



Australian  
Competition &  
Consumer  
Commission

# **Draft** Determination

## **Applications for authorisation**

**lodged by**

**Softwood Tasmania Joint Venture**

in respect of

a joint venture agreement and related arrangements for planting, cultivating, harvesting, processing, marketing and selling softwood logs in Tasmania

**Date: 11 June 2009**

**Commissioners:** Kell  
Schaper  
Dimasi  
Willett

**Authorisation no.:** A91120-A91122

**Public Register no.:** C2009/462

## Summary

The ACCC proposes to grant authorisation to the relevant provisions of a joint venture agreement and related arrangements for the purpose of planting, cultivating, harvesting, processing, marketing and selling softwood logs in Tasmania. The ACCC proposes to grant authorisation for 10 years.

The Softwood Tasmania Joint Venture (STJV) has been operating since 1999. It was formed following a decision by Forestry Tasmania to sell down its interest in the softwood plantation it owned and managed.

The other joint venture participants are the Tasmanian Softwood Fund Pty Ltd and Southern Hemisphere Softwood Strategies, both of which are investment vehicles with a specified mandate to invest funds, on behalf of their investors, in forestry assets.

The joint venture assets are owned by Forestry Tasmania, Tasmanian Softwood Fund and Southern Hemisphere Softwood Strategies (JV Participants) as tenants in common, with each participant having a proportional interest in the products derived from harvested and processed softwood trees (Forest Products). Therefore, the JV Participants submit that as a matter of practical necessity their respective interests in softwood sawlogs must be sold to the same customers, in the same volumes, and on the same terms.

The JV Participants submit that Forestry Tasmania would not have had sufficient capital to make the investment in the softwood plantations that have occurred since the formation of the joint venture.

The ACCC accepts that the joint venture arrangements are likely to result in public benefits in the form of greater access to capital. The JV Participants claim this has led to the improved management and operation of the joint venture assets and has created greater consistency in supply, increased sales and the continued growth and development of the forestry assets.

The ACCC considers that authorisation of the arrangements provides certainty that the joint venture as structured may continue, which in turn enables these benefits to continue to be achieved.

The ACCC considers that any public detriments likely to result from the joint venture arrangements are minimal. The ACCC considers that pricing of sawlogs by the JV Participants is constrained by the pricing of downstream products which are traded both nationally and internationally.

On balance, the ACCC considers the likely public benefits that will result will outweigh any public detriments and the ACCC proposes to authorise the arrangements for 10 years. The ACCC is now seeking further submissions in relation to this draft determination prior to making a final decision. The applicants and interested parties may also request that a conference be held to make oral submissions on the draft determination.

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## List of abbreviations

STJV	Softwood Tasmania Joint Venture
Operating Agreement	Joint Venture Operating Agreement
The Deed	Asset Sale and Crop Transfer Deed
GMORR	GMO Renewable Resources
JV Participants	Forestry Tasmania, Tasmania Softwood Fund Pty Ltd and Southern Hemisphere Softwood Strategies
Manager	Timberlands Pacific Pty Ltd
Operator	Softwood Tasmania (Operator) Pty Ltd
Investment Vehicles	Tasmania Softwood Fund and Southern Hemisphere Softwood Strategies
Forest Products	Products derived from harvested and processed softwood trees owned by the JV Participants
The Act	Trade Practices Act 1974

# 1. Introduction

## Authorisation

- 1.1 The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act 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 Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an ‘authorisation’.
- 1.3 The ACCC may ‘authorise’ businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.4 The ACCC conducts a public consultation process when it receives 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.
- 1.5 After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.
- 1.6 Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.
- 1.7 The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, 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 benefit to the public or reduce the public detriment.

## The applications for authorisation

- 1.8 On 17 February 2009, Forestry Tasmania, Tasmania Softwood Fund Pty Ltd and Southern Hemisphere Softwood Strategies (JV Participants) in their capacity as participants in the Softwood Tasmania Joint Venture (STJV) lodged applications for authorisations A91120 – A91122 with the ACCC.
- 1.9 The JV Participants are seeking authorisation for the relevant provisions of a joint venture agreement and related arrangements for planting, cultivating, harvesting, processing, marketing and selling softwood logs in Tasmania.

1.10 The JV Participants are seeking authorisation for 20 years.

## **Chronology**

1.11 Table 1.1 provides a chronology of significant dates in the consideration of this application.

**Table 1.1: Chronology of application for authorisation A91120 – A91122**

<b>DATE</b>	<b>ACTION</b>
<b>17 February 2009</b>	Lodgement of application and supporting submission.
<b>26 February 2009</b>	Public consultation process begins.
<b>20 March 2009</b>	Closing date for submissions from interested parties.
<b>6 April 2009</b>	Meeting with GMORR on behalf of the JV Participants
<b>11 June 2009</b>	Draft determination issued
<b>25 June 2009</b>	Deadline to request a pre-decision conference and to provide submissions in response to the draft determination.
<b>July 2009</b>	Pre-decision conference, if called.

