

APPLICATION FOR AUTHORISATION: SOUTH AUSTRALIAN OYSTER GROWERS' ASSOCIATION INC

AA1000531

SAOGA Response to Additional Questions from ACCC dated 23 November 2020

1. **Please describe the circumstances where hatcheries might decide to refuse to supply spat to South Australian oyster growers.**

The Application, at paragraph 9.3, sets out that a Hatchery may refuse to supply an oyster grower with spat where they do not pay the levy. While this creates a degree of compulsion to participate in the authorised conduct, there remains the ability for an oyster grower to request a refund of any levy paid on spat, preserving their ability to acquire spat from Hatcheries. The compulsive element in this instance is the requirement for an oyster grower to pay a valid invoice issued to them by a Hatchery.

The SAOGA and SAORC are not aware of any circumstance where a Hatchery has refused, or where the Hatcheries will refuse, supply of spat on the basis of non-payment of the levy by itself. This is due to the high rate of compliance with the previously authorised conduct and the net benefit the proposed conduct provides the South Australian oyster industry.

While refusal of supply on non-payment of the levy is included in the Application, the SAORC does not ask or require the Hatcheries to refuse supply of spat on the basis of non-payment of the levy. The Application, at paragraph 9.3, intentionally uses non-obligatory language ("...may refuse to supply...") with respect to the withholding of supply.

The SAOGA and SAORC recognise that the ACCC has previously raised concerns regarding this aspect of the Application when assessing the proposed conduct in 2010.¹ The SAOGA and SAORC submit that any detriment to oyster growers wishing to not participate in the levy is negated by the ability for those oyster growers to seek full refunds of any levy paid. Seeking a refund will not jeopardise the supply of spat to an oyster grower.

Would hatcheries refuse to supply spat to growers that have sought a refund of the levy already paid?

No. The proposed conduct would not see an oyster farmer prevented from acquiring spat if they have sought a refund of the levy. The Application/proposed conduct only relates to the payment of the levy itself, not prohibitions on supply of spat post-payment.

So in this scenario, the growers would not have access to research and hatcheries may decide not to supply the grower, effectively putting the grower out of business.

There is *no requirement or obligation* for a Hatchery to cease supplying spat to an oyster grower who does not pay the levy. As noted above, non-obligatory language is used in the Application.

Any harm to oyster grower who does not wish to participate in the levy-funded research scheme is negated by the ability to obtain a full refund of any levy paid on request. Where an oyster grower has requested a refund, there is no aspect of the Application or proposed conduct that would require Hatcheries to cease supplying spat to that oyster grower. The

¹ Australian Competition and Consumer Commission, *Determination: Application for revocation and substitution of authorisations A60024 and A60025* (1 October 2010) [4.52].

Application/proposed conduct only relates to payment of the levy, it does not include prohibitions on supply of spat post-payment (including where there has been a refund of the levy paid).

2. **Alternatively, might refusal to supply spat occur if a grower is unwilling to pay the levy, which is listed on the sales invoice at the time of purchase? In short, the grower wants to buy spat, but does not want to pay the levy.**

Yes, refusal to pay the levy may result in a Hatchery refusing to supply spat. Despite this, if a grower pays an invoice for spat but removes the itemised levy from the payment, the non-payment is not pursued by SAOGA or SAORC. Further, the SAOGA and SAORC do not expect the Hatcheries to pursue unpaid levies.

As noted in the response to Question 1, the ability for an oyster grower to seek a full refund of any levy paid negates any harm felt by those market participants who do not wish to participate. The imposition of the levy at the time of acquisition of spat is intended to create a 'user pays' system and broadly prevents oyster growers 'free-riding' off the contributions of others to research and development activities. This is especially the case where the benefits of such research would be difficult to isolate from non-levy paying market participants.

3. **Are there other circumstances where a hatchery might refuse to supply a grower?**

Hatcheries may refuse to supply an oyster grower for a range of reasons (as permitted by law). This may include failure to pay invoices.

The SAOGA and SAORC would not expect a Hatchery to rely solely on non-payment of the levy as grounds for refusing to supply spat.

4. **One of the reasons for asking about survival rates for spat in my earlier email was to understand what effect the levy might have on the retail price for oysters in South Australia. Can you provide any details on the impact of the levy on oyster prices in South Australia?**

Whilst spat survival is variable,² a conservative industry average of 35% survival would see the levy add approximately 3.43 cents to the cost of one dozen oysters (approximately 0.286 cents per oyster).

Oysters are sold for approximately \$8.50 per dozen at the farm gate. On a 3.43 cents per dozen basis, the levy is equivalent to 0.4% of the farm gate sale price of oysters in South Australia.

Amongst South Australian industry participants, the levy is considered a cost of production and does not figure into the price charged for oysters separately to other input costs.

The price for oysters is a factor of supply and demand and acts mostly as a commodity. Cost structures are usually only considered when determining viability not price.

² In response to Question 6 of the ACCC's request for additional information on 30 October 2020, the SAOGA and SAORC submitted that spat survival to maturity rates can vary enormously between 0 and 90%.