

**Carfrae, Andrew**

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**From:** Rouw, John  
**Sent:** Monday, 31 May 2010 12:29 PM  
**To:** Buik, Jessica  
**Cc:** Carfrae, Andrew  
**Subject:** SA Oyster - EMAIL AND ATTACHMENT for PR [SEC=IN-CONFIDENCE]  
**Attachments:** SAOGA Revised Submission.pdf  
**ACCC Classification:** SEC=UNCLASSIFIED  
**Security Classification:** IN-CONFIDENCE



Our Ref:grd:100492

Dear Dr Chadwick

**SA OYSTER GROWERS ASSOCIATION INC – C2010/75**

We refer to our email submission of 17 May 2010.

We are instructed that the information set out in clauses 6.2.1 and 6.2.3 was not correct. A revised submission document containing revised details in clauses 6.2.1 and 6.2.3 is attached. All other elements of the submission are unchanged.

On behalf of our client, we apologise for any inconvenience.

Yours faithfully

**Rick Davies**

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31/05/2010



**REVISED 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 research into the toxicity of Pinatoxin in oysters in relation to human health;
- 6.2.2 reduction in pacific oyster mortality by improving farming and processing technologies in South Australia;
- 6.2.3 financial support for the Australian Seafood Cooperative Research Centre and related projects including:
  - i. cool chain management;
  - ii. supply chain temperature profiles;
  - iii. genetic improvement of oysters;
  - iv. oyster Supply Chain;
  - v. benchmarking;
  - vi. retail transformation; and
  - vii. oyster consumption research; 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:

*27/5/2010*

  
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**COWELL CLARKE COMMERCIAL LAWYERS**

Solicitors for the Applicant