



**Australian
Competition &
Consumer
Commission**

Application for Authorisation

**South Australian Oyster Growers Association
Inc.**

**in relation to the imposition of a levy on
purchasers of oyster spat sold for cultivation of
oysters within South Australia**

8 September, 1999

Commissoners:
Fels
Asher

**Martin
Cousins
Jones**

**Authorisation No: A60023
File no: CA 99/8**

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Summary

The Commission has considered the application for authorisation A60023 lodged by the South Australian Oyster Growers Association (SAOGA). The application was in relation to the imposition of a levy on purchasers of oyster spat sold for cultivation of oysters within South Australia.

Authorisation was sought for the levy in so far as it constitutes an arrangement which may be, or give effect to, an exclusionary provision within the meaning of s. 45 of the Trade Practices Act.

The Commission accepted that there is public benefit in imposing a levy on oyster spat sales. The Commission considered that the anti-competitive nature of the levy was significantly reduced due to industry support and the operation of the refund scheme.

On 1 July 1999, the Commission granted conditional interim authorisation to application A60023. The interim authorisation will cease operation on the date this determination comes into effect.

On 1 July 1999, the Commission issued a draft determination proposing, subject to any requests for a predecision conference pursuant to section 90A of the Trade Practices Act, to grant authorisation for five years. There was no request for a predecision conference and no objection to the Commission's draft was voiced.

The Commission therefore grants authorisation to SAOGA's application A60023 for a period of five years.

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Glossary

Spat Juvenile oysters, typically 3-10mm in length, acquired from hatcheries and farmed until they reach a marketable size.

List of Abbreviations

SAOGA	South Australian Oyster Growers Association
The Council	South Australian Oyster Research Council
TORC	Tasmanian Oyster Research Council
Trade Practices Act 1974	the Act

1 The Application

1.1 Introduction

The South Australian Oyster Growers Association (SAOGA) on 23 April 1999 lodged an application for authorisation under sub-section 88(1) of the *Trade Practices Act 1974* (the Act).

Application A60023 seeks authorisation to:

- make a contract or arrangement, or arrive at an understanding, where a provision of the proposed contract, arrangement, or understanding would be, or might be, an exclusionary provision within the meaning of s. 45 of the Act; and
- give effect to a provision of a contract, arrangement or understanding where the provision is, or may be, an exclusionary provision within the meaning of s. 45 of the Act.

1.2 The applicant

The SAOGA was formed in 1988 to represent all licensed oyster growers at the government and community level.

Currently, approximately 95% of licensed growers are members of the SAOGA.

Since 1988, SAOGA has been involved in:

- coordinating the South Australian oyster industry's strategic plan;
- developing an industry code of practice; and
- initiating the formation of OYSA, a marketing body that promotes and deals with approximately 85% of all South Australian product.

1.3 The proposed conduct

The conduct under consideration relates to an agreement between the applicant organisation (SAOGA) and six oyster hatcheries, namely The South Australian Oyster Hatchery Pty Ltd, Cameron of Tasmania Pty Ltd, Shellfish Culture Ltd, Wingarra Estates Pty Ltd (Marine Shellfish Hatcheries), Geordy River Aquaculture, and Great Southern Oyster Co Pty Ltd.

The agreement provides for the formation of a company to invest moneys levied on oyster growers in South Australia for the purpose of research and development via a company proposed to be formed. The new company to be set up is to be known as the South Australian Oyster Research Council (the Council). The levy will be collected from all purchasers of oyster spat for cultivation within South Australia, and hatcheries for oyster spat retained and cultivated within South Australia.

The Council

The objects of the Council are to:

- encourage scientific research and development for the South Australian cultured oyster industry;
- promote, encourage and coordinate scientific research and development in the South Australian cultured oyster industry;
- to attract and allocate funds according to projects' budgets and to administer such funds for oyster farming research in South Australia in a way so as to maximise the availability of funding from State and Federal Governments and their respective authorities;
- to report to South Australian participants in the oyster industry of the Council's research and development activities and to State and Federal Governments where required;
- to meet the costs and expenses of setting up the Council and all activities of the Council; and
- to do all other acts and things as the Council may from time to time consider ancillary or incidental.

