Australian Competition & Consumer Commission

Determination

Application for revocation and substitution of authorisations A60024 and A60025

lodged by

the South Australian Oyster Growers Association Inc

in respect of

an agreement to impose a levy on purchasers of oyster spat for cultivation in South Australia

Date: **1 October 2010**

Commissioners: Samuel
Kell
Schaper
Dimasi
Walker

Authorisation no.: A91229
A91230

Public Register no.: C2010/495

Summary

The ACCC revokes authorisations A60024 and A60025 and grants authorisations A91229 and A91230 in substitution. The substitute authorisations are for an agreement between the South Australian Oyster Growers Association Inc and five oyster hatcheries to impose a levy on purchasers of oyster spat for cultivation in South Australia.

The ACCC grants authorisation for 10 years.

The South Australian Oyster Growers Association Inc (SAOGA) is an industry association that supports and represents South Australian oyster growers. The South Australian Oyster Research Council Pty Ltd (SAORC) was created in 1998 to act as the research body of SAOGA.

Commercial oyster production is reliant on the provision of juvenile oysters (spat) by licensed oyster hatcheries to oyster growers. Upon receipt of the spat, oyster growers raise the oysters until they are of marketable size and ready for sale. At present, five oyster hatcheries, in Tasmania and South Australia, supply all spat requirements to oyster growers in South Australia.

SAORC is funded by a levy on oyster spat sold to South Australian oyster growers. Under the current arrangements hatcheries impose a $1 per 1000 spat levy on oysters sold by them to oyster growers. Funds raised through the imposition of the levy are provided to SAORC to invest in research and development for the South Australian oyster industry.

The levy is separately itemised on growers' invoices and growers can seek a refund of the levy in any financial year. If a grower seeks a refund of the levy the grower does not have access to the results of research undertaken in that year.

The oyster spat levy arrangements were first authorised by the ACCC in 1999. The arrangements were reauthorised in 2005. These authorisations expired on 24 August 2010.

The levy has been set at $1 per 1000 spat since the arrangements were first implemented in 1999. In its current application, SAOGA seeks authorisation to adjust the levy each year to reflect any increase in the consumer price index.

In a competitive market, incentives for individual growers to undertake research and development of the type undertaken by SAORC would be limited. While the cost of undertaking research and development would be borne by the individual grower much of the benefit from the types of research SAORC undertakes, which is aimed at improving the viability and competitiveness of the South Australian oyster industry, is shared by all growers. Therefore, absent industry wide arrangements there are strong incentives for individual growers to free ride on the provision of research and development by others.

Efficient levels of research and development of this type depend on growers' collective willingness to pay for the research and development rather than their individual willingness to pay. Levy arrangements such as those proposed by SAOGA capture growers' collective willingness to pay and facilitate the collective funding of research and development.

The ACCC considers that by supporting SAORC's research objectives the imposition of the levy is likely to result in public benefits. The imposition of the levy is likely to lead to the availability of more funding, greater coordination of research and development for the South

Australian oyster industry, and wider dissemination of the results of this research and development.

SAORC's research objectives contribute to the development and improved viability and productivity of the oyster growing industry, improving the competitiveness of the industry and the quality and safety of oysters produced.

The ACCC also considers that to the extent that the arrangements contribute to the growth of the South Australian and national oyster industries, this will support rural and regional employment and communities.

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 arrangements is very limited given the operation of the refund scheme. The refund scheme allows growers to choose not to participate in the arrangements without their supply of oyster spat being jeopardised.

The levy, at $1 per 1000 spat, constitutes around 3 percent of the purchase price of spat. The fact that no grower has sought a refund on levies paid, and the general widespread industry support for the arrangements, 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.

The ACCC accepts that, in order to maintain funding levels to support research and development initiatives undertaken by SAORC at their current level, in real dollar terms, it is appropriate that the levy is indexed to the consumer price index as proposed by the applicant.

On balance, the ACCC considers that the public benefit that is likely to arise from the arrangements is likely to outweigh the public detriment. The ACCC grants authorisation for 10 years.

If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force 23 October 2010.

On 20 August 2010 the ACCC granted interim authorisation to the oyster spat levy arrangements.

Interim authorisation will remain in place until the date the ACCC's final determination comes into effect.

Contents

List of abbreviations

ACCC	Australian Competition and Consumer Commission
The Act	The *Trade Practices Act 1974*
CPI	Consumer Price Index (All groups – Adelaide)
FRDC	Fisheries Research and Development Corporation
PIRSA	Primary Industries and Resources South Australia
SAAC	South Australian Aquaculture Council
SAOGA	The South Australian Oyster Growers Association Inc
SAORC	The South Australian Oyster Research Council
The Tribunal	The Australian Competition Tribunal

1. The application for authorisation

1.1. On 17 May 2010 the South Australian Oyster Growers Association Inc (SAOGA) lodged an application under section 91C(1) of the Trade Practices Act 1974 (the Act) for the revocation of authorisations A60024 and A60025 and the substitution of authorisations A91229 and A91230 for the ones revoked.

1.2. Authorisation is a transparent process where the ACCC may grant immunity from legal action for conduct that might otherwise breach the Act. 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 public consultation process when it receives an application for authorisation, inviting interested parties to lodge submissions outlining whether they support the application or not. Further information about the authorisation process is contained in Attachment A.

1.4. The holder of an authorisation may apply to the ACCC to revoke an existing authorisation and grant another authorisation in substitution for the one revoked (reauthorisation). In order for the ACCC to re-authorise conduct, the ACCC must consider the application for reauthorisation in the same manner as it would consider an application for initial authorisation under section 88 of the Act.

