



Draft Determination

Application for authorisation

lodged by

Morgan Sawmill Jamestown

in respect of

collective bargaining for logs from the Mount Lofty Ranges

Authorisation number: AA1000539

10 May 2021

Commissioners:

Rickard

Keogh

Court

Ridgeway

Brakey

Summary

The ACCC proposes to authorise Morgan Sawmill and other businesses that acquire unprocessed timber logs from ForestrySA (the Buying Group) to collectively negotiate terms and conditions (including price) concerning the supply of logs from the Mount Lofty Ranges in South Australia (the Proposed Conduct).

The ACCC considers that the Proposed Conduct is likely to result in public benefits including transaction cost savings; improved efficiency for businesses in the Buying Group; and increased domestic log processing. It is also likely to lead to lower input costs for businesses in the Buying Group, and result in lower prices for finished timber products for end consumers.

The ACCC notes the Proposed Conduct is likely to lead to some reduction in competition to acquire unprocessed timber logs from the Mount Lofty Ranges. The collective bargaining group is expected to initially comprise of four sawmills and a timber harvester (the Initial Group) who currently account for the majority of log sales from ForestrySA.

However, the ACCC considers it is unclear whether (and, if so, to what extent) this is likely to result in public detriment as:

- participation in the Buying Group will be voluntary for customers of ForestrySA and does not prevent participating businesses from also pursuing individual supply contracts with ForestrySA;
- ForestrySA will not be compelled to engage in the Buying Group's attempts at collective bargaining or accept any offer put to it;
- the Proposed Conduct would not permit the Buying Group to boycott ForestrySA;
- it is unlikely that the volume of log production in the Mount Lofty Ranges will decrease (especially in the short-to-medium term) even if there is a change in the terms and conditions upon which ForestrySA supplies to businesses within the Buying Group
- there are businesses outside the collective bargaining group (including exporters and other sawmills) who have acquired, and are likely to continue to compete to acquire, logs from ForestrySA; and
- the four sawmills in the Buying Group have no economically viable alternative to the Mount Lofty Ranges to source their timber, and therefore little or no ability to credibly threaten to cease or substantially reduce their purchases.

The ACCC considers that effective competition from businesses outside the Buying Group is a potentially important factor in ensuring the Proposed Conduct is likely to result in limited public detriment. The ACCC would want to be informed about any increase in the number of businesses comprising the Buying Group or participation of businesses that are not in the Initial Group so that it can consider whether that might constitute a material change of circumstances and warrant a review of the authorisation. For this reason, the ACCC proposes to impose a condition on this authorisation requiring Morgan Sawmill to notify it at least 30 days before any

business that is not a member of the Initial Group participates in the collective bargaining enabled by the authorisation.

Overall, the ACCC considers that the Proposed Conduct with the condition described above is likely to result in a public benefit and that this public benefit would outweigh any likely public detriment.

The ACCC proposes to grant authorisation to the Buying Group for 11 years. This period of authorisation allows for the negotiation of a log supply agreement of up to 10 years, where this is mutually beneficial to both a business in the Buying Group and ForestrySA. Morgan Sawmill requested a 20 year authorisation period, but the ACCC does not propose to authorise the proposed conduct for this period, as it considers it would be inappropriate for a new authorisation.

The ACCC invites submissions in relation to this draft determination by 24 May 2021 before making its final decision.

Morgan Sawmill also requested that the ACCC expand the scope of interim authorisation to permit the discussion of prices within the collective bargaining group. The ACCC has decided not to expand the scope of interim authorisation at this time.

On 12 February 2021, the ACCC granted a limited interim authorisation under subsection 91(2) of the Act permitting the formation of a collective bargaining group to negotiate certain terms and conditions with ForestrySA. The interim authorisation did not permit the group to discuss prices per grade of log, or enter into or give effect to log supply agreements with ForestrySA.

This interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

1. The application for authorisation

- 1.1. On 18 December 2020, Morgan Sawmill Jamestown¹ (**Morgan Sawmill**) lodged application for authorisation AA1000539 with the Australian Competition and Consumer Commission (the **ACCC**).
- 1.2. Morgan Sawmill is seeking authorisation for 20 years for itself and any other businesses that source unprocessed timber from ForestrySA to form a collective bargaining group to negotiate terms and conditions (including price) with ForestrySA concerning the supply of logs from the Mount Lofty Ranges in South Australia. This application for authorisation AA1000539 was made under subsection 88(1) of the Competition and Consumer Act 2010 (Cth) (the **Act**).
- 1.3. The ACCC may grant authorisation, which provides businesses with protection from legal action under the competition provisions in Part IV of the Act for arrangements that may otherwise risk breaching those provisions, but are not harmful to competition and/or are likely to result in overall public benefits.

¹ Edward John Morgan as trustee for the Ed Morgan Family Trust and Luke Laurence Morgan as Trustee for the Luke Morgan Family Trust, trading as 'Morgan Sawmill Jamestown'.

- 1.4. On 12 February 2021, the ACCC granted a limited interim authorisation under subsection 91(2) of the Act² permitting the formation of a collective bargaining group to negotiate certain terms and conditions with ForestrySA. The interim authorisation did not permit the group to discuss prices per grade of log, or enter into or give effect to log supply agreements with ForestrySA.
- 1.5. On 26 March 2021, Morgan Sawmill requested that the scope of interim authorisation be extended to permit the group to discuss prices. This request and the ACCC's decision not to expand the scope of interim authorisation are discussed in Section 6, below.

The Buying Group

- 1.6. Morgan Sawmill seeks authorisation on behalf of itself, SA Pine Pty Ltd (**SA Pine**), KSI Sawmill³, PalletCo SA Pty Ltd, Harvestco Hills Pty Ltd (**Harvestco**) and any other business that acquires unprocessed timber logs from ForestrySA.⁴
- 1.7. Morgan Sawmill, SA Pine, KSI Sawmill and PalletCo each operate timber processing businesses, principally involving the sawmilling of raw logs from the Mount Lofty Ranges in South Australia. Collectively, these sawmills produce timber goods such as posts (round and square), structural timber, pallets, bins, boxes, crates, woodchips, sawdust, shavings, decking, framing, sleepers, case grade boards and pine bark. Some of these sawmills also provide treatment facilities for timber.
- 1.8. Harvestco provides harvesting and haulage, site preparation, roading and fire-fighting services in South Australia, Victoria, New South Wales and South Australia.
- 1.9. Morgan Sawmill envisioned when it lodged the application for authorisation that the collective bargaining group would initially consist of a maximum of five members (being four sawmills and Harvestco), but may include any other processors or operators that are or become involved in the sourcing of timber from ForestrySA.
- 1.10. As discussed later in this draft determination (at paragraphs 4.63 and 4.66), the ACCC considers that the potential scope of the Buying Group (i.e. a group whose membership could continue to expand over time with minimal constraints on who can participate) presents a risk of substantial public detriment resulting from excessive bargaining power which could accrue to the group if it approaches monopsony. This means the net public benefit test is unlikely to be met without a condition of authorisation. This draft determination uses three defined terms to describe key parties to the proposed authorisation:
 - a) **'the Buying Group'** means any business that acquires unprocessed timber logs from ForestrySA (this is the group of businesses on whose behalf Morgan Sawmill has sought authorisation). The 'Buying Group' describes an open collective bargaining group which any and every eligible business could to participate in.
 - b) **'the Sawmills'** means Morgan Sawmill, SA Pine, KSI Sawmill and PalletCo, collectively (these are the timber processors that Morgan Sawmill has invited into the collective bargaining group to date under the February 2021 interim authorisation),

² See ACCC decision of 12 February 2021 available at https://www.accc.gov.au/system/files/public-registers/documents/Interim%20Authorisation%20Decision%20-%2012.02.21%20-%20PR%20-%20AA1000539%20Morgan%20Sawmill_0.pdf.

