Limited

- 2.16 Gunns is Australia's largest fully integrated hardwood forest products company. Gunns employs over 1200 people, owns 175 000 hectares of freehold land and manages in excess of 90 000 hectares of plantations. Gunns operates four woodchip export ports, five sawmills and two veneer factories within Tasmania. Its other processing interests include the recent acquisition of sawmills in Western Australia and a veneer factory in Christchurch, New Zealand. Gunns have also purchased two wood companies, North Forest Products Limited and Forest Resources Limited, over the past five years.

³ For the purposes of this determination, the five wood companies comprised of Gunns Limited, Forestry Tasmania, Forest Enterprises Australia, Norske Skog and Rayonier will be collectively known as "the wood companies"

Forestry Tasmania

- 2.17 Forestry Tasmania is a Government Business Enterprise that manages 1.5 million hectares of State forest and employs 580 direct employees and over 1000 contractors in Tasmania. Forestry Tasmania employs its forest contractors directly and is the second largest employer of forest contracting services in Tasmania. Forestry Tasmania produces approximately three million tonnes of timber per year, consisting of sliced veneer logs, peeled veneer logs, sawlogs, pulp logs, woodchips and other forest products. Forestry Tasmania produces both hardwood and softwood products.

Forest Enterprises Australia

- 2.18 Forest Enterprises Australia Ltd (FEA) has 32 000 hectares of forest under management in Tasmania, Queensland and New South Wales. Between these three states they employ approximately 180 contractors. FEA obtains funding through retail managed investment schemes that it operates on behalf of its investors. FEA currently manages eight harvesting operations.

Rayonier

- 2.19 Rayonier is a large multinational company with land holdings of 2.2 million acres (890 000 hectares) in the U.S. and New Zealand. In Australia, Rayonier acts as the forest manager for a softwood resource joint venture between GMO Renewable Resource and Forestry Tasmania in the north-east of Tasmania.

Norske Skog

- 2.20 Norske Skog is a multinational company that operates three paper mills in Australasia including one north of Hobart in Boyer. Norske Skog is the world's second largest supplier of news print paper and supplies approximately 35 per cent of the Australia's news print market. Norske Skog sources approximately 50 per cent of its own wood for use in its Boyer paper mill, and employs harvesting, transport and silviculture contractors to supply this wood. The remainder of Norske Skog's wood needs are supplied by the other wood companies.

The role of government

The Tasmanian Government

- 2.21 The *Forestry (Fair Contract Codes) Act 2001* was enacted to provide for the development of forestry codes by the forest industry for the purpose of improving the fairness of forest contracts. The Forestry Fair Contracts Code 2003 (the FFCC) is a code developed in accordance with the *Forestry (Fair Contract Codes) Act 2001*

2.22 The FFCC mandates certain standard terms and conditions into contracts, both written and unwritten, between forest contractors and those that engage their services. It provides a periodic performance and rate review mechanism for forest contractors, and mandates negotiation between the parties upon renewal or extension of a forest contract. It is also incumbent upon the wood company under the FFCC, to ensure that a forest contractor that it engages is competent to carry out the assigned tasks, and complies with all relevant state and federal legislation, particularly those relating to workplace safety. The FFCC also provides a dispute and grievance procedure for forest contractors, which includes access to mediation and arbitration processes.

The Australian Government⁴

2.23 The Australian Government, through the Department of Agriculture, Fisheries and Forestry (DAFF) is involved in a series of Regional Forest Agreements (RFAs) with state and territory governments. The RFAs are 20-year plans for the conservation and sustainable management of Australia's native forests, one of which is currently in place in Tasmania. A further assistance program has also been agreed upon between the Australian and Tasmanian governments, known as the Tasmanian Community Forest Agreement. The stated purpose of the agreement is to enhanced protection of Tasmania's forest environment and growth in the Tasmanian forest industry and forestry jobs.

⁴ information under this heading sourced from www.daff.gov.au

3 The TFCA's application

- 3.1 On 30 June 2005, the TFCA, on behalf of its members, lodged applications for authorisation A90973 and A90974 with the ACCC. On 30 January 2006, the TFCA withdrew its application for authorisation for an exclusionary provision (A90973).
- 3.2 The TFCA also sought interim authorisation for certain aspects of the proposed arrangements.
- 3.3 Copies of the applications and the TFCA's submission in support are available on the public register maintained by the ACCC. The main issues are outlined below.

Collective bargaining

- 3.4 Application for authorisation A90974 was made pursuant to section 88(1) of the TPA for an authorisation under that subsection:
 - a) to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or may have the likely effect, of substantially lessening competition within the meaning of section 45 of the TPA and
 - b) to give effect to a provision of a contract, arrangement or understanding where the provision has, or may have, the effect of substantially lessening competition within the meaning of section 45 of the TPA.

Collective boycotts

- 3.5 Application for authorisation A90973 was made pursuant to section 88(1) of the TPA for an authorisation under that subsection:
 - a) to make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement or understanding would be, or might be, an exclusionary provision within the meaning of section 45 of the TPA and
 - b) to give effect to a provision of a contract, arrangement or understanding, where the provision is, or may be, an exclusionary provision within the meaning of section 45 of the TPA.
- 3.6 The TFCA has since withdrawn application for authorisation A90973.

Parties to the proposed arrangements

3.7 The TFCA has applied for authorisation A90974 on behalf of its members that carry out silviculture, harvesting and transport services (collectively known as forest contractors) for one or more of the following wood companies:

- Gunns Limited
- Forestry Tasmania
- Forest Enterprises Australia Limited
- Rayonier Limited or
- Norske Scog

The proposed arrangements

3.8 The TFCA, on behalf of its members, is seeking authorisation A90974 to enable it to collectively negotiate with various wood companies:

- the terms and conditions of the supply of wood harvesting, transport and silviculture services and
- for the TFCA, its members and the wood companies to enter into and give effect to agreements between the TFCA, its members and individual wood companies in respect of the terms of supply of wood harvesting, transport and silviculture services.

3.9 The TFCA state that the terms and conditions to be negotiated with the wood companies will include:

- a diesel fuel surcharge to account for changes in the cost of fuel
- an indexing model that would be used to adjust the rate paid to contractors annually, based on movements in commodity prices
- rate tables for harvesting and transport contractors that adjust the price of tasks based on their degree of difficulty
- develop a clause containing minimum annual contract revenue targets and consistent work levels and
- long-term silviculture contracts.

The proposed collective bargaining arrangements

3.10 The TFCA proposes that the collective bargaining arrangements for which it has sought authorisation will be carried out in the following manner:

- (i) the TFCA will advise individual wood companies of its intention to bargain on behalf of its members. It will outline the topics on which it seeks to negotiate and seek a date for negotiations to take place
- (ii) the TFCA will establish a series of individual contractor committees to negotiate with wood companies on behalf of its members. The composition of these committees will be decided by a postal vote from within the relevant membership section
- (iii) the individual contractor committees will then vote on the topics of negotiation and forward these topics to the relevant wood company
- (iv) negotiations will take place between at least two nominated members of the individual contractor committee and the wood companies. Any agreed terms will not come into effect without the majority vote of the committee
- (v) negotiated outcomes will be reviewed annually by the individual contractor committees and
- (vi) if negotiations break down without a satisfactory outcome or are not finalised within a five month period, a 28 day mediation process will come into effect. A mediator will then be chosen by consensus between the two parties. If the parties cannot agree on a suitable mediator, the president of the Tasmanian law society will appoint a mediator.

Other details of the proposed arrangements

3.11 Other relevant details of the proposed arrangements are:

- the TFCA is seeking authorisation for application A90974 for a period of ten years.
- the TFCA submits that it does not intend to collectively negotiate contract rates for its members and
- the TFCA has applied for authorisation for any future members as well as any other wood company that may enter the industry.

Interim authorisation

3.12 As part of its application, the TFCA requested that the ACCC grant interim authorisation to allow it to begin the process of organising its members into bargaining groups, but not to commence collective negotiations with the wood companies.

3.13 The TFCA submitted that interim authorisation was necessary due to the large task of communicating and adequately briefing its members of the proposed arrangements. The TFCA submitted further that a grant of interim authorisation would not prevent the market from returning to a pre-interim state if the ACCC later denied authorisation.

- 3.14 The ACCC postponed a decision on interim authorisation, noting that it was unclear whether the TFCA proposed to engage in activities for which interim authorisation was required. That is, it was not apparent that interim authorisation was in fact necessary for the TFCA to determine the structure of future bargaining groups.

4 Submissions received in relation to the application

- 4.1 The ACCC sought submissions from a wide range of interested parties and conducted a number of meetings with key interested parties. The main points of these are summarised below. Complete copies of all publicly available submissions and meeting notes are available on the ACCC's public register and on its website. Many of the interested parties commented on the TFCA's claimed public benefits, and a combined summary of these comments is included in this section.

The TFCA's submission in support of its application

Public benefits claimed by the TFCA

- 4.2 The TFCA submits that there are several direct and indirect public benefits that will flow back to the community if the proposed arrangements are authorised and the bargaining power of the forest contractors is increased. The TFCA submits that these will include:
- improvements in occupational health and safety conditions for forest contractors
 - greater training for employees and improved retention of skilled labour
 - a reduction in transaction costs
 - improvements in the social wellbeing of forest contractors and
 - an increase in the sustainability of the Tasmanian forest industry.

