

R60024

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Regulation 7 [26.505]

FORM A

COMMONWEALTH OF AUSTRALIA

Trade Practices Act 1974 - Sub-section 88(1)

EXCLUSIONARY PROVISIONS

AGREEMENTS AFFECTING COMPETITION

APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under sub-section 88(1) of the Trade Practices Act 1974 for an authorisation under that sub-section 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 46 of that Act.

(PLEASE READ DIRECTIONS AND NOTICES ON BACK OF FORM)

1. (a) Name of Applicant: The South Australian Oyster Growers Association Inc.
- (b) Short description of business carried on by applicant:
Association for oyster growers in South Australia
- (c) Address in Australia for service of documents on the applicant:
C/- DMAW Lawyers, Level 3, 80 King William Street, Adelaide SA 5000
2. (a) Brief description of contract, arrangement or understanding and, where already made, its date:
Agreement between the applicant and 8 oyster hatcheries providing for the formation of a company to invest moneys to be levied on oyster growers in South Australia for the purposes of research and development via the South Australian Oyster Research Council Pty Ltd Agreement was authorised on 8 September 1999 and entered into in 1999. Authorisation expired on 7 September 2004.
- (b) Brief description of those provisions of the contract, arrangement or understanding that are, or would or might be, exclusionary provisions:
The agreement by the oyster growers to add a levy on oyster spat sold by them.
- (c) Names and addresses of other parties or proposed parties to contract, arrangement or understanding:
 1. The South Australian Oyster Research Council Pty Ltd
 2. The South Australian Oyster Hatchery Pty Ltd
 3. Cameron of Tasmania Pty Ltd
 4. Shellfish Culture Ltd
 5. Geordy River Aquaculture

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COMMISSION - ADELAIDE

3. Names and addresses (where known) of parties and other persons on whose behalf application is made:
South Australia Oyster Research Council Pty Ltd

4. (a) Grounds for grant of authorisation: The grounds are contained in the submission attached to the application.

(b) Facts and contentions relied upon in support of those grounds: The grounds are contained in the submission attached to the application.
(See Notice 1 on the back of this Form)

5. This application for authorisation may be expressed to be made also in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding:

(a) Is this application to be so expressed: Yes

(b) If so, the following information is to be furnished:

(i) the names of the parties to each other contract, arrangement or understanding:
Other hatcheries, as yet unknown.

(ii) the names of the parties to each other proposed contract, arrangement or understanding which names are known at the date of this application: N/A

(See Direction 5 and Notice 2 on the back of this Form)

6. (a) Does this application deal with a matter relating to a joint venture (See section 4J of the Trade Practices Act 1974): No.

(b) If so, are any other applications being made simultaneously with this application in relation to that joint venture? No.

(c) If so, by whom or on whose behalf are those other applications being made?
N/A

7. Name and address of person authorised by the applicant to provide additional information in relation to this application: DMAW Lawyers

Dated..... 22-2-2005

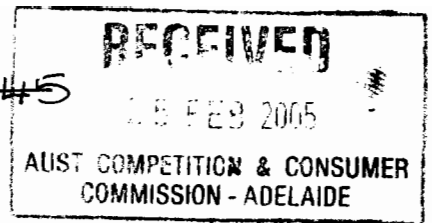
Signed by/on behalf of the applicant

M. C. Whillas
.....
(Signature)

MICHAEL WHILLAS

Chairman of and duly authorised by SA Oyster Growers Association Inc

N60045



SUBMISSION

RELATING TO

***APPLICATIONS FOR AUTHORISATION LODGED
UNDER SUBSECTION 88(1) OF THE TRADE
PRACTICES ACT 1974***

BY

**THE SOUTH AUSTRALIAN OYSTER GROWERS
ASSOCIATION INC**

APPLICANT DETAILS

1. Applicant

The South Australian Oyster Growers' Association Inc. ("SAOGA").

