



Australian  
Competition &  
Consumer  
Commission

# Draft Determination

## Applications for Authorisation

lodged by

**South Australian Oyster Growers Association Limited**

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

**Date: 29 June 2005**

**Commissioners:**

Samuel  
Sylvan  
King  
Martin  
Smith

**Authorisation no.** A60024  
A60025  
**Public register no.** C2005/406

## **Executive Summary**

On 25 February 2005, the South Australian Oyster Growers Association (SAOGA) lodged application for authorisation A60024 with the Australian Competition and Consumer Commission (the ACCC). SAOGA lodged a related application for authorisation, A60025, on 11 March 2005.

### **The authorisation process**

A key objective of the *Trade Practices Act 1974* (the TPA) is to prevent anti-competitive arrangements or conduct, thereby encouraging competition and efficiency in business, resulting in greater choice for consumers in price, quality and service.

The TPA however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'.

Broadly, the ACCC may 'authorise' businesses to engage in anti-competitive arrangements or conduct where it is satisfied that the public benefit from the arrangements or conduct outweighs any public detriment.

The ACCC conducts a comprehensive public consultation process before making a draft decision and ultimately a final decision to grant or deny authorisation.

### **The arrangements**

SAOGA is seeking authorisation to give effect to an agreement between the applicant and four oyster hatcheries for the imposition of a levy on oyster spat (juvenile oysters) sold by them and an agreement that potentially restricts supply of oyster spat if the levy is not paid. Funds raised through the imposition of the levy are provided to the South Australian Oyster Research Council (SAORC) to invest in research and development for the South Australian oyster industry.

### **Assessment of public benefit and anti-competitive detriment**

The ACCC is of the view that the anti-competitive detriment resulting from the conduct is significantly diminished by the operation of the refund scheme and the continued widespread industry support for the levy. The ACCC notes that at the current level of \$1.00 per 1000 oyster spat the levy constitutes only a very small component of the retail price of oysters (one tenth of a cent per oyster spat).

The ACCC considers that the imposition of the levy is likely to result in public benefits in the form of improved husbandry knowledge, production technology and environmental management in the South Australian Pacific oyster industry. The ACCC also considers that the conduct is likely to result in public benefits through improvement in the quality and safety of oysters, the potential for expanding exports of oysters and the development of employment opportunities in rural areas. On the basis of the information provided to it, the ACCC is satisfied that SAORC is being administered in an appropriate manner so as to ensure that the claimed benefits are likely to result from the imposition of the levy.

While the ACCC is satisfied that, with the levy set at its current level of \$1.00 per 1000 oyster spat, the proposed arrangements would generate minimal anti-competitive detriment, and that any such detriment would be outweighed by the public benefit resulting from the arrangements any substantial increase in the levy has the capacity to generate significant anti-competitive detriment. The ACCC considers that, with the potential for such an increase in the levy to occur, it could not be satisfied that the public benefit resulting from the arrangements would be likely to outweigh any public detriment.

### **Draft Determination**

Therefore, the ACCC proposes to grant authorisation to applications A60024 and A60025 for five years, subject to the condition that the levy set by SAORC under these arrangements is not more than \$1.00 per 1000 oyster spat.

### **Interim authorisation**

SAOGA also sought interim authorisation for the arrangements. On 27 April 2005, the ACCC granted interim authorisation. The terms of the proposed authorisation differ from the interim authorisation granted to SAOGA on 27 April 2005. The ACCC considers it appropriate to amend the interim authorisation in accordance with the ACCC's proposed condition that the levy may be set at no more than \$1.00 per 1000 oyster spat.

Interim authorisation will continue to protect the arrangements from action under the TPA until the final determination comes into effect or until interim authorisation is revoked.

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# 1 Introduction

- 1.1 The Australian Competition and Consumer Commission (the ACCC) is the Australian Government agency responsible for administering the *Trade Practices Act 1974* (the TPA). A key objective of the TPA is to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, resulting in a greater choice for consumers in price, quality and service.
- 1.2 The TPA, however, allows the ACCC to grant immunity from legal action for anti-competitive conduct in certain circumstances. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'. Broadly, the ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment.
- 1.3 The ACCC conducts a comprehensive public consultation process before making a decision to grant or deny authorisation. Upon receiving an application for authorisation, the ACCC invites interested parties to lodge submissions outlining whether they support the application or not, and their reasons for this.
- 1.4 The ACCC then issues a draft determination in writing, proposing to either grant the application (in whole, in part or subject to conditions) or deny the application. In preparing a draft determination, the ACCC will take into account any submissions received from interested parties.
- 1.5 This document is a draft determination in relation to authorisation applications A60024 and A60025 lodged with the ACCC by the South Australian Oyster Growers Association (SAOGA or the Applicant).
- 1.6 Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides interested parties with the opportunity to put oral submissions to the ACCC in response to a draft determination. The ACCC will also invite interested parties to lodge written submissions on the draft.
- 1.7 The ACCC then reconsiders the application taking into account the comments made at the conference (if one is requested) and any further submissions received and issues a final written determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied.
- 1.8 The ACCC also has the power to grant interim authorisation, at the time the application is lodged or at a later stage. Interim authorisation protects the arrangements for which authorisation is sought from legal action under the TPA while the ACCC considers and evaluates the merits of the application.