³ KSI Sawmill means: The KSI Sawmills Unit Trust, ABN 11 657 678 273.

⁴ The South Australian Forestry Corporation, trading as 'ForestrySA'.

- c) **‘the Initial Group’** means the Sawmills and Harvestco, collectively (this is the group of businesses that Morgan Sawmill expects will comprise the collective bargaining group for the foreseeable future).

ForestrySA

- 1.11. **ForestrySA** is an enterprise of the South Australian government. It has responsibilities as a commercial and recreational forest manager and operates a sustainable forest management program that involves the management of plantation pine in the Mount Lofty Ranges.
- 1.12. ForestrySA’s principal statutory functions are to:
- a) manage plantation forests for commercial production;
 - b) encourage and facilitate regionally based economic activities based on forestry and other industries; and
 - c) conduct research related to the growing of wood for commercial purposes.⁵
- 1.13. Until 2012, ForestrySA managed substantial softwood plantations spanning more than 90,000 hectares. At that time, the South Australian Government divested the future harvesting rights to the high-value plantations in the south east of South Australia, representing more than 90% of ForestrySA’s commercial asset base. The Mount Lofty Ranges estate of around 10,500 hectares remains ForestrySA’s only commercial plantation asset, representing approximately 6% of the total plantation area in South Australia by area.

The Proposed Conduct

- 1.14. Morgan Sawmill is seeking authorisation for the Buying Group to collectively negotiate terms and conditions (including price) with ForestrySA concerning the supply of logs from the Mount Lofty Ranges in South Australia.
- 1.15. Morgan Sawmill proposes that the Buying Group’s discussions would be limited to how the sawmills (and harvester) could work together to secure a log supply agreement from ForestrySA and what the terms of that agreement would be. In particular, discussion within the Buying Group would include:
- Prices per grade of log.
 - Period of supply.
 - Log volumes.
 - Delivery and collection locations.
 - Log specifications.
 - The rate at which logs would be collected (m³ or tonnes per week).
 - Incidental matters (e.g. when fire affected logs would be rejected, measurement methodology, insurance requirements, payment terms, security).

(the Proposed Conduct)

- 1.16. Morgan Sawmill does not seek authorisation for the Buying Group to discuss any matters relating to the products they produce or the prices they charge for them, and submits that there will be no need for such discussions.

⁵ See *South Australian Forestry Corporation Act 2000* (SA), s 9.

Rationale for the Proposed Conduct

1.17. Morgan Sawmill considers that the ability for it and other local purchasers to collectively bargain with ForestrySA will increase the likelihood of securing long-term log supply agreements.

1.18. Morgan Sawmill submits:

- ForestrySA has stated before the SA Legislative Council Standing Committee:

One of the real problems is that, as I said to you before, we have five log supply agreements. If we had one or two, with a more consolidated processing base—one or two larger players instead of five smaller ones—it would certainly be much more sustainable than it is today. Julian Speed, CEO, ForestrySA on 17 March 2020⁶.

- Recent log tenders from ForestrySA have offered large volumes of logs that must be collected in short timeframes, and such terms are out of reach of the local timber processors individually.
- The term of log supply agreements offered to individual members of the Initial Group are generally shorter than the Initial Group would like, typically running for three years rather than 10.

2. Background

Plantation forests and sawmills

2.1. Plantation timber is differentiated from ‘native’ timber, which is harvested from natural forests. Plantation timber can generally be categorised as softwood (e.g. pine) or hardwood (e.g. eucalypt).

2.2. Within the Mount Lofty Ranges there are three plantation forests – Mount Crawford Forest, Second Valley Forest and Kuitpo Forest. These three forests each contain softwood plantations managed by ForestrySA.

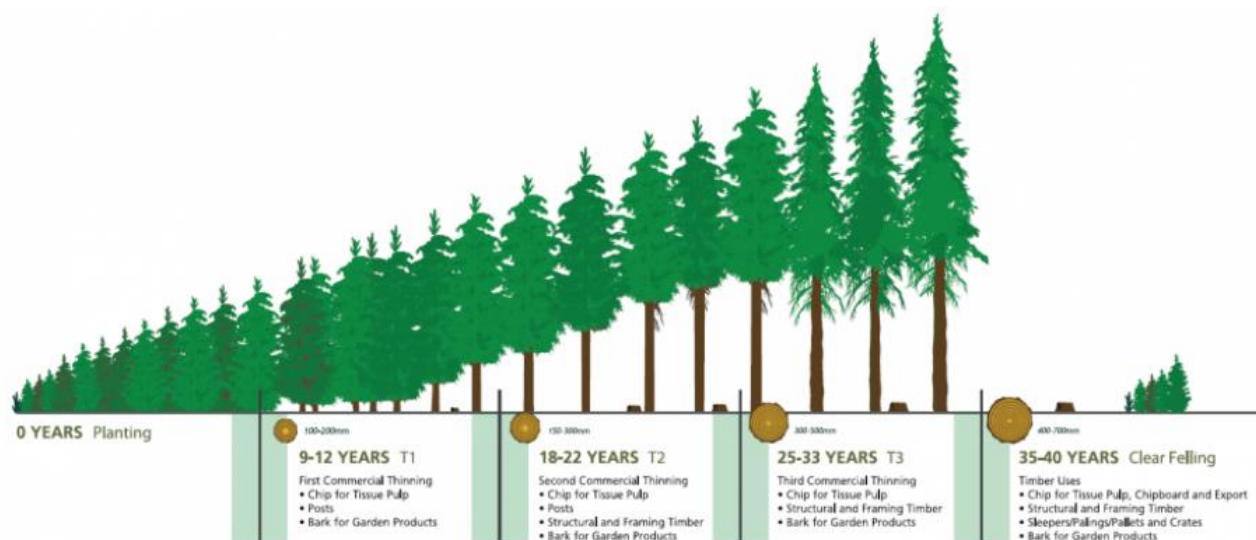
2.3. Softwood has a life cycle of about 35 to 40 years. During this cycle, the plantation is periodically thinned (at approximately 10 year intervals) to remove weaker trees and promote the growth of stronger trees. As a result, softwood plantations typically produce a range of grades of logs:

- Pulplogs: small diameter, low grade logs used to manufacture woodchips, ‘roundwood’ products such as posts and poles, paper, particleboard and medium density fibreboard (MDF). Pulplogs and woodchips are often exported.
- Non-structural (industrial) sawlogs: generally produced from larger logs harvested during thinning or from the tree tops at final harvest, used for processing into non-structural timber (such as pallets, fencing and landscaping products) or for exporting as unprocessed logs.
- Structural sawlogs: generally produced from final ‘clear felling’; and suitable for structural timber production, such as house frames.

