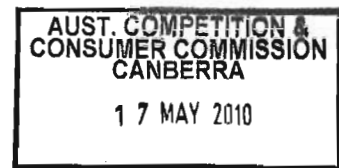


Seccombe, David

From: Rick Davies [RDavies@CowellClarke.com.au]
Sent: Monday, 17 May 2010 2:49 PM
To: Adjudication
Cc: Trudy McGowan; Richard McNeil
Subject: Attention Dr R Chadwick: SA Oyster Growers Association Inc
Attachments: SAOGA Form FC.pdf; SAOGA Submission.pdf; letter to SAOGA - fee waiver granted.pdf



Our Ref:grd:100492

Dear Dr Chadwick

ATTENTION DR R CHADWICK: SA OYSTER GROWERS ASSOCIATION INC – C2010/75

We refer to previous correspondence and the writer's conversation with Jessica of your office earlier today. We attach:

1. notice of grant of fee waiver request dated 6 April 2010;
2. Form FC application for revocation of a non-merger authorisation and substitution of a new authorisation; and
3. submission relating to such application by the South Australian Oyster Growers Association Inc.

We will be pleased if you would acknowledge receipt of this email and the attachments.

As I will be on leave from the close of business on 28 May until the end of June, if you require assistance from our office, please contact Mr Richard McNeil, Partner, of this firm.

We look forward to your response.

Yours faithfully

Rick Davies
Senior Associate | Cowell Clarke
Level 5, 63 Pirie Street, Adelaide SA 5000 Australia
T +61 8 8228 1111 | F +61 8 8228 1100
E RDavies@cowellclarke.com.au | W www.cowellclarke.com.au

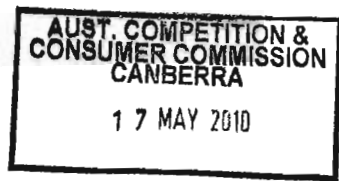
You are reminded that electronic communication involves unavoidable risks. Cowell Clarke does not

17/05/2010

warrant or represent that this communication is confidential or that it is free of any computer virus.

This message is intended only for the use of the individual or entity to whom it is addressed and may contain information that is privileged, confidential and exempt from disclosure under applicable law. Any unauthorised use, disclosure, copying or distribution of this message or information is prohibited. If you have received this message in error, please telephone me on +61 8 82281111 or contact me by return email immediately.





Form FC

Commonwealth of Australia

Trade Practices Act 1974 — subsection 91C (1)

APPLICATION FOR REVOCATION OF A NON-MERGER AUTHORISATION AND SUBSTITUTION OF A NEW AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection 91C (1) of the *Trade Practices Act 1974* for the revocation of an authorisation and the substitution of a new authorisation for the one revoked.

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

(a) Name of applicant:

A91229 The South Australian Oyster Growers Association Inc (SAOGA)

(b) 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/- Cowell Clarke Commercial Lawyers

Level 5, 63 Pirie Street, Adelaide SA 5000

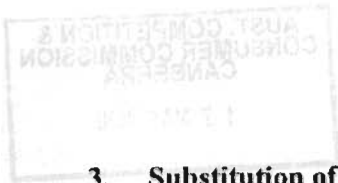
2. Revocation of authorisation

(a) Description of the authorisation, for which revocation is sought, including but not limited to the registration number assigned to that authorisation:

Authorisation for agreement between the applicant and five oyster hatcheries providing for the formation of a company to invest moneys 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 for agreement was granted again on 3 August 2005 (authorisations A60024 and A60025), and is due to expire on 24 August 2010.

(b) Provide details of the basis upon which revocation is sought:

Revocation is sought due to the pending expiry of authorisations A60024 and A60025 on 24 August 2010.



3. Substitution of authorisation

- (a) Provide a description of the contract, arrangement, understanding or conduct whether proposed or actual, for which substitution of authorisation is sought:

The proposed substituted arrangement is in the same terms as the arrangement currently operated under authorisations A60024 and A60025, with exception to the levy amount, provided that authorisation is also sought in respect of conduct which may be otherwise in contravention of the recently effected cartel conduct provisions of the *Trade Practices Act*. The levy is presently fixed at \$1.00 per 1000 oyster spat. It is proposed that:

- (i) the levy be revised to \$1.50 per 1000 oyster spat, and that the levy be adjusted on 1 January of each year commencing 2012 to reflect any increase in the Consumer Price Index (all Groups - Adelaide) for the preceding 12 month period; or in the alternative
- (ii) the levy be revised to \$1.50 per 1000 oyster spat; or in the alternative
- (iii) the levy remain at \$1.00 per 1000 oyster spat and that the levy be adjusted on 1 January of each year commencing 2011 to reflect any increase in the Consumer Price Index (all Groups - Adelaide) for the preceding 12 month period.