## 2. Background to the applications

### The applicants

#### *Forestry Tasmania*

- 2.1 Forestry Tasmania is a corporation operating as a government business enterprise under the Government Business Enterprises Act 1995 (TAS) and is wholly owned by the State Government of Tasmania. Forestry Tasmania is responsible for the management of 1.5 million hectares of state forest land, comprising approximately 39% of Tasmania's forests. About half the forest managed by Forestry Tasmania is available for sustainable timber production.<sup>1</sup>

#### *Southern Hemisphere Softwood Strategies and Tasmania Softwood Fund*

- 2.2 Southern Hemisphere Softwood Strategies and Tasmania Softwood Fund (Investment Vehicles) represents discreet investors operating according to specified investment mandates.

#### *The Softwood Tasmania Joint Venture*

- 2.3 The STJV was established in 1999 for the purpose of planting, cultivating and processing softwood trees in Tasmania, with a view to enabling the Participants to market and sell their interest in the Forest Products.
- 2.4 The STJV currently controls a total of 60,000 hectares of softwood plantations. The output of Forest Products produced from the STJV assets is currently approximately 600,000 tonnes per annum and is predicted to increase to about one million tonnes by 2015.
- 2.5 The STJV is responsible for the management of the land and growing of new trees. The STJV does not supply timber products. Rather, saw logs produced by the STJV are sold to mills to produce timber.
- 2.6 The STJV was established following a decision by Forestry Tasmania to sell down its interests in the joint venture assets by 50%. This decision was prompted by a desire to bring a more experienced and commercially focused approach to the planting, cultivating and processing of its softwood trees in Tasmania, and thereby realise the full economic potential of the forestry assets.
- 2.7 The joint venture assets are owned by the Participants as tenants in common. The respective interests are:
- Forestry Tasmania - 50%
  - Southern Hemisphere Softwood Strategies - 27%
  - Tasmania Softwood Fund - 23%

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<sup>1</sup> Forestry Tasmania website, *About Us*. [www.forestrytas.com.au/about-us](http://www.forestrytas.com.au/about-us) (accessed February 2009)

- 2.8 Prior to the establishment of the STJV, Forestry Tasmania held all of the assets (that have subsequently become the joint venture assets) and had the sole responsibility for the management and marketing of the joint venture assets.
- 2.9 The JV Participants formed the separate company, Softwood Tasmania (Operator) Pty Ltd (Operator) for the purpose of managing and operating the joint venture.
- 2.10 Timberlands Pacific Pty Ltd (Manager) is currently appointed as the manager of the STJV assets. Timberlands is a sister company to the New Zealand based forestry management company Timberlands Limited. Timberlands manages large forest estates and market forest products in Australia.<sup>2</sup> As Manager, Timberlands is responsible for the planting, cultivating and harvesting of the softwood plantations.

## The industry

- 2.11 Forests contain two major types of wood – softwood and hardwood. Softwood logs are sold to sawmills for processing into softwood timber which is used mainly as a structural component of house frames. Most hardwood sawn timber is used for flooring, decking, joinery, furniture and similar applications where particular appearances or colours are required, or for engineering and architectural applications that demand particular strength, hardness and durability.<sup>3</sup>
- 2.12 In general, four generic grades of logs can be produced from each tree, namely pruned logs (high grade), structural logs (for use in building), utility logs and pulp logs (paper, chipboard). Every tree generally produces some of each grade.
- 2.13 Almost half of Tasmania’s land mass is covered by forest, of which approximately 93% is native forest and seven percent is plantation forest.<sup>4</sup> Currently, 47% of Tasmania's native forests are reserved.<sup>5</sup>
- 2.14 Forestry is one of the four main industries in Tasmania, with an annual turnover of \$1.4 to \$1.6 billion. The forest industry provides more than 6,000 direct jobs, 20% of Tasmania's manufacturing employment and more than 25% of manufacturing wages.<sup>6</sup>
- 2.15 Privately owned forests make up about 30% of the total forest area of the State. The private forest harvest in 2007-08 was 2.8 million tonnes, which accounted for approximately 42.5% of total timber production in Tasmania during that period.<sup>7</sup>
- 2.16 As noted, Forestry Tasmania has responsibility for the management of 1.5 million hectares of public forest land. Under legislation, Forestry Tasmania is required to manage and produce around 300,000 cubic meters of high quality saw and veneer logs annually.

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<sup>2</sup> Timberlands Limited Website *Company Profile*. [www.tll.co.nz/pacific](http://www.tll.co.nz/pacific) (accessed March 2009)

<sup>3</sup> IRIS website, *Forestry*. [www.iris.tas.gov.au/resource\\_industry/forestry](http://www.iris.tas.gov.au/resource_industry/forestry) (accessed February 2009)

<sup>4</sup> *ibid*

<sup>5</sup> Forest Practices Authority (2007). *State of the Forests, Tasmania 2006*, Department of Agriculture, Fisheries and Forestry

<sup>6</sup> IRIS website, *Forestry*. [www.iris.tas.gov.au/resource\\_industry/forestry](http://www.iris.tas.gov.au/resource_industry/forestry) (accessed February 2009)

<sup>7</sup> *ibid*

### **3. Applications for authorisation**

- 3.1 The JV Participants are seeking authorisation for the relevant provisions of a joint venture agreement and related arrangements for the planting, cultivating, harvesting, processing, marketing and selling of softwood logs in Tasmania.
- 3.2 The JV Participants entered into a series of arrangements to establish and give effect to the joint venture. The relevant arrangements are contained within the:
- Asset Sale and Crop Transfer Deed (The Deed)
  - Joint Venture Operating Agreement (Operating Agreement)
  - Management Agreement
  - Sales Agency Agreement

#### *Asset Sale and Crop Transfer Deed*

- 3.3 The Deed was made between Forestry Tasmania, Tasmanian Softwood Fund and GMO Renewable Resources (GMORR) as trustee for Southern Hemisphere Softwood Strategies, in contemplation of the establishment of the joint venture.
- 3.4 The Deed provided for the transfer by Forestry Tasmania of the 50% interest in the joint venture assets to the Investment Vehicles.
- 3.5 The Deed stated that the JV Participants intended to associate themselves in the STJV by entering into the Operating Agreement.