The levy

The proposed levy is \$1.00 per 1000 spat and will automatically be included in the cost of oyster spat. The Council will set the levy and review it as deemed necessary.

Payment of the levy provides for oyster growers to obtain access to the results of research and development carried out by the Council.

Payment of the levy is voluntary, despite the levy being included in the total cost of oyster spat, due to the operation of a refund scheme. The refund scheme operates in the event that a grower refuses to pay the levy. Instead of the loss of supply that would result from non payment, the grower would pay the levy and seek a refund of the levy that the grower has paid in any financial year. To this extent, the level of compulsion is minimal.

Additionally, in the event that a grower obtains a levy refund, the grower then ceases to be entitled to access the results of industry research and development. This factor addresses the potential free rider problem of growers still being party to research results after receiving a refund.

1.4 Interim authorisation

On 1 July 1999, the Commission granted interim authorisation to application A60023. The interim authorisation will cease operation on the date this determination comes into effect.

The decision to grant interim authorisation should not be taken as precedent. It should not be presumed the Commission will grant interim authorisation without persuasive submissions. Nor does granting interim authorisation ensure that authorisation will also be granted.

Therefore, the interim authorisation was conditional on the SAOGA agreeing to arrangements that allowed a refund of all levy monies collected during the period of interim authorisation in the event that the Commission denied final authorisation.

1.5 Draft determination

On 1 July 1999, the Commission issued a draft determination in relation to application A60023 proposing, subject to any request for a predecision conference, to grant authorisation to SAOGA in respect of imposing a levy on purchasers of oyster spat sold for cultivation of oysters within South Australia.

The Commission proposed to grant authorisation to application A60023 for a five-year period.

2 Background to the application

2.1 Precedent

In 1991, the Trade Practices Commission granted the Tasmanian Oyster Research Council Ltd (TORC) authorisation to impose an oyster spat levy for purchases resulting in oyster cultivation in Tasmania (application numbers A80008 and A80009).

The applicant submits that the levy has proven to be very successful in producing funds for a range of research projects and for industry seminars in Tasmania.

The applicant asserts that the grounds for authorisation in the TORC case pertain equally to the conduct proposed by the South Australian Oyster Research Council Pty Ltd. In addition, the applicant claims that the anti-competitive effect of the proposed South Australian agreement is reduced by a grower being able to seek a refund of the levy.

3 Statutory test

The Act prohibits arrangements that substantially lessen competition, but the prohibition is not absolute. Certain arrangements may be authorised by the Commission and, if authorisation is granted, the parties to the arrangements are given protection from court action for contravention of the Act.

The tests upon which the Commission must determine the application for authorisation are contained in s. 90 of the Act.

As one of the provisions of the agreement would or might be an exclusionary provision, the applicant must satisfy the test in s. 90(8).

The relevant test under sub-section 90(8) prevents the Commission from granting authorisation unless it is satisfied in all circumstances that the provision would result,

or be likely to result, in such a benefit to the public that the arrangement should be allowed to be given effect to.

4 Applicant submissions

4.1 Industry Background

The applicant submits that the Pacific Oyster (*Crassostrea gigas*), introduced to the Eyre and Yorke Peninsulas South Australia in 1969, has commercial and gastronomic advantages over other species of oyster. Historically, oyster cultivation in South Australia was first recorded in 1910 when the native species was cultured for experimental purposes on the Eyre Peninsula.

Production of South Australian Pacific Oysters is reliant upon the provision of juvenile oysters (spat) from licensed oyster hatcheries. The hatcheries use advanced techniques to rear high density larvae and spat cultures. Spat, 3-10mm in length, is purchased by farmers and placed in high nutrient nursery systems to protect the young oysters from predators and high wave action. Oysters are then 'on-grown' in trays, baskets or bags in sub-tidal or inter-tidal areas of the farm until they reach a marketable size.

4.2 South Australian position

The applicant submits that the South Australia Pacific Oyster industry's direct business income is equivalent to more than \$5.8 million per annum. There are approximately 82 licensed growers, the majority of these being located on the Eyre Peninsula. It is also submitted that the industry directly employs approximately 188 (full time equivalent) personnel, with another approximate 88 indirect jobs being generated in the manufacturing, transport and finance service industries. Oyster farming is crucial to the development of the oyster industry in South Australia.