## 2 Background

- 2.1 There are approximately 100 licensed oyster growers in South Australia, the number increased steadily since the first licence was granted in there was one licence in 1986. There are six major growing areas: Denial Bay, Smoky Bay, Streaky Bay, Haslam, Coffin Bay and Cowell (Franklin Harbour) as well as the Yorke Peninsula and the north eastern side of Kangaroo Island.<sup>1</sup>
- 2.2 The Pacific oyster (*Crassostrea gigas*) was introduced to South Australia in 1969.<sup>2</sup> Juvenile oysters are known as 'spat' and are obtained by spawning adult oysters and rearing the larvae in special tanks until they reach a size suitable to be transported to a farm. At this stage the spat are typically 3-10mm in length.<sup>3</sup> At present, four oyster hatcheries, from Tasmania and South Australia, supply all spat requirements to oyster farms in South Australia.<sup>4</sup>

### SAOGA

- 2.3 SAOGA was established in 1989 and currently has around 100 members, accounting for approximately 98 percent of all licensed oyster growers in South Australia.<sup>5</sup>

### Previous authorisation

- 2.4 On 8 September 1999 the ACCC granted authorisation A60023<sup>6</sup> to SAOGA for five years. The conduct was almost identical to that of the current application.<sup>7</sup> It related to an agreement between SAOGA and six oyster hatcheries (rather than the current four), namely the South Australian Oyster Hatchery Pty Ltd, Cameron of Tasmania Pty Ltd, Shellfish Culture Ltd, Wingara Estates Pty Ltd (Marine Shellfish Hatcheries), Geordy River Aquaculture and Great Southern Oyster Co Pty Ltd.
- 2.5 The agreement provided for the formation of the South Australian Oyster Research Council (SAORC) to invest monies levied on oyster growers in South Australia for the purpose of research and development. The levy imposed on purchasers of oyster spat was set at \$1.00 per 1000 spat, although SAORC had the ability to review and set the levy.

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<sup>1</sup> SAOGA supporting submission, paragraph 4.3.1, page 2.

<sup>2</sup> Ibid., paragraph 4.1.2, page 1.

<sup>3</sup> Ibid., paragraph 4.2.1, pages 1-2.

<sup>4</sup> Ibid., paragraph 4.3.10, page 3.

<sup>5</sup> Ibid., paragraph 4.3.6, page 3.

<sup>6</sup> The application was lodged under section 88(1) of the TPA 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 section 45 of the TPA, and to give effect to such a provision.

<sup>7</sup> The ACCC notes that SAOGA's 1999 application only sought authorisation for conduct that may be an exclusionary provision and not for conduct that may constitute price-fixing.

- 2.6 The ACCC accepted that there was a public benefit in the conduct. Specifically, the ACCC considered that the imposition of a levy would contribute significantly towards ensuring that: all South Australian oysters would be of the highest quality and free from contamination; economic development and business efficiency in farming Pacific oysters was fostered; new employment opportunities in export markets were created; and employment opportunities were created in an environmentally sustainable industry.
- 2.7 The ACCC considered that the anti-competitive nature of the levy was significantly reduced due to industry support and the operation of a refund scheme. The refund scheme provided that, while all oyster growers were required to pay the levy or risk the hatcheries refusing to supply them, oyster growers who did not wish to have access to the results of research funded by the levy could seek a refund of levies paid. At the time, the average price paid for oyster spat was \$20.00 per 1000 spat. Prices varied directly according to size. Therefore, the levy of \$1.00 per 1000 spat equated to an increase of 0.1 cents per juvenile oyster from 2 cents to 2.1 cents. The ACCC concluded that the levy was insignificant as a cost of production and was not a barrier to entry to the industry.
- 2.8 Authorisation A60023 lapsed on 8 September 2004. However, SAOGA, SAORC and the other parties to the agreement appear to have continued to engage in the conduct the subject of authorisation 60023 in the time between the authorisation lapsing and interim authorisation being granted to the current application (see paragraph 3.4).

## SAORC

- 2.9 SAORC was established on 28 October 1999. SAOGA is the sole shareholder in SAORC and all board members are nominated licensed oyster growers.<sup>8</sup> The objects of SAORC are to<sup>9</sup>:
- encourage scientific research and development for the South Australian cultured oyster industry
  - promote, encourage and co-ordinate scientific research and development in the South Australian cultured oyster industry
  - attract and allocate funds according to projects' budgets and to administer such funds for oyster farming research in and/or related to South Australia in such a way as to maximise the availability of funding from State and Federal Governments and their respective authorities
  - report to South Australian participants in the oyster industry of SAORC's research and development activities and where required to State and Federal Governments

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<sup>8</sup> SAOGA supporting submission, paragraph 4.3.7, page 3.

<sup>9</sup> Ibid., paragraph 5.3.1, page 6.

- meet the costs and expenses of setting up SAORC and all activities of SAORC
- do all other acts and things as SAORC may from time to time consider ancillary or incidental.

2.10 SAORC has obtained grants from Fisheries Research and Development Corporation, Seafood Services Australia, Farmbis SA, Eyre Regional Development Board and Centre of Innovation, Business and Manufacturing.<sup>10</sup>

2.11 SAORC has collected the following amount of money under the levy<sup>11</sup>:

<b>Financial year</b>	<b>Money collected under levy</b>
1999-2000	\$37 666
2000-2001	\$70 423
2001-2002	\$102 768
2002-2003	\$125 008
2003-2004	\$137 404
2004-2005 (expected seed levies)	\$100 000 (conservative estimate)

#### **Tasmanian Oyster Research Council authorisation**

2.12 In 1991, the Trade Practices Commission (the TPC) granted authorisations A80008 and A80009 without time limit to the Tasmanian Oyster Research Council Ltd (TORC) to impose an oyster spat levy for purchases resulting in oyster cultivation in Tasmania.