#### *Joint Venture Operating Agreement*

- 3.6 The Operating Agreement was entered into by the JV Participants and the Operator and:
- appointed the Operator to manage and operate the joint venture of behalf of the JV Participants
  - set out the rights and obligations of the Participants under the STJV.
- 3.7 The joint venture assets are owned by the JV Participants as tenants in common (clause 6.1) and the Participants appointed the Operator to manage and operate the STJV on their behalf (clause 9.1).
- 3.8 Each Participant, in proportion to its participating interest, takes its share of all softwood trees that are cultivated, harvested and processed on their behalf, and separately disposes of its share of the Forest Products (Clause 7.4).

- 3.9 Further, each JV Participant agreed that, with respect to the disposal of its share of Forest Products:
- they would do so pursuant to the form of Sales Agency Agreement annexed to the Operating Agreement (clause 19.1)
  - the Manager would be appointed as the sale agent for each of the Participants (clause 19.2) and
  - they would each instruct their agent to sell Forest Products at market prices (clause 19.3).

#### *Management Agreement*

- 3.10 The Operating Agreement provided for the Operator to enter into the Management Agreement with the Manager, pursuant to which the Manager was appointed to manage, plant, cultivate and harvest the softwood plantations.
- 3.11 The JV Participants were also parties to the Management Agreement, pursuant to which each approved the appointment of the Manager.
- 3.12 The Management Agreement was conditional on each of the Participants and the Manager entering into the Sales Agency Agreements.

#### *Sales Agency Agreement*

- 3.13 Each of the Participants entered into a Sales Agency Agreement with the Manager. The key elements of each Sales Agency Agreements are:
- the Manager was appointed as the exclusive agent of each Participant to sell their interest in the Forest Products (clause 2.1)
  - on an annual basis, the Manager has to provide each Participant a Sales Budget and Marketing Plan, which sets out sales forecasts (clause 3.1)
  - any proposed amendment to the Sales Budget and Marketing Plan must be agreed to by each of the Participants (clause 3.1) and
  - the Manager seeks to implement the Sales Budget and Marketing Plan by entering into sales contacts on behalf of the Participants (clause 4.1).
- 3.14 Each Sales Agency Agreement was conditional on each of the JV Participants entering into a Sales Agency Agreement with the Manager.

#### **Reasons for the applications**

- 3.15 While the JV Participants do not consider that any provision of the joint venture arrangements give rise to any contraventions of the Act, the applications are made for the reason that it is possible that, on a technical construction of the provisions of the Act, various provisions of the joint venture arrangements (and consequential sales arrangements) might constitute a contravention(s) of the Act.

3.16 In this regard the ACCC notes that legal proceedings were commenced by Auspine Limited against the JV Participants and other parties in respect of alleged breaches of the Act. The proceedings were discontinued after a commercial resolution between Auspine and the JV Participants.

3.17 To remove any legal risk the JV Participants have made the following applications:

#### **Exclusionary provisions (A91120)**

3.18 The JV Participants have identified the following as provisions that may give rise to an exclusionary provision:

- **Operating Agreement:** to the extent that the Operating Agreement contemplated, and established the basis for, the giving effect to the provisions of the Management and Sales Agency Agreements, its relevant provision might constitute an exclusionary provision.
- **Management Agreement:** in agreeing to appoint the Manager as manager of each of their interests in the joint venture assets, the JV Participants might be giving effect to an exclusionary provision.
- **Sales Agency Agreement:** in agreeing that each of the Participants would:
  - appoint the Manager to sell its share of the Forest Products and
  - only sell its share of the Forest Products to customers acquiring the other Participants' shares in the Forest Products

each of the Participants might be giving effect to an exclusionary provision.

#### **Agreements affecting competition (A91121)**

3.19 The JV Participants have identified that the relevant provisions of the Operating Agreement pursuant to which each of the Participants agree to sell their shares in the Forest Products on the same terms and conditions, including as to price, might be determined to substantially lessen competition pursuant to the operation of Section 45A of the Act.

3.20 Further, the JV Participants have identified that the combination of agreements comprising the STJV might have the effect of substantially lessening competition in relation to the supply and acquisition of softwood sawlog.

#### **Exclusive dealing (A91122)**

*Exclusive dealing (other than third line forcing)*

3.21 The JV Participants have identified that pursuant to the Management Agreement, the Participants have each appointed the Manager as their exclusive sales agent. The supply by the Manager of management services to the STJV on condition that the JV Participants will not acquire management services from other managers may constitute the practice of exclusive dealing in contravention of section 47 of the Act.