2. Address

Level 1, 16 Unley Road
UNLEY SA 5061

3. Names and addresses of other parties and other persons on whose behalf the application is made

Company	Address
South Australian Oyster Research Council Pty Ltd	Level 1, 16 Unley Road Unley SA 5061
The South Australian Oyster Hatchery Pty Ltd (ACN 060 490 511)	246 Somerton Road Somerton Park SA 5044
Cameron of Tasmania Pty Ltd (ACN 009 579 168)	Arthur Highway Dunally Tas 7177
Shellfish Culture Ltd (ACN 009 519 719)	299 Macquarie Street Hobart Tas 7000
ATF A.R.K. Fisheries Trust and M & I Securities Pty Ltd (ACN 006 773 360) trading as Geordy River Aquaculture	Binalong Bay Road St Helens Tas 7216

DESCRIPTION OF BUSINESS DETAILS

4. Industry Background

4.1 History

4.1.1 Oyster cultivation in South Australia was first recorded in 1910 when the native species was cultured for experimental purposes on the Eyre Peninsula.

4.1.2 In the late 1940's, the Pacific oyster (*Crassostrea gigas*) was introduced from Korea and Japan into Tasmania and was found to be highly suited to the southern temperate waters. News of the species success spread to the Eyre and Yorke Peninsulas in South Australia where it was eventually introduced in 1969. The Pacific Oyster has commercial and gastronomic advantages over other species of oyster.

4.2 Oyster Growing

4.2.1 Commercial oyster production is reliant upon the provision of juvenile oysters (spat) from licensed oyster hatcheries. Juvenile oysters are obtained by spawning adult oysters (broodstock) and rearing the larvae in special tanks until they reach a size suitable to

be transported to a farm. At this stage, the oysters are known as spat and are typically 3-10mm in length.

- 4.2.2 Spat is acquired by farmers (oyster growers) in South Australia from licensed oyster hatcheries, the first of which originated in Tasmania. Hatcheries use advanced techniques to rear high density larvae and spat cultures.
- 4.2.3 Once the farmer receives spat, the spat are placed in nursery systems which are typically high in nutrient and sheltered which encourage the growth of the spat and protect the young oysters from predators and high wave action. Once the young oysters have reached between 30-40mm, they are placed in trays, baskets or bags and placed in either sub-tidal or inter-tidal grow-out areas of the farm. Here, the oysters are regularly graded and sorted until they reach marketable size.

4.3 Position in South Australia

- 4.3.1 The South Australian oyster industry comprises 320 (305 intertidal and 15 subtidal)¹ licences, a steady increase from the 1 in 1986. The oyster industry now comprises 6 major growing areas; Denial Bay, Smoky Bay, Streaky Bay, Haslam, Coffin Bay and Cowell (Franklin Harbour), as well as on the Yorke Peninsula and north eastern side of Kangaroo Island.
- 4.3.2 The total direct business turnover (output) for the SA oyster industry equated to \$30.9 million in 2002/03. Direct business turnover generated by SA oyster farming enterprises was \$16.1 million in 2002/03 while the output generated by associated downstream activities (processing, transport, retail and food service) in SA was \$14.7 million. Flow-ons to other sectors of the State economy added another \$33.9 million in business turnover in 2002/03. The sectors most affected were the trade, manufacturing and property and business sectors.
- 4.3.3 In 2002/03, total oyster farming-related value added in South Australia was over \$32 million. This comprised \$10.8 million generated by oyster farming directly, \$4.9 million generated directly by down stream activities and almost \$17 million generated in other sectors of the state economy.
- 4.3.4 In 2002/03, SA oyster farming was responsible for the direct employment of approximately 320 people² and downstream activities created employment for approximately 80 people. Flow-on business activity was estimated to generate a further 189 jobs. Those jobs were concentrated in the trade (46), manufacturing (29) and business services (27) sectors. In total the South Australian oyster industry provided 589 jobs for the state of South Australia in 2002/03.