<sup>10</sup> Ibid., paragraph 5.8, page 8.

<sup>11</sup> SAOGA, letter to ACCC, 25 May 2005.



### 3 The Applications

- 3.1 On 25 February 2005, SAOGA lodged application for authorisation A60024<sup>12</sup> with the ACCC relating to an agreement between SAOGA and four oyster hatcheries, namely the South Australian Oyster Hatchery Pty Ltd, Cameron of Tasmania Pty Ltd, Shellfish Culture Ltd and ATF A.R.K. Fisheries Trust and M & I Securities Pty Ltd, trading as Geordy River Aquaculture Pty Ltd. SAOGA lodged an additional application for authorisation A60025<sup>13</sup> in relation to the agreement on 11 March 2005.<sup>14</sup> SAOGA subsequently amended both applications on 5 April 2005.<sup>15</sup>
- 3.2 The agreement allows the hatcheries to impose a levy on all purchasers of oyster spat for cultivation within South Australia and hatcheries for oyster spat retained and cultivated within South Australia. SAORC invest monies raised by the levy for the purpose of research and development. The levy, currently \$1.00 per 1000 oyster spat, is set by SAORC. The levy is included in the cost of oyster spat and the agreement between the hatcheries allows for the hatcheries to refuse supply to any grower who refuses to pay the levy. However, growers are able to seek a refund of the levy paid in any financial year. If a refund is sought, the grower ceases to be entitled to access the research published or generated from the levy in that year.
- 3.3 Pursuant to section 88(10) of the TPA, the applications were also expressed so as to apply to any additional hatcheries that subsequently become a party to the agreement.
- 3.4 In addition, SAOGA requested that interim authorisation be granted for the conduct.<sup>16</sup> On 27 April 2005, the ACCC granted SAOGA's request for interim authorisation.

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<sup>12</sup> Application A60024 was made under section 88(1) of the TPA for an authorisation to 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 section 45 of the TPA.

<sup>13</sup> Application A60025 was made under section 88(1) of the TPA for a an authorisation to give effect to a provision of a contract or arrangement or understanding, which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of the section 45 of TPA.

<sup>14</sup> The applications were also made on behalf of the South Australian Oyster Research Council Pty Ltd.

<sup>15</sup> These amendments did not alter the substantive application.

<sup>16</sup> SAOGA requested that interim authorisation be granted retrospectively from 7 September 2004. The ACCC is unable to grant interim authorisation retrospectively.

## 4 Summary of Submissions

### SAOGA

- 4.1 SAOGA's submission supporting its application is summarised below. On 25 May 2005 and 7 June 2005, at the request of the ACCC, SAOGA provided additional submissions in relation to the financial operations of SAORC since its establishment. A copy of each submission is available on the ACCC's Public Register.

#### *Public benefit*

- 4.2 SAOGA submits that continued research and development is necessary to improve and expand the South Australian Pacific oyster industry. The conduct will encourage the development of strategic research and development programs, which will ensure the long term viability and environmental sustainability of the industry.
- 4.3 SAOGA submits that inadequate husbandry knowledge and production technology constitute major constraints to full production and market expansion for the South Australian Pacific oyster industry. SAOGA submits that the conduct will lead to improvements in these areas. SAOGA also submits that the conduct will help to expand the industry by assisting growers to conform to strict overseas import regulations.
- 4.4 SAOGA submits that the conduct will ensure that the general public receives high quality oysters. SAOGA notes two previous examples of public health problems resulting from oysters grown in New South Wales. SAOGA submits that the quality of oysters is of particular importance as they are generally eaten raw. SAOGA also submits that research into oyster husbandry and farm management will have environmental management benefits.
- 4.5 SAOGA submits that in 1999 the South Australian Pacific oyster industry's direct business income was \$5.8 million per annum and it provided 276 full time equivalent jobs for the state. SAOGA submits that in 2002/03, the South Australian oyster industry's direct business income was \$16.1 million and it provided 589 full time equivalent jobs for the state. SAOGA submits that this increase is due to the strategic industry approach to research and development. SAOGA submits that the continuation of the conduct will result in greater opportunities for employment, particularly in rural areas.
- 4.6 SAOGA submits that without authorisation for the continuation of the levy, Pacific oyster research and development would be conducted on an ad hoc basis and would be dependent on the resources of individual licence holders.

#### *Anti-competitive detriment*

- 4.7 SAOGA submits that the levy continues to have comprehensive industry support. It submits that the continuation of SAORC and the associated

conduct have been fully discussed within the industry and all information has been provided to licence holders.

- 4.8 SAOGA submits that hatcheries do not profit from the levy and competition between hatcheries is not precluded by the operation of the levy as it applies equally to all hatcheries.
- 4.9 SAOGA notes that the levy will be fixed at a price to be set by SAORC and submits that the fact that SAOGA is the sole shareholder of SAORC will ensure that there is no significant impact on industry pricing structures. SAOGA submits that the current levy of \$1 per 1000 spat is modest in terms of total production costs and end sale price.<sup>17</sup> In addition, the levy may be offset by a reduction in oyster farming costs as a result of research and development undertaken by SAORC.
- 4.10 SAOGA submits that while a grower could be denied oyster spat without full payment of the levy, the arrangement allows a grower to seek a refund of the levy paid in any financial year. The grower would then not be entitled to access to the research generated from the levy in that year.<sup>18</sup> SAOGA submit that there have been no requests for refunds of levies paid.<sup>19</sup>
- 4.11 SAOGA notes that levy funds are collected by the hatcheries and sent to SAORC. SAOGA submits that independent administration of these funds ensures that individual levy transactions are kept commercial-in-confidence.