*Third line forcing*

- 3.22 The JV Participants have identified that in giving effect to the joint venture arrangements may give rise to third line forcing under subsections 47(6) and (7) in that a customer may not purchase a Participant's interest in a Forest Product unless they also acquire the interests of the other Participants in that Forest Product.

## 4. Submissions received by the ACCC

- 4.1 The ACCC tests the claims made by applicants in support of applications for authorisation through an open and transparent public consultation process. To this end the ACCC aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application and the claims made in support of an application.
- 4.2 The JV Participants submit that as no two trees have the same characteristics it was not possible for Forestry Tasmania to facilitate investments in the forestry assets unless the investments took the form of a joint venture, with the JV Participants owning the forestry assets as tenants in common rather than as specific parcels outright. As a result, and as a matter of commercial and logistical practicality, it was necessary for the respective JV Participants to have joint management, sales and marketing arrangements.
- 4.3 Further, the JV Participants submit that there are clear efficiency advantages in managing the joint venture assets jointly. It would be highly inefficient for each of the Participants to separately manage the planting, harvesting, processing, storage and sorting of trees, with each using different service providers, facilities and equipment.
- 4.4 The JV Participants submit there is no public detriment arising from the STJV. In particular, the JV Participants submit they are not in competition with each other. Prior to the STJV Forestry Tasmania owned 100% of the assets. The Investment Vehicles were established solely for the purpose of the joint venture arrangements and would not exist but for joint venture arrangements.
- 4.5 The ACCC sought submissions from around thirty interested parties potentially affected by the application, including commonwealth and state governments, industry associations and Tasmanian timber companies. The ACCC received one public submission from Timber Communities Australia (TCA).
- 4.6 TCA submits that the joint venture has resulted in “increased investment, increased employment the enhancement of scale opportunities leading to further investment and employment, improved management across the full spectrum of management activities including those of neighbour relations and community engagement”.<sup>8</sup>
- 4.7 The views of the JV Participants and TCA are discussed in the ACCC’s evaluation in Chapter 6 of this draft determination. Copies of public submissions are available from the ACCC website ([www.accc.gov.au](http://www.accc.gov.au)) by following the ‘Public Registers’ and ‘Authorisations Public Registers’ links.

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<sup>8</sup> TCA submission to the ACCC, March 2009

## **5. The net public benefit test**

- 5.1 The ACCC may only grant authorisation where the relevant test in section 90 of the Act is satisfied.

### **Application A91120**

- 5.2 The JV Participants lodged application for authorisation A91120 under section 88(1) of the Act to give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act.
- 5.3 The relevant test is found in section 90(8) of the Act. Section 90(8) states that the ACCC shall not authorise exclusive dealing conduct unless it is satisfied in all the circumstances that such conduct would result or be likely to result in such a benefit to the public that the conduct should be authorised.

### **Application A91121**

- 5.4 The JV Participants lodged application for authorisation A91121 under section 88(1) of the Act give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act.
- 5.5 The relevant test for this application is found in section 90(7) of the Act. In respect of the giving effect to the arrangements, section 90(7) of the Act states that the ACCC shall not authorise a provision of a contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
- the provision of the contract, arrangement or understanding would result, or 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 has resulted, or is likely to result, from giving effect to the provision.

### **Application A91122**

- 5.6 The JV Participants lodged application A91122 under section 88(8) of the Act to engage in conduct that constitutes or may constitute, exclusive dealing.
- 5.7 The relevant test for this application is found in section 90(8) of the Act. Section 90(8) states that the ACCC shall not authorise exclusive dealing conduct unless it is satisfied in all the circumstances that such conduct would result or be likely to result in such a benefit to the public that the conduct should be authorised.

## Application of the tests

- 5.8 There is some variation in the language in the Act, particularly between the tests in sections 90(6)<sup>9</sup>/90(7) and 90(8).
- 5.9 The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition but the test under section 90(8) is not so limited.<sup>10</sup>
- 5.10 However, the Tribunal has previously stated that regarding the test under section 90(6):
- [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.<sup>11</sup>
- 5.11 Consequently, when applying either test, the ACCC can take most, if not all, public detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.
- 5.12 Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7).
- 5.13 The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition.<sup>12</sup>
- 5.14 However, the Tribunal has previously stated that regarding the test under section 90(6):
- [the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.<sup>13</sup>
- 5.15 Consequently, given the similarity of wording between section 90(6) and 90(7), when applying these tests the ACCC can take most, if not all, detriments likely to result from

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<sup>9</sup> The JV Participants have not sought authorisation for the *making* of the relevant agreements. Under s. 88(12) the Commission does not have power to grant an authorisation to make a contract or arrangement or to arrive at an understanding if the contract, arrangement or understanding has been made before the Commission makes a determination in respect of the application. Section 90(6) contains the test for authorisation in respect of the making and giving effect to a provision of a *proposed* contract, arrangement or understanding.

<sup>10</sup> *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT9 at paragraph 67.

<sup>11</sup> *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

<sup>12</sup> *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] ACompT9 at paragraph 67.

<sup>13</sup> *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

## **Definition of public benefit and public detriment**

5.16 Public benefit is not defined in the Act. 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.<sup>14</sup>

5.17 Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

...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.<sup>15</sup>

## **Future with-and-without test**

5.18 The ACCC applies the ‘future with-and-without test’ established by the Tribunal to identify and weigh the public benefit and public detriment generated by arrangements for which authorisation has been sought.<sup>16</sup>

5.19 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 predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the ‘counterfactual’.