⁶ Legislative Council, Select Committee on matters relating to the timber industry in the Limestone Coast, Transcript of Evidence – ForestrySA, 17 March 2020, Paragraph 151, <https://www.parliament.sa.gov.au/en/Committees/Committees-Detail>

2.4. Figure 1 illustrates the life-cycle of softwood, the typical size at cutting intervals and the products made from log taken at these intervals:

Figure 1: Plantation Forestry



Source: ForestrySA

2.5. In 2019-20, ForestrySA log sales revenue totalled \$12.43m, a decrease of \$1.08m (or 8%) on the previous year. The majority of log products (81%) were marketed to local wood processors in the Mount Lofty Ranges and Mid North regions, providing \$9.48m in revenues. More than 132,000t of log were processed by ForestrySA's local customers, an increase of 9% over the previous year.⁷

2.6. A snapshot of recent log sales from the Mount Lofty Ranges was included in ForestrySA's Annual Report for 2019 – 2020.

Table 1: ForestrySA Domestic Log Sales from the Mount Lofty Ranges

TOTAL LOG PRODUCT			
Domestic log sales, Mount Lofty Ranges			
Product	2019-20 (m ³)	2018-19 (m ³)	2017-18 (m ³)
Sawlog	85,283	85,847	80,100
Industrial	42,403	34,458	46,314
Total log	127,686	120,305	126,414
Pulpwood	23,487	11,272	18,455
Preservation	9,084	7,591	7,550
Total pulp	32,571	18,863	26,005
Other log	57,934	16,862	-
TOTAL	218,191	156,030	152,420

Source: ForestrySA Annual Report 2019 – 2020, page 21.

⁷ ForestrySA Annual Report 2019-20, 17 December 2020, p 4 <https://www.forestrysa.com.au/app/uploads/2020/12/Forestry-Annual-Report-2019-20-web.pdf>.

- 2.7. At its simplest, softwood plantations produce sawlogs that are sold as an input to sawmills, who process the sawlogs to supply a range of products into a series of downstream markets.
- 2.8. Sawmills typically establish their operations to specialise in processing particular types, sizes and/or grades of sawlog.

Nearby forests and log purchasers

- 2.9. In 2013 and 2014 South Australia saw substantial fires which extensively damaged timber supplies from the Bundaleer and Bangor/Wirrabara forests in South Australia's mid-north. These timber stocks have not yet regrown.
- 2.10. The Mount Lofty Ranges now represents a significant source of log supply for the Sawmills. Malec Bros. Transport Group (**Malec**), a timber export and import business with a branch in Adelaide, also purchases significant volumes of log from the reserve.
- 2.11. A major forest region known as the 'Green Triangle' lies approximately 300km from the Mount Lofty Ranges and approximately 300-600km from the members of the Initial Group. The hardwood and softwood forest resources of the Green Triangle are mostly privately owned.
- 2.12. The locations of the businesses in the Initial Group, Malec and relevant forests are depicted in Figure 2, below.

Figure 2: Forests and log buyers



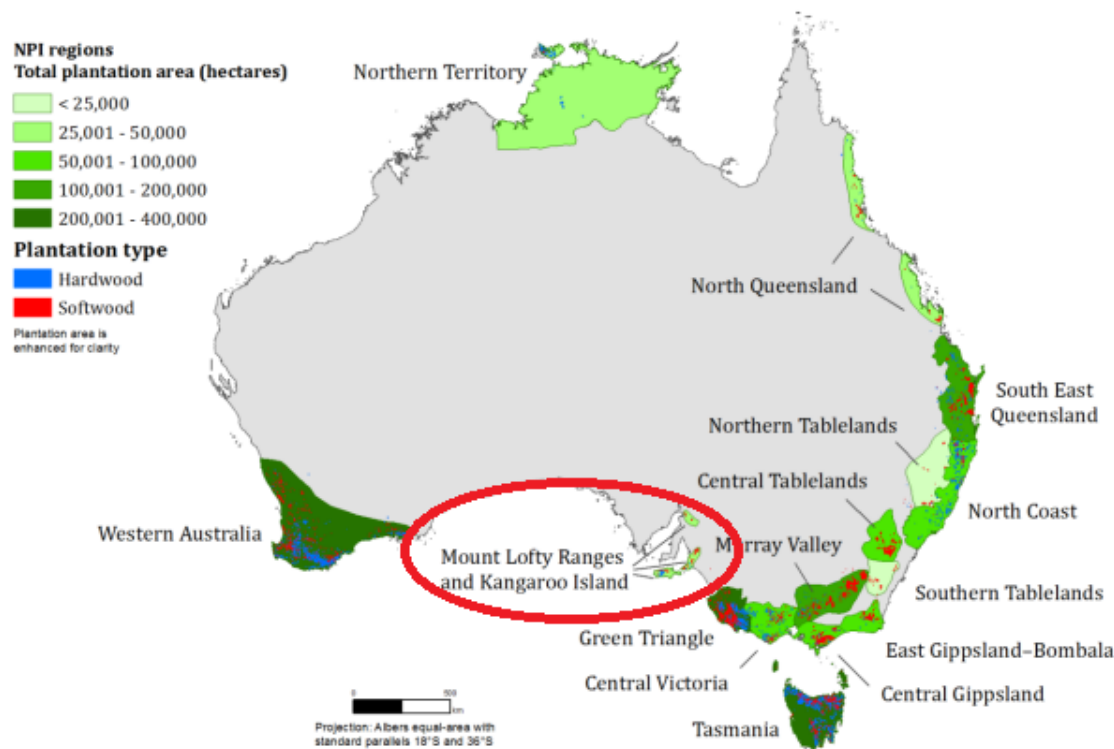
Mount Lofty Ranges

2.13. The Mount Lofty Ranges are approximately 10,000ha and produce around 150,000-160,000 cubic metres of logs each year. This accounts for 5.81% of South Australia's plantations or 0.51% of Australia's plantations.

2.14. As noted at 1.11, ForestrySA is the forest manager for the Mount Lofty Ranges and is responsible for the sale of log from its forests.

2.15. Figure 3, below, provides a snapshot of the location and relative size of the Mount Lofty Ranges relative to other plantations in Australia.⁸

Figure 3: National Plantation Inventory regions (regional hubs)



Source: ABARES

ForestrySA's log sale process

2.16. ForestrySA's approach to marketing logs utilises a combination of medium to long term contracts with established customers, supplemented by ad-hoc sales of specific parcels through competitive tender processes.

2.17. ForestrySA directly negotiates with customers whose log sale agreements are nearing an end and this can result in new contracts if those negotiations reveal a clearly competitive log price by reference to ForestrySA's benchmarking. If negotiations do not reveal a clearly competitive log price, then ForestrySA undertakes an open

⁸ Department of Agriculture and Water Resources. ABARES. *Australian Plantation statistics 2019 update*. May 2019. Available at: https://www.agriculture.gov.au/sites/default/files/sitecollectiondocuments/abares/publications/AustPlantationStats_2019_v.1.0.0.pdf

'Request for proposal' or tender process, going to the market for bids on the available log parcel.