Presently, seven oyster hatcheries, both in Tasmania and South Australia, supply all spat requirements to oyster farms in SA.

The applicant claims that South Australia's pristine water conditions and 'green' reputation combined with the marketing efforts of OYSA puts South Australia in a solid position in the domestic market to produce high quality oysters and in an equally strong position to enter international markets.

However, the applicant reports that extensive research is required in order for the industry to produce oysters at a consistently high quality and quantity, hence becoming an economically and environmentally sustainable industry. Enhanced industry knowledge and skills will allow the South Australian oyster industry to satisfy strict overseas import restrictions, therefore maximising the industry's export potential.

The applicant asserts that the levy has comprehensive industry support and that the establishment of the Council and the associated conduct has been fully discussed with industry and all information has been provided to licence holders.

5 Public benefits argued by the applicant

The applicant asserts that research is necessary to consolidate current gains, improve and expand the South Australian Pacific Oyster industry, and encourage the development of strategic Research and Development Programs. This will help the South Australian Pacific Oyster industry become highly productive, economically sustainable, and ensure the long term viability and environmental sustainability of the industry.

Moreover, research and development can overcome the major constraints to market expansion for the South Australian Pacific Oyster industry. These constraints result from inadequate husbandry knowledge and production technology. By research and development focussing on product handling and quality assurance, the ability to conform to strict overseas import restrictions will also be improved.

The applicant argues that the conduct benefits persons involved in the industry and assists farmers engaged in the industry. Additionally, the general public will benefit from the conduct by receiving a higher quality product in the market place, gaining opportunities for employment as a result of increases in production, and the development of an environmentally friendly industry.

6 Interested party submissions

The Commission received a submission from the Tasmanian Oyster Growers Co-Op Society Ltd. A copy of this submission is held on the Public Register.

Tasmanian Oyster Growers Society submitted that the application should be authorised.

The submission supported the assertions made in the application that the Tasmanian Oyster Research Council has had arrangements similar to those proposed by South Australia since 1991. Moreover, they expressed the view that growers and hatcheries in Tasmania fully accept and endorse the arrangements and that the situation would be similar in South Australia.

7 Commission assessment

In considering applications for authorisation, the Commission may only grant authorisation if the relevant statutory test within s. 90 of the Act is satisfied.

In relation to this application, the applicant must satisfy s. 90(8). The Commission may grant authorisation if it is satisfied in all circumstances that there is such a benefit to the public that the conduct should be allowed.

7.1 Past Commission decision

The arrangements proposed in this application are similar to the arrangements in the application for authorisation lodged by the TORC in October 1990.

In February 1991, the Commission authorised TORC to impose a levy on purchasers of oyster spat sold for cultivation of oysters within Tasmania. The Commission saw public benefit in imposing a levy on oyster spat purchasers, specifically:

- ensuring that all Tasmanian oysters produced will be of the highest quality;
- fostering the development of aquaculture and business efficiency in farming Pacific Oysters; and
- opening up new opportunities in export markets, and creating employment opportunities in an environmentally friendly industry.

Similar public benefit claims have been argued by SAOGA for Commission consideration in support of their application.

The issue for the Commission to decide is whether the public benefits argued by the SAOGA outweigh the anti-competitive detriment. In other words, the possible detriment caused by the SAOGA imposing a levy must not outweigh the public benefits of the scheme.

7.2 Public benefit

The Commission accepts that there is public benefit flowing from the imposition of a research levy. The levy will fund research into product handling and quality assurance. This should ensure that oysters consumed by the Australian public should be free from contamination and disease.

In addition, the Commission accepts that research into product handling and quality assurance will improve the industry's ability to adhere to the strict import requirements of countries around the world. This will develop the export potential of the South Australian Pacific Oyster. The Commission is of the view that export market expansion will provide greater opportunities for employment.

The Commission accepts that there is public benefit flowing from industry research into husbandry knowledge and production technology. By improving the provision of husbandry knowledge and technology, production should increase and there will be greater opportunities for business and market expansion. Again, the Commission is of the view that increases in production will provide greater opportunities for employment, especially in rural areas.

The Commission also accepts that the public will benefit from research into oyster husbandry given that farm management is directly related to environmental management.