## **Length of authorisation**

5.20 The ACCC can grant authorisation for a limited period of time.<sup>17</sup>

## **Conditions**

5.21 The Act also allows the ACCC to grant authorisation subject to conditions.<sup>18</sup>

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<sup>14</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677. See also Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242.

<sup>15</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

<sup>16</sup> Australian Performing Rights Association (1999) ATPR 41-701 at 42,936. See also for example: Australian Association of Pathology Practices Incorporated (2004) ATPR 41-985 at 48,556; Re Media Council of Australia (No.2) (1987) ATPR 40-774 at 48,419.

<sup>17</sup> Section 91(1).

<sup>18</sup> Section 91(3).

## Future and other parties

5.22 Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

- persons who become party to the contract, arrangement or understanding at some time in the future<sup>19</sup>
- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.<sup>20</sup>

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<sup>19</sup> Section 88(10).

<sup>20</sup> Section 88(6).

## 6. ACCC evaluation

6.1 The ACCC's evaluation of the applications for authorisation is in accordance with the net public benefit test outlined in Chapter 5 of this draft determination. As required by the test, it is necessary for the ACCC to assess the likely public benefits and detriments flowing from the joint venture arrangements.

### The market

6.2 The first step in assessing the effect of the conduct for which authorisation is sought is to consider the relevant market(s) affected by that conduct.

6.3 The JV Participants submit the relevant markets are:

- the supply and acquisition of softwood and hardwood sawlogs that includes Tasmania and parts of Asia, particularly Korea.
- the supply of forestry managements services in Australia

6.4 No submissions were received from interested parties on the relevant markets.

#### *Supply and acquisition of softwood and hardwood sawlogs*

6.5 The JV Participants advise that softwood and hardwood sawlogs are processed in timber mills to produce softwood and hardwood timber. While these timbers have different functional applications, the JV Participants submit that the sawlogs are substitutable from the perspective of the mill operators and forest owners. The JV Participants submit that the forest owner can replace a harvested crop (plantation or native forest) with hardwood or softwood trees and the time from planting to harvesting is similar for hardwood and softwood.

6.6 Similarly, newer mills can process both hardwood and softwood sawlogs, such as Forestry Enterprise Australia's (FEA) new Tasmanian mill. Further, the JV Participants submit that in the case of older purpose built mills it is feasible to invest in technology to enable the substitution of input material, as in the case of FEA's original saw mill in Tasmania.

6.7 Sawlogs are exclusively purchased by sawmills. Given the weight and size of sawlogs, haulage is a very significant component of the costs faced by sawmills. As a result, sawmills tend to be established in reasonable proximity to forests. The JV Participants submit that this means it would not be competitive to supply sawlogs from Tasmania to mainland Australia, as the costs of transport from the importing port to the mills would make the price of the Tasmanian sawlogs prohibitive.

6.8 However, the JV Participants submit the same proposition does not hold true with respect to East Asia. East Asia imports a significant proportion of forest products and, as such, accepts a significantly higher delivered log cost than Australian softwood sawmills. This price differential covers the large sea transport costs.

- 6.9 While the STJV is focused on supplying the Tasmanian timber industry and is not currently exporting any sawlogs, it anticipates that it will make sales to Asia from time to time. Following its inception, the joint venture has sold more than 100,000 tonnes of sawlogs to Korea annually.
- 6.10 Forestry Tasmania is the largest owner of softwood plantations in Tasmania, controlling approximately 60,000 hectares out of approximately 75,000 hectares in Tasmania.<sup>21</sup> Other softwood plantation owners in Tasmania are:
- **Gunns Limited:** is Australia's largest private plantation owner/manager. Gunns has extensive hardwood plantations in Tasmania with some minor softwood plantations. Gunns operates five sawmills (softwood and hardwood), a veneer factory, four processing facilities and loading ports around Tasmania.<sup>22</sup>
  - **Norske Skog:** is a world leading producer of newsprint and magazine paper. Norske Skog owns the Boyer mill in Tasmania which produces around 290,000 tonnes of newsprint and related grades annually, which is about 40% of Australian consumption. Sawlogs, export chip and veneer are also produced from plantations managed by Norske Skog.<sup>23</sup>

*Forestry management services*

- 6.11 The JV Participants submit that every forestry asset/plantation needs to be managed, from the planning stage through to the harvest. The services are almost always provided by an entity related to the asset owner (or by the asset owner itself). Where assets are owned by a joint venture it is common for the joint venture to obtain forestry services from one of the joint venture participants (or an entity related to one of them).<sup>24</sup>
- 6.12 The JV Participants submit that the key asset owners and therefore providers of forestry management services are:

<b>Public Sector</b>	<b>Private Sector</b>
Forestry Plantations Queensland	Hancock Victorian Plantations
Forest NSW	Auspine Limited
VicForests	Murray River Forest Pty Limited
Forestry SA	Gunns Ltd
Forest Products Commission (WA)	Forestry Enterprises Australia
Forestry Tasmania	Great Southern Limited
	ITC Limited
	Forestry Corp
	Timberlands Pacific Pty Ltd
	P F Olsen (Aus) Pty Limited

<sup>21</sup> BIS Shrapnel Forestry Group, *Sawn Timber in Australia 2002-2016*, 2002, p35

<sup>22</sup> IRIS website, *Forestry*. [www.iris.tas.gov.au/resource\\_industry/forestry](http://www.iris.tas.gov.au/resource_industry/forestry) (accessed February 2009)

<sup>23</sup> *ibid*

<sup>24</sup> STJV submission to the ACCC, February 2009, p12

### *ACCC's view*

6.13 The ACCC does not consider it necessary for the purpose of assessing these applications to precisely define the relevant market/s. However the ACCC notes that the STJV only deals in softwood sawlogs.