- 2.18. In determining whether to advance direct negotiations with a timber processor or to take a parcel to an open market tender, ForestrySA uses price benchmarking which it has developed using pricing data derived from existing contracts and responses from competitive processes run by ForestrySA over the last three years, and unsolicited offers made by buyers such as timber processors and exporters from time to time.
- 2.19. ForestrySA issues tenders for volumes of logs that in some instances may be larger than local sawmills could take on individually. However, ForestrySA submits the tender process allows bidders to make an offer for a subset of the bundle of logs put to tender – they are not required to bid for the entire lot.

3. Consultation

- 3.1. The ACCC conducts a public consultation process to inform our assessment of the likely public benefits and detriments from the Proposed Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including major competitors, other forest owners/operators, customers of businesses in the Initial Group, relevant industry associations or peak bodies, consumer groups, state and federal government and relevant regulatory bodies.⁹
- 3.3. The ACCC received submissions from three interested parties in relation to the application. Midway (a large processor and exporter of timber of woodfibre) and the Small Business Commissioner for South Australia (**the Commissioner**) support the application for authorisation, while ForestrySA opposes it.
- 3.4. Midway supports the application for authorisation, noting that it is challenging for small businesses to compete for softwoods in South Australia.
- 3.5. The Commissioner submits that he is aware that small timber processors in South Australia have experienced and continue to experience 'extreme difficulties' in negotiating reasonable terms and continuity of log supply, and supports the application on this basis.
- 3.6. On 27 January 2021 and 3 February 2021, ForestrySA provided separate submissions opposing Morgan Sawmill's requests for interim and substantive authorisation. ForestrySA considers that the primary purpose of the Proposed Conduct would be to secure lower log pricing by reducing competition between members of the Initial Group. ForestrySA does not consider the Proposed Conduct is likely to be of benefit to it and a net benefit to the public is best achieved through potential customers, including the Initial Group, continuing to operate in a market that is competitive. Further submissions from ForestrySA are detailed in the relevant sections, below.
- 3.7. On 18 February 2021, Morgan Sawmill provided a response to interested party submissions arguing there is minimal competition between members of the Initial Group for the acquisition of logs under ForestrySA's current tender processes, and the Proposed Conduct would be beneficial for ForestrySA and the public. Further submissions from Morgan Sawmill are detailed in the relevant sections, below.

⁹ A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

- 3.8. On 9 April 2021, ForestrySA provided public and confidential versions of its response to a request for further information from the ACCC.
- 3.9. Public submissions by Morgan Sawmill and interested parties are on the Public Register for this matter.

4. ACCC assessment

- 4.1. The ACCC's assessment of the Proposed Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. Morgan Sawmill has sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act. Consistent with subsection 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (authorisation test).

Relevant areas of competition

- 4.3. To assess the likely effect of the Proposed Conduct, the ACCC will identify the relevant areas of competition likely to be impacted.
- 4.4. Morgan Sawmill submits:
 - a) The Proposed Conduct will primarily have an impact in the 'forest' and 'timber' industries, but secondary industries that source products from the Buying Group could also be affected.
 - b) Its log supply has been supplemented by logs from the Adelaide Hills (Mount Lofty Ranges) to account for the shortfall caused by the Bundaleer and Bangor fires in 2013 and 2014. This supplementation is likely to continue until new growth can be harvested from the replanted Bundaleer and Bangor/Wirrabara forests.
 - c) While there are a number of suppliers other than ForestrySA that could supply the Initial Group, the reality is that supply from these sources is not viable. In particular:
 - Sourcing logs from the Green Triangle, located 620km from Morgan Sawmill, is not economically viable due to high transport costs.
 - There are some small timber plantations in the Adelaide hills that were encouraged by ForestrySA in the 1980s. These are unmanaged small plantations and all of the log in these plantations would be insufficient to meet the needs of the Initial Group for a single year before being exhausted.
 - Logs could be imported from overseas or interstate. However, associated freight costs would render this unviable.
- 4.5. ForestrySA accepts that the 2013 and 2014 fires have effectively cut off Morgan Sawmill's ability to source logs from the Bundaleer and Bangor forests. However, it adds:
 - a) At least some members of the Initial Group also purchase log from private forestry owners and leaseholders, but ForestrySA accepts that the log from the Mount Lofty

Ranges estate currently provides a significant supply to its local customers, including the Initial Group.

- b) The larger, higher value logs, such as AA, A and K grade sawlogs have attracted competitive bids from buyers outside the local region. Advances in transport and logistics systems have seen log catchments extend to significantly greater distances than 300km and ForestrySA has sold log to domestic customers up to 700km away.
- 4.6. The ACCC considers that the Proposed Conduct is most likely to have a direct effect on the acquisition of softwood plantation sawlogs. It may also have flow-on effects into downstream related markets, noting that structural sawlogs, non-structural sawlogs and pulplogs (roundwood and woodchips) are used for different products, and are generally sold to different customers and at different prices.
- 4.7. In terms of the relevant geographic area, the ACCC notes that Morgan Sawmill, the member of the Initial Group located furthest from the Mount Lofty Ranges, is situated approximately 200km from the closest forest in the reserve (Mount Crawford Forest) and 300km from the furthest (Second Valley Forest). While ForestrySA has noted that log sales from up to 700km can occur and over time operators situated in the Green Triangle region may become more competitive, the ACCC considers that records of recent Mount Lofty Ranges log sales suggest that parties interested in the log from that reserve are typically located within 300km of it.
- 4.8. Overall, the ACCC considers that the relevant areas of competition could be characterised as either:
- a) three regional markets for the acquisition of different grades of sawlogs from the Mount Lofty Ranges, specifically structural sawlog, non-structural sawlog and pulplog.
 - b) a single market for the acquisition of softwood sawlogs from the Mount Lofty Ranges with three distinct product sub-markets, being structural sawlog, non-structural sawlog and pulplog.
- 4.9. The ACCC does not consider that either of these approaches to defining the relevant area(s) of competition materially changes its assessment of the Proposed Conduct.

Future with and without the Proposed Conduct

- 4.10. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 4.11. Morgan Sawmill submits that:
- a) Authorisation will allow it to secure larger log supply agreements (seeking a volume of logs sufficient to supply the Buying Group) for a longer period (such as 10 years with a 10 year renewal option).
 - b) Obtaining a 10 year log supply agreement would allow it to secure loans and undertake investments that would improve the efficiency of their operations but that are currently unviable or unavailable.

- c) In the future with the Proposed Conduct each of the four Sawmills will continue to operate and source logs from ForestrySA; whereas, without the Proposed Conduct, only one or two sawmills will continue to operate.
- d) More of the logs sourced from the Mount Lofty Ranges will be processed in South Australia and fewer will be exported overseas in the future with the Proposed Conduct than would be the case in the future without the Proposed Conduct.

4.12. ForestrySA submits that:

- a) It has not expressed, and does not have, a preference about the number of supply agreements it wishes to manage in relation to log stock in the Mount Lofty Ranges. Further, it contends that Mr Speed's statement to the SA Legislative Council Standing Committee on 17 March 2020 (reproduced at paragraph 1.18, above) was an expression of Mr Speed's personal view that a consolidated processing sector would be likely to be more sustainable in the long term.
- b) It has been and remains open to entering into log supply agreements of up to 10 years. However, it considers that any long term supply agreement that locks in significant amounts of future yield at a fixed price (with CPI or similar indexation) should reflect a price benchmark that reflects the opportunity cost of the longer term and pricing that other market participants are evidently willing to pay.
- c) It is concerned that if authorisation is granted, the Initial Group may offer lower prices for logs in comparison to what they would otherwise present as their individual best and final offers.