### *Previous research*

- 4.12 In 1999 SAORC identified three proposed research projects: the influence on commercial oyster growth productivity by fine scale plankton dynamics in South Australian embayments; the selective breeding of the Pacific oyster; and the effect of aerial exposure on oyster condition and growth. The first two projects were undertaken by assisting with a study of the 'biological response of the Pacific oyster to the South Australian environment' and the establishment and funding of Australian Seafood Industries (ASI), in conjunction with TORC, to commercialise research into the sustainable genetic improvement of Pacific oysters in Tasmania and South Australia.
- 4.13 SAOGA submits that SAORC has also supported the following research and development projects:
- strategic planning workshop (2001)
  - the safe upper threshold levels of toxins in oysters (2002)
  - supporting the South Australian Shellfish Quality Assurance Program
  - how to grow oysters workshop (2002)
  - investigating unexplained oyster mortalities (2003)

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<sup>17</sup> SAOGA submit that the average price per 1000 spat is \$17.

<sup>18</sup> SAOGA notes that the levy imposed by TORC is not refundable.

<sup>19</sup> SAOGA, letter to ACCC, 25 May 2005.

- identification of natural mudworm species in South Australian Pacific oyster stocks (2003)
- shelf-life testing (2003)
- development of an industry recipe card (2004)
- international and domestic market research (2004)
- oyster hatchery feasibility study (2004)
- sponsorship of six oyster farmers to participate in the state seafood leadership training program
- alternatives to algae for conditioning of saleable Pacific oysters (2005)
- development of an oyster stress test (ongoing)
- facilitating focus groups on business management and development (2004/2005).

***Term of authorisation***

4.14 SAOGA is seeking authorisation for an indefinite period from 1 July 2005.

**Other submissions**

4.15 The ACCC sought submissions from interested parties in relation to the proposed arrangements. The ACCC received one submission supporting the applications, from a licensed oyster grower and member of SAOGA, Ms Vicki Blesing. A copy of this submission is available on the ACCC's Public Register.

## 5 The Statutory Tests

- 5.1 The ACCC may only grant authorisation where the relevant public benefit test in section 90 of the TPA is satisfied.

### Application A60024

- 5.2 SAOGA lodged application for authorisation A60024 under sub-section 88(1) of the TPA to give effect to a contract, arrangement or understanding, a provision of which is or may be an exclusionary provision within the meaning of section 45 of the TPA.
- 5.3 Section 90(8) of the TPA provides that the ACCC shall not make a determination authorising an exclusionary provision of a contract, arrangement or understanding, unless it is satisfied in all the circumstances that the provision would result or is likely to result in such a benefit to the public that the proposed contract, arrangement or understanding ought be authorised.

### Application A60025

- 5.4 SAOGA lodged application for authorisation A60025 under subsection 88(1) of the TPA to make and give effect to a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would have or might have the effect, of substantially lessening competition within the meaning of section 45 of the TPA.
- 5.5 The relevant public benefit test for this application is found in sub-section 90(6). This section provides that the ACCC may grant authorisation to a provision of a contract, arrangement or understanding, other than an exclusionary provision, if it is satisfied that:
- the provision of the contract, arrangement or understanding would be likely to result in a benefit to the public
  - this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result if the provision concerned was given effect to.

### Application of the tests

- 5.6 While there is some variation in the language between the test in section 90(6) and the test in section 90(8), the ACCC has until recently adopted the previous view of the Trade Practices Tribunal (now the Australian Competition Tribunal) that, in practical application, the tests are essentially the same.<sup>20</sup>

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<sup>20</sup> *Re Media Council of Australia (No 2)* (1987) ATPR at 40-774; *Re 7-Eleven Stores Pty Ltd* (1994) ATPR 41-357.

- 5.7 This view has now been reconsidered by the Australian Competition Tribunal (the Tribunal) and it has found that the two tests are not precisely the same.<sup>21</sup> In particular the Tribunal considered that the test under section 90(6) was limited to a consideration of those detriments arising from a lessening of competition. It was the Tribunal's view that the test under section 90(8) was not so limited.
- 5.8 However, with respect to SAOGA's applications, the ACCC is satisfied that the public detriments resulting from the conduct arise directly from a lessening of competition. Consequently, the differences in the tests identified by the Tribunal do not affect the assessment of the current applications.

### **Definition of public benefit and public detriment**

- 5.9 Public benefit is not defined by the TPA. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes 'anything of value to the community generally, any contribution to the aims pursued by society including as one of its principle elements ... the achievement of the economic goals of efficiency and progress'.<sup>22</sup>
- 5.10 Similarly, public detriment is not defined in the TPA but the Tribunal has given the concept a wide ambit. It has stated that the detriment to the public includes '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'.<sup>23</sup>

### **Future with-and-without test**

- 5.11 In weighing up the public benefit and anti-competitive detriment generated by proposed arrangements for which authorisation has been sought the ACCC also applies the 'future with-and-without test' established by the Tribunal.
- 5.12 Under this test, the ACCC compares the public benefit and anti-competitive detriment generated by arrangements in the future if the authorisation is granted with those generated if the authorisation is not granted. This requires the ACCC to predict how the relevant markets will react if authorisation is not granted. This prediction is referred to as the counterfactual.

