



ForestrySA

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27 January 2021

Australian Competition & Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

By email only: exemptions@accc.gov.au

Attn: Danielle Staltari, Director, Competition Exemptions

Dear Ms Staltari

Re: AA1000539 – Morgan Sawmill Jamestown – Submission on Interim Authorisation

Thank you for the opportunity to comment on the application for a collective bargaining authorisation made by Morgan Sawmill Jamestown (**MSJ**) on behalf of itself and other potential group members (together, **the Nominated Applicants**).

This submission is focussed on the question of an interim authorisation being considered by the ACCC. Therefore, ForestrySA may still wish to make an additional or supplementary submission on the substantive application.

Summary

ForestrySA considers that a net benefit to the public is best achieved through any interested customers, including the Nominated Applicants, continuing to individually compete for the future supply of logs from ForestrySA's Mount Lofty Ranges estate. ForestrySA considers that, in overall terms, and based on recent log sales experience, the market for ForestrySA products is relatively active and competitive and does not warrant the intervention sought by the Applicants.

While ForestrySA acknowledges and seeks to continue its considerable support for the contribution of local sawmillers to regional communities and to down-stream industries, ForestrySA does not consider that this equates to ensuring the ongoing viability of any particular (or a particular subset of) local sawmilling operations.

Background to ForestrySA

ForestrySA is an enterprise of the South Australian government. It is a body corporate established by legislation (see the *South Australian Forestry Corporation Act 2000* (SA) and the *Public Corporations Act 1993*), and is an instrumentality of the Crown in right of the State

of South Australia. ForestrySA's principal statutory functions are to:

- manage plantation forests for commercial production;
- encourage and facilitate regionally based economic activities based on forestry and other industries; and
- conduct research related to the growing of wood for commercial purposes.¹

In this way, ForestrySA recognises its balanced obligations as compared to most private forest managers.

ForestrySA also has functions conferred on it by other legislation, such as the *Forestry Act 1950* (SA) in relation to the management and licensing of forestry assets.

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.

Valued at \$54.8 million, the Mt Lofty Ranges tree crop contributes a long-term calculated annual yield of around 155,000 m³ of wood products on average, with each harvested area replanted in subsequent years for sustainability. ForestrySA's management system is certified to the Australian Standard for Sustainable Forest Management (AS 4708) administered by Responsible Wood.

ForestrySA's statutory functions have not changed according to its reduction in scale, although ForestrySA exercises those same functions in relation to a much more limited stock of commercial assets.

Further information about the scope of the activities undertaken by ForestrySA, including its community services obligations (for which it receives specific SA Government funding), can be found in the ForestrySA 2019/20 annual report available here: <https://www.forestrysa.com.au>

The ForestrySA Charter can also be found here: <https://www.forestrysa.com.au/about-us/corporate-overview-strategic-plan-charter/>. In particular, the Charter records that the statutory Board of ForestrySA is responsible to the Minister for Primary Industries and Regional Development for overseeing the operations of ForestrySA with the goal of:

- securing continuing improvements of performance; and
- encouraging and facilitating regionally based economic activities based on forestry and other industries to protect the long term viability of ForestrySA and the Crown's financial interest in ForestrySA for the benefit of the people and economy of the State.

In respect of ForestrySA's strategic commercial directions:²

¹ See *South Australian Forestry Corporation Act 2000* (SA), s 9.

² As to the nature of the Charter see section 12 of the *Public Corporations Act 1993* (SA).

“3.1 The Government requires [ForestrySA], in fulfilling its statutory functions as set out in the *South Australian Forestry Corporation Act 2000*, to be a business enterprise with the principal responsibility to manage State-owned plantation forests, manage plantation forests for other forest owners and pursue the following strategic commercial directions:

- 3.1.1 Manage State-owned plantation forests for commercial production in line with best practice standards for forestry operations and environmental management.
- 3.1.2 Undertake directly or with industry partners and, where appropriate commercialise, forestry related research for the benefit of [ForestrySA] and the State.
- 3.1.3 Maximise the value of [ForestrySA] whilst achieving other key requirements of Government set out [in this Charter].”

Against this background, it should be noted that this submission represents and records the considered views of ForestrySA, on the basis of the information available to it at the time of writing. However, this submission does not necessary reflect the views of the South Australian Government more broadly.