4.13. In a future without the Proposed Conduct, the ACCC considers ForestrySA will continue to be the only viable option for sawmills in the Mount Lofty Ranges to profitably acquire logs; and that it is likely to continue to offer logs for sale through the processes described at 2.16 to 2.19, above. In these circumstances, the ACCC expects ForestrySA will have considerable bargaining power when negotiating terms and conditions of supply to individual customers (including sawmills within the Buying Group). The ACCC understands that when ForestrySA seeks to attract bids from individual customers for parcels of logs it makes available to the market, there are typically at least two members of the Initial Group bidding against each other for these parcels; and often their bids are significantly different to each other. The ACCC considers it is highly likely in a future without the Proposed Conduct that ForestrySA will be able to extract terms and conditions of supply for its parcels of logs that are better (for it) than those one might expect in competitive markets for such products.

4.14. In contrast, the ACCC considers that in the future with the Proposed Conduct, members of the Buying Group will be able to discuss a range of commercial matters with each other, including their upcoming supply log needs and the prices they would be willing to pay for them. Acting collectively, members of the Buying Group may be able to redress some of the imbalance in bargaining power they face when negotiating with ForestrySA; and overcome some of the informational asymmetries they face when individually negotiating with it.

4.15. The ACCC considers that the Proposed Conduct is likely to assist the Buying Group in its efforts to secure improved terms and conditions of supply from ForestrySA, but notes that:

- ForestrySA is not compelled to negotiate with the Buying Group

- ForestrySA will continue to have other “outside options” for the sale of its logs, including to other potential sawmills outside the Buying Group and purchasers seeking to export logs into overseas markets.

4.16. In a future without the Proposed Conduct, the ACCC also considers:

- a) It is likely that members of the Buying Group would continue to submit individual bids for logs to be supplied from the Mount Lofty Ranges in addition to attempting to collectively negotiate such log supply.
- b) The Buying Group is likely to pursue a log supply agreement of 10 years (or longer). In this regard, the ACCC:
 - understands it is primarily the prices offered for logs, rather than the annual cut volumes requested, that will determine whether ForestrySA would be willing to accept longer term log-supply agreements;
 - considers that the prices likely to be offered by the Buying Group for various log grades would either reflect the average prices that members of the group would be willing to pay, or the lowest price that a member would be willing to pay;
 - notes that only one business in the Initial Group has previously secured a 10 year log supply agreement, and any negotiation seeking such an agreement would need to satisfy ForestrySA’s benchmarking requirements.

Public benefits

4.17. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.¹⁰

4.18. The ACCC has considered the following public benefits:

- Transaction cost savings.
- Improved efficiency for businesses in the Buying Group.
- Increased investment and improved business certainty.
- Increased domestic log processing and fewer logs exported.
- Benefits for customers of the Buying Group.

Transaction cost savings

4.19. Morgan Sawmill submits that by having a consolidated log supply agreement, rather than several smaller supply agreements, the Buying Group can reduce the costs associated with negotiating contracts, allow its members to pool resources to retain professionals, and coordinate their operations. By estimating the value of time saved

¹⁰ Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

and meetings that could be foregone, Morgan Sawmill estimates the value of administrative cost savings at approximately \$32,000 over a 10 year period.

- 4.20. ForestrySA disputes the manner in which Morgan Sawmill seeks to quantify the extent of potential administrative savings (which largely focuses on fewer meetings being required) and does not consider potential administrative cost savings in contract management resources to be a significant factor.
- 4.21. The ACCC considers that in addition to administrative savings and the time saved in direct discussions between individual businesses and ForestrySA, transaction cost savings can result from reduced search and information costs (which are likely to occur as a result of information sharing between the businesses in the Buying Group).
- 4.22. Overall, the ACCC considers that the Proposed Conduct is likely to result in public benefit from transaction cost savings including sharing resources for the retention of professional staff, condensing negotiations pursuing log supply agreements, and reducing the search and information costs for the Buying Group.

Improved efficiency for businesses in the Buying Group

- 4.23. Morgan Sawmill submits that the Proposed Conduct would allow the Buying Group to more effectively respond to tenders that offer large volumes of logs or that must be cut and collected in short timeframes. Because the Sawmills are set up to process particular volumes and grades of log, and log must be cut before it dries out (meaning it cannot be stored for long periods), it can be difficult for the Sawmills (acting individually) to adjust their operations and place effective bids.
- 4.24. By way of example, Morgan Sawmill notes that on 21 January 2020 ForestrySA offered a parcel of 75,000 tonnes of logs that had to be taken over a short time period (four and half months) and logging contracts for this parcel were to commence three weeks after the tender issued (on 14 February 2020). Morgan Sawmill submits that three weeks was not enough time for them to make changes within their business to cater for this opportunity and parcels of this nature exclude small local timber processors.
- 4.25. ForestrySA submits that it may be open to the benefits of the Proposed Conduct to the Initial Group if non-price terms *only* (e.g. specifications, measurement methods etc) were able to be discussed jointly.
- 4.26. In relation to the 21 January 2020 log parcel, ForestrySA rejects the suggestion that the parcel was sold in such a way as to exclude the small local processors.¹¹
- 4.27. The ACCC notes the Proposed Conduct is likely to facilitate increased information sharing within the Buying Group, encourage better coordinated terms in log supply agreements, and create an environment in which the businesses in the Buying Group can agree between them who wants what volume of logs and when. In turn, there are likely to be some circumstances in which these improvements are likely to enable the businesses in the Buying Group to take on more log each year than they would otherwise be able to.

¹¹ ForestrySA submits that, as is normal practice, it was open to respondents to bid for part of the parcel and some did so, including Morgan Sawmill. ForestrySA also submits that this was an unusual offering outside of its sustainable annual cut volume because:

- a) The majority of the parcel comprised fire-affected log and, to remain merchantable, fire affected log must be processed in a much short timeframe than non-affected log.
- b) The parcel included an amount of lower grade log to be harvested as part of a 'thinning' program to increase the value of future yields in the reserve.
- c) The parcel included some non fire-affected log to enable operations by contractor personnel and equipment in areas that would later become inaccessible.

- 4.28. Overall, the ACCC considers that the businesses in the Buying Group are likely to be able to set up their businesses more efficiently than would be possible in the absence of the Proposed Conduct and this constitutes a likely public benefit.

Increased investment and improved business certainty

- 4.29. Morgan Sawmill submits that securing a long-term log supply agreement would provide greater business certainty and enable investments that would improve the efficiency and safety of their operations. In particular, Morgan Sawmill submits that its bank has requested the guarantee of a 10 year log supply agreement to underpin loans and finance that it has sought.
- 4.30. Morgan Sawmill submits that there are opportunities to research and develop new timber products and processing systems, and to improve the safety and efficiency of workplaces and machinery, but it is unable to undertake these long-term investments with a short (three year) log supply agreement.
- 4.31. The ACCC accepts that if the Buying Group is able to secure a long term log supply agreement (e.g. 10 years or longer) as a result of the Proposed Conduct, then the improved certainty afforded by the longer term and improved access to finance would be likely to support improved business certainty and increased efficient investments, which would constitute public benefits.
- 4.32. However, on the material available, the ACCC does not accept that the Proposed Conduct is likely to lead to a public benefit in the form of increased investment and improved business certainty.