### **Term of authorisation**

- 5.13 Section 91(1) of the TPA allows the ACCC to grant authorisation for a specific period of time. Section 91(3) allows the ACCC to grant authorisation subject to conditions.

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<sup>21</sup> *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004.

<sup>22</sup> *Re 7-Eleven Stores; Australian Association of Convenience Stores* (1994) ATPR ¶ 41-357 at 42677. The Tribunal recently followed this approach in *Qantas Airways Limited* [2004] ACompT 9, 16 May 2005.

<sup>23</sup> *Re 7-Eleven Stores; Australian Association of Convenience Stores* (1994) ATPR ¶ 41-357 at 42683.

## 6 ACCC Assessment

- 6.1 The ACCC's evaluation is in accordance with the statutory tests outlined in section 5 of this draft determination. As required by the tests, it is necessary for the ACCC to assess and weigh the likely public benefits and detriments flowing from the proposed arrangements.

### Relevant markets

- 6.2 The first step in assessing the public benefits and anti-competitive detriment of the conduct for which authorisation is sought is to consider the relevant market(s) in which that conduct occurs.
- 6.3 Defining the markets affected by arrangements proposed for authorisation assists in assessing public benefit and public detriment from any lessening of competition from the arrangements. However, depending on the circumstances, the ACCC may not need to comprehensively define the relevant markets, as it may be apparent that a net public benefit will or will not arise regardless of this definition. The ACCC is of the view that this is the case in relation to this matter.
- 6.4 In considering this application, the ACCC has identified two areas of competition, broadly being those associated with:
- the supply of oyster spat to South Australian oyster growers
  - the wholesale and retail supply of oysters in Australia.
- 6.5 With regard to the supply of oyster spat to South Australian oyster growers, the ACCC notes that SAOGA submits that the four hatcheries that are party to these arrangements supply all spat requirements to oyster farms in South Australia.<sup>24</sup>
- 6.6 With regard to the wholesale and retail supply of oysters in Australia, the ACCC notes that in 2000-2001 Australia imported nearly 600 tonnes of edible oysters, most of which were from New Zealand.<sup>25</sup> By way of comparison, in 2000-2001 Australia produced a total of 9560 tonnes of edible oysters. In 2002-2003 Australia produced a total of 9855 tonnes of edible oysters.<sup>26</sup> The ACCC notes that nearly all farmed edible oysters are sold domestically.<sup>27</sup>
- 6.7 SAOGA submits that the total direct business turnover for the South Australian oyster industry was \$30.9 million in 2002/03. Direct business turnover generated by South Australian oyster farming enterprises was

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<sup>24</sup> SAOGA supporting submission, paragraph 4.3.10.

<sup>25</sup> ABARE, 'Import competitiveness of Australian aquaculture', July 2002, page 40.

<sup>26</sup> ABS, 'Australia Now (1301.0 - 2005) - Year Book Australia, Forestry and fishing, Fishing', <http://www.abs.gov.au/Ausstats/abs@.nsf/94713ad445ff1425ca25682000192af2/6a0bc7e1b9041db9ca256f7200833030!OpenDocument>

<sup>27</sup> ABARE, 'Import competitiveness of Australian aquaculture', July 2002, page 6.

\$16.1 million and the output generated by associated downstream activities in South Australia was \$14.7 million. SAOGA submitted that flow-ons to other sectors of the state economy added another \$33.9 million in business in business turnover in 2002/03.<sup>28</sup>

#### **Future with-and-without test (the counterfactual)**

- 6.8 The ACCC notes SAOGA's submission that without authorisation for the continuation of the levy, Pacific oyster research and development in South Australia would be conducted on an ad hoc basis and would be dependent on the resources of individual licence holders.<sup>29</sup>
- 6.9 Given that the conduct would be likely to raise concerns under the TPA, it is unlikely, absent of authorisation, that SAOGA and the parties to this application would be able to engage in the conduct. Therefore, the ACCC considers that the most likely situation without the arrangements is that the levy would no longer be imposed on sales of oyster spat for cultivation in South Australia and the research and development initiatives undertaken by SAORC, both currently and in the future, would not take place.
- 6.10 Without the levy, it is possible that SAORC would continue to be funded in some form by the industry. However, the level of funding generated without a formal industry wide set of arrangements such as those the subject of these applications would be likely to be greatly reduced. Similarly individual businesses within the industry may choose to conduct research projects independently. However, in either case, the level of research and development undertaken and the extent to which the results of this research and development is shared across the industry, is likely to be significantly reduced absent the proposed arrangements.

#### **Anti-competitive detriment**

- 6.11 As discussed in section 5, the ACCC must assess the extent to which the arrangements give rise to detriment to the public constituted by any lessening of competition that flows from the arrangements.

#### *Refusal to supply*

- 6.12 The proposed arrangement includes an agreement between competing hatcheries not to supply spat to oyster farmers if they do not pay the levy. The ACCC notes that all hatcheries that currently supply spat to South Australian oyster farmers are parties to the conduct.
- 6.13 The ACCC notes that SAOGA submits that while a grower could be denied oyster spat without full payment of the levy, the arrangement allows a grower to seek a refund of the levy paid in any financial year. If a grower obtains a refund of the levies paid, the grower is not entitled to access to the research

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<sup>28</sup> SAOGA supporting submission, paragraph 4.3.2, page 2.