In conclusion, the Commission accepts that the imposition of a levy should contribute significantly towards ensuring that:

- all South Australian oyster produced will be of the highest quality and free from contamination;

- economic development and business efficiency in farming Pacific Oysters is fostered;
- new opportunities in export markets are created; and
- employment opportunities are created in an environmentally sustainable industry.

Moreover, the imposition of a research levy appears to be essential to the long-term viability of the oyster industry both domestically and internationally, particularly in the export market.

7.3 Anti-competitive effect

Conversely, the Commission is aware that the anti-competitive nature of imposing a levy has the potential to operate as a severe restriction on competition. It could result in oyster farmers, objecting to pay the levy, being forced out of the industry with no practical alternative source of supply of oyster spat.

However, the Commission accepts that the anti-competitive nature of the levy is significantly reduced by two factors. First, the Commission accepts the submissions provided by the applicant and interested party that there is comprehensive industry support for the research levy. Industry support reduces the likelihood of the exclusionary provisions of the arrangements being invoked by a purchaser refusing to pay the levy and being denied supply of oyster spat.

Secondly, the operation of the refund scheme for growers who object to the levy also minimises the likelihood of the exclusionary provisions being invoked. Furthermore, due to the economic and safety advantages extending from the levy, it is unlikely that any new entrant into the oyster industry would object to paying the proposed levy.

7.4 Barriers to entry

The average price paid for oyster spat by South Australian oyster growers is \$20.00 per 1000 spat. This charge varies directly according to size. The imposition of the levy on growers will raise the average price to \$21.00 per 1000 spat. This equates to an increase of 0.1 cents per juvenile oyster, from 2 cents to 2.1 cents.

The Commission concludes that the levy charge is insignificant as a cost of production and, at that level, does not contribute as a barrier to entry.

On balance, the Commission is of the view that public benefits flowing from the imposition of the levy on oyster growers will outweigh the anti-competitive detriment that might arise if a farmer refused to pay the levy and was refused supply of spat. Consequently, the Commission proposes to grant authorisation to the application.

7.5 Review process

The Commission believes, in regard to authorisations, there is a possibility that the competition or public benefit 'climate' may change after an authorisation is granted, or the details of what was authorised may change to alter the respective weights of public

benefit and anti-competitive effect. It is for these reasons that the Commission proposes to place a time limit in this determination.

In the short term, the imposition of a flat levy across the oyster farming industry helps ensure sufficient levels of funding for effective research and development and the provision of extension exercises for information dissemination. The Commission is of the view that a flat research levy, the benefits of which accrue to the South Australian oyster industry as a whole, is appropriate.

However, in the longer term, it may be feasible to supply research and development information on a user pays basis. In other words, research results are likely to be demanded in the South Australian market and purchased by those who recognise the importance to the future of their business. For example, a flat levy may be imposed on oyster growers at a reduced level while the supply of research and development results would be funded under user pays arrangements. This may include growers paying a fee to participate in seminars and field days.

8 Determination

For the reasons outlined in section 7 of this determination, the Commission concludes, that in all circumstances the arrangements for which the SAOGA has sought authorisation:

- are likely to result in a benefit to the public; and
- that benefit would outweigh the detriment to the public constituted by any anti-competitive effect that would be likely to result from the arrangements.

On 1 July 1999, the Commission issued a draft determination proposing, subject to any requests for a predecision conference pursuant to s. 90A of the Act, to grant authorisation to SAOGA in respect to application A60023. A predecision conference was not requested and no objection to the draft was voiced. The Commission therefore confirms its draft determination and grants authorisation to SAOGA in respect of the imposition of a research levy on all purchasers of oyster spat sold for cultivation of oysters in South Australia.

This determination is made on 8 September 1999. If no application for review of the determination is made to the Australian Competition Tribunal, in accordance with s. 101 of the Act, this authorisation will come into force on 29 September 1999.

If an application for review is made to the Tribunal, the authorisation will come into force:

- where the application is not withdrawn – on the day on which the Tribunal makes a determination on the review; or
- where the application is withdrawn – on the day on which the application is withdrawn.

The authorisation that the Commission grants in respect of application A60023 is to remain in force until 7 September 2004.

The interim authorisation previously granted by the Commission will continue until the date this authorisation comes into force in accordance with the details above, or until such further order by the Australian Competition Tribunal.