- (b) Description of the goods or services to which the contract, arrangement, understanding or conduct (whether proposed or actual) relate:

The supply by five oyster hatcheries of oyster spat to oyster farmers which farmers retain and cultivate the spat within South Australia.

- (c) The term for which substitute authorisation of the contract, arrangement or understanding (whether proposed or actual), or conduct, is being sought and grounds supporting this period of authorisation:

Authorisation is sought for:

- (i) an indefinite period from the date of substitution; or in the alternative
- (ii) for a period of 10 years; or in the alternative
- (iii) for a period of 5 years.

4. Parties to the contract, arrangement or understanding (whether proposed or actual), or relevant conduct, for which substitution of authorisation is sought

- (a) Names, addresses and description of business carried on by those other parties to the contract, arrangement or understanding (whether proposed or actual), or the relevant conduct:

- (i) South Australian Oyster Hatchery Pty Ltd
PO Box 1906 Port Lincoln South Australia 5606
Producer of Spat
- (ii) Cameron of Tasmania Pty Ltd

145-149 Arthur Highway,

Dunalley, Tasmania 7177

Producer of Spat

(iii) Shellfish Culture Ltd

Bicheno Street

Sandford, Tasmania 7020

Producer of Spat

(iv) A.R.K. Fisheries Trust and M & I Securities Pty Ltd t/as Geordy River Aquaculture

228 Binalong Bay Rd

St Helens Tasmania 7216

Producer of Spat

(v) Southern Cross Shellfish Pty Ltd

25 Aquaculture Drive

St Helens, Tasmania 7216

Producer of Spat

(b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:

South Australia Oyster Research Council Pty Ltd (SAORC)

PO Box 757 Stirling South Australia 5152

Research body of the South Australian Oyster Growers Association on behalf of the broader South Australian Industry.

(c) Where those parties on whose behalf the application is made are not known - description of the class of business carried on by those possible parties to the contract or proposed contract, arrangement or understanding:

Any organisation which is the first point of sale of spat (live animals) into South Australia originating from a hatchery.

5. Public benefit claims

(a) Arguments in support of application for substitution of authorisation:

Arguments are contained in the submission attached to this application.

- (b) Facts and evidence relied upon in support of these claims:

Facts and evidence relied upon are contained in the submission attached to this application.

6. Market definition

Provide a description of the market(s) in which the goods or services described at 3 (b) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

Oyster spat in South Australia is supplied by five oyster hatcheries to farmers in South Australia, to be raised, cultivated and sold. Supply of spat to oyster farmers that raise and cultivate the spat within South Australia is conditional upon payment of a levy, currently set at \$1.00 per 1000 oyster spat in accordance with authorisations A60024 and A60025.

7. Public detriments

- (a) Detriments to the public resulting or likely to result from the substitute authorisation, in particular the likely effect of the conduct on the prices of the goods or services described at 3 (b) above and the prices of goods or services in other affected markets:

Detriments are addressed in the submission attached to this application.

- (b) Facts and evidence relevant to these detriments:

Facts and evidence relevant to detriments are contained in the submission attached to this application.

8. Contracts, arrangements or understandings in similar terms

This application for substitute authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings (whether proposed or actual) 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) description of any variations between the contract, arrangement or understanding for which substitute authorisation has been sought and those contracts, arrangements or understandings that are stated to be in similar terms:

The inclusion of any additional oyster hatcheries from any State of Australia which wish to sell oyster spat into South Australia for cultivation by oyster farmers.

- (ii) Where the parties to the similar term contract, arrangement or understanding(s) are known - names, addresses and description of business carried on by those other parties:

N/A

- (iii) Where the parties to the similar term contract, arrangement or understanding(s) are not known — description of the class of business carried on by those possible parties:

Oyster hatcheries.