<sup>29</sup> Ibid., paragraph 6.9, page 9.



generated from the levy in that year. In addition, SAOGA submits that the levy continues to have comprehensive industry support. The ACCC notes SAOGA's submission that there have been no requests for a refund of levies paid.<sup>30</sup>

- 6.14 While the arrangements, if they were to result in some South Australian oyster growers being refused supply of oyster spat, would generate significant anti-competitive detriment, the ACCC is of the view that the anti-competitive detriment resulting from the conduct is significantly diminished by the operation of the refund scheme and the continued widespread industry support for the levy. Specifically, the refund scheme allows farmers to opt out of the arrangements without their supply of oyster spat being jeopardised. More generally, the fact that no farmer has sought a refund of the levy suggests that farmers do not consider that its imposition results in any significant detriment to them.

#### *Agreements on price*

- 6.15 The arrangements involve an agreement between competing hatcheries to fix an element of the prices they charge for oyster spat. In general, where buyers or sellers collude on the terms or conditions of acquisition or supply, competition can be distorted and resources directed to less efficient uses. For this reason, agreements between competitors as to price are deemed to substantially lessen competition under section 45A of the TPA.
- 6.16 The ACCC notes SAOGA's submission that hatcheries do not profit from the levy and that price competition is not precluded by the levy as it applies equally to all hatcheries. The ACCC accepts that these features of the arrangements significantly lessen the detriment that could otherwise result from the conduct. However, the ACCC notes that if the levy were to be set at a high level and/or the resulting funds used inappropriately, the conduct could have the potential to act as a barrier to entry for new oyster farmers in South Australia.
- 6.17 In this respect, the ACCC notes that the levy is \$1.00 per 1000 spat and has not been changed since its introduction in 1999. SAOGA submits that the average price per 1000 spat is currently \$17.00 and submits that the levy is modest in comparison with total production costs and end sale price. The ACCC also notes that South Australian Pacific oysters face competition from Tasmanian Pacific oysters, Sydney rock oysters, other rock oysters and imported oysters, predominantly from New Zealand.
- 6.18 The ACCC considers that the competition provided by oysters grown in other regions of Australia and imported oysters is likely to serve as a constraint on SAORC increasing the amount of the levy beyond that necessary to fund appropriate research and development projects. As SAOGA is the sole shareholder in SAORC, it is likely to ensure that SAORC's decision making adequately reflects the competitive constraints faced by its member farmers.

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<sup>30</sup> SAOGA, letter to ACCC, 25 May 2005.

The ACCC is satisfied that the levy is not likely to constitute a barrier to entry for oyster farmers in South Australia.

- 6.19 In relation to the wholesale and retail supply of oysters in Australia, the ACCC considers that the levy could potentially increase the price that would otherwise be paid for South Australian Pacific oysters particularly as SAORC has the ability to vary the amount of the levy.
- 6.20 However, as noted in paragraph 6.17, the levy has not been changed since its introduction and as submitted by SAOGA, the levy is not likely to be significant in comparison with total production costs. In this respect, the ACCC notes that the levy, at its current level, is one tenth of a cent per juvenile oyster. In addition, South Australian Pacific oysters face competition from other Australian and internationally produced oysters and it is in SAOGA's interests to ensure that the price of its members' oysters remain competitive. The ACCC also notes SAOGA's submission that the levy may be offset by a reduction in oyster farming costs as a result of the research and development undertaken by SAORC.
- 6.21 However, despite these mitigating factors, the ACCC remains concerned in relation to SAORC's ability to vary the amount of the levy. As noted at paragraph 6.15, agreements as to price are deemed to substantially lessen competition under section 45A of the TPA. For this reason, the ACCC would be reluctant to offer a blank cheque to SAORC to increase the levy as it sees fit. Subject to this concern being addressed, the ACCC considers that the levy arrangements are likely to generate minimal anti-competitive detriment.

#### **Public benefit**

- 6.22 As discussed in section 5, the ACCC must assess the public benefit that is expected to flow from the authorised conduct.
- 6.23 SAOGA submits that continued research and development is necessary to improve and expand the South Australian Pacific oyster industry. SAOGA submits that the conduct will improve husbandry knowledge and production technology and assist growers to conform to strict overseas import regulations. SAOGA also submits that research into oyster husbandry and farm management will have environmental management benefits. SAOGA also submits that the conduct will ensure that the general public receives high quality oysters and notes that the quality of oysters is of particular importance as they are generally eaten raw.
- 6.24 SAOGA submits that the value of the South Australian oyster industry has increased significantly since the arrangements were first entered into and that this increase is due to the strategic industry approach to research and development. SAOGA submits that the continuation of conduct will result in greater opportunities for employment, particularly in rural areas.
- 6.25 The ACCC notes SAOGA's submission that without the imposition of the levy, research would be conducted only on an ad hoc basis. SAOGA submits that continued research and development is necessary to improve and expand

the South Australian Pacific oyster industry. The conduct will encourage the development of strategic research and development programs, which will ensure the long term viability and environmental sustainability of the industry.

