

APPLICATION FOR AUTHORISATION: SOUTH AUSTRALIAN OYSTER GROWERS' ASSOCIATION INC

AA1000531

SAOGA Response to Additional Questions from ACCC dated 7 December 2020

1. Section 4.1.1 states that the Applicant seeks revocation and substitution of authorisations A91229 and A91230 to continue the conduct authorised by the ACCC since 1999. The conduct authorised in 1999, 2005 and 2010 has been an arrangement summarised as follows:

- Imposition of a levy on spat purchase (on a per 1000 spat basis), collected by hatcheries and remitted to SAORC.
- The levy can be adjusted on 1 January of each year commencing in 2011 to reflect any increase in the Consumer Price Index (all Groups – Adelaide) for the preceding 12 months (introduced in 2010)
- Payment of the levy is required at the time of spat purchase
- Hatcheries can refuse to supply of spat to a grower if the grower refuses to pay the levy at the time of spat purchase.
- Operation of a refund scheme so that growers can receive a refund of levies already paid.
- Where a grower seeks a refund of levies paid during a previous financial year that grower ceases to have access to the research published or generated from the levy in that year.

In the 2020 Application, the Applicants state the Proposed Conduct is limited to the imposition of a levy on spat purchase (on a per 1000 spat basis), and that the levy will be collected by hatcheries and remitted to SAORC.

Please outline exactly what conduct you require authorisation for. Please describe the circumstances where hatcheries might decide to refuse to supply spat to South Australian oyster growers.

The SAOGA and SAORC (jointly, the "**Applicant**") in the Application have relied upon the content of the previous authorisations to set out the conduct requiring authorisation.

The Applicant is seeking authorisation for the following conduct:

- 1.1 the imposition of a levy on:
 - 1.1.1 the acquisition of spat (on a per 1000 spat basis) by oyster growers ("**Grower**") from spat hatcheries listed in paragraph 3.1 of the Application ("**Hatcheries**"); and
 - 1.1.2 spat retained by the Hatcheries (on a per 1000 spat basis) for the purpose of growing oysters for eventual sale as a food product;
 ("**Levy**")

- 1.2 the Levy commencing at \$1.00 per 1000 spat acquired;
- 1.3 the collection of the Levy by the Hatcheries (with the Levy listed as a separate item on each invoice for the purchase of spat);
- 1.4 remittance of the Levy by the Hatcheries to the SAORC which will pool funds in order to fund research and development activities associated with growing oysters for human consumption;
- 1.5 the ability to increase the Levy on 1 January of each year by an amount equal to or less than the Consumer Price Index (All Groups – Adelaide) for the preceding 12 months (but not a requirement to increase the Levy by this amount each year);
- 1.6 the ability for an individual Hatchery to stop supplying a Grower with spat following non-payment of the Levy (please see the below additional comments regarding the ability for a Hatchery to cease supplying spat following non-payment of the Levy);
- 1.7 the maintenance of a refund mechanism whereby a Grower can request the SAORC refund all Levy paid to the Hatcheries; and
- 1.8 the ability to exclude non-Levy paying Growers from the benefit of the research and development activities funded by the Levy if there were to request a refund of the Levy.

The Applicant wishes to clarify the scope of a Hatchery's ability to cease supplying spat to a Grower following non-payment of the Levy. The Applicant notes that the Application and previously granted authorisations may be interpreted as allowing the Hatcheries to *collectively* stop supplying spat following an incidence of non-payment of the Levy.¹ The Applicant wishes to clarify that this conduct (authorisation for a boycott) is not being requested in the Application. The Applicant is only seeking authorisation for individual Hatcheries to cease supplying spat following non-payment of the Levy to *that* Hatchery. There would be no prohibition on the Grower approaching a different Hatchery.

There is strong competition between the Hatcheries in the South Australian market for the supply of spat. In respect of the supply of spat, the Applicant estimates that the supply of spat currently exceeds industry demands. As such, it is unlikely that the Hatcheries would agree to limit their own capacity to supply spat.

The Applicant also notes that if the re-authorisation is granted, where a Grower refuses to pay the Levy, this will likely amount to breach of the contract by the Grower which in turn may give the Hatchery a contractual right to cease providing spat for non-payment of an invoiced amount.

2. **The Applicant is defined as SAOGA and SAORC. We understand that authorisation is sought for the hatcheries listed in Table 1 and any future South Australian hatcheries.**

Please set out the other parties on whose behalf authorisation is requested. For example, is authorisation sought for:

- **SAOGA and its current and future members, or SAOGA and all South Australian oyster growers (we understand that not all South Australian oyster growers are SAOGA members). If you are not seeking authorisation for all growers set out, why?**

¹ For example: Australian Competition and Consumer Commission, *Determination: Application for revocation and substitution of Authorisation A60024 and A60025* (1 October 2010) [4.51]

- **SAORC, if so please outline why SAORC, as the recipient of levies requires authorisation.**

The Applicant confirms that they are seeking the authorisation on behalf of the following entities:

2.1 **SAOGA:** As the sole shareholder of the SAORC, the SAOGA exercises effective control over the SAORC's activities. The SAOGA directs the SAORC continue to utilise the Levy arrangement to fund research and development activities. The Applicant holds the belief that the SAOGA may be considered a party to the classes of conduct set out in paragraph 4.5 of the Application.