¹ Pers. Comm. PIRSA Aquaculture

² Full-time equivalent jobs

- 4.3.5 The South Australian Oyster Growers Association (**SAOGA**) was established in 1989 by a group of oyster farmers on the Eyre Peninsula who saw a need to take a collaborative approach towards the management of the oyster farming industry in South Australia.
- 4.3.6 Today, SAOGA's membership is around 100³ which is approximately 98% of all oyster licence holders in South Australia. SAOGA is the representative body for industry.
- 4.3.7 In 1998, SAOGA recognised that for the industry to remain competitive and dynamic, research and development must be a priority. As a result, in 1999 SAOGA lodged Application for Authorisation No A60023 under subsection 88(1) of the *Trade Practices Act 1974*. That application sought authorisation of an agreement to invest moneys levied on oyster growers in South Australia for the purpose of research and development via the South Australian Oyster Research Council Pty Ltd (**SAORC**) which was established on 28 October 1998. The Board consists of nominated licensed oyster growers and SAOGA as the sole shareholder.
- 4.3.8 Authorisation was granted on 8 September 1999 (***the 1999 Authorisation***). A copy of the 1999 Authorisation is enclosed.
- 4.3.9 The 1999 Authorisation expired on 7 September 2004. The purpose of this application is to seek a further authorisation in respect of that arrangement.
- 4.3.10 At present **four** oyster hatcheries, both in Tasmania and South Australia, supply all spat requirements to oyster farms in South Australia.
- 4.3.11 South Australia's pristine waters and "green" reputation make South Australian Pacific oysters well accepted in the domestic market and in an extremely strong position to enter overseas markets. Growing conditions differ in the various States.
- 4.3.12 SAORC, SAOGA and other members of the industry recognise that for the industry to become a highly productive and economically and environmentally sustainable industry, extensive research must be undertaken. It is only through such research that the industry will maintain the skills and knowledge available to maximise its potential and produce oysters of a consistent high quality.
- 4.3.13 Ensuring the consistency of the quality of oysters is important given that oysters are generally eaten raw. The ACCC will be aware of newspaper reports of contaminated oysters.

In 1996 a gastroenteritis outbreak in Tweed River, Sydney rock oysters, caused by the Norwalk virus, led to a number of poisonings in northern New South Wales.

The 1997 hepatitis outbreak from Wallis Lakes, Sydney rock oysters caused poisonings all over Australia, and culminated in oyster

³ SAOGA members on average have numerous licences

growers and the New South Wales Government and the local Council being successfully sued in negligence.

The health and safety aspects of growing oysters commercially is crucial not only to the survival of the oyster industry in South Australia but also to public health and safety generally.

- 4.3.14 SAORC had identified 3 proposed research projects in 1999 being:
- (a) the influence on commercial oyster growth productivity by fine scale plankton dynamics in South Australian embayments;
 - (b) the selective breeding of the Pacific oyster; and
 - (c) the effect of aerial exposure on oyster condition and growth.
- 4.3.15 The establishment of SAORC enabled the first two projects identified above to be undertaken:
- (a) The oyster industry assisted Benjamin Baghurst with his Doctor of Philosophy in the 'biological response of the Pacific oyster (*Crassostrea gigas*) to the South Australian environment' completed through the Flinders University of South Australia.
 - (b) Selective breeding is a crucial part of all primary industries to address improvements in production. The South Australian and Tasmanian Pacific oyster industries have supported selective breeding research conducted by CSIRO (Hobart) and the University of Tasmania since 1996.

In 2000, Australian Seafood Industries (**ASI**) was established by the South Australian and Tasmanian Oyster Industry to unify the delivery of commercially-oriented research to the industry and to provide leadership in commercialising the results of the research. SAORC and the Tasmanian Oyster Research Council (**TORC**) provided seed funding for the research. ASI was formed in 2000 by key Tasmanian and South Australian industry groups, specifically to commercialise research conducted in the Fisheries Research and Development Corporation (**FRDC**) project number 2000/206 - "Sustainable Genetic Improvement of Pacific Oysters in Tasmania and South Australia". This project commenced in October 2000 as a joint venture between FRDC, CSIRO (Hobart), the University of Tasmania (TAFI) and the Pacific Oyster Industry, at an estimated cost of \$1.6 million.