- 6.26 As discussed at paragraphs 6.8 to 6.10, the ACCC considers that the imposition of the levy is likely to lead to the availability of more funding, greater coordination of research and development for the industry and wider dissemination of the results of this research and development than without the levy.
- 6.27 The ACCC sought further information from SAOGA as to the money collected by SAORC under the levy and details as to SAORC's expenditure since its establishment. As shown at paragraph 2.12, the money collected under the levy has increased each year from \$37 666 in the 1999-2000 financial year to \$137 404 in 2003-2004. SAOGA has conservatively estimated that levy funds collected for 2004-2005 will be \$100 000.<sup>31</sup>
- 6.28 Significant features of SAORC's research and development expenditure since its establishment include<sup>32</sup>:
- \$70 000 in levies paid to the Fisheries Research and Development Corporation<sup>33</sup> (the FRDC)
  - \$62 000 funding for Australian Seafood Industries (ASI)<sup>34</sup>
  - \$52 000 on shelf-life testing, development of an industry recipe card and international and domestic market research
  - \$25 000 for an oyster mortality project implemented by the South Australian Research & Development Institute
  - \$12 000 for research into the safe upper threshold levels of toxins in oysters
  - \$10 000 funding of identification of natural mudworm species in South Australian Pacific oyster stocks.
- 6.29 Significant expected future expenditure includes further funding for ASI, an oyster conditioning project with James Cook University, leadership training and continued support for the South Australian Shellfish Quality Assurance Program.<sup>35</sup>

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<sup>31</sup> SAOGA, letter to ACCC, 25 May 2005.

<sup>32</sup> These figures compiled from SAOGA's letter to ACCC and attached documents, 25 May 2005, and SAOGA's additional submission, 7 June 2005.

<sup>33</sup> The FRDC is a statutory authority within the portfolio of the federal Minister for Agriculture, Fisheries and Forestry, jointly funded by the Australian Government and the fishing industry. The FRDC plans, invests in and manages fisheries research and development throughout Australia. <[www.frdc.com.au](http://www.frdc.com.au)>.

<sup>34</sup> ASI was established by SAORC in conjunction with TORC to commercialise research into the sustainable genetic improvement of Pacific oysters in Tasmania and South Australia

<sup>35</sup> SAOGA, letter to ACCC and attached documents, 25 May 2005, and SAOGA's additional submission, 7 June 2005.

- 6.30 The ACCC notes that SAOGA has provided details of a number of research projects conducted using the funds provided by the levy as well as some ongoing and planned projects (see paragraphs 4.12, 4.13 and 6.29). The ACCC notes that SAOGA submits that the levy has the full support of the industry and also notes that no submissions opposing the conduct were received.
- 6.31 The ACCC accepts that improved husbandry knowledge, production technology and environmental management in the South Australian Pacific oyster industry resulting from the use of the funds generated by the levy constitutes a public benefit. The ACCC is also of the view that the improvement of the quality and safety of oysters, the potential for expanding exports of oysters and the development of employment opportunities in rural areas would also constitute a benefit to the public.
- 6.32 The ACCC is of the view that ongoing appropriate and effective administration of the levy is necessary in order for the claimed public benefits to accrue from the conduct. The public benefit associated with the conduct would be significantly diminished if the levy was administered inefficiently and the ACCC will be concerned to ensure that this does not occur. On the basis of the information provided by SAOGA and SAORC in relation to SAORC's research and other spending at this time, including likely future research projects, the ACCC considers that the continued imposition of the levy is likely to result in the benefits outlined at paragraph 6.32.
- 6.33 The ACCC notes that it may be possible for such research and development to be funded on a more direct user pays basis. However, as noted, the level of research and development undertaken and the dissemination of information obtained through such research and development to the industry is likely to be reduced under such arrangements. More generally, the ACCC notes that the levy arrangements, through the operation of the refund scheme, broadly reflect the user pays principal. The fact that no grower has sought a refund on levies paid and that no growers have raised concerns regarding the arrangements with the ACCC during its consideration of the arrangements to date, suggests that growers consider that the benefit derived through the various projects to which levy funds are allocated outweigh the costs of funding those projects.

#### **Balance of public benefits and detriments**

- 6.34 The ACCC is of the view that the anti-competitive detriment resulting from the conduct is significantly diminished by the operation of the refund scheme and the continued widespread industry support for the levy.
- 6.35 Furthermore, the ACCC considers that competition provided by oysters grown in other regions of Australia and imported oysters is likely to serve as a constraint on SAORC increasing the amount of the levy beyond that necessary to fund appropriate research and development projects. In this respect, the ACCC notes that at the current level of \$1.00 per 1000 oyster spat, the levy constitutes only a very small component of the retail price of oysters (one tenth of a cent per oyster spat).

- 6.36 The ACCC considers that the imposition of the levy is likely to result in public benefits in the form of improved husbandry knowledge, production technology and environmental management in the South Australian Pacific oyster industry. The ACCC also considers that the conduct is likely to result in public benefits through improvement in the quality and safety of oysters, the potential for expanding exports of oysters and the development of employment opportunities in rural areas. On the basis of the information provided to it, the ACCC is satisfied that SAORC is being administered in an appropriate manner so as to ensure that the claimed benefits are likely to result from the imposition of the levy.
- 6.37 While the ACCC is satisfied that, with the levy set at its current level of \$1.00 per 1000 oyster spat, the proposed arrangements would generate minimal anti-competitive detriment, and that any such detriment would be outweighed by the public benefit resulting from the arrangements, as noted, any substantial increase in the levy has the capacity to generate significant anti-competitive detriment. The ACCC considers that, with the potential for such an increase in the levy to occur, it could not be satisfied that the public benefit resulting from the arrangements are likely to outweigh any public detriment.
- 6.38 Accordingly the ACCC proposes to grant authorisation to applications A60024 and A60025, subject to the condition that the levy set by SAORC under these arrangements is not more than \$1.00 per 1000 oyster spat. If SAORC becomes of the view that it is necessary to increase the levy beyond \$1.00 per 1000 oyster spat to ensure sufficient funds are available for its research and development programs, it is open to SAOGA to apply to the ACCC for the revocation of these proposed authorisations and the substitution of new ones on different terms.