Preliminary comments in relation to the interim authorisation application

ForestrySA understands that, were the ACCC to grant the interim or substantive authorisation, the approved conduct would be limited to the Nominated Applicants entering discussions about the potential for collective bargaining. ForestrySA understands that any such approvals would not bind ForestrySA to do or not do anything. For example, such approvals would not:

1. prohibit any Nominated Applicant from negotiating individually with ForestrySA in relation to any available or potentially available log supply; or
2. require ForestrySA to negotiate only with Nominated Applicants as a collective, or to continue with or advance negotiations with the Nominated Applicants to any particular extent or within any particular timeframe; or
3. prohibit or limit ForestrySA’s ability to progress marketing activities in general, including negotiating and entering into log sales agreements in accordance with its statutory mandate.

In respect of the cover letter from MSJ dated 21 October 2020, addressing the application for interim authorisation, ForestrySA makes the following comments:

1. ForestrySA refers to the point made above about the scope of the conduct to be authorised as part of an interim authorisation.
2. For the reasons set out in this submission, ForestrySA does not agree with the assertion that the proposed conduct will have a positive impact on the state of competition in the market for the supply of timber products in South Australia.
3. Given the expiry of the existing contracts between ForestrySA and MSJ, and ForestrySA and KSI Sawmill Pty Ltd (KSI), in June this year, approximately 50,000 – 60,000 tonnes of commercial log from the Mount Lofty Ranges estate will become available for forward contracts from July this year, and therefore will be the subject of negotiation and agreements to be established over the coming 5 months (which includes the proposed duration of the interim authorisation).

4. ForestrySA anticipates that this available parcel will be of interest, either wholly or in part, to a number (if not all) of the Nominated Applicants, and that at present, those Nominated Applicants would see each other as competitors for part or all of that parcel. ForestrySA further anticipates the available parcel to be of interest to customers beyond the Nominated Applicants, including other South Australian-based sawmillers, possibly interstate sawmillers and customers serving the export market.
5. The application states that “[i]f we did not gain interim authorisation, then this would slow down the negotiation phase and may cause detriment to our log supply and hence the business.” In reference to negotiations with ForestrySA over future log supply, ForestrySA notes that contract negotiations are in accordance with ForestrySA’s own operational, production and marketing timelines, not dependent on one current customer.
6. ForestrySA considers that if the conduct were not to be authorised on an interim basis then the following is likely to occur:
 - a. ForestrySA will continue to, in good faith, directly negotiate log supply agreements with those individual customers whose agreements are nearing an end, including some Nominated Applicants, in advance of proceeding to open competitive processes if necessary.
 - b. If direct negotiations reveal a clearly competitive log price by reference to ForestrySA’s price benchmarking, then negotiations may progress to one or more completed log supply contracts. In this way ForestrySA has encouraged the active participation of incumbents to future log supply arrangements. For clarity, ForestrySA’s price benchmarking process has been developed using pricing data derived from existing contracts, responses from competitive processes run by ForestrySA over the last three years, and unsolicited offers made by South Australian processors (including members of the Nominated Applicants and outside of the Nominated Applicants) and exporters from time to time.
 - c. If however the direct negotiations do not reveal a clearly competitive log price by reference to ForestrySA’s price benchmarking, ForestrySA will undertake an open “request for proposal” or tender process to the market for the available parcel. ForestrySA is open to receiving proposals for short (nominally around 3 months), medium (1-5 years) or long term (up to 10 years) log supply contracts. Consistently with recent competitive sales processes run by ForestrySA, the process will be open, including to all Nominated Applicants, and importantly, any responses will be able to relate to all or part of the parcel offered.
 - d. ForestrySA will evaluate the responses consistently with the request for proposal documentation, and, having regard to its specific functions including to improve the performance of ForestrySA while also encouraging and facilitating regionally based economic activities based on forestry and other industries.
7. ForestrySA considers that if the conduct were to be authorised by the ACCC on an interim basis, then ForestrySA will undertake the same process outlined in point 6 immediately above in relation to the available parcel, and would take into account any proposals received by the Nominated Applicants and any other parties.

8. However, ForestrySA is concerned that, in this circumstance, the Nominated Applicants may offer a lower price in comparison to what they would otherwise present as their individual best and final offers, if there was a perception that they need not compete with each other for specific log parcels as they have in the past. Some of this past competitive tension is documented by ForestrySA under its competitive sales processes.
9. ForestrySA considers that none of the reasonably likely outcomes resulting from the proposed conduct will generate a net public benefit and nor are they consistent with ForestrySA's particular goals and obligations as outlined earlier this letter. The specifics of the effects of reduced competition on the management of the ForestrySA estate in future will be addressed in ForestrySA's submission on the substantive application.

Please contact me if you would like ForestrySA to clarify any aspects of this submission.

Yours sincerely



Julian Speed
**CHIEF EXECUTIVE
FORESTRYSA**