The "Sustainable Genetic Improvement of Pacific Oysters in Tasmania and South Australia" project concluded in November 2003, having established a basic breeding program with an initial pool of selectively bred oyster families. The project demonstrated the potential for selective breeding to improve the profitability of oyster farming,

particularly by improving the uniformity of growth in batches of oysters.

Since the start-up of ASI, SAORC and TORC have both equally committed funding to ensure successful establishment of ASI to deliver the benefits of selectively bred stock to individual oyster growers in both South Australia and Tasmania.

4.3.16 In addition to the projects listed above, SAORC has supported the following research and development projects to develop the sustainability of the South Australian oyster industry:

- (a) Strategic planning workshop (2001);
- (b) the understanding of toxic algae species and upper threshold levels of toxins retained by oysters ensuring the safety of oysters, which are generally eaten raw. For example, SAORC achieved great results for South Australian growers by supporting the Pectinotoxin-2 project undertaken in 2002. SAORC funded research in conjunction with Fisheries Research and Development Corporation (FRDC) and South Australian Shellfish Quality Assurance Program (SASQAP) amongst others. As a result of the project, Pectinotoxin-2-Seco acids (PTX2-SA's) were no longer declared toxic;
- (c) SAORC provides continual support to SASQAP, which is the group responsible for South Australia's safe water program. SASQAP regularly tests oysters and the surrounding waters in each SA oyster growing area to guarantee the safety of the oysters consumed from South Australia;
- (d) How to grow oysters workshop (2002);
- (e) Investigating unexplained oyster mortalities on SA oyster farms (2003);
- (f) Identification of natural mudworm species in South Australia Pacific oyster (*Crassostrea gigas*) stocks (2003);
- (g) Shelf-life testing to ensure quality and safety of oysters to the consumer (2003);
- (h) Development of a industry recipe card (2004);
- (i) Market research in both the domestic and international markets (2004);
- (j) Oyster hatchery feasibility study (2004);
- (k) Sponsored 6 oyster farmers to participate in the state seafood leadership training program;
- (l) Alternatives to Algae for Conditioning of Saleable Pacific Oysters (*Crassostrea gigas*)- preliminary proof of concept (2005);

- (m) Development of an oyster stress test to identify low stress management techniques for oyster growers (current);
- (n) Integrated business management and development through focus group facilitation in the Oyster Industry (2004/2005).

4.3.17 The SA oyster industry is fifteen years old and is still in its development stages, but the industry has experienced significant growth and provided employment opportunities in regional South Australia. In 1999, the SA Pacific oyster industry's direct business income was equivalent to \$5.8 million per annum and provided 276 jobs for the state. As stated above, this generated direct business income in SA oyster farming enterprises of \$16.1 million in 2002/03 and provided 589 jobs for the state. The industry has effectively tripled in value and doubled the number of jobs available for the state of SA, which has been a result of a united and strategic industry approach to research and development.

4.3.18 It is important that the industry maintains a continual improvement philosophy to build a long term sustainable industry, considering it is principally a commodity based industry. This can be achieved through a collaborated approach to research development under the SAORC banner to commission development projects in accordance with the needs and objectives of the industry.

5. Description of contract, arrangement or understanding

5.1 The conduct under consideration relates to the giving effect to of an arrangement amongst:

5.1.1 the applicant – SAOGA; and

5.1.2 the South Australian Oyster Hatchery Pty Ltd;

5.1.3 Cameron of Tasmania Pty Ltd;

5.1.4 Shellfish Culture Ltd;

5.1.5 ATF A.R.K. Fisheries Trust and M & I Securities Pty Ltd (ACN 006 773 360) trading as Geordy River Aquaculture Pty Ltd;

5.2 The arrangement is in the same terms as the arrangement authorised by the 1999 Authorisation.

5.3 The arrangement has the following effect:

5.3.1 The objects of SAORC are to:

- (a) encourage scientific research and development for the South Australian cultured oyster industry;
- (b) promote, encourage and co-ordinate scientific research and development in the South Australian cultured oyster industry;
- (c) 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;

- (d) report to South Australian participants in the oyster industry of SAORC's research and development activities and where required to State and Federal Governments;
- (e) meet the costs and expenses of setting up the Council and all activities of SAORC; and
- (f) do all other acts and things as SAORC may from time to time consider ancillary or incidental to the main purpose of SAORC under paragraph 5.2.2(a).

5.3.2 It provides for collection of the levy from:

- (a) all purchasers of oyster spat for cultivation within South Australia; and
- (b) hatcheries for oyster spat retained and cultivated within South Australia.

5.3.3 It provides for growers to obtain access to the results of the research and development.

5.3.4 It allows for growers to seek a refund of the levy that the grower has paid in any financial year, but the grower then ceases to be entitled to access the research published or generated from the levy in that year (5.4, 5.5). To that extent, the element of compulsion for the levy is not significant.

5.3.5 It provides for the addition of any new hatcheries to the proposed arrangement, and the application seeks to apply the authorisation granted to such new hatcheries.

5.4 On purchase of oyster spat from any of the designated oyster hatcheries, a spat levy will be collected from all those purchasing spat for cultivation in South Australia. The proposed levy is \$1.00 per 1,000 spat. This amount is considered modest in terms of total production costs and end sale price although it will be reviewed as deemed necessary.

5.5 The levy will be fixed at a price to be set by SAORC. As the SAOGA is the sole shareholder of SAORC,, this should ensure that there is no significant impact on industry pricing structures in either South Australia or Tasmania. The levy will also be automatically included in the cost of oyster spat. Hence without full payment, a grower could be denied oyster spat. However, this situation is unlikely given the current level of industry support and, in any event, the arrangement allows a grower to seek a refund of the levy the grower has paid.

5.6 Funds collected by the designated hatcheries are to be sent to SAORC. Independent administration will ensure individual levy transactions are kept commercial in confidence and made unavailable to SAORC.

- 5.7 SAORC is empowered to seek grants for research. SAORC will use the levy and the grants on specific research and development funds and in accordance with the objects of SAORC. SAORC will be able to call on specialist advice where deemed appropriate.
- 5.8 SAORC has previously obtained grants from the following funding bodies listed below:
- 5.8.1 Fisheries Research and Development Corporation;
 - 5.8.2 Seafood Services Australia;
 - 5.8.3 Farmbis SA;
 - 5.8.4 Eyre Regional Development Board;
 - 5.8.5 Centre of Innovation, Business and Manufacturing (CIBM).
- 5.9 The Board of SAORC is comprised of nominated licensed oyster growers (this does not exclude SAOGA non-members) and nominations to the Board are called annually from all SA licensed oyster growers.
- 5.10 Attached are:
- 5.10.1 the Heads of Agreement (Attachment 1);
 - 5.10.2 the Constitution of the Council (Attachment 2); and
 - 5.10.3 Australian Taxation Office letter regarding tax exempt status (Attachment 3).
- 5.11 Given that research and development is considered an ongoing priority by the oyster industry in South Australia for:
- 5.11.1 the survival of the industry in South Australia;
 - 5.11.2 the growth in the industry leading to potential job growth;
 - 5.11.3 growth in the overseas market leading again to potential job growth;
 - 5.11.4 increasing the likelihood of healthy oysters for public health and safety,
- authorisation is sought for an indefinite period from **1 July 2005**, and from **7 September 2004** on an interim basis.

6. Grounds for grant of authorisation

- 6.1 Implementation of the conduct would see the continuation of the research fund, used specifically for industry research and development projects in accordance with the objects of SAORC.
- 6.2 Continued research and development is necessary to consolidate current gains and to improve and expand the South Australian Pacific oyster industry to become highly productive and economically sustainable. As well, 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.

- 6.3 Currently, on average a fully developed oyster farm in South Australia would expect to earn a gross income of approximately \$350,000. However, the majority of farms are only 80-90% developed and it would not be unreasonable to expect that once fully developed, production and therefore value would increase.
- 6.4 As previously mentioned, major constraints to full production and therefore market expansion for the SA Pacific oyster industry result from inadequate husbandry knowledge and production technology. The proposal is aimed at significantly improving the provision of husbandry knowledge and technology, which will further increase production and opportunities for business and market expansion.
- 6.5 In addition, increased production results in greater opportunities for employment, particularly in rural areas. In 1999, the industry directly employed approximately 188 (full time equivalent) personnel, with another approximately 88 indirect jobs being generated in the manufacturing, transport and finance services. Employment opportunities have increased since SAORC was established pursuant to the arrangement authorised by the 1999 Authorisation. As stated above, in 2002/03 SA oyster farming was responsible for the direct employment of approximately 320 people⁴ and downstream activities created employment for approximately 80 people. Flow-on business activity was estimated to generate a further 189 jobs. These jobs were concentrated in the trade (46), manufacturing (29) and business services (27) sectors. In total the South Australian oyster industry provided 589 jobs for the state of South Australia in 2002/03. Oyster farming is crucial to the development of the oyster industry in South Australia.
- 6.6 Another constraint to market expansion is the ability to conform to strict overseas import regulations. The applicant asserts that this too can be overcome by research and development focussing on product handling and quality assurance.
- 6.7 Research results funded by the levy will continue to be made available to the scientific community on request, and the SA oyster industry will continue to be kept informed and updated with research results through various extension exercises.
- 6.8 The applicant claims that the general public will benefit from the conduct by receiving high quality product in the market place as well as receiving opportunities for employment in a growing industry. The public will also benefit from research into oyster husbandry given that farm management is directly related to environmental management.
- 6.9 Without authorisation from the ACCC for the continuation of the spat levy, Pacific oyster research and development will be dependent on the resources of individual licence holders which will instigate an ad hoc approach to industry research and development.

⁴ Full-time equivalent jobs

7. Facts and contentions relied upon in support of the proposed conduct

- 7.1 The applicant asserts that the levy continues to have comprehensive industry support. The continuation of SAORC and the associated conduct have been fully discussed with industry and all information has been provided to licence holders.
- 7.2 In 1991, the Tasmanian Oyster Research Council Ltd (**TORC**) was authorised by the Trade Practices Commission to impose an oyster spat levy for purchases resulting in oyster cultivation in Tasmania (application numbers A80008 and A80009) 1991 ATPR (Com) 50-106). The levy has proven to be very successful in producing funds for a range of research projects and for industry seminars in Tasmania.
- 7.3 The applicant asserts that the grounds for authorisation in the TORC case pertain equally to the conduct proposed by the SAORC. A difference with the arrangement proposed in South Australia is that a grower can seek a refund of this levy.
- 7.4 The applicant also refers to the 1999 Authorisation. The grounds on which the 1999 Authorisation was granted pertain equally to the current application.
- 7.5 The applicant asserts the proposed conduct satisfies the tests contained in Sections 90(6), (7) and (8) of the Trade Practices Act 1974 and seeks authorisation from the ACCC.

8. Section 45 – Anti-Competitive Conduct

As the proposed conduct may involve a contravention of Sections 45(2) (a) and (b) of the Trade Practices Act, authorisation is sought.

9. Prospective changes within the authorisation

- 9.1 A change to the detail of the proposed conduct would be based on the establishment of new oyster hatcheries (in any State of Australia) who wish to sell spat into South Australia for cultivation. The proposed arrangement allows for the addition of other hatcheries. Changes to the conduct involving newly established hatcheries would involve a request for an additional registered trading name to be included on the authorisation.
- 9.2 The addition of new growers in South Australia will not result in any requested change to the authorisation.

DATED: 25 February 2005



DMAW LAWYERS
Solicitors for the Applicants