***Term of authorisation***

- 6.39 Section 91(1) of the TPA allows the ACCC to grant authorisation for a specific period of time.
- 6.40 SAOGA is seeking authorisation indefinitely. The ACCC does not consider it appropriate to grant authorisation for the conduct indefinitely. The ACCC proposes to grant authorisation for a period of five years.
- 6.41 In general, authorising arrangements for a limited time period allows the ACCC, at the end of the period of authorisation, to evaluate whether the public benefits upon which its decision is made actually eventuate in practice and the appropriateness of the authorisation in the current market environment. As noted at paragraph 6.33, the ACCC is concerned that SAORC ensures that the levy continues to be administered in such a way as to give rise to the claimed public benefits from the conduct.
- 6.42 It is open for the Applicant to reapply for authorisation at the expiration of an authorisation. In the event that an application for re-authorisation is received by the ACCC, whether re-authorisation should be granted would be considered based on the circumstances at that time. As is the case in this instance, should the Applicant apply for re-authorisation, the ACCC would expect the

Applicant to provide information in relation to operation of the levy over the term of the authorisation and demonstrate the results of research and development projects undertaken.

- 6.43 In addition, the ACCC may review the authorisation prior to the expiry of the authorisation if there has been a material change of circumstance since the authorisation was granted.

## 7 Draft Determination

- 7.1 On 25 February 2005, the South Australian Oyster Growers Association (SAOGA) lodged application for authorisation A60024 under section 88(1) of the *Trade Practices Act 1974* (the TPA) for an authorisation to 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 section 45 of the TPA. On 11 March 2005, SAOGA lodged application for authorisation A60025 under section 88(1) of the Act for an authorisation to give effect to a provision of a contract or arrangement or understanding, which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of the section 45 of Act.
- 7.2 The applications relate to an agreement between SAOGA and four oyster hatcheries, namely the South Australian Oyster Hatchery Pty Ltd, Cameron of Tasmania Pty Ltd, Shellfish Culture Ltd and ATF A.R.K. Fisheries Trust and M & I Securities Pty Ltd, trading as Geordy River Aquaculture Pty Ltd. The agreement allows the hatcheries to impose a levy on all purchasers of oyster spat for cultivation within South Australia and hatcheries for oyster spat retained and cultivated within South Australia.
- 7.3 The South Australian Oyster Research Council (SAORC)<sup>36</sup> invests monies raised by the levy for the purpose of research and development. The levy, currently \$1.00 per 1000 oyster spat, is set by SAORC. The levy is included in the cost of oyster spat and the agreement between the hatcheries allows for the hatcheries to refuse supply to any grower who refuses to pay the levy. However, growers are able to seek a refund of the levy paid in any financial year. If a refund is sought, the grower ceases to be entitled to access the research published or generated from the levy in that year.
- 7.4 Pursuant to section 88(10) of the TPA, the applications were also expressed so as to apply to any additional hatcheries that subsequently become a party to the agreement.

### Statutory test

- 7.5 Having regard to the public benefits and detriments likely to flow from this authorisation and the proposed condition set out below, the ACCC is satisfied, pursuant to sub-section 90(8) of the TPA, that the conduct for which authorisation is sought under sub-section 88(1) would result or is likely to result in such a benefit to the public that the proposed contract, arrangement or understanding ought be authorised. The ACCC is also satisfied pursuant to sub-section 90(6) of the TPA that the conduct:
- would be likely to result in a benefit to the public, and

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<sup>36</sup> The applications were also made on behalf of SAORC.

- this benefit would outweigh the detriment to the public constituted by any lessening of competition that would be likely to result from the contract, arrangement or understanding.

#### **Draft determination**

- 7.6 The ACCC therefore proposes, subject to any pre-determination conference requested pursuant to section 90A of the TPA, to grant authorisation to applications A60024 and A60025 for five years for the conduct described at paragraphs 7.2 and 7.3.
- 7.7 The authorisation the ACCC is proposing to grant is subject to the condition that the levy set by SAORC under these arrangements is not more than \$1.00 per 1000 oyster spat.

#### **Interim authorisation**

- 7.8 SAOGA sought interim authorisation for the arrangements. On 27 April 2005, the ACCC granted interim authorisation.
- 7.9 The terms of the proposed authorisation differ from the interim authorisation granted to SAOGA on 27 April 2005. The ACCC considers it appropriate to amend interim authorisation in accordance with the condition as stated at paragraph 7.7.
- 7.10 Interim authorisation will continue to protect the arrangements from action under the TPA until the final determination comes into effect or until interim authorisation is revoked.

#### **Further submissions**

- 7.11 The ACCC will now seek further submissions from interested parties. In addition, the Applicant or any interested party may request that the ACCC hold a pre-determination conference pursuant to section 90A of the TPA.