Increased domestic log processing and fewer logs exported

- 4.33. Morgan Sawmill submits that it is uneconomical for logs from the Mount Lofty Ranges to be supplied domestically but outside the surrounding area. As such, it believes that any logs that are not sold locally are likely to be exported. Morgan Sawmill considers a joint log supply agreement is likely to involve a larger volume of logs being sold domestically than would be the case if the members of the Initial Group sought to acquire logs independently. This will increase domestic sales and result in less log being exported.
- 4.34. ForestrySA submits that the export market has demonstrated a willingness to purchase almost any product for sale by ForestrySA, including very low grade and non-radiata pine, which domestic processing customers (both among the Initial Group and elsewhere in South Australia) are unable or unwilling to process. ForestrySA submits that being able to sell these products allows ForestrySA to continue to invest in improved forest management practices including by removing very low grade or surplus logs which in turn increases the future value of the remaining yield. These practices provide further benefits in relation to fire protection obligations, significantly reducing fuel loads by minimising waste left on the forest floor. As such, ForestrySA submits that there is an overall industry and public benefit to retain at least some exporter presence.
- 4.35. ForestrySA also notes that it discontinued direct export of logs in July 2018 but submits that it is aware that some customers, including members of the Initial Group, export logs purchased from it. ForestrySA understands that all logs sold to Malec have been exported as well as the volumes of log delivered to Port Adelaide for Morgan Sawmill, KSI Sawmill and Harvestco.
- 4.36. As noted at 4.27, the ACCC considers that the Proposed Conduct is likely to result in larger volumes of log being sold to the Buying Group. Similarly, the ACCC considers it likely that the Proposed Conduct will increase the volume of log that will be

processed in Australia and proportionately reduce the volumes of log that will be exported.

- 4.37. The ACCC considers that by reducing input costs for members of the Initial Group and increasing the volume of log that is likely to be processed domestically, the Proposed Conduct is likely to lead to one or more of the following outcomes (1) increased employment by the businesses in the Buying group, (2) increased investment in their facilities (to handle the increased volumes), and/or (3) improved utilisation of existing facilities and resources; any of which would constitute a public benefit.

Benefits for customers of the Buying Group

- 4.38. Morgan Sawmill submits that if authorisation is not granted and the Initial Group cannot secure long term log supplies, then their customers will have to purchase their timber products elsewhere. Morgan Sawmill estimates that it contributes \$9.4m back to the local economy each year and this contribution will be maintained under the Proposed Conduct.
- 4.39. Morgan Sawmill submits that authorisation will allow local timber supply to be maintained and has noted several products that would continue to be supplied to local customers as a result.
- 4.40. The ACCC considers that this claimed public benefit arises from the continued operation of the Sawmills rather than directly from the Proposed Conduct.
- 4.41. The ACCC is not satisfied on the information available that any of the businesses in the Initial Group are likely to cease their operations in the short to medium term without the Proposed Conduct.
- 4.42. The ACCC expects that having the additional information about how the other businesses in the Buying Group value each grade of log will allow them to make more informed bids and potentially to purchase the logs for lower prices.
- 4.43. To the extent that the Proposed Conduct translates into improved prices or other non-price terms and conditions of supply, the ACCC expects this would represent a lowering of the input costs faced by members of the Buying Group when producing goods they sell into downstream (including final goods) markets. Where this improvement in input costs represents a lowering of the marginal costs for members of the Buying Group (e.g. if the prices they pay per log are reduced), the ACCC expects at least some of this input cost saving would be passed-through in the final price of goods for consumers in downstream markets.
- 4.44. The ACCC considers that the Proposed Conduct is likely to result in some benefits for customers of the Buying Group in the form of reduced prices for timber products.

Conclusion on public benefits

- 4.45. The ACCC considers that the Proposed Conduct is likely to result in public benefits including transaction cost savings, improved efficiency for businesses in the Buying Group, and increased domestic log processing. It is also likely to lead to lower input costs for businesses in the Buying Group and result in lower prices for finished timber products for end consumers.

Public detriments

- 4.46. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

...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.¹²

4.47. The ACCC has considered whether the Proposed Conduct is likely to result in public detriment by reducing competition in the acquisition of logs from the Mount Lofty Ranges.

Mount Lofty Ranges log sales

4.48. ForestrySA submits that of the regular, ongoing sustainable annual cut volume of 155,000 tonnes from the Mount Lofty Ranges estate, on average, 145,000 tonnes (or 94%) is contracted to the businesses in the Initial Group. ForestrySA has provided the following table illustrating sustainable annual cut volumes in the Mount Lofty Ranges and the proportion of that volume that has been contracted and sold to members of the Initial Group since FY2016/17:

Table 2: Summary of actual sale volumes FY16/17 to FY20/21 (GMT = Green metric tonnes)					
Customer	Financial Year period GMT				
	16/17	17/18	18/19	19/20	20/21 ¹ [¹ Pro-rata basis]
Morgan Sawmill	38,497	30,059	27,874	30,421	25,920
KSI Sawmill	27,064	25,818	29,412	27,650	26,647
PalletCo	7,752	7,161	6,382	6,186	5,588
SA Pine	56,986	61,578	71,838	60,641	67,842
Harvestco	-	-	-	212	214
Group members (combined) sales	130,299	124,616	135,506	125,110	126,211
Group members (combined) contracted volume	128,000	128,000	146,500	146,800	147,250
Sustainable Annual Cut (SAC)	155,000	155,000	155,000	155,000	155,000
Difference	-24,701	-30,384	-19,494	-29,890	-28,789
Cumulative difference	-24,701	-55,085	-74,579	-104,469	-133,258
% Log Sales v SAC proportion	84%	80%	87%	81%	81%
% Contract volume v SAC	83%	83%	95%	95%	95%
Notes: SA Pine log sale volume based on delivered GMT					

Source: ForestrySA, response to ACCC request for information

4.49. ForestrySA submits that it has other customers who have demonstrated capacity to compete in the market for purchasing log from the Mount Lofty Ranges estate, including South Australian based timber processors, timber processors in the Green Triangle region as well as exporters of raw log.

4.50. Morgan Sawmill understands that ForestrySA currently supplies logs to the Initial Group and an Australian-based exporter. Morgan Sawmill does not believe it would be

12 Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

economically viable to transport the logs from Mount Lofty Ranges to any timber processor outside the Initial Group, with the closest other sawmill located in Mount Gambier, 423km away.

- 4.51. Morgan Sawmill submits that recently, much larger quantities of log have been exported, such as the 75,000 tonnes of logs that ForestrySA offered on 21 January 2020.

Impact on competition in the acquisition of logs and resulting prices

- 4.52. Morgan Sawmill submits that individual processors in the Initial Group 'operate and specialise out of what the Forest can supply'. Morgan Sawmill considers there is minimal overlap between the businesses in the Initial Group and some have a vertical relationship in that they buy/sell timber products from one another.

- 4.53. ForestrySA disagrees that there is minimal overlap between the businesses in the Initial Group. It submits that those businesses are often in competition with each other for log supplies of specific grades. Periodically, ForestrySA has had several competing bids for specific log parcels, including from within the Initial Group, and has therefore seen the effects of direct competition for log supply.