9. Joint Ventures

- (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

10. Further information

- (a) Name, postal address and telephone contact details of the person authorised by the parties seeking revocation of authorisation and substitution of a replacement authorisation to provide additional information in relation to this application:

Cowell Clarke Commercial Lawyers

Level 5, 63 Pirie Street, Adelaide SA 5000

Dated..... 17/5/2010

Signed by/on behalf of the applicant

.....
(Signature)

RICK DAVIES

Senior Associate

Cowell Clarke Commercial Lawyers

On behalf of South Australian Oyster Growers Association Inc.

DIRECTIONS

1. Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.
2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. In item 1 (b), describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding, or the relevant conduct, in respect of which substitute authorisation is sought.
4. In completing this form, provide details of the contract, arrangement or understanding (whether proposed or actual), or the relevant conduct, in respect of which substitute authorisation is sought.
 - (a) to the extent that the contract, arrangement or understanding, or the relevant conduct, has been reduced to writing — provide a true copy of the writing; and
 - (b) to the extent that the contract, arrangement or understanding, or the relevant conduct, has not been reduced to writing — provide a full and correct description of the particulars that have not been reduced to writing; and
 - (c) If substitute authorisation is sought for a contract, arrangement or understanding (whether proposed or actual) which may contain an exclusionary provision — provide details of that provision.
5. Where substitute authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
6. Provide details of those public benefits claimed to result or to be likely to result from the contract, arrangement or understanding (whether proposed or actual), or the relevant conduct, including quantification of those benefits where possible.
7. Provide details of the market(s) likely to be affected by the contract, arrangement or understanding (whether proposed or actual), in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the application for substitute authorisation.
8. Provide details of the detriments to the public, including those resulting from the lessening of competition, which may result from the contract, arrangement or understanding (whether proposed or actual). Provide quantification of those detriments where possible.
9. Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.

SUBMISSION

RELATING TO

**APPLICATION FOR REVOCATION AND SUBSTITUTION OF
AUTHORISATION LODGED UNDER SUBSECTION 91(1C) 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

PO Box 757 Stirling South Australia 5152

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)	PO Box 1906 Port Lincoln SA 5606
Cameron of Tasmania Pty Ltd (ACN 009 579 168)	145-149 Arthur Highway, Dunalley, Tas 7177
Shellfish Culture Ltd (ACN 009 519 719)	Bicheno Street, Sandford, Tasmania 7020
A.R.K. Fisheries Trust and M & I Securities Pty Ltd (ACN 006 773 360) trading as Geordy River Aquaculture	228 Binalong Bay Road, St Helens, Tas 7216
Southern Cross Shellfish Pty Ltd (ABN is 88 128 452 380)	25 Aquaculture Drive St Helens, Tas, 7216

DESCRIPTION OF BUSINESS DETAILS

4. Industry Background

4.1 Oyster Growing

Commercial oyster production is reliant upon the provision of juvenile oysters ("**spat**") by licensed oyster hatcheries ("**hatcheries**") to oyster farmers. Upon receipt of the spat, oyster farmers raise the oysters until they are of a marketable size and ready for sale.

4.2 The Industry in South Australia

- 4.2.1 The South Australian oyster industry comprises eight growing areas, namely Denial Bay, Smoky Bay, Streaky Bay, Haslam, Coffin Bay and Cowell (Franklin Harbour), Yorke Peninsula and the north-eastern side of Kangaroo Island.
- 4.2.2 At present, five oyster hatcheries, both in Tasmania and South Australia, supply all spat requirements to oyster farms in South Australia.

4.3 **Background to the Arrangement and Authorisation**

- 4.3.1 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.
- 4.3.2 The South Australian Oyster Research Council Pty Ltd (“SAORC”) was established on 28 October 1998. The Board of the SAORC is comprised of nominated licensed oyster growers (this does not exclude SAOGA non-members), and SAOGA is the sole shareholder. Nominations to the Board are called annually from all SA licensed oyster growers.
- 4.3.3 In 1999, SAOGA lodged Application for Authorisation No. A60023 under subsection 88(1) of the *Trade Practices Act 1974* (Cth), seeking authorisation of an agreement to invest moneys levied on oyster growers in South Australia for the purpose of research and development through SAORC.
- 4.3.4 Authorisation was granted on 8 September 1999.
- 4.3.5 The 1999 authorisation expired on 7 September 2004, and two new authorisations A60024 and A60025 were granted on 3 August 2005 and are due to expire on 24 August 2010.

5. **Description of contract, arrangement or understanding**

- 5.1 The arrangement is in the same terms as the arrangement authorised in the 1999 authorisation and the 2005 authorisation save for the variations set out in items 5.3 and 5.8.
- 5.2 The arrangement has the following effect:
 - 5.3.1 A levy is collected from:
 - (a) all purchasers of oyster spat for cultivation in South Australia, when purchasing spat from a designated oyster hatchery; and

- (b) hatcheries for oyster spat retained and cultivated within South Australia.
- 5.3.2 The levy assists the SAORC in fulfilling its objects, which include (but are not limited to):
 - (a) encouraging scientific research and development for the South Australian cultured oyster industry;
 - (b) promoting, encouraging and co-ordinating scientific research and development in the South Australian cultured oyster industry;
 - (c) attracting, allocating, and administering funds to oyster farming research in and/or related to South Australia; and
 - (d) reporting to South Australian participants in the oyster industry of SAORC's research and development activities.
- 5.3.3 The arrangement allows growers to obtain access to the results of the research and development.
- 5.3.4 The arrangement permits farmers to seek a refund of the levy that the farmer has paid in any financial year in which event such farmer ceases to have access to the research published or generated from the levy in that year. To that extent, the element of compulsion for the levy is not significant.
- 5.3.5 The arrangement 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.
- 5.3 The arrangement provides that the levy will be fixed at a price to be set by SAORC. As SAOGA is the sole shareholder of SAORC, this would ensure that there is no significant impact on industry pricing structures in either South Australia or Tasmania. The levy is automatically included in the price of the oyster spat.
- 5.4 In granting authorisations A60024 and A60025, the commissioners expressed their concern about the ability of SAORC to increase the levy. Accordingly, the commissioners set a levy upper limit of \$1.00 per 1000 oyster spat.
- 5.5 The levy has remained constant since its initial introduction in 1999. The effects of inflation have negatively affected the value of the levy over that time. Accordingly, approval for an increase in the amount of the levy is sought. In so doing, SAOGA is cognisant of the commissioners' concern expressed above. Accordingly, authorisation is sought for the levy to be set at one of the three following levels (in reducing level of preference):

- 5.5.1 the levy be revised to \$1.50 per 1000 oyster spat, and that the levy be adjusted on 1 January of each year commencing 2012 to reflect any increase in the Consumer Price Index (all Groups - Adelaide) for the preceding 12 month period; or in the alternative
 - 5.5.2 the levy be revised to \$1.50 per 1000 oyster spat; or in the alternative
 - 5.5.3 the levy remain at \$1.00 per 1000 oyster spat, and that the levy be adjusted on 1 January of each year commencing 2011 to reflect any increase in the Consumer Price Index (all Groups - Adelaide) for the preceding 12 month period.
- 5.6 The proposed levy revision will ensure that SAOGA cannot increase the levy above what is reasonably reflective of the overall cost and pricing pressures on the farmers whilst ensuring that the amount of levies collected bear some relationship to the increasing research activity costs.
- 5.7 Even with a revision to \$1.50 per 1000 oyster spat and with adjustment for inflation, the levy represents less than 5% of the purchase price of the spat.
- 5.8 The period of authorisations A60024 and A60025 was set at 5 years. SAORC has been engaged in its research activity and the levy has now been applied for in excess of 10 years. The industry remains very competitive and the research remains a crucial element of the continued competitiveness of the South Australian industry. No likely change to that situation is reasonably foreseeable.
- 5.9 As the imposition of a time limit on authorisations is discretionary and as SAOGA wishes to reduce the costs it incurs in reapplying for authorisations, authorisation is therefore sought for one of the three following periods (in reducing level of preference):
- 5.9.1 indefinite as from the date of authorisation; or in the alternative
 - 5.9.2 10 years; or in the alternative
 - 5.9.3 5 years.

6. Arguments in support of application for substitution of authorisation

- 6.1 In the period of operation of authorisations A60024 and A60025 approximately \$590,000 has been collected in levies and applied in furtherance of the research objectives.
- 6.2 The levies have been applied to projects including:

- 6.2.1 experimental production of tetraploid oysters for use as broodstock for commercial hatchery production of triploids;
 - 6.2.2 reduction in pacific oyster mortality by improving farming and processing technologies in South Australia;
 - 6.2.3 a supply chain assessment of marine vibrios in oysters: prevalence, quantification and public health risk; and
 - 6.2.4 enhancement of the Pacific oyster selective breeding program.
- 6.3 The levy and the research activities retain the full support of the participants and no farmer has requested any refund of levies or raised concerns regarding the use of those monies.
- 6.4 Substituted authorisation of the arrangement would permit continuity of research activities to the competitive advantage of both the industry and consumers.
- 6.5 Such competitiveness supports rural and regional employment and general enterprise activities.
- 6.6 There has been no discernable detriment to the public through the imposition of the levy. Rather, the public has benefited by the continually advancing competitiveness and productivity of the industry, in part a result of the imposition of the levy.
- 6.7 The applicant submits that the arrangement satisfies the tests contained in Section 90 of the *Trade Practices Act 1974*.

7. Facts and evidence relied upon in support of these claims

The applicant submits that after more than 10 years of operation, the levy continues to have comprehensive industry support. It results in general competition, enterprise and consumer benefits. The continuation of SAORC and the associated conduct have been fully discussed with industry and all information has been provided to licence holders.

8. Public detriment resulting or likely to result from the contract, arrangement or understanding for which substitute authorisation is sought

- 8.1 As the hatcheries have agreed not to supply spat where the levy has not been paid, the arrangement has the potential effect of restricting supply. However, as noted above, the arrangement allows farmers to seek a refund of levy monies paid in any financial year, on the condition that the farmer does not receive the benefits of the research generated from the levy during that year. This reduces the need for hatcheries to deny supply to farmers, and will therefore not cause significant detriment.

8.2 As the arrangement involves an agreement to fix an element of the prices charged by competing hatcheries for oyster spat, this could have the effect of unrestricted increases of the levy, with consequent increases in price, which could distort competition in the industry. However, the hatcheries do not profit from the levy, as it is collected purely for the purposes of research and development, and as the levy applies equally to all spat sold into South Australia, competition in price in the South Australian market is not precluded. As submitted, authorisation is sought in a manner that would prevent unregulated increases that might otherwise adversely affect competition.

DATED: 17/5/2010


.....
COWELL CLARKE COMMERCIAL LAWYERS
Solicitors for the Applicant



**Australian
Competition &
Consumer
Commission**

GPO Box 3131
Canberra ACT 2601
23 Marcus Clarke Street
Canberra ACT 2601
tel: (02) 6243 1111
fax: (02) 6243 1199
www.accc.gov.au

Our Ref: C2010/75
Contact Officer: Clare McGinness
Contact Phone: (02) 6243 1049

6 April 2010

Steve Bowley
Chairman
South Australian Oyster Research Council
P.O BOX 757
Stirling SA 5154

Dear Mr Bowley,

Fee waiver request

I refer to your letter of 22 March 2010 to the Australian Competition and Consumer Commission (ACCC) in respect of a proposed application for re-authorisation. In your letter you have requested that the ACCC grant a fee waiver in respect of the proposed arrangements.

In particular, you have requested that the fee to be paid in relation to the application for revocation and substitution to be lodged by SOAGA be waived in whole.

In support of your request, among other things, you submitted that:

- SOAGA is a not-for-profit organisation entirely focussed upon the development and health of the South Australian oyster industry; and
- any fee imposition would result in a debit against the funds otherwise available for industry research and development, to the potential detriment of the industry.

Having regard to the above, as a person authorised to assess fee waiver requests for and on behalf of the ACCC, I wish to advise that the application fee to be paid by SAOGA has been waived in whole. No application fee will apply with respect to the application for revocation and substitution to be lodged by SAOGA.

This decision will remain in force for a period of three months. The three month period will expire on 30 June 2010.

A copy of this letter should accompany the application for re-authorisation to be lodged by SAOGA. The cover letter to the application should mention that a letter from the ACCC

regarding a fee waiver is enclosed with the application. The application together with this letter will be placed on the public register at that time.

If the application for authorisation is lodged by SAOGA after 30 June 2010, a full application fee of \$2500 will apply, unless a subsequent request for a fee waiver is made and ultimately approved by the ACCC.

Should you have any queries in relation to this matter, please do not hesitate to contact Clare McGinness on (02) 6243 1049

Yours sincerely

A handwritten signature in black ink, appearing to be 'R. Chadwick', with a long horizontal line extending to the right.

Dr Richard Chadwick
General Manager
Adjudication Branch