2.2 **SAORC:** The SAORC undertakes day-to-day management of the Levy scheme and as such would likely be liable for contraventions of the *Competition and Consumer Act 2010* (Cth) in the instance the re-authorisation is not granted as the SAORC is the entity instigating and facilitating the understanding giving rise to the Levy between the relevant parties.

2.3 **Hatcheries:** The Hatcheries are party to the understanding that underpins the Levy as they are directly imposing the Levy on purchasers of spat. The Applicant has requested the authorisation cover any future South Australian oyster hatcheries in the case a new supplier enters the market.

The Hatcheries are members of the SAOGA.

2.4 **Growers:** The Applicant included the current and future members of the SAOGA within the scope of the Application (at paragraph 3.1) as a precautionary measure in the instance a Grower could be considered to aid, abet, counsel, procure, induce, or attempt to induce the conduct subject of the Application and be deemed accessories to certain contraventions of the *Competition and Consumer Act 2010* (Cth).

The Applicant notes that they did not include those Growers who are not members of the SAOGA within the scope of this protection. Taking note of the ACCC's question, the Applicant wishes to extend the content of paragraph 3.1 of the Application and seek coverage for all non-SAOGA member Growers (current and future).

3. **Section 4.5.3 states that the Proposed Conduct may infringe on the *Competition and Consumer Act 2010* (Cth)'s prohibitions on exclusive dealing (s 47). Please outline what aspect of the conduct might infringe section 47 of the Act.**

The Applicant included exclusive dealings (s 47 of the *Competition and Consumer Act 2010* (Cth)) at paragraph 4.5.3 of the Application as a precautionary measure.

The Applicant provides research and development outcomes to the Hatcheries and Growers due to their participation in the Levy. Inclusion of s 47 in the Application relates to the possibility of:

3.1 the Hatcheries withholding supply of spat following non-payment; and

3.2 the SAORC withholding research and development outcomes,

being considered a condition on the supply or acquisition of goods or services (primarily the supply of research and development outcomes by the SAORC to the Hatcheries and Growers).

4. **We note that under biosecurity protocols introduced since the 2010 authorisations, South Australian oyster growers cannot source spat from other states and territories. If the Proposed Conduct provides for hatcheries to refuse to supply spat to oyster growers that refuse to pay the levy at the time of purchase, this may result in a more significant detriment compared to the time when growers could source spat interstate. We accept that the refund scheme may mitigate any detriment, however paying the levy upfront and then requesting a refund is likely to impact a grower's cash flow and may therefore result in some public detriment. Please comment on the possibility that the likely public detriments, may be more significant now compared to the period before the biosecurity protocols were introduced.**

The Applicant acknowledges the ACCC's concerns regarding the ability of Growers to acquire spat in South Australia if the re-authorisation is granted as well as the concerns regarding Grower cash flow.

The Applicant noted, in response to Question 1 of the Additional Questions from the ACCC dated 23 November 2020, that there are limited circumstances in which a Hatchery would refuse to supply spat to a Grower. It was also noted that while the Application seeks permission for a Hatchery to refuse to supply spat to a Grower following a refusal to pay the Levy, this has not been, and there is no intention of making this, a mandatory requirement for the Hatcheries. Furthermore, where one Hatchery has ceased supplying spat to a Grower, the Grower may seek spat from an alternate (South Australian based) Hatchery.

With respect to the cash flow concerns of the ACCC, the Applicant makes two submissions:

- 4.1 the Levy has a low value that has been – when adjusting for inflation – decreasing in a real dollar value since the conduct was first authorised in 1999. As there has been no increase in the Levy (even after increases were permitted in the 2010 Authorisation), the imposition on a Grower has been steadily decreasing. As such, the Applicant submits that the cost imposition on Growers has decreased over time and re-authorisation (including allowing for increases at CPI) is unlikely to have a substantial impact on Growers as the value of the Levy is a minor component of the overall cost of business for Growers.
- 4.2 the Levy arrangement has been structured in a way to garner high levels of participation, spread the benefits of the research and development activities across the South Australian oyster industry and prevent entities within the industry from 'free-riding' off the contributions of other industry participants. The Applicant submits that the refund mechanism provides the greatest balance between industry and public benefit, and Grower detriment.

Within the South Australian oyster industry, it would be extremely difficult to isolate the benefits of the SAORC's research and development program to a small number of Growers if an 'opt-in' model was used to fund the SAORC. An 'opt-in' model also places a greater burden on those industry participants who are willing and able to appreciate research and development contributions. In an opt-in model, Grower contributions would need to substantially increase to compensate for the loss of industry wide funding. The lack of control over, and ready availability of, research outcomes would also quickly undermine any 'opt-in' system as Growers are likely to be able to obtain the benefits of the Levy without making a contribution.

The 'opt-out' Levy does introduce a burden on Growers, but this is counterbalanced by the benefits Growers receive. The 'opt-out' model ensures that those receiving benefits from research and development activities are contributing to it, reflecting a user pays system, whilst also encouraging a high level of participation.

The Applicant would also like to note that the ACCC has consulted widely across the South Australian oyster industry on the Application and has not received any criticism of the current model. The only submission received on the Application was supportive, stating that '[t]he levy charged on spat sales collected by the hatcheries is an efficient and effective way of sharing the burden of R&D across the whole of industry and minimising free-riders',² echoing the submissions of the Applicant as set out above.

² Submission of Pacific Estate Oysters to ACCC regarding application for Authorisation by South Australian Oyster Growers' Association Inc (24 October 2020).