- 4.54. In response, Morgan Sawmill reiterates that the businesses in the Initial Group purchase differing parcels, noting that processing facilities (sawmills) are designed to take a particular specification of log. Morgan Sawmill submits that because the members of the Initial Group seek different logs, there is virtually no competition between the businesses, specifically:

- SA Pine only processes high grade log, predominately 6.0m topped up with 4.8m lengths.
- KSI Sawmill only processes short 2.4m log.
- PalletCo only processes low grade or break log.
- Morgan Sawmill processes any log that is surplus to the other three sawmills' requirements – any length up to 6.0m.

- 4.55. ForestrySA has provided the ACCC with information (on a confidential basis) about previous log sales and successful and unsuccessful bids tendered for various log grades by members of the Initial Group and businesses outside it.

- 4.56. The ACCC notes the following points do not appear to be in contention:

- a) The Sawmills are substantially reliant on logs sold by ForestrySA from the Mount Lofty Ranges and do not have a viable alternative source of logs.
- b) The Sawmills purchase the majority of the logs sold by ForestrySA from Mount Lofty Ranges, accounting for more than 90% of the regular, ongoing sustainable annual cut volume.
- c) Over the last three years, approximately 10% of logs sourced from Mount Lofty have been exported, but greater quantities have been exported in more recent novel log bundles put to tender (e.g. large volume burnt log bundles).
- d) There is some overlap in the grades/sizes of logs sourced by the five businesses in the Initial Group.
- e) The five businesses in the Initial Group face competition from one or more timber exporters which have regularly secured contracts for log from Mount Lofty. There

has also been interest in Mount Lofty timber from processors outside the five businesses in the Initial Group.

4.57. Having examined confidential information provided by ForestrySA, the ACCC notes that:

- a) Within the Initial Group, there are at least two businesses that are capable of cutting and have previously been interested in acquiring each of the following types of log: structural sawlog, non-structural sawlog, pulplog and preservation pine.
- b) There have been occasions where members of the Initial Group have bid against each other to acquire particular grades of log.
- c) Timber processors and exporters that are not members of the Initial Group have previously sought and acquired structural sawlog, non-structural sawlog, pulplog and preservation pine from the Mount Lofty Ranges through ForestrySA.
- d) The sustainable annual cut volume of the Mount Lofty Ranges is approximately 155,000 GMT and has not varied significantly since FY2016/17.

Effect on competition of collective bargaining by the Initial Group – unlikely to result in inefficiencies

4.58. The ACCC notes that the businesses comprising the Initial Group purchase the vast majority of Mount Lofty's sustainable annual cut volume, accounting for more than 80% of log sales and up to 95% of contracted volumes.

4.59. The large share of log sales (and contracted volumes) secured by the Initial Group in circumstances where ForestrySA implements competitive tender processes (unless an offer to purchase log is above its price benchmarks) suggests that the Initial Group have generally offered to pay more for log than other businesses.

4.60. The Proposed Conduct will provide each business in the Initial Group with transparency over the volumes of log that their rivals within the Initial Group will be seeking and the prices they would be willing to pay for them. In some instances, this information may allow individual sawmills in the Initial Group to reduce the prices they offer to pay for log compared to what is likely otherwise occur in the absence of the Proposed Conduct.

4.61. However, the ACCC also considers that the extent to which any reduction in rivalry resulting in lower prices and carrying the potential to cause inefficient outcomes (such as by leading to too little log being supplied in the future) is limited by a range of factors, including:

- Participation in the Buying Group will be voluntary for customers of ForestrySA and does not prevent participating businesses from also pursuing individual supply contracts with ForestrySA,
- ForestrySA will not be compelled to engage in the Buying Group's attempts at collective bargaining or accept any offer put to it by the Buying Group collectively or any of its members individually.
- The Proposed Conduct would not permit the Buying Group to boycott ForestrySA.
- Businesses outside the Initial Group have previously sought, bid on and secured the sale of log from the Mount Lofty Ranges in competitive sale processes. As discussed above, the businesses in the Initial Group are reliant on log from the Mount Lofty Ranges and do not have other viable timber sources. As such, if the

Initial Group were to offer prices too low (in joint offers or individual negotiations with ForestrySA), then they will risk losing log sales to competitors that are not in the Initial Group and appear to be capable of taking large volumes of log across all of the relevant grades of log. So, the presence of competition from outside the Initial Group is likely to limit the extent to which log prices are likely to fall.

4.62. Further, even if businesses within the Initial Group secure more favourable terms and conditions as a result of their ability to collectively bargain with ForestrySA, the ACCC is not convinced this is likely to result in any public detriment (such as the inefficiencies that can result where lower prices result in lower volumes of log being provided than would occur in more competitive markets). This is because:

- The ACCC understands that the sustainable annual cut volume of log from the Mount Lofty Ranges has not changed significantly since FY2016/17 and there would be a considerable time lag between any change in the amount of pine planted being reflected in the volumes available for harvest (noting that the first thinning takes place approximately ten years after trees are planted and clear felling occurs after 35-40 years). As such, the ACCC considers that ForestrySA is unlikely to reduce the volume of pine that will be made available in the future unless log prices fall significantly. And, in any event, the volume of pine available is unlikely to change in the short to medium term.
- Any fall in log prices is likely to be constrained by competition from outside the Initial Group, log volumes are unlikely to change significantly in response (and are unlikely to change at all in the short to medium term), so any resulting decrease in efficiency would be small.

Effect on competition of collective bargaining by the Buying Group – likely to result in inefficiencies

4.63. Morgan Sawmill seeks authorisation on behalf of itself, the Initial Group and any other businesses that source unprocessed timber from ForestrySA. This would allow any business with an interest in logs from the Mount Lofty Ranges to participate in the Buying Group if authorisation is granted. In effect, this would mean that all of the businesses with an interest in logs from that region would gain visibility over their competitors' upcoming log supply needs and the prices they would be willing to pay for each grade of log.

4.64. The ACCC notes that if businesses outside the Initial Group were to join the Buying Group and engage in the Proposed Conduct, competition from outside the Buying Group would decrease and one of the key mitigating factors at paragraph 4.61 would be reduced or removed.

Condition of authorisation

4.65. The ACCC considers that effective competition from businesses outside the Buying Group is an important factor in ensuring the Proposed Conduct is likely to result in limited public detriment. The ACCC would want to be informed about any increase in the number of businesses comprising the Buying Group or participation of businesses that are not in the Initial Group so that it can consider whether that might constitute a material change of circumstances and warrant a review of the authorisation.

4.66. For this reason, the ACCC proposes to impose a condition on this authorisation requiring Morgan Sawmill to notify it at least 30 days before any business that is not a member of the Initial Group participates in the collective bargaining enabled by the authorisation (see paragraph 5.6).