6.14 Therefore for the purpose of assessing these applications, the ACCC considers the relevant areas of competition affected by the proposed conduct to be the:

- supply of softwood sawlogs in Tasmania and
- supply of forestry management services in Tasmania.

### **The counterfactual**

6.15 As noted in Chapter 5 of this draft determination, in order to identify and measure the public benefit and public detriment generated by conduct, the ACCC applies the 'future with-and-without test'.

6.16 The JV Participants submit that in the absence of the joint venture arrangements:

- the Investment Vehicles would cease to have an interest in the joint venture assets and would not be able to be involved in the production and sale of Forest Products derived from the joint venture assets
- the Investment Vehicles would have no other involvement in the forestry industry in Tasmania, as their investments in the STJV represents the minimum commercial scale for a viable forestry investment, and no other parcels of softwood forest of similar or greater size exist in Tasmania
- the joint venture assets would revert back to Forestry Tasmania as the sole owner
- Forestry Tasmania considered that it would not have had sufficient capital to make the investment in the softwood plantations that have occurred since the formation of the joint venture. Forestry Tasmania, of itself, would not be able to develop and exploit the joint venture assets to their full potential when it was the sole owner of those assets prior to the formation of the STJV
- there would be significant uncertainty about the management and development of the joint venture assets, and the ongoing supply of Forest Products produced from the joint venture assets.

6.17 The JV Participants submit that without authorisation, the counterfactual situation is that the STJV would continue to operate. This is essentially because the JV Participants have lodged the applications out of an abundance of caution and they do not consider that they are breaching the Act.

6.18 The ACCC agrees that in the absence of authorisation a form of the STJV is likely to continue to operate. The ACCC has not considered whether or not it would be feasible for the Investment Vehicles to invest in other parcels of softwood forest.

6.19 However, the continuation of the STJV in its current form is not without some risk. The ACCC notes that in August 2007, Auspine Limited commenced proceedings against

the JV Participants and FEA in respect of alleged breaches of the Act following the rejection of Auspine's bid for a long-term supply contract of softwood sawlog. The proceedings were discontinued after a commercial resolution between Auspine and the JV Participants.

6.20 While it may be likely that some form of the joint venture arrangement continues absent authorisation, the ACCC also notes the advice by the JV Participants that any material alteration to the essential features of the joint venture would result in a strong likelihood that they would be forced to withdraw from the joint venture. The JV Participants submit that the essential features for a practical and commercially rational joint venture are:

- common ownership of the joint venture assets
- common management of the joint venture assets
- a single sales agent for all of the JV Participants
- agreement on, and adherence to, a common marketing plan and
- each STJV Participant entering into joint sales arrangements with the same customers for their respective interest in the Forest Products.

6.21 The ACCC notes that the Operating Agreement provides that, upon termination of the STJV the interest of each Participant in the STJV assets, other than Forestry Tasmania, will revert to Forestry Tasmania. The ACCC considers therefore that if some form of the joint venture is not able to continue to operate absent authorisation, the likely counterfactual is Forestry Tasmania reverting to the single owner and manager of the assets rather than three separate entities individually owning and managing a share of the assets.

## **Public benefit**

6.22 The JV Participants submit that the joint venture arrangements have resulted, and will continue to result, in the following public benefits:

- Significant initial and ongoing investments in the development and maintenance of the joint venture assets, as evidenced by an increase in the area of the STJV's softwood plantations from 38,000 hectares to 60,000 hectares, for example.
- Current output of Forest Products produced from the joint venture assets is 600,000 tonnes and is predicted to increase to about 1 million tonnes by 2015.
- A more commercial approach to the supply of Forest Products leading to greater consistency and stability of the returns derived from the softwood plantations. For example, new contracts have provided for regular sales, as opposed to seasonal sales, and provide greater certainty for buyers and sellers.
- Increased domestic sales, generating greater local employment.
- The ongoing operation of a range of softwood processors in Tasmania as a result of the supply of Forest Products from the joint venture assets. This includes the new

FEA mill (representing an investment of approximately \$72 million), the re-investment in the Branxholm sawmill, the DIM particle board plant and the Norske Skog pulp and paper plant. The STJV may also invest in the probable re-configuration on one of the Norske Skog pulp and paper plants into a softwood line.

- 6.23 The JV Participants submit that without the joint venture as currently structured the Participants would have been unlikely to enter into the arrangements in the first place and therefore these benefits would not have been achieved. Further, although the STJV has been operating since 1999, the JV Participants claim that authorisation will provide them with the certainty to continue in the current form.
- 6.24 The ACCC received only one interested party submission in response to the applications for authorisation from Timber Communities Australia Ltd (TCA), a not for profit non government community organisation with the role of ensuring community interests are properly and fully considered in decisions impacting timber communities. The TCA submits that the joint venture has resulted in public benefit with the potential for extensive further public benefit from factors such as increased investment, increased employment, the enhancement of scale opportunities, improved management across the full spectrum of management activities including those of neighbour relations and community engagement.
- 6.25 The ACCC accepts that the joint venture arrangements have resulted in initial and ongoing access to capital. It appears that this has led to the improved management and operation of the joint venture assets leading to greater consistency in supply which has resulted in continued growth and development of the assets, as claimed by the JV Participants.
- 6.26 The ACCC accepts that certainty of supply is likely to be an important factor in decisions by mills or pulp and paper plants to expand, invest and therefore create increased employment. The extent to which the growth and consistency in the supply of softwood by the STJV has contributed to these decisions is also likely to be a public benefit.
- 6.27 The ACCC considers that authorisation of the arrangements provides certainty that the joint venture as structured may continue which will enable these benefits to also continue to be achieved.

### **ACCC conclusion on public benefits**

- 6.28 The ACCC accepts that the STJV has led to increased access to capital, which appears to have resulted in the improved management of the joint venture assets.

### **Public detriment**

- 6.29 The JV Participants believe the STJV will not result in public detriment and the joint venture cannot have an adverse impact on competition in any market because:
- prior to the formation of the STJV, Forestry Tasmania was the sole supplier of Forest Products produced from the joint venture assets

- but for the joint venture arrangements, none of the Participants would be, or would have likely to have been, in competition with each other.

### **Supply of softwood logs**

#### *Arrangements involving agreements on price/affecting competition*

- 6.30 Under the Operating Agreement the JV Participants agree to sell their shares in the Forest Products on the same terms and conditions, including as to price. The JV Participants claim that the provisions relating to the sale by each participant of its share in the Forest Products were necessary to give effect to the joint venture arrangements.
- 6.31 The ACCC considers that there are a number of factors which are likely to constrain the prices able to be set by the STJV.
- 6.32 In particular, the ACCC notes the price for sawlogs is derived from the price for end products, such as sawn timber, plywood, veneer, particleboard and paper and paper products. The prices for the Forest Products from the STJV are therefore constrained to some degree by competition faced by its customers (for example the mills and paper processing plants identified in paragraph 6.35) in downstream markets.
- 6.33 Further, the end products are exposed to international (and interstate) trade.<sup>25</sup> Therefore in order to secure supply contracts the STJV prices must remain in line with imported products including those of imported downstream end products.
- 6.34 In this regard the ACCC notes that the contracts for the supply of Forest Products to customers of the STJV are generally long term and prices are set through direct negotiation with mills, through a tender process or through auction. Uncontracted volume can be sold on the spot market.
- 6.35 The ACCC also notes that the main purchasers of product derived from the STJV are Gunns Limited, FEA and Norske Skog - which are vertically integrated and own/manage plantations. Their ability to self supply to a degree may provide some countervailing power in price negotiations with the STJV. Further, the JV Participants submit that while sawlogs are not typically exported from Tasmania, the demand for Tasmanian saw logs in Asia means that the alternative pricing available to Tasmanian producers provides guidance as to the prevailing price in Tasmania. The ACCC notes that this may operate more as a price floor.
- 6.36 For these reasons the ACCC considers that the pricing of Forest Products by the JV Participants is constrained by the pricing of downstream products and is set with reference to prices for internationally traded end products.

#### *Arrangements restricting supply*

- 6.37 By virtue of the Sales Agency Agreement the JV Participants agree that they will only sell their share of the Forest Products to customers that also acquire the other Participants' shares in the Forest Products. The JV Participants submit that this may result in the giving effect to an exclusionary provision and third line forcing conduct.

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<sup>25</sup> BIS Shrapnel Forestry Group, *Sawn Timber in Australia 2002-2016*, 2002, p27

- 6.38 The ACCC considers that the public detriments, including anticompetitive effect, from such restrictions are likely to be minimal. While customers are required to purchase the Forest Products from all three JV Participants, as noted, long term supply contracts linked to international prices and competition in downstream markets are likely to constrain the pricing by the Manager/JV Participants.
- 6.39 Further, the joint venture arrangements do not restrict or limit the number or types of customers who may purchase Forest Products from the STJV, subject to contracted volume.
- 6.40 Therefore the ACCC considers the detriments from the agreement between the JV Participants that each will only sell its share of the Forest Products to customers acquiring the other Participants' shares in the Forest Products are likely to be minimal.

### **Forestry management services**

- 6.41 By virtue of the Management Agreement and the Sales Agency Agreement the JV Participants have each appointed the Manager as their exclusive sales agent to sell their shares in the Forest Products. The JV Participants have identified that this may give rise to exclusive dealing conduct and an exclusionary provision.
- 6.42 The current Manager for the STJV is Timberlands Pacific Pty Ltd, which is not related to any of the JV Participants. Timberlands Pacific is a sister company to the New Zealand owned forestry management company Timberlands Limited.
- 6.43 The services provided by the Manager involve all activities associated with the management of forestry and plantation assets, from planning and planting through to harvesting.
- 6.44 The JV Participants submit that forestry management services in Australia tend to be provided by an entity related to the asset owner rather than an independent supplier, as in the case of Timberlands Pacific.
- 6.45 The ACCC considers that the appointment of Timberlands Pacific as the exclusive Manager and sales agent for the STJV is unlikely to have a significant public detriment. Timberlands Pacific does not provide forest management services to any other owners of forestry assets in Tasmania/Australia.
- 6.46 Further, the ACCC notes that under the Management Agreement the services provided by the Manager can be terminated by either the STJV or the Manager in certain circumstances. The ACCC understands that previously the Manager for the STJV was Rayonier, which is an international forest products company operating in the USA and New Zealand.

### **ACCC conclusion on public detriments**

- 6.47 The ACCC considers that any public detriments likely to result from the joint venture arrangements are minimal.

## Balance of public benefit and detriment

6.48 The ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the STJV is likely to result in a public benefit that will outweigh any public detriment.

6.49 In the context of applying the net public benefit test at section 90(8)<sup>26</sup> of the Act, the Tribunal commented that:

... something more than a negligible benefit is required before the power to grant authorisation can be exercised.<sup>27</sup>

6.50 For the reasons outlined in this chapter, the ACCC is satisfied that the arrangements are likely to result in public benefits in the form of greater access to capital, resulting in the improved management, production and sales of softwood are likely to arise and that any public detriment is likely to be minimal.

6.51 Therefore on balance, the ACCC considers the public benefit that is likely to result will outweigh the public detriment likely to result.

## Length of authorisation

6.52 The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.

6.53 In this instance, the JV Participants have sought authorisation for 20 years.

6.54 The ACCC has granted authorisation for long periods of time, particularly where longer term contracts are necessary to underwrite investments.

6.55 The JV Participants submit that a longer term authorisation is necessary because:

- the investments require the “lockup” of capital for significant periods of time, resulting in a deferred return on investment. The joint venture currently plants trees knowing there will be no cash return until harvesting which is approximately 30 years away
- in the meantime the joint venture incurs ongoing costs associated with 30 years worth of annual maintenance expenditure, including silviculture, protection, management services and fire prevention
- ongoing investment decisions with respect to the replanting of forest rely upon certainty surrounding long term investment decisions
- as a result supply contracts with customers tend to be long term.

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<sup>26</sup> The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

<sup>27</sup> Re Application by Michael Jools, President of the NSW Taxi Drivers Association [2006] ACompT 5 at paragraph 22.

- 6.56 A longer term authorisation which makes it easier for the STJV to confidently enter into, and perform to, these longer term contracts also provides customers with the confidence they need to make capital investments in processing plants.
- 6.57 On the basis of this information, the ACCC proposes to grant authorisation for 10 years.

## 7. Draft determination

### The application

- 7.1 On 17 February 2009, the JV Participants lodged applications for authorisations A91120 - A91122 with the Australian Competition and Consumer Commission (the ACCC).
- 7.2 Broadly, the JV Participants are seeking authorisation to give effect to relevant provisions of a joint venture agreement and related arrangements for the planting, cultivating, harvesting, marketing and selling of softwood sawlogs.
- 7.3 Application A91120 was made using Form A of the Trade Practices Regulations 1974. The application was made under subsection 88 (1) of the Act to give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the Act. The relevant test is found in section 90(8) of the Act.
- 7.4 Application A91121 was made using Form B of the Trade Practices Regulations 1974. The application was made under subsection 88(1) of the Act to give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the Act. The relevant tests for this application are found in section 90(7) of the Act.
- 7.5 Application A91122 was made using Form E of the Trade Practices Regulation 1974. The application as made under subsection 88(8) of the Act to engage in conduct that constitutes or may constitute, exclusive dealing. The relevant test for this application is found in section 90(8) of the Act.

### The net public benefit test

- 7.6 For the reasons outlined in Chapter 6 of this draft determination, the ACCC considers that in all the circumstances the arrangements for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements.
- 7.7 Similarly, the ACCC is satisfied that the arrangements for which authorisation is sought are likely to result in such a benefit to the public that the arrangements should be allowed to take place.
- 7.8 The ACCC therefore **proposes to grant** authorisation to applications A91120 - A91122 for 10 years.

## **Conduct for which the ACCC proposes to grant authorisation**

7.9 The ACCC proposes to grant authorisation to the JV Participants to:

- give effect to the provisions of the Operating Agreement, Management Agreement and Sales Agency Agreement (**the Agreements**) to allow each of the JV Participants to agree to sell their interests in the Forest Products:
  - To the same customers (meaning that the interest of each of the Participants in that particular volume of Forest Products cannot be supplied to anyone else); and/or
  - On the same terms and conditions, including as to price;
- give effect to the provisions of the Agreements to allow the JV Participants to appoint the Manager as exclusive sales agent for the purposes of the Softwood Tasmania Joint Venture
- engage in conduct whereby each JV Participant:
  - appoints the Manager as its exclusive sales agent to sell its share of the Forest Products and
  - only sell its share of the Forest Products to customers who acquire the other JV Participants' shares in the Forest Products.

7.10 This draft determination is made on 11 June 2009.

### **Further submissions**

7.11 The ACCC will now seek further submissions from interested parties and the JV Participants. In addition, the applicant or any interested party may request that the ACCC hold a conference to discuss the draft determination, pursuant to section 90A of the Act.