Silviculture

- 4.3 The TFCA states that long-term silviculture contracts are difficult to obtain as the work is generally seasonal and tendered on a task-by-task basis. The TFCA states that this creates a challenge for silviculture contractors in retaining skilled employees. The TFCA states that significant time is spent on the recruitment and training of replacement staff for seasonal activities.
- 4.4 The TFCA submits that it seeks to use the proposed arrangements to change the way in which work is tendered to silviculture contractors. Currently work is tendered for short periods on a task-by-task basis. The TFCA submits that it will use collective negotiations to line up consecutive silviculture tasks into packages to ensure continuity of work for silviculture contractors. The TFCA submits that this will allow the wood companies to grant long term contracts to silviculture contractors.
- 4.5 The TFCA submits that long-term contracts will enable silviculture contractors to create efficiencies from having a stable work force. The TFCA also submits that

long-term contracts will allow silviculture contractors better access to finance, and provide scope for innovation through the purchase of new machinery.

Previous collective bargaining arrangements

- 4.6 The TFCA states that, prior to the mid-to-late 1990s, forest contracting rates were negotiated and determined by a process of collective negotiations. These collective negotiations were conducted between the wood companies and either the Tasmanian Logging Association (the current TFCA) or special contractor committees. The groups negotiated the transport or harvesting rates which were then placed into rate tables to price jobs based on their degree of difficulty.
- 4.7 This process of negotiations changed in the mid-to-late 1990s when NFP (now owned by Gunns) introduced a system of individual tendering for forest contracts. The TFCA states that, as many individual forest contractors did not have experience in calculating sustainable rates from a 'bottom up' methodology, many forest contractors made poor decisions and tendered unsustainable rates. The TFCA also claims that many forest contractors received poor advice on the process from their accountants.
- 4.8 The TFCA submits that the wood companies used the extremely competitive tendering process to their advantage by accepting unsustainably low rates from forest contractors. The tendering process had the effect of significantly lowering harvesting and transport rates, leading to the formation of a misleading industry price average and causing many forest contractors to exit the industry.
- 4.9 The TFCA states that, along with the reduction in harvesting and transport rates, the tendering process eliminated the rate tables, with contractors tendering a single rate based on an average of all foreseeable working conditions and attributes.

Issues with the current contract review process

- 4.10 The TFCA submits that forest contractors that have a long-term contractual arrangement are able to have a formal rate review conducted annually, or at any time throughout the year, as mandated by the FFCC. The TFCA states that at these formal rate reviews, rates may be adjusted based on either the wood company's own methodology, or based on a common index such as the Consumer Price Index. Some wood companies will also separately account for diesel fuel prices, though the methodology used is not consistent or widely used by all wood companies.
- 4.11 The TFCA submits that negotiations at this level typically involve a review of the previous year's inputs and outputs, as well as discussions of productivity targets and future wood volumes. The TFCA states that, whilst the forest contractors may provide evidence to support a rate rise at these meetings, the wood companies are unlikely to grant any more than a marginal increase. The TFCA states that the outcome of these negotiations is usually either no increase in rates, or a small rate increase that is not sufficient to cover the forest contractor's additional expenses.

- 4.12 The TFCA states that the bargaining position of forest contractors generally becomes weaker when the negotiations are less formal. Informal negotiations will often take place on-site at short notice, due to either unforeseen variations in the required task or when the nature of the contract work requires a different price for every coupe⁵. The forest contractor is generally quite vulnerable to statements made at these meetings as they are usually committed to the job. The TFCA submits that while it is possible for the forest contractor to negotiate a small increase at these meetings, it is unlikely to be sufficient to cover their costs.
- 4.13 The TFCA also states that, while harvesting contractors are typically engaged on contracts of three to five years, they are increasingly being engaged for short periods without written contracts. The TFCA states that, in the worst cases, harvesting contractors are either working without a contract or securing contracts on a year-to-year basis. The TFCA states that this creates uncertainty and makes it difficult for harvesting contractors to invest in new equipment. The TFCA states that transport contractors are also facing difficulties in obtaining long term contracts.

Current issues in the Tasmanian Forest Industry

- 4.14 In its submission, the TFCA notes a number of concerns with the state of infrastructure and the standard of services provided by the wood companies to the forest contractors. The TFCA submits that, at the time that most forest contractors tendered their contract rates (largely in the late 1990s), they could reasonably expect the wood companies to provide them with all weather roads, a suitable coupe and sufficient supervision to cater for their operational requirements. Forest contractors could also expect to be provided with forward work projections and job locations well in advance of starting any job.
- 4.15 The TFCA states that the rates tendered by the forest contractors were critically dependant on service levels being maintained. The TFCA submits that these service levels have declined and, as a direct result, forest contractors are experiencing production and productivity losses.
- 4.16 The TFCA also states that the majority of forest contractors do not have minimum volume guarantees within their contracts. In the absence of such a guarantee, forest contractors lack protection from quota reductions or significant breaks in work.

Changes in the expected workload and legislative environment

- 4.17 The TFCA states in its submission that, over the past fifteen years, the expected workload of forest contractors has greatly increased. This increase has occurred as a result of forest contractors being made responsible for many tasks formerly

⁵ a term used to refer to a group of trees that are designated for harvest

carried out by the wood companies, such as stripping the wood of bark and rot. Changes in legislation have also increased the workload and compliance costs faced by forest contractors.

- 4.18 The TFCA submits that the increase in cost brought about by a higher workload has not been reflected in the rates paid to the forest contractors. They state that rates have not moved significantly over the past 15 years and have not kept pace with the increase in the retail price of wood products.
- 4.19 The TFCA submits that the forest contractors are not averse to an increased workload, but feel that it is unfair to suggest that they should be responsible for absorbing the increased costs involved. The TFCA notes that the wood companies are not entirely responsible for the change in circumstances, which may, in some circumstances, be attributed to market influences placed upon them by their customers.
- 4.20 The TFCA states that improvements in the productivity of equipment and workforce output have assisted forest contractors in absorbing some of the additional costs. The TFCA submits however, that the return on invested capital, hours worked, and risk exposure have deteriorated to the extent that forest contracting businesses are becoming commercially unviable.

The role of government in the forest industry

- 4.21 The TFCA states that it is common knowledge to government, especially at the state level, that small businesses are at a disadvantage when competing against large corporate entities. The TFCA states that the situation in the forest industry has been recognised as being critical in nature, and governments have attempted to enact legislative provisions to make contracts fairer. The TFCA submits that this has met with mixed results.

The Tasmanian Government

- 4.22 The TFCA states that the first version of the FFCC was completed in 2003 but that it has done little more than mandate generic contract conditions and has done little to assist forest contractors to date. The TFCA states that the FFCC assumes that annual rate reviews between the parties are conducted in good faith, and that the review process has not been successful due to the forest contractors' poor bargaining position.
- 4.23 The TFCA also states that the FFCC assumes that each forest contractor has a written contract with its wood company, which is not always the case. The TFCA states that, as the number of formal written contracts between the parties has been in decline this assumption has, to a large extent, rendered the FFCC unusable.
- 4.24 The TFCA states that the 'dispute and grievance resolution procedure' contained within the FFCC, which is the formal mechanism to instigate mediation if

negotiations are not satisfactory, has not been used to date. The TFCA states that mediation may not have been used because of a perception amongst forest contractors that any action may compromise their future dealings with the wood companies.

Submissions from interested party received before the draft determination

Gunns Ltd

- 4.25 Gunns submits that it is concerned that the proposed arrangements are likely to artificially inflate contractor rates above competitive levels and act as a disincentive for contractors to cut costs and achieve efficiencies through innovation and investment. Gunns submits that the conduct for which authorisation is sought proposes an excessive and distortionary system that is likely to have wide-reaching anti-competitive effects and public detriments.
- 4.26 Gunns notes that a one size fits all approach is unlikely to be suitable for the particular individual needs of its contractors, as each contract currently varies depending on a wide variety of factors, including the particular task involved, the machinery configuration used and on the individual characteristics of the coupe.
- 4.27 Prior to the TFCA's withdrawal of the collective boycott application, Gunns submitted that the power to engage in collective boycotts was likely to be used and threatened strategically to enforce rate-fixing arrangements. Gunns submitted that disruptions to supply channels would cause breaches of contracts with downstream buyers and cause significant financial and reputation harm to Gunns and other Australian businesses, both large and small, involved in the supply chain.

Forestry Tasmania

- 4.28 Forestry Tasmania submits that, if successful, this application would significantly inhibit the economic efficiency of the forest industry and reduce competitive behaviour. Forestry Tasmania submits that all of its contact services are engaged under written contracts in accordance with the FFCC. Forestry Tasmania notes that the range of services that it contracts is diverse, and that individual negotiations provide it with the necessary flexibility needed to remain efficient and arrive at the best outcome. Forestry Tasmania submits that the involvement of the TFCA may either slow down negotiations or add an unnecessary level of cost to the proceedings.

Rayonier

- 4.29 Rayonier notes that final contracts agreed upon for harvesting and transport contractors will vary depending on the difficulty of the coupe, with factors such as the slope and the amount of slash cover taken into account. Rayonier also notes that it will consider the different mix of machinery and equipment used by each contractor when contracting certain tasks. Rayonier notes that its contracts will

vary from coupe to coupe depending on these factors. Rayonier notes that most of its harvesting contracts are for five years and annual performance reviews are provided in accordance with the FFCC.