Balance of public benefit and detriment

- 4.67. For the reasons outlined in this draft determination, the ACCC considers that the Proposed Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

Length of authorisation

- 4.68. The Act allows the ACCC to grant authorisation for a limited period of time.¹³ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period, in considering any application for reauthorisation.
- 4.69. In this instance, Morgan Sawmill seeks authorisation for 20 years, on the basis that such a period would enable it to enable it to pursue a 10 year log supply agreement with a 10 year option for renewal. Morgan Sawmill submits that log supply agreements have historically been offered for a 10 + 10 year period.
- 4.70. ForestrySA submits that it has never awarded a 10 + 10 year agreement to any members of the Initial Group. ForestrySA typically awards agreements that operate for two to five years, but notes that a 10 year agreement would be feasible if adequately attractive terms were offered and notes that one member of the Initial Group currently holds a 10 year log supply agreement. ForestrySA does not comment on what it would consider an appropriate duration for authorisation to operate if it is granted.
- 4.71. The ACCC notes there is considerable uncertainty about the likelihood of a long term supply agreement being awarded as a result of the Proposed Conduct. In these circumstances, the ACCC does not consider it appropriate to grant authorisation for 20 years, which is a longer term than the ACCC would typically grant for a new authorisation.
- 4.72. However, in circumstances where a 10 year log supply agreement (if one can be negotiated) would bring with it additional public benefits, the ACCC does consider it appropriate to allow a period that would enable such an agreement to be negotiated and given effect.
- 4.73. The ACCC understands that a collectively negotiated log supply agreement would likely commence in June or July 2022. As such, in order to accommodate negotiations before the end of the 2021 financial year and enable a 10 year log supply agreement to be given effect (if one can be secured), the ACCC proposes to authorise the Proposed Conduct for 11 years.

5. Draft determination

The application

- 5.1. On 18 December 2021 Morgan Sawmill lodged application AA1000539 with the ACCC, seeking authorisation under subsection 88(1) of the Act.

¹³ Subsection 91(1)

- 5.2. Morgan Sawmill seeks authorisation for the Proposed Conduct. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 5.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 5.4. For the reasons outlined in this draft determination, the ACCC considers that, in all the circumstances, the Proposed Conduct with the proposed condition (described at 5.6) would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 5.5. Accordingly, the ACCC proposes to grant authorisation.

Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to grant authorisation AA1000539 with a condition to enable businesses that source unprocessed timber from ForestrySA (including the Initial Group and future parties)¹⁴ to form a collective bargaining group to negotiate terms and conditions (including price) with ForestrySA concerning the supply of logs from the Mount Lofty Ranges in South Australia, as described in paragraphs 1.14 and 1.15 and defined as the Proposed Conduct. Authorisation AA1000539 is proposed to be granted with the following condition:
- Morgan Sawmill must, at least 30 days prior to any new member¹⁵ engaging in conduct in reliance on this interim authorisation, provide to the ACCC:
 - the business name of and contact details for the new member, in a form that can be placed on the public register, and
 - on a confidential basis, the quantity (m³) of logs that were (or, for 2021, are projected to be) processed, harvested or otherwise dealt with by that member in 2019, 2020 and 2021, and the quantity of logs (m³) that were (or, for 2021, are projected to be) acquired from ForestrySA in 2019, 2020 and 2021.
- 5.7. The ACCC proposes to grant authorisation in relation to Division 1 of Part IV of the Act, and section 45 of the Act.
- 5.8. The ACCC proposes to authorise the Buying Group to engage in the Proposed Conduct for 11 years.
- 5.9. This draft determination is made on 10 May 2021.

6. Interim authorisation

- 6.1. At the time of lodging the application, Morgan Sawmill requested interim authorisation for the Initial Group to engage in the Proposed Conduct. Morgan Sawmill noted that it

¹⁴ Subsection 88(2).

¹⁵ In this context, 'new member' means any party other than Morgan Sawmill, KSI Sawmill, PalletCo, SA Pty Ltd and Harvestco Hills Pty Ltd.

and KSI Sawmill's current log supply agreements will expire in June 2021 and it is common industry practice for the negotiation of terms for upcoming log supply agreements to begin up to a year before current agreements expire. Morgan Sawmill requested interim authorisation to enable the Initial Group to form a strategy before meeting with ForestrySA.

- 6.2. On 12 February 2021, the ACCC granted a limited interim authorisation under subsection 91(2) of the Act.¹⁶ The interim authorisation permitted the formation of a collective bargaining group to negotiate the following terms and conditions with ForestrySA concerning the supply of logs from the Mount Lofty Ranges in South Australia: period of supply, log volumes, delivery and collection locations, log specifications, the rate at which logs would be collected (m³ or tonnes per week), and incidental matters (e.g. when fire affected logs would be rejected, measurement methodology, insurance requirements, payment terms, security). The interim authorisation did not permit the Initial Group to discuss prices per grade of log, or enter into or give effect to log supply agreements with ForestrySA.
- 6.3. On 26 March 2021 Morgan Sawmill requested that the ACCC consider expanding the scope of interim authorisation to allow the Initial Group to discuss prices. Morgan Sawmill submits that the original interim authorisation has been beneficial and expanding its scope would allow the Initial Group to move forward in its discussions.
- 6.4. Morgan Sawmill submits that expanding interim authorisation to permit the discussion of prices would allow the Buying Group to "move forward on the same playing field". Morgan Sawmill submits that the Buying Group would expect to enter into a group log supply agreement by 1 July 2022 but negotiations take a long time and it is important for the Buying Group to be able to be open in the meetings to progress their discussions.
- 6.5. Morgan Sawmill also notes that its contract for logs expires on 30 June 2021 and submits that it would like to be able to discuss pricing with the Buying Group before that date to enable negotiations to take place if required before they are out of logs.
- 6.6. The ACCC has decided to deny Morgan Sawmill's request for interim authorisation to be expanded to permit discussion of prices. In reaching this decision, the ACCC notes:
 - Permitting discussion of prices within the Buying Group would be likely to impact the prices that members of the Buying Group would offer to ForestrySA in their individual negotiations. Once the business in the Buying Group have visibility over the prices being paid, their interactions with ForestrySA could change irreversibly. If the ACCC decides not to grant authorisation in its final determination, it may not be possible to return to the status quo if prices have been discussed by the Buying Group.
 - It appears that expanding interim authorisation to permit discussion of prices would primarily provide more time for the Buying Group to make arrangements for future discussions with ForestrySA, which Morgan Sawmill expects to occur towards the end of 2021, with a view to arranging new supply contracts by 1 July 2021. As such, the ACCC considers there is not a high degree of urgency for the Buying Group to be able to discuss prices prior to the ACCC making its final

¹⁶ See ACCC decision of 12 February 2021 available at https://www.accc.gov.au/system/files/public-registers/documents/Interim%20Authorisation%20Decision%20-%2012.02.21%20-%20PR%20-%20AA1000539%20Morgan%20Sawmill_0.pdf.

determination which is due on 18 June 2021 (unless extended by the ACCC with Morgan Sawmill's agreement).

- Allowing discussion of prices, but not allowing discussions or contracts with ForestrySA could cause financial harm to ForestrySA (and financial benefit to the individual members of the Group), but is unlikely to achieve significant public benefits and may lead to public detriments resulting from reduced competition. The public benefits and public detriments considered by the ACCC are discussed above in Section 4.

6.7. The interim authorisation granted by the ACCC on 12 February 2021 (which does not permit discussion of prices per grade of log) will remain in place until it is revoked, the date on which the application for authorisation is withdrawn, or the date the ACCC's final determination comes into effect.

7. Next steps

7.1. The ACCC now invites submissions in response to this draft determination by 24 May 2021. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination.