

Our Ref: grd:dyk:100492  
Your Ref: 42030 C2010/494

Level 5, 63 Pirie Street  
Adelaide, South Australia  
Australia, 5000  
Telephone 61 8 8228 1111  
Facsimile 61 8 8228 1100  
lawyer@cowellclarke.com.au  
www.cowellclarke.com.au

12 July 2010

Australian Competition & Consumer Commission  
GPO Box 520  
MELBOURNE VIC 3001



Attention: Mr John Rouw

By email: John.Rouw@accg.gov.au

Dear Mr Rouw

**SOUTH AUSTRALIAN OYSTER GROWERS ASSOCIATION  
- APPLICATIONS FOR AUTHORISATION A91229 AND A91230**

We refer to your letter dated 25 June 2010 and are instructed as follows.

**Public submissions**

1. Regarding the submissions from Boylan Oysters, Eyre Island Oysters and Pure Coffin Bay Oysters, the substantive element of each submission is the amount of the proposed levy only. That aspect is addressed below.
2. With respect to the submissions from JB & CJ Holmes, whilst appearing to support the general concept of research, the amount of the proposed levy appears to be at issue. Again, that aspect is addressed below. Further, the comment in relation to the 2004 "genetically modified spat" is incorrect. The spat is selectively bred, not in any way genetically modified. The 2004 spat referred to in that submission was a trial knowingly undertaken within the industry at that time. As such, it must be acknowledged that the research into improvement in spat requires long gestation periods spanning numerous seasons and cannot be guaranteed to bring immediate commercial success at any particular time. The comment regarding the relative lack of success for that particular grower in relation to that particular trial is acknowledged. Fortunately, however, that grower's experience is not widely reflected across the industry, where the benefits of the activities are generally recognised, as indicated by the various public responses. Since 2004, there have been 5 generations of breeding improvement. Those improvements have largely focussed upon addressing issues such as those of which the submitting party complains. It is understood that these breeding activities have resulted in improved yields which in turn have decreased the cost to growers, demonstrating the value of the research undertaken, in part, with the funding generated by the levy. A copy of the final draft report entitled "Enhancement of the Pacific oyster breeding program" is attached which provides further detail in that regard. As that report is in final draft form, it is requested that it be withheld from the public record at this time.
3. With regard to the submission by the party whose details were excluded from the public register, it appears that the primary concern is in relation to the amount of the levy. That aspect is addressed below.
4. The remaining 2 submissions that have been provided indicate clear support not only for the levy but also for the proposed rise in the amount.

### Response to request for further information

1. The amount of money raised each financial year commencing 2003/04:
  - (a) 2003/4 - \$96,352
  - (b) 2004/5 - \$126,110
  - (c) 2005/6 - \$134,524
  - (d) 2006/7 - \$122,892
  - (e) 2007/8 - \$131,648
  - (f) 2008/9 - \$119,932
  - (g) 2009/10 – figures not yet available.
2. (a) *How are farmers made aware that they can seek a levy refund?* The information regarding refunds was provided in publications and during meetings when SAORC was formed and at various meetings within the industry since that time (such as annual general meetings). SAORC was of the understanding that growers were aware that a refund could be requested and is surprised that some growers claim they were not aware of that opportunity. SAORC proposes to ensure that this aspect is addressed in documentation preceding each annual general meeting in the future, provided this levy authorisation application is granted.
2. (b) *Is the levy listed as a separate item on invoices for farmers?* Yes.
3. The ACCC has proposed an alternative approach of farmers being asked at the start of the financial year whether they wish to pay the levy and have access to research published or generated by the levy.

The effect of such a proposal on the operation of the levy system would likely be dependent upon how it is operated. If, for example, the approach was to be an "opt out" method (which automatically presumes the levy will be paid unless otherwise notified), it might have little practical effect on the process of raising levies, as levies would continue to be included in all invoices. The impact of monitoring any objections and arranging variations to billing arrangements for those who opt out would undoubtedly add some degree of administrative burden on SAORC, SAOGA and the hatcheries.

On the other hand, if an "opt in" approach is taken, such administrative burden would likely be greater. Positive action would be required to approach each grower in relation to the levy, follow up in the absence of response and address the administrative issues associated with the application of the levy by the relevant hatchery. Presumably all hatcheries would carry some additional responsibility to ensure that no grower who has not "opted in" is billed. The absence of a positive response from a grower would have the result that the levy could not be applied.

In either event, the operating costs of SAOGA and SAORC will rise, which would result in a reduction of funds available for the intended research and development. Further, it is submitted that the impact upon the hatcheries, being the levy collecting bodies, will be the critical factor in any change to the collection process. If the burden upon the hatcheries becomes too onerous, it is reasonably foreseeable that there may be a reluctance to continue



to collect the levy. If any or all of the hatcheries declined to collect the levy, the funding would cease with likely detrimental effect upon the future development of the industry.

Aside from any change to the levy application and collection processes, it is submitted that the practicalities of its concept and its uses must remain in clear focus.

The levy funded research is used for the benefit of the industry not only in South Australia, but nationally, as noted by the SA Aquaculture Council in its submission to the ACCC. It would be impossible to quarantine the benefits arising out of the investments made in the industry through the collection of the levy to only those growers who choose to pay the levy. For example, it is inevitable that all growers will have access to the oyster selective breeding programs because it is not in the interests of the breeding program to limit sales of spat with a royalty attached. One of the goals of the breeding program is to become self funding. Another example is the research done on Pinnatoxin where SAORC invested in research which helped prove the lack of human health risk. This resulted in the removal of a limit for pinnatoxin benefitting all growers. SAORC has also helped meet industries commitments to the Seafood Cooperative Research Centre. The benefits of the work carried out by the Seafood Cooperative Research Centre is available to all growers. Such a concept as the one proposed, may be counterproductive and possible against the competitive and developmental best interests of the industry. It is unlikely to gain support within the industry.

It is submitted that the current collection and refund processes are satisfactory, subject to the comments in item 2(a) above.

4. *Has any party ever refused to pay the levy?* Neither SAOGA nor SAORC have to their knowledge ever been formally made aware of any grower refusing to pay the levy.

However, in respect of the original submission in respect of the levy, and the revised submission, item 8.1 in the first line is incorrect. That first line should read "As the hatcheries have agreed that they may choose not to supply spat where the levy has not been paid...".

The agreement between SAOGA and the relevant hatcheries does not in fact preclude the hatcheries from supplying spat if the levy is not paid. It does however give them the option as to whether to supply any grower or not if the grower does not pay the levy. Neither SAOGA nor SAORC are aware of any instance of any grower being refused supply of spat as a result of failure to pay the levy. As a result of investigations following the responses to the public submissions, SAOGA has become aware of some instances where growers have not paid the levy but the hatchery involved nevertheless has continued to supply spat.

5. *What options are available to South Australian oyster farmers to obtain spat other than from the parties to the agreement?* It is understood that all hatcheries supplying to the South Australian market are party to the agreement in relation to the imposition of levies. Accordingly, it would not appear that there are any alternative arrangements currently available to growers who do not wish to purchase supplies from the existing South Australian market suppliers. However, given the comments in our item 4 above and a clear understanding that in the event of a request for a refund of levies, the board of SAOGA will make such refund, it is submitted the growers are neither disadvantaged by the imposition of the levy nor being forced to pay it against their will.

#### **Further submission**

Having considered the view of the various parties who have submitted comments to the ACCC, and in reliance upon the comments above, particularly in relation to the non-binding requirement upon

12 July 2010

hatcheries regarding the imposition and collection of the levy, we request that the ACCC consider those matters in its further deliberations.

Further, in recognition of the degree of comment regarding the amount of the levy, we request that the levy either:

1. be revised to \$1 per 1,000 oyster spat, adjusted on 1 January each year commencing 2011 to reflect any increase in the Consumer Price Index (All Groups – Adelaide) for the preceding 12 month period; or in the alternative
2. remain unchanged from the previous authorisations – at \$1 per 1,000 oyster spat.

Please contact the writer with any queries.

Yours faithfully  
**COWELL CLARKE**

Per: 

**RICK DAVIES**  
Senior Associate  
RDavies@cowellclarke.com.au