- 4.30 Rayonier also noted that rates can be adjusted over time depending on the coupe and it uses rate matrices to compensate contractors for changes in input prices and task difficulty. These matrices may take into account the cost of fuel, tyres, replacement of equipment and movements in the consumer price index.

Forest Enterprises Australia

- 4.31 Forest Enterprises Australia (FEA) submits that it uses approximately eight forest harvesting operations and 30 silviculture contractors. FEA submits that each of these is managed in accordance with the *Forestry (Fair Contract Codes) Act 2001*.
- 4.32 FEA notes that in a number of cases contracts contained terms providing for pricing review mechanism which uses a formula based on a contractor's inputs such as the cost of fuel to assist negotiation of price adjustments. FEA notes that its contracts are often the subject of informal reviews whereby both FEA and contractors discuss their operating constraints and needs which can take into account contractors needs to have increased work quotas in order to more efficiently utilise its equipment.
- 4.33 FEA notes that different types of forest operations require different and specialised equipment and different mixes of labour and capital, and may or may not incorporate the supply of materials. FEA notes that each contract needs to be considered individually for this reason.

Norske Skog

- 4.34 Norske Skog states that it supplies 35 per cent of the Australian market for newsprint paper and operates two mills in Australia. Norske Skog submits that the price of newsprint paper is sensitive to changes in the exchange rate and movements in world commodity prices. Norske Skog states that, in real terms, the price of newsprint paper has fallen by around four per cent per annum over the past ten years.
- 4.35 Norske Skog submits that in order to continue to operate in this environment it must reduce its cost of production, and that any increase in production cost, such as an increase in the cost of wood fibre brought about by higher harvesting, transport or silviculture costs, will impact on its competitiveness. Norske Skog considers that this may cause difficulties in attracting investors, which may threaten the operation of its Tasmanian paper mill.
- 4.36 Norske Skog notes that it has re-negotiated each of its contracts over the past 18 months and is concerned that the proposed collective bargaining arrangements may have a negative affect on its current contracts. These contracts are each for a period

of five years. Norske Skog submits that it has serious concerns that efficiency through improvements and innovation will not be translated to competitive costs under the collective bargaining processes outlined in the TFCA's submission.

Forest Industry Association of Tasmania

- 4.37 The Forest Industry Association of Tasmania (FIAT) submits that it opposes granting authorisation to the proposed arrangements. Also, prior to the TFCA's withdrawal of its collective boycott application, FIAT stated that collective boycott arrangements may cause harm not only to the targeted wood company but also to the processors that purchase the wood and have no involvement with the dispute.
- 4.38 FIAT submits that the Tasmanian forest industry is characterised as a price taker in the markets in which it sells. FIAT states that wood is sold into very competitive markets in either mainland Australia or overseas.
- 4.39 FIAT submits that the current individual tendering system creates an incentive for harvesting and cartage contractors to become more efficient through innovative work practices and by utilising more effective equipment. FIAT submits that such a system allows forest and harvesting contractors to maintain profitability while decreasing costs.

Department of Employment and Workplace Relations

- 4.40 The Department of Employment and Workplace Relations (DEWR) submits that it is in support of collective bargaining arrangements that are in the public interest but it disputes many of the public benefits cited by the TFCA in this case. Again, prior to the TFCA's withdrawal of the collective bargaining proposal, DEWR noted its concern of the possible detrimental effects of a collective boycott.
- 4.41 DEWR also submits that it is concerned that the large aggregate size of the bargaining groups and the potential for common industry representation may increase the potential for industry standard contracts. DEWR also notes that the period for which authorisation is sought (10 years) may reduce competition by 'locking-in' supply and acquisition decisions, creating barriers to entry.

Department of Agriculture, Fisheries and Forestry

- 4.42 The Department of Agriculture, Fisheries and Forestry (DAFF) stated that it would not be providing a submission to comment on the public benefits or anti-competitive detriments of the proposed arrangements, but offered some general comments on the Australian Government's role in the Tasmanian forest industry.
- 4.43 DAFF provided an outline of the financial packages provided by the Australian Government to aid the development of the forest industry in Tasmania. These

financial packages include a \$110 million fund to promote new forest management initiatives, enhance conservation measures and infrastructure development.

- 4.44 DAFF noted that a further financial package of \$156.8 million has been agreed upon to provide support for investment and promote changes to forest management, the overall aim of which is to promote a sustainable, competitive and value-adding forest industry while ensuring the maintenance of a comprehensive and representative forest reserve system. DAFF stated that, while the details of the latest assistance program have yet to be finalised, upgrading harvesting and haulage equipment to more modern, safe and environmentally sensitive models has been identified as a priority.

Other interested party submissions

- 4.45 The ACCC also conducted meetings with the Tasmanian Department of Infrastructure, Energy and Resources (DIER) and the Forests and Forest Industries Council of Tasmania (the FFIC). While both parties declined to comment on the TFCA's applications, they provided background information on the Tasmanian forest industry.

Interested party submissions relating to silviculture contractors

- 4.46 The wood companies and FIAT note that silviculture demand is seasonal, with certain tasks such as planting only carried out at certain times of the year. The extent to which certain silviculture services are required may also vary between years depending on the number of new plantations being established. They note that much of the funding for new plantations is derived from private sector investment which may also vary from year to year. The wood companies note that forecasting the demand for silviculture tasks from year to year is made difficult by this variability in funding, and that they cannot be certain of their silviculture needs until funding is finalised. The wood companies submit that engaging silviculture contractors on a long-term basis is, in most cases, commercially impractical by virtue of this uncertainty.

Interested party submissions relating to current contract negotiations

- 4.47 The wood companies submitted that contract negotiations with forest contractors involve consultation with the prospective contractor to identify the particular skills and equipment that they possess, their suitability to a particular task and any requirements that the contractor may have. For example, Forestry Tasmania submitted that a typical contract negotiation may begin with an expression of interest, followed by an assessment of a contracting businesses' price, OH&S systems, skills and credit worthiness. Forestry Tasmania's General Manager will then consult with the forest contracting business over the individual needs of the task and refine a contract on a one-to-one basis. This proposal will then be sent to Forestry Tasmania's executive for approval.

- 4.48 Various wood companies also noted the need for ongoing negotiations during the life of a contract to allow for unforeseen variances in the task being carried out. Many of the wood companies noted that this ongoing form of negotiation allowed for a high level of innovation on the part of their forest contractors.

Interested party submissions on the TFCA's claimed public benefits

- 4.49 The following section contains general comments made by interested parties in respect of the public benefits claimed by the TFCA.

Safety

- 4.50 The wood companies stated that they comply with the relevant safety standards for forest work and have a good track record in respect of occupational health and safety issues. The wood companies also stated that they work with their contractors to ensure safety. Many of the wood companies also provided information that reflected a reduction in the number and severity of workplace accidents. The wood companies attributed this to the implementation of improved safety systems and more effective consultation with their forest contractors. Gunns noted that occupational health and safety legislation exists without the proposed collective bargaining arrangements, and that authorisation would do nothing to add to this. DEWR noted that the Australian Government is currently developing a national standard for workplace safety and stated that any current concerns would be better dealt with by state workplace safety agencies, rather than a collective bargaining arrangement.

Employment and training

- 4.51 While the wood companies acknowledged that some sections of the forest industry are facing a skills shortage, they submitted that this situation is being faced by many other sectors of the labour market, and is due to strong economic conditions and low unemployment. Gunns noted that the Australian Government is currently providing funding for 165 traineeships in the Tasmanian forest industry. DEWR noted that the TFCA's claim that collective bargaining will lead to an improvement in the training and retention of skilled workers is flawed as it pre-supposes that forest contractors will pass on any rate increases to its employees.

Transaction cost

- 4.52 The wood companies stated that current transaction costs are low due to the standard and unambiguous nature of the contracts and of the individual bargaining process. They submitted that the TFCA's involvement would add an additional layer of cost to the process, increasing the level of transaction cost.

Social issues and industry sustainability

- 4.53 The wood companies stated that collective bargaining and boycotts are more likely to harm the industry than improve its sustainability. Gunns noted that instability in the price of Australian wood products caused by anti-competitive practices would force buyers to switch to cheaper international alternatives. DEWR noted that industry sustainability is beyond the scope of an authorisation, and that ultimately the sustainability of the industry will depend on how competitive Australian wood products are with international competitors in both the domestic and international markets.

The TFCA's submission in response

- 4.54 Prior to the release of the draft determination, the TFCA lodged two further submissions in respect of the interested party submissions and meeting notes. Broadly, the TFCA disputed many of the adverse claims submitted by the wood companies. The TFCA noted that many of the interested party submissions had misinterpreted the TFCA's application as being an attempt to bring about a large-scale rate-fixing mechanism within the forest contracting sector. The TFCA noted that the purpose of the application is to provide for fair contractual outcomes and a functional negotiation process.
- 4.55 In its further submission of 19 October 2005, the TFCA disputed claims by interested parties that barriers to market exit are low. The TFCA also disputed DIER's submission that the FFCC has been working well for forest contractors.

5 Submissions received post draft determination

Pre-decision conference of 19 December 2005

- 5.1 On 19 December 2005, the ACCC held a pre-decision conference in relation to its draft determination. The conference was called by the TFCA and was attended by representatives of the TFCA, Gunns, Forestry Tasmania, Norske Skog and FIAT.
- 5.2 The following is a summary of the significant issues which were raised during the conference and which had not been raised previously. A record of the conference and a list of attendees are available on the ACCC website.
- 5.3 The TFCA stated that:
- the ACCC's findings in the draft determination are contrary to those of an inquiry conducted into the Victorian forest industry and the conclusions reached by the Dawson Committee
 - barriers to exit for harvesting and transport contractors are greater than those considered within the draft determination as harvesting machinery and trucks are modified with expensive specialised equipment
 - a safety audit conducted in the North West of Tasmania had found a high degree of non-compliance with safety regulations for transport contractors
 - the proposed rate tables will not affect the competitive process as they will be implemented after competitive tendering
 - the rate tables will be open for negotiation and will not contain any calculators or fixed formulas
 - forest contracts do not differ greatly, and contain the same terms and conditions aside from some variation in duration and price in the contract's schedules
 - collective bargaining groups are only intended to be small in size and the ACCC could have considered a condition to restrict the size of the groups and to require the TFCA to report back to its membership and
 - silviculture tasks that are labour intensive such as pruning and fire hazard reduction could be coordinated.
- 5.4 The other participants (being several wood company representatives and FIAT) stated that:
- conditions in the Victorian forest industry are different from Tasmania, and the findings of the inquiry into the Victorian industry are not relevant
 - most of the terms and conditions contained within forest contracts are mandated by the FFCC and it is normal for contracts to differ only in terms of their schedules

- the wood companies are attempting to address safety compliance issues with both their contractors and the state regulators. The issue is separate from, and will not be dealt with by, the collective bargaining arrangements
- in the past, contractors have tended to migrate towards the top bracket of a degree of difficulty matrix regardless of the actual difficulty of the coupe and
- Gunns noted that its rate indexation, together with fuel price adjustment and ad hoc rate negotiation had led to contractor rates growing at a greater rate than the Consumer Price Index.

The TFCA

5.5 The TFCA also lodged a further submission to the ACCC. This submission covered the issues raised in the PDC along with further information. This further information states that:

- the rate tables proposed by the TFCA bear no resemblance to those prevalent in the industry in the early 1990s
- contract schedules tend to differ only in terms of price and the TFCA does not propose to influence competitive market forces or the individually tender process and
- Workplace Standards Tasmania has reported that fatalities in the transport and harvesting sectors are becoming worse and the TFCA has provided information and newspaper articles on the current situation.

5.6 The TFCA also submits that it is unfair and not in the public interest to allow an unhealthy bargaining environment in which strong and powerful companies can negotiate with individuals who are generally in a difficult financial position and may have no option but to accept the terms and conditions offered to them. The TFCA claims that this will produce a serious detriment to the industry as a critical component of the forest industry will cease to exist.

5.7 The TFCA submits that there is evidence that the public and the forest workers employed by contractors are exposed to more risk while contractors are forced to balance survival with regulations and legislation.

Gunns Limited

5.8 Gunns submits that the removal of the TFCA's application for collective boycotts does not affect the balance of public benefit and detriment of the proposed collective bargaining arrangements. Gunns submits that the TFCA will not achieve any of its claimed public benefits under the proposed arrangements. Gunns also claims that the proposed conduct is likely to: artificially inflate contractor rates; act as a disincentive to contractors to cut costs and respond to technological development; and reduce competition in non-price areas such as safety compliance, environmental compliance and quality.

- 5.9 Gunns submits that the TFCA's suggestion that it is not proposing conduct that will impact upon contractor rates is inconsistent with its application for authorisation, which anticipates collective negotiation of a matrix of rates and other price related issues. Gunns submits that the only real objective of the collective bargaining arrangement appears to be to increase contractor rates, as most other key terms are embodied in the Tasmanian Forestry Fair Contracts legislation and code.
- 5.10 Gunns notes that it shares the safety concerns referred to by the TFCA with respect to the Hampshire (North West) area and is working with relevant state authorities to address the issues and improve compliance. Gunns notes that safety standards are the subject of both state and federal regulation, which are enhanced by company policies and procedures, and that safety standards have improved dramatically in Tasmania since rate fixing was abandoned. Gunns also submits that legislation, innovation, new technology and competition amongst forest contractors has helped to improve safety standards, and that the collective bargaining proposal put forward by the TFCA does nothing to address safety in the industry.

Forest Industries Association of Tasmania

- 5.11 FIAT's submission addresses the issues of barriers to exit and safety compliance raised at the pre-decision conference by the TFCA. FIAT also provided a response made by its economic consultant rebutting claims made by the TFCA in relation to economic data attached to FIAT's original submission.
- 5.12 FIAT submits that equipment used for harvesting can be readily sold on a number of websites and through various trade magazines. FIAT submits that much of the equipment used for harvesting can easily be transferred into other industries within Tasmania or mainland Australia. FIAT submits that trucks and trailers are easier to transport to other forest regions and are more marketable Australia wide. FIAT notes that trucks are more easily converted to other types of cartage such as moving gravel.
- 5.13 FIAT notes with respect to safety that the industry supports compliance with regulation and would welcome more regular monitoring to ensure standards are achieved. FIAT submits that that this is a matter of law and is separate from the issues relevant to the applications for authorisation.
- 5.14 FIAT submits that collective bargaining by silvicultural, harvesting and cartage contractors will be detrimental to the viability of the forest processing companies. FIAT also submits that the TFCA has failed to demonstrate that authorisation to collectively bargain would result in any public benefits.

Forestry Tasmania

- 5.15 Forestry Tasmania notes that its support for the ACCC's proposed decision in the draft determination. Forestry Tasmania also made reference to its safety monitoring programs, and other safety programs in place for forest contractors within Tasmania.

6 Collective boycotts

- 6.1 The TFCA originally sought authorisation to allow its members to withhold the supply of forest contractor services from the wood companies under certain circumstances. At the pre-decision conference on 9 December 2005, the TFCA noted that it intended to withdraw the application for authorisation of the proposed collective boycott arrangements. On 30 January 2006, the TFCA advised the ACCC in writing of the withdrawal of application A90973.
- 6.2 Collective boycotts may involve members of a collective bargaining group agreeing not to acquire goods or services from, or jointly agreeing not to supply goods or services to, a business with whom they are negotiating, unless that business accepts the terms and conditions of acquisition or sale offered by the group.
- 6.3 Where a group of businesses bargaining collectively also has the ability to engage in a collective boycott, this reduces the discretion of the other party to the collective bargaining arrangements over the extent to which they participate in negotiations. Specifically, the ability to engage in a collective boycott will reduce the discretion of the other party to the collective bargaining arrangements over the extent to which terms and conditions (including price) might deviate from those that might be expected to prevail absent of the collective arrangements. This is because the other party to the arrangements, faced with the threat of withdrawal of supply or acquisition, will be under increased pressure to accept the terms and conditions offered by the collective bargaining unit.
- 6.4 In addition to the effect a collective boycott can have on increasing the anti-competitive detriment of collective bargaining, in many cases the direct inefficiencies caused by collective boycotts are also likely to be significant as collective boycotts have the potential to cause significant disruption to businesses, including the target of the boycott, downstream and upstream businesses, and ultimately consumers.
- 6.5 If used strategically, the ability to collectively boycott could also give a collective bargaining unit a degree of bargaining power that goes well beyond that necessary to address any imbalance in market power issues. In such cases it could simply reverse any imbalance in bargaining power.
- 6.6 In its draft determination, the ACCC noted that the level of anti-competitive detriment likely to result from the proposed collective bargaining arrangements was likely to be of some significance. To the extent that the parties to the arrangement were to engage in a collective boycott, the ACCC considered that these detriments would be of a more significant weight. That is the ACCC considered that the proposed collective boycott arrangements were likely to

magnify the detriments to competition that it had already been identified in the draft determination.

- 6.7 In addition, the ACCC considered that the proposed collective boycott arrangements may lead to direct inefficiencies through disruption to participants in the Tasmanian forest industry. In particular, the ACCC considered that the proposed collective boycott arrangements were likely to cause damage to:
1. the wood companies and other wood processors
 2. export markets and
 3. forest contractors.
- 6.8 Consequently, given the significant level of public detriment identified in respect of the TFCA's proposed collective boycott arrangements, the ACCC proposed to deny application for authorisation A90973 in the draft determination.
- 6.9 The TFCA's withdrawal of the collective boycott proposal has significantly reduced the ACCC's concerns over the TFCA's proposed arrangements. The ACCC's assessment that follows is based upon the TFCA's proposal absent collective boycotts.

7 Statutory provisions

- 7.1 Application A90974 was made under sub-section 88(1) of the TPA to make and give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the TPA. In assessing an application made under sub-section 88(1) of the TPA to make and give effect to arrangements that might substantially lessen competition within the meaning of section 45 of the TPA, the relevant test that the TFCA must satisfy for authorisation is outlined in subsection 90(6) of the TPA.
- 7.2 Under subsection 90(6) of the TPA, the ACCC may grant authorisation in respect of a proposed contract, arrangement or understanding that may have the purpose or effect of substantially lessening competition if it is satisfied that:
- the contract, arrangement or understanding would be likely to result in a benefit to the public and
 - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.

Benefits and detriments

- 7.3 In deciding whether it should grant authorisation, the ACCC must examine the detriments of the arrangements or conduct, particularly those arising from any lessening of competition, and the public benefits arising from the arrangements or conduct and weighing the two to determine which is greater.
- 7.4 Should the public benefits or expected public benefits outweigh the detriments, the ACCC may grant authorisation. If this is not the case, the ACCC may refuse authorisation or, alternatively, the ACCC may grant authorisation subject to conditions as a means of ensuring that the public benefit outweighs the detriment.
- 7.5 Public benefit is not defined by the TPA. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress.⁶
- 7.6 Similarly, public detriment is not defined in the TPA but the Tribunal has given the concept a wide ambit. It has stated that the detriment to the public includes:

⁶ *Re 7-Eleven Stores; Australian Association of Convenience Stores Incorporated and Queensland Newsagents Federation* (1994) ATPR ¶ 41-357 at 42677. The Tribunal recently followed this approach in *Qantas Airways Limited* [2004] ACompT 9, 16 May 2005.

...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.⁷

- 7.7 The ACCC also applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and any detriment generated by arrangements for which authorisation has been sought.
- 7.8 Under this test, the ACCC compares the public benefit and detriments generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the counterfactual.

Other relevant provisions

- 7.9 Section 88(10) of the TPA provides that an authorisation may be expressed so as to apply to or in relation to another person who becomes a party to the proposed arrangements in the future.
- 7.10 Section 91(1) of the TPA allows the ACCC to grant authorisation for a specific period of time.

⁷ Ibid at 42683.

8 The relevant markets and the counterfactual

- 8.1 The first step in assessing the public benefits and detriments of the proposed arrangements for which authorisation is sought is to consider the relevant market(s) in which those arrangements occur.
- 8.2 While the ACCC is of the view that it may not be necessary to definitively identify all the relevant markets, it is important for the ACCC's assessment of the application to define general market parameters so that it can assess the public benefits and detriments, particularly the anti-competitive effects of the proposed arrangements.
- 8.3 In considering this application, the ACCC has identified two areas of competition that may be relevant to its assessment:
- the supply of forest contracting services to wood companies in Tasmania and
 - the supply of wood products.

Submissions on the market for the supply of forest contracting services

- 8.4 After the release of the draft determination, the TFCA made submissions, both at the pre-decision conference and in writing, which disputed the market features considered within the draft determination. Specifically, the TFCA noted that barriers to exit for transport and harvesting contractors may be higher than considered, as the equipment used by these contractors, such as trucks and excavators, are likely to include expensive, forestry specific modifications.
- 8.5 In this regard, the ACCC notes that its consideration of the likely market features in the draft determination did take into account the possibility of sunk costs, such that it considered that barriers to exit were likely to exist, but these were not likely to be overly high for harvesting contractors, and were likely to be moderate to low for transport contractors. The ACCC considers that the ability to substitute equipment into other industries does exist, and that there is a secondary market for equipment, such that there is an ability for less profitable business to exit the industry, although they are likely to be constrained to some extent by being unable to recoup the full value of their equipment.

The supply of forest contracting services to wood companies in Tasmania

- 8.6 The TFCA is primarily seeking authorisation to allow groups of forest contractors to collectively negotiate the terms and conditions of their contracts with the wood companies that employ their services. As such, the primary area of competition that is likely to be relevant to the ACCC's consideration of the benefits and detriments is the market for the supply of forest contracting services to wood companies in Tasmania.

- 8.7 Forest contracting services are varied in nature and cover a wide range of services required by the wood companies to manage their timber resources. As the services provided by each group of contractors are different, it is relevant to the ACCC's consideration to provide a brief description of those market features of harvesting contractors, transport contractors and silviculture contractors which may be important to its assessment.

Harvesting contractors

- 8.8 The ACCC considers that the features of this area of competition that are likely to be relevant to its assessment include:

- while not low, barriers to entry and exit are generally not considered to be overly high
- equipment used for harvesting can be used in other industries, albeit with some conversion cost (eg. harvesting equipment can be modified for use in excavation tasks such as road building)
- harvesting businesses are reasonably diverse and will differ in terms of the amount and type of equipment and skills involved
- there are approximately 130 harvest contracting businesses in Tasmania⁸ and
- harvest contracting businesses will vary in size from small to medium sized businesses

Transport contractors

- 8.9 The ACCC considers that the features of this area of competition that are likely to be relevant to its assessment include:

- barriers to entry and exit are moderate to relatively low
- transport contractors can substitute their services into other cartage related industries, albeit with some conversion cost (the prime mover used for cartage of wood can be modified and used for many large cartage purposes)
- cartage of logs may be carried out by harvesting businesses that own their own trucks, or subcontracted to owner-drivers or transport fleet operators and
- there is significant variability in the size of transport contractors (fleet operators may use up to fifty trucks while harvesting contractors that handle their own cartage may use as few as two trucks).

⁸ Page 5 of the TFCA's supporting submission

Silviculture contractors

- 8.10 The ACCC considers that silviculture contractors carry out a diverse range of tasks and it is not feasible to give a definitive set of characteristics given the different mixes of labour and capital required for the different tasks. The ACCC has however, identified general characteristics that may apply to the majority of silviculture contractors. These include:
- barriers to entry and exit are generally low
 - much of the demand for silviculture services is seasonal, with the availability of employment and contracts differing throughout the year and
 - silviculture contractors may work for more than one wood company over the course of a year.

The supply of wood products

- 8.11 Wood companies are either engaged in processing various grades of wood into products for resale or in the supply of raw wood to processors such as saw and pulp mill operators. The cost of forest contracting services constitutes a significant input into the wood companies' cost of production. As such, the ACCC considers that the supply of wood products is a secondary area of competition that may be effected by the proposed arrangements.
- 8.12 The wood companies note that they are involved in supplying both the domestic and export markets with wood products. They note further that Australian wood companies compete with a large number of international suppliers in both of these markets.
- 8.13 The ACCC considers that there are many features of the market for wood products that are likely to be relevant to its assessment. These include:
- Tasmanian wood companies sell their products into competitive domestic and export markets
 - there are a number of wood companies competing for both international and domestic market share and
 - there are well established commodity markets for pulpwood and a number of alternative international suppliers of both pulpwood and sawlogs that are likely to limit the extent to which the wood companies can increase the price of their products in international and domestic markets.

The ACCC's consideration of the likely counterfactual

- 8.14 As stated in section 7, the ACCC applies the 'future with-and-without test' established by the Tribunal to identify and weigh the public benefit and anti-

competitive detriment generated by arrangements for which authorisation has been sought.

- 8.15 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to make a reasonable forecast about how the relevant markets will react if authorisation is not granted. This forecast is referred to as the counterfactual.
- 8.16 The ACCC considers that in the event that authorisation is denied, the most likely situation will be one where forest contractors continue to engage in individual bargaining with their respective wood companies, without engaging in collective negotiations. However, the ACCC notes that legislation governing matters such as workplace safety standards and the FFCC will continue to be in place irrespective of whether the current application for authorisation is granted.

9 ACCC assessment – Effect on competition

- 9.1 Section 88 of the TPA allows the ACCC to grant immunity from legal action for parties to engage in certain anti-competitive conduct which may include collective bargaining.
- 9.2 Generally, collective agreements to negotiate terms and conditions for independent businesses covered by those agreements are likely to lessen competition relative to a situation where each business individually negotiates their own terms and conditions. However, the extent of the detriment and the impact on competition of the collective agreement will depend upon the specific circumstances involved.
- 9.3 As discussed in section 7 the ACCC must assess the extent to which the proposed arrangements give rise to any detriments. Specifically, in relation to the collective bargaining arrangements, the ACCC must assess the detriment to the public constituted by any lessening of competition flowing from the proposed arrangements.

The ACCC's assessment of anti-competitive detriment

Lost efficiencies arising from the proposed arrangements

- 9.4 Generally, the ACCC considers that collective bargaining arrangements are likely to reduce competition between members of the bargaining group, which may lead to lost efficiencies when compared to a situation where collective bargaining is not present.
- 9.5 In this instance, the ACCC considers that lost efficiencies are likely to occur from the proposed collective bargaining arrangements as against the current or counterfactual situation where forest contractors individually negotiate the terms and conditions of their contracts with the wood companies.
- 9.6 Based on the information provided by the TFCA and interested parties, the ACCC understands that a significant feature of the Tasmanian forest industry is that it requires forest contractors to carry out a wide range of tasks, many of which may be specialised or unique to a certain wood company or, more often, to a particular coupe. In particular, the ACCC understands that the diversity of coupes means that individual forest contracting businesses often compete to differentiate themselves in order to win particular contracts from the wood companies based upon individual skills, experience and available equipment. The ACCC considers that a natural consequence of this diversity is the need for varied, and flexible, contractual arrangements.
- 9.7 The ACCC notes that information provided by the wood companies suggests that negotiations between forest contractors and the wood companies currently occur at

the formation of a contract and may also continue once a contract has commenced to allow for unforeseen variances in the task. The ACCC understands that in conducting negotiations, and ultimately assigning forest contracts, the varying skills, experience and equipment of a forest contractor are key matters to be taken into account.

- 9.8 The ACCC considers that competition amongst forest contractors to distinguish themselves from their competitors currently provides an incentive for those businesses to continue looking for ways to innovate and adapt along with finding more effective and efficient ways of conducting their business. The ACCC considers that such incentives may manifest themselves in a number of ways, including: providing more efficient harvesting of wood from difficult sites; improved harvesting techniques that reduce the damage caused to the site; and improved methods of transporting harvested wood from stump to landing that help to preserve the wood fibre.
- 9.9 The ACCC considers that the introduction of collective bargaining to such a diverse group of contractors may result in lost efficiencies when compared to individual negotiations of the type described above. In the case of forest contractors, the ACCC considers that the proposed collective bargaining arrangements may lessen competition between forest contractors and reduce their incentive to:
- innovate in respect of the services that they provide
 - differentiate themselves from their competitors and
 - pursue more effective work practices.
- 9.10 An example of this may arise in the TFCA's proposal to collectively negotiate rate tables for inclusion in forest contracts. The TFCA proposes that collectively negotiated forest contracts will contain rate tables that serve to categorise different working conditions based upon their varying degrees of difficulty.
- 9.11 Submissions provided by the wood companies have expressed concern that, under rate tables previously adopted by the industry, contractors tended to migrate towards the top bracket of a degree of difficulty matrix regardless of the actual difficulty of the coupe. The wood companies submit that this leads to inefficiencies which have been addressed by the current arrangements.
- 9.12 The TFCA has submitted that a lack of information has resulted in forest contractors accepting contractual terms which are not commercially appropriate for their business in the longer term and that rate tables would assist contractors in avoiding this.
- 9.13 The ACCC is concerned that, given the diverse range of tasks carried out by forest contractors, the adoption of collectively negotiated rate tables may to some extent result in a reduction of a contractor's incentive to innovate and differentiate their

business from that of their competitors. The rate tables may also result in an increase in transaction costs associated with disputes – for example, disputes as to the degree of difficulty to be assigned to a particular coupe.

- 9.14 The TFCA has also submitted that it does not intend to collectively negotiate the actual rates included in these tables. They submit that it is intended that the tables simply include factors to be considered in setting prices. The ACCC does not consider this has been described well, noting that earlier discussion seemed to accept that the rate tables would be more than a guide to contractors as to the type of factors they may wish to consider in negotiating rates.
- 9.15 The ACCC considers that if the TFCA wishes to provide information to its members about the factors that they may wish to consider during negotiations – for example coupe difficulty, severity of slope or equipment requirements – and to the extent that this information does not include the collective determination of price, including the use of fee scales or multipliers, it is unlikely that the TFCA requires authorisation to do so. In fact, the ACCC would consider that one of the roles of a representative organisation would be to make its members aware of important contractual considerations.
- 9.16 Regardless of the nature of the rate tables, the ACCC is concerned, that the TFCA’s proposal to include an input price adjustment index into forest contracts may have the effect of dampening competition between forest contractors. As previously noted the TFCA has proposed an input price adjustment index to be applied on an annual basis. Under this index, contract rates paid to forest contractors would be automatically adjusted if certain input costs increased. The TFCA has indicated that the costs captured by the index would include a ‘basket’ of common inputs used by forest contracting businesses, such as the cost of a particular mix of maintenance items. The TFCA proposes to negotiate indexes which are specifically tailored to the type of work being carried out (eg. cable harvesting, mechanical harvesting, transport, silviculture, et cetera).
- 9.17 The ACCC is concerned however that, while the TFCA proposes to negotiate different indexes based on the type of forest contractor involved, the nature of the forest industry is such that its implementation on a group basis, while limited, may nonetheless lead to some lost efficiencies.
- 9.18 Specifically, the ACCC considers that a system of rate adjustment that is based on common base commodity prices, such as a collectively determined basket of costs, may encourage forest contractors to pursue a common input mix, as they are shielded from any risk associated with movements in the price of certain inputs and may be compensated to a larger extent by pursuing particular inputs over others.
- 9.19 Put another way, the ACCC considers that a standardised method of contract rate adjustment, achieved by tracking changes in certain common and collectively determined input prices, applied to a diverse group of businesses may reduce the

incentive for such businesses to distinguish themselves further and may encourage individual business to operate in a similar manner to that of their competitors.

- 9.20 Given that the ACCC considers that there is currently an incentive for forest contractors to differentiate themselves from their competitors, and that this is likely to lead to increased efficiencies and therefore benefits to the Tasmanian forest industry, the ACCC is concerned that any move, however minor, towards increased standardisation of forest contracting services is likely to result in some anti-competitive detriment.
- 9.21 The ACCC notes that there are some features of the proposed collective bargaining arrangement which may serve to mitigate the extent of the anti-competitive detriment associated with a potential loss of efficiencies. Most notably, the ACCC considers that in the absence of collective boycotts, the proposed collective bargaining arrangements are likely to be voluntary for all parties. However, the ACCC considers that, for the reasons discussed earlier, and to the extent that the proposed arrangements are entered into, they are likely to lead to lost efficiencies.
- 9.22 Consequently, the ACCC considers that while there may be certain industry and arrangement features which may mitigate potential efficiency losses, the nature of the industry and, in particular, the diversity of the activities carried out by its participants are likely to mean that efficiency losses will occur. As such, the ACCC considers that an anti-competitive detriment is likely to arise due to lost efficiencies from the proposed arrangements.

Size and coverage of the proposed collective bargaining groups

- 9.23 Generally, the ACCC considers where the size of bargaining groups is restricted, any anti-competitive effect is likely to be smaller having regard to the smaller area of trade directly affected and having regard to the competition provided by those suppliers outside the group.
- 9.24 In this instance, the ACCC considers that the extent to which the proposed collective bargaining groups may be able to impose an industry standard set of terms and conditions is likely to be limited by the TFCA's proposal to segregate groups based on the principal wood company to which a forest contractor offers their services. However, the ACCC remains concerned that the proposed groups may still be quite large, particularly those groups associated with the larger wood companies.
- 9.25 The ACCC also considers that there may be scope for a degree of cross representation in this regard, as many forest contractors within Tasmania provide their services to more than one wood company. The ACCC considers that the potential for cross-representation is such that, were the proposed collective bargaining arrangements to take place, there is likely to be increased scope for certain terms and conditions to be introduced on an industry-wide basis. The ACCC is also concerned that the role of a common representative, such as the

TFCA, across the proposed collective bargaining groups may lead to the greater prevalence of industry standard terms and conditions for harvesting, transport or silviculture contractors.

- 9.26 In response to the concerns raised within the draft determination, the TFCA submitted that it only intended to form small, regional negotiating groups of perhaps five contractors, and that the ACCC could have restricted the size by use of a condition.
- 9.27 Again, the expectation of smaller groups is not apparent in earlier TFCA submissions and is not reflected in their application which sought authorisation to establish 10 bargaining groups (one silviculture and one harvesting and transport group for each of the five wood companies).
- 9.28 In any event, the ACCC remains concerned that the conduct as applied for creates the potential for cross representation across more than one of the proposed bargaining groups. The ACCC considers that this may increase the potential anti-competitive detriments discussed in the previous topic relating to the potential for lost efficiencies. Whether or not a condition is likely to mitigate this detriment to a sufficient extent will be addressed in section 11 of this determination.

Reduced scope for new market entry

- 9.29 The ACCC considers that the capacity for new entrants to compete for the right to undertake the business of existing market participants subject to a collective agreement has implications for how competition in the market is affected. Collective negotiations between parties resulting in agreed prices and other terms and conditions, and entry into long-term common agreements may reduce the likelihood of entry into the relevant markets.
- 9.30 The ACCC considers that a barrier to entry may arise if, in order to compete for the supply of forest contracting services, a potential entrant needed to obtain a long-term contract. To the extent that such a contract may be more difficult to obtain in the presence of a collective bargaining arrangement, there is the potential for any pre-existing barriers to entry to be increased.
- 9.31 The ACCC notes that the applications have been expressed so as to apply to any future parties that may become members of the TFCA and as such, there is scope for a new entrant to the market that is seeking to take part in the proposed arrangements to become a member of the TFCA and participate in one of the bargaining groups.
- 9.32 The ACCC also considers it likely that the various wood companies named in the TFCA's application would continue to deal with forest contractors that are not parties to the proposed collective bargaining arrangements.

9.33 Consequently, the ACCC considers that the proposed collective bargaining arrangements are not likely to significantly increase barriers to entry for the supply of forest contracting services.

Conclusion on collective bargaining

- 9.34 On balance, the ACCC is concerned that the proposed collective bargaining arrangements are likely to generate a level of anti-competitive detriment which, while not of substantial weight, is also not insignificant. The ACCC is particularly concerned that, given the lack of commonality between forest contractors in terms of their business set ups, size and capabilities, and the differing requirements of the wood companies for forest contractor services, the proposed collective bargaining arrangements, if given effect to, have the potential to result in a loss of efficiency by inappropriately standardising work practices.
- 9.35 The ACCC is also concerned that there is scope for cross representation between the proposed collective bargaining groups which may serve to further the anti-competitive detriments associated with the potential loss of efficiencies.

10 ACCC assessment – Public benefits

- 10.1 In order to grant authorisation to the proposed collective bargaining arrangements, the ACCC must be satisfied that those arrangements would result in a benefit to the public that outweighs any public detriment.
- 10.2 There must be a nexus between the claimed public benefits and the proposed arrangements for which authorisation is sought. In other words, the benefit must flow from the proposed arrangements.
- 10.3 The TFCA submits that granting authorisation allowing its members to collectively negotiate contract terms and conditions with the wood companies will result in a number of benefits to the public. The ACCC will consider these, as well as any other benefits that it considers may be relevant to its assessment.

Reduced transaction costs

- 10.4 The TFCA submits that the proposed arrangements are likely to reduce transaction costs by simplifying the individual negotiations between the wood companies and forest contractors. The TFCA submits that the collective bargaining groups will negotiate many aspects of the proposed contracts, reducing the amount of individual negotiation required. The TFCA also submits that the proposed rate tables and fuel multiplier will reduce the time and cost of re-negotiating contract rates.
- 10.5 The interested party submissions received by the ACCC from the wood companies have disputed the scope for transaction cost savings in this instance. They state that each task carried out by a contractor requires the individual consideration of many factors, such as the difficulty of the coupe, and the skills and equipment needed to harvest the trees. The wood companies note that the proposed arrangements are unlikely to be flexible enough to cover the individual needs of each coupe and, were collective negotiations to take place, they would not remove the need for individual negotiations. The wood companies submit that contract negotiations that involve both a collective process and individual negotiations would increase transaction costs rather than reduce them.
- 10.6 In previous applications for authorisation, the ACCC has noted that transaction costs may well be lower in implementing a collective bargaining agreement involving a single, or small number, of negotiating processes than where the acquirer or supplier must negotiate and implement agreements with every business with which it deals. The ACCC however, has also considered that, to the extent that individual businesses seek their own legal, business or accounting advice in the course of individual negotiations, and to the extent that the need for such expert advice is reduced by the process of bargaining collectively, there is scope for some savings in transaction costs.

- 10.7 The information available to the ACCC regarding the Tasmanian forest industry suggests that forest contracts are not offered on a standard form *take it or leave it* basis. It is therefore feasible that the arrangements may result in some transaction cost savings.
- 10.8 In this instance however, the ACCC considers that it is likely that two negotiation processes will take place, a process of collective negotiation and one of individual negotiation. The process of collective negotiation is likely to involve a number of individual contractors acting as a collective, negotiating standard terms and conditions of their contracts, such as contract rate and fuel multipliers. The individual negotiations would take place between the individual contractors and their wood company and would negotiate specific terms and conditions such as their harvest and transport quota and contract rates.
- 10.9 The ACCC considers that, depending on the level of negotiations required in each process, conducting two processes of negotiation may either increase or decrease transaction costs against those that would be present in the counterfactual situation. If the collective bargaining process significantly reduces the need for individual negotiations, it is likely that some transaction cost savings may arise. However, if the collective bargaining process does not greatly reduce the need for individual negotiations against the counterfactual, it is likely to add a new layer of cost to contract negotiations which may increase transaction costs.
- 10.10 Having considered the information provided to it, the ACCC is unable to reach a view as to whether transaction cost savings would arise in these circumstances. Accordingly the ACCC does not propose to recognise transaction cost savings as a potential benefit of the TFCA proposed arrangements.

More effective input into contracts

- 10.11 The ACCC considers that collective bargaining arrangements can result in benefits to the public by facilitating improvements in the level of input parties have in their contractual negotiations. Improved input provides a mechanism through which the negotiating parties can identify and achieve greater efficiencies in their businesses, for example by addressing common contractual problems in a more streamlined and effective manner.
- 10.12 The ACCC considers that this improved input is a function of the increased bargaining power of the members of the collective (by allowing them to aggregate their influence in the negotiation); of improving individual access to information and resources; and of providing a mechanism through which productive contractual discussions between the collective and the counterparty can be achieved.
- 10.13 Where members of the collective have common issues, there can be significant efficiencies in putting proposed improvements on the table through the collective bargaining process.

- 10.14 In this instance, the TFCA submits that, while the forest contractors participate in contract negotiations with wood companies, the wood companies are generally in a strong bargaining position in these negotiations, and often offer contracts that provide little scope for input from the forest contractor. The TFCA also submits that some forest contractors either do not have written contracts, or have very short contract tenures.
- 10.15 The wood companies have stated that contracts are negotiated to reflect the differences in tasks between coupes, and take into account a number of factors including whether the contractors has the appropriate skills or equipment to carry out the task, the difficulty of the task, and the contractor's safety and environmental compliance systems. A number of the wood companies also submitted that they have price adjustment systems in place to compensate contractors for movements in the price of inputs such as the fuel price.
- 10.16 Submissions provided to the ACCC from the wood companies also suggest that contract negotiations will take place over the term of a contract to allow for variances in the task. The wood companies noted that the ongoing nature of negotiations have allowed their forest contractors to develop improved work practices through innovation.
- 10.17 The ACCC considers that if the proposed collective arrangement allows party's access to processes such as effective dispute resolution processes, to the extent that they are not available under the likely counterfactual, there may be increased scope for efficiencies to arise from the proposed arrangements. However, the ACCC considers that forest contracts are likely to contain terms and conditions mandated under the FFCC with or without authorisation, such as access to mediation, dispute resolution, and annual performance reviews. The ACCC considers that the FFCC is also likely to provide forest contractors with a further opportunity to have input into their contracts by mandating negotiations upon renewal or extension of an existing contract.
- 10.18 As noted earlier in the determination, the ACCC considers that, under the proposed arrangements, forest contractors are likely to engage in both group and individual negotiations and that any group negotiations that lead to the standardisation of certain terms and conditions may lead to lost efficiencies due to the diverse nature of forest contracting businesses.
- 10.19 Furthermore, the ACCC considers that the way in which the TFCA has proposed to structure the bargaining groups may further reduce the ability of the forest contractors to obtain more effective outcomes. A committee representative system that is not required to report back to its membership may not be best placed to fully reflect the views of its members in contract negotiations. This potential lack of responsiveness may reduce the bargaining group's ability to obtain an efficient

outcome, although the TFCA has submitted that a condition could be used to address this concern.

- 10.20 Having regard to the forgoing, the ACCC considers that the proposed arrangements are unlikely to provide forest contractors with more effective input into their contracts with the wood companies, relative to the counterfactual. The ACCC considers however that industry associations, such as the TFCA, can play a valuable role in facilitating the exchange of information and discussing issues of common concern to participants in an industry. The ACCC supports such representations, particularly in respect of small businesses, when, for example, this is likely to lead to better informed markets. The ACCC considers that, up to a certain point in the negotiation process, the TFCA contributing to the relationship between its members and wood companies does not necessarily give rise to concerns about possible contraventions of the TPA. Indeed, an industry association such as the TFCA can represent and assist members in matters such as ensuring its members have access to appropriate legal and/or financial services, or even making representations to major suppliers in relation to issues of concern to members, *without* the need for authorisation.

Long-term silviculture contracts

- 10.21 The TFCA submits that it seeks to use the proposed arrangements to change the way in which work is tendered to silviculture contractors by lining up consecutive tasks into work packages. The TFCA submits that this will ensure continuity of work for silviculture contractors and allow the wood companies to grant long-term silviculture contracts.
- 10.22 The TFCA submits that long-term contracts would enable silviculture contractors to create efficiencies from having a stable work force. The TFCA also submits that long-term contracts would allow silviculture contractors better access to finance, and provide scope for innovation through the purchase of new machinery.
- 10.23 The wood companies have submitted that silviculture is a ‘catch all’ term used to describe a wide range of services carried out by forest contractors. The wood companies stated that many of these services require different skill and labour mixes, with site preparation requiring a large amount of equipment, while the pruning of trees is more labour intensive. The wood companies stated that silviculture contractors do not offer all silviculture services, and so would not be able to fulfil all of their silviculture requirements individually. The wood companies further noted that silviculture work is seasonal, with certain tasks only being necessary at certain times of the year.
- 10.24 The wood companies also submitted that much of the funding for silviculture work is provided for by managed investment schemes (MIS), a highly regulated form of funding that places time constraints on when certain tasks can be carried out. They noted that the level of funding derived from an MIS will differ from year to year

making it commercially impractical to use long term contracts for silviculture tasks.

- 10.25 Based on the information before it, the ACCC considers that silviculture contractors engage in a wide variety of activities, and that not all silviculture contractors will be equipped with either the appropriate staff or equipment to carry out the full range of silviculture requirements. While the ACCC considers that allowing silviculture contractors greater access to long-term contracts may lead to efficiency gains, it appears that, due to the arrangements used to fund silviculture, and due to the variable nature of demand for silviculture work, long-term silviculture contracts are likely to be difficult to implement. The ACCC also notes that it is likely that the wood companies would implement long-term silviculture contracts if they saw a potential efficiency gain in having them.
- 10.26 Consequently, the ACCC considers that the proposed arrangements are unlikely to provide silviculture contractors with greater access to long-term contracts and does not consider that a public benefit is likely to arise.

Improved occupational health and safety standards

- 10.27 The TFCA submits that concerns have been raised that many forest contractors are at risk of breaching their workplace safety obligations to employees, as they are increasingly being forced to choose between the compliance cost associated with workplace safety legislation and other financial obligations. The TFCA states that forest contractors are being confronted with the choice of working in adverse conditions or losing their businesses and assets by not meeting their financial commitments. The TFCA has specifically identified access to coupes by contractors involved in the transportation of logs, including on site parking, as being the primary area of workplace safety concern to its members.
- 10.28 The majority of interested party submissions received by the ACCC disputed the TFCA's claims with respect to safety issues. The wood companies stated that they comply with the relevant safety standards for forest work, and have a good track record in respect of occupational health and safety issues. Many of the wood companies also provided information that reflected a reduction in the number and severity of workplace accidents. The wood companies attributed this to the implementation of improved safety systems and more effective consultation with their forest contractors.
- 10.29 In relation to the work carried out by forest contractors, it is noted that federal and state safety legislation mandates occupational health and safety standards, and further that the FFCC makes it incumbent upon the wood companies to ensure that their forest contractors comply with safety legislation.
- 10.30 In respect of public benefit claims relating to greater compliance with existing laws or safety standards, the ACCC considers that for a benefit to arise there must be a nexus between the proposed arrangements and an improved level of compliance. In

the absence of such a link, the ACCC is unlikely to consider that a public benefit will arise in this respect.

- 10.31 In relation to the current application, the ACCC considers that improvements in workplace safety as identified by the TFCA would fundamentally arise through improvements in the input of contractors to their contracts. That is, the arrangements may facilitate greater discussions between contractors and wood companies on issues of safety and result in improved compliance.
- 10.32 The ACCC considers however, that industry associations can identify common membership issues, such as concerns relating to safety, without a need for authorisation. The ACCC does not consider that a collective bargaining arrangement is likely to change in any way the role of the TFCA in ensuring the concerns of contractors are raised with the wood companies and notes that each of the wood companies demonstrated a high degree of concern for contractor safety. Consequently, the ACCC does not lend weight to the claims put forward under this heading.

Employment and training

- 10.33 The TFCA submits that the forest industry will face a skilled labour shortage in the immediate future. The TFCA submits that, if forest contractors were not under a high degree of financial pressure, there would be a dramatic increase in the number of traineeships offered from within the forest contracting sector. The TFCA submits that this would be an investment in the future of the forest industry, ensuring that the workforce retained a high and consistent skill level and providing a continual stream of new industry entrants.
- 10.34 While the wood companies acknowledged that some sections of the forest industry are facing a skills shortage, they submitted that this situation is being faced by many other sectors of the labour market, and is due to strong economic conditions and low unemployment. Gunns noted that the Australian Government is currently providing funding for 165 traineeships in the Tasmanian forest industry. DEWR noted that the TFCA's claim that collective bargaining will lead to an improvement in the training and retention of skilled workers is flawed as it pre-supposes that forest contractors will pass on any rate increases to its employees.
- 10.35 The ACCC considers that the public benefit argued under this heading is a possible flow on from other potential efficiency gains rather than a benefit in and of itself. Consequently, the ACCC does consider that it furthers the TFCA's public benefit claims.

Industry sustainability

- 10.36 The TFCA states that it is concerned that there will be a reduction in the number of professional forest contracting resources available to the forest industry if the current imbalance in bargaining power is not addressed. The TFCA noted that 22

businesses have been sold in the past year. These were purchased by either employees or other forest contracting businesses.

- 10.37 The TFCA submits that it is concerned that forest contracting businesses will become unattractive to entrepreneurs, as the rate of return on investment may not justify the cost. The TFCA submits that this problem will be more visible when faster rotation plantation timber comes on line post 2010, where it is estimated wood volumes will dramatically increase as plantation forests mature.
- 10.38 In this case, the ACCC does not consider that an authorisation will enhance the sustainability of the industry when compared to the counterfactual. The ability to collectively bargain may result in efficiency gains under certain circumstances, but the sustainability of the forest industry is more likely to depend on the competitiveness of Tasmania's products as against international suppliers and the demand for such products. To the extent that there is a demand for Tasmanian products there is an incentive for wood companies to continue to produce wood products and maintain a viable forest industry. As discussed above, the ACCC is concerned that the arrangements may have the effect of lessening competition in the forest industry. To the extent that this occurs, the arrangements are likely to have a negative impact on industry sustainability.

Improvement in social wellbeing

- 10.39 The TFCA submits that there are currently many issues in the Tasmanian forest industry with regards to a decline in social wellbeing brought about by financial pressures faced by forest contractors. While any efficiencies gained from a collective bargaining process may directly or indirectly affect the level of social welfare in communities reliant on forest contractors, the ACCC does not consider that the TFCA's arguments under this heading advance the public benefits considered earlier in this section.

Conclusion on the public benefits

- 10.40 The ACCC considers that the proposed arrangements may lead to some transaction cost savings, although these may potentially be removed by the need for further individual negotiations. However, the ACCC does not lend weight to the other arguments put forward by the TFCA as public benefits, nor does it consider it likely that the proposed arrangements will lead to forest contractors having more effective input into their contracts. Consequently, the ACCC considers that the proposed collective bargaining arrangements are likely to generate only minimal public benefits.

11 The balance of benefits and detriments

- 11.1 After consideration of the information provided by the TFCA and interested parties, the ACCC is concerned that, given the lack of commonality between forest contractors in terms of their business set ups, size and capabilities, and the differing requirements of the wood companies for forest contractor services, the proposed collective bargaining arrangements, if given effect to, have the potential to result in a loss of efficiency by inappropriately standardising work practices.
- 11.2 The ACCC is also concerned that there is scope for cross representation between the proposed collective bargaining groups which may serve to further the anti-competitive detriments associated with the potential loss of efficiencies.
- 11.3 The ACCC is concerned that, on balance, the proposed collective bargaining arrangements are likely to generate a level of anti-competitive detriment which, while not of substantial weight, is also not insignificant.
- 11.4 The TFCA has submitted that a number of benefits to the public would flow from the proposed collective bargaining arrangements. Having considered the information provided to it, the ACCC considers that, on balance, the potential benefits to the public of the TFCA's proposed arrangement are likely to be small. In particular the ACCC is concerned that, given the circumstances presented, the arrangements are unlikely to result in transaction costs savings, nor are they likely to improve the effectiveness of the input of forest contractors into their contracts.
- 11.5 Having considered the information provided by the TFCA and interested parties, the ACCC is of the view that the likely benefits to the public of the proposed collective bargaining arrangements would not outweigh their potential anti-competitive effect. The ACCC considers that, while the use of conditions may serve to lessen the anti-competitive detriment of the arrangements to some extent, particularly with regards to concerns over cross-representation, the level of public benefit that may arise from the proposed arrangements is still likely to be insufficient to outweigh the remaining detriment. Accordingly the ACCC does not propose to grant authorisation to the TFCA's application.

12 The determination

The applications

12.1 On 30 June 2005, the TFCA, on behalf of its members, lodged two applications for authorisation pursuant to section 88(1) of the TPA for authorisations A90973 and A90974.

12.2 Application A90974 seeks:

- to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or may have the likely effect, of substantially lessening competition within the meaning of section 45 of the TPA and
- to give effect to a provision of a contract, arrangement or understanding where the provision has, or may have, the effect of substantially lessening competition within the meaning of section 45 of the TPA.

12.3 The TFCA has withdrawn application for authorisation A90973.

12.4 The TFCA is seeking the authorisations to on behalf of its members that provide silviculture, harvesting or transport services to at least one of the following wood companies:

- Gunns Limited
- Forestry Tasmania
- Forest Enterprises Australia Limited
- Rayonier Limited or
- Norske Scog

12.5 Specifically, the TFCA seeks to form groups of forest contractors to collectively negotiate the terms and conditions of contracts between its members and the wood companies that contract their services. The TFCA does not intend to collectively negotiate the price paid for such services by the wood companies.

Statutory test

12.6 For the reasons outlined in this draft determination, the ACCC is not satisfied that in all circumstances the making of contracts and giving effect to the provisions of the proposed collective bargaining arrangements for which authorisation A90974 is sought under section 88(1) of the TPA:

- would be likely to result in a benefit to the public and

- that benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the proposed arrangements

Decision

12.7 Pursuant to section 88 of the TPA and the statutory tests outlined in that section, the ACCC denies authorisation to application A90974.

Effective date of the determination

12.8 This decision is subject to any application to the Australian Competition Tribunal for its review. This determination is made on 22 February 2006. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 16 March 2006.

Representations absent authorisation

- 12.9 The ACCC considers that industry associations, such as the TFCA, can play a valuable role in facilitating the exchange of information and discussing issues of common concern to participants in an industry. The ACCC supports such representations, particularly in respect of small businesses, when, for example, this is likely to lead to better informed markets.
- 12.10 The ACCC considers that, up to a certain point in the negotiation process, the TFCA contributing to the relationship between its members and wood companies does not necessarily give rise to concerns about possible contraventions of the *Trade Practices Act 1974*.
- 12.11 Indeed, an industry association such as the TFCA can represent and assist members in matters such as ensuring its members have access to appropriate legal and/or financial services, or even making representations to major suppliers in relation to issues of concern to members, for example safety issues, *without* the need for authorisation.