1.5. Relevantly, the initial authorisation was made under:

- section 88(1) of the Act to make and 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 Act.
- section 88(1) of the Act 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 Act.[1]

1.6. A chronology of the significant dates in the ACCC's consideration of reauthorisations A91229 and A91230 is contained in Attachment B.

The proposed conduct

1.7. The reauthorisations sought by SAOGA are for an agreement between SAOGA and five oyster hatcheries to impose a levy on purchasers of oyster spat sold for cultivation in South Australia. The parties have agreed that the hatcheries (which grow juvenile oysters or 'spat') shall charge oyster growers (which rear spat to marketable size) in South Australia a levy on spat. The money is used by an association-owned company, the South Australian Oyster Research Council Pty Ltd (SAORC), for oyster-industry research and development.

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[1] Amendments to the Act in 2009 introduced new provisions prohibiting cartel conduct, establishing both civil and criminal penalties. Authorisations that were in effect at the time when the cartel provisions commenced will also provide immunity from the cartel provisions of the Act.

1.8. As noted below, the arrangements were first authorised in 1999 and again in 2005. The proposed substitute arrangements are in the same terms as the arrangements under authorisations A60024 and A60025, with the exception of a proposed increase in the levy amount.

1.9. The application is made by SAOGA on behalf of itself, SAORC and the five oyster hatcheries supplying oyster farms in South Australia, namely:

- The South Australian Oyster Hatchery Pty Ltd
- Cameron of Tasmania Pty Ltd
- Shellfish Culture Ltd
- A.R.K. Fisheries Trust and M & I Securities Pty Ltd, trading as Geordy River Aquaculture
- Southern Cross Shellfish Pty Ltd.

1.10. SAOGA seeks authorisation for:

- an indefinite period from the date of substitution, or in the alternative
- for a period of 10 years, or
- for a period of five years.

Previous authorisations

1.11. SAOGA lodged authorisation application A60023 in relation to the arrangements on 23 April 1999. Authorisation was granted on 8 September 1999 and A60023 expired on 7 September 2004.

1.12. New applications for authorisation A60024 and A60025 were lodged on 25 February 2005 and were granted with conditions on 3 August 2005. Due to its concern about the ability of SAORC to increase the levy, the ACCC imposed a condition of authorisation that set the upper limit of the levy at $1.00 per 1000 oyster spat. Authorisations A60024 and A60025 are due to expire on 24 August 2010.

Other parties

1.13. Under section 88(6) of the Act, any authorisation granted by the ACCC is automatically extended to cover any person named in the authorisation as being a party or proposed party to the conduct.

1.14. SAOGA seeks authorisation to include any additional oyster hatcheries from any State of Australia which wish to sell oyster spat into South Australia for cultivation by oyster growers.

Interim authorisation

1.15. On 26 July 2010, SAOGA requested interim authorisation for the oyster spat levy agreement. The ACCC granted interim authorisation on 20 August 2010.

1.16. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Draft determination

1.17. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

1.18. On 20 August 2010, the ACCC issued a draft determination proposing to re-authorise the proposed conduct for 10 years.

1.19. A conference was not requested in relation to the draft determination.

2. Background to the application

The applicant

2.1. SAOGA submits that it was established in 1989 by a group of oyster growers on the Eyre Peninsula who saw a need to take a collaborative approach towards the management of the oyster farming industry in South Australia. SAOGA submits that it supports and represents South Australian oyster growers at the regional, State and national level. SAOGA's membership has grown to around 100 oyster licence holders, approximately 98 percent of licence holders in South Australia.[2]

2.2. SAORC was established on 28 October 1998. The Board of SAORC is comprised of nominated licensed oyster growers who are members of SAOGA, and SAOGA is the sole shareholder. Nominations to the Board are called annually from all South Australian licensed oyster growers.

The South Australian oyster growing industry

2.3. Commercial oyster production is reliant on the provision of juvenile oysters (spat) by licensed oyster hatcheries to oyster growers. Upon receipt of the spat, oyster growers raise the oysters until they are of marketable size and ready for sale.

2.4. In Australia, oysters are farmed in Tasmania, South Australia and New South Wales. The three species grown are Sydney Rock oysters, Pacific oysters and Native oysters.[3]

2.5. The South Australian oyster industry was established in the late 1980s.[4] The South Australian oyster industry comprises eight growing areas, namely Denial Bay, Smoky Bay, Streaky Bay, Haslam, Coffin Bay and Cowell (Franklin Harbour), as well as Yorke Peninsula and the north-eastern side of Kangaroo Island.[5] The South Australian oyster growing industry cultivates Pacific oysters.

2.6. At present, five oyster hatcheries, in Tasmania and South Australia, supply all spat requirements to oyster farms in South Australia.

The levy arrangements

2.7. A levy is collected from all purchasers of oyster spat for cultivation in South Australia, when purchasing spat from a designated hatchery, as well as from the hatcheries themselves in relation to spat they retain themselves for cultivation.

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[2] SAOGA website, visited 3 August 2010, http://www.oysterssa.com.au/saoga.php.
[3] Australian Seafood Cooperative Research Centre website, visited 3 August 2010, http://www.seafoodcrc.com/oysters.html.
[4] Primary Industries and Resources SA website, visited 3 August 2010, http://www.pir.sa.gov.au/aquaculture/aquaculture_industry/oysters.
[5] SAOGA supporting submission.

2.8. SAOGA submits that the levy assists SAORC in fulfilling its objectives, which include (but are not limited to):

- encouraging scientific research and development for the South Australian cultured oyster industry
- promoting, encouraging and coordinating scientific research and development in the South Australian cultured oyster industry
- attracting, allocating and administering funds to oyster farming research in and/or related to South Australia
- reporting to the South Australian participants in the oyster industry of SAORC's research and development activities.

2.9. The arrangements allow growers to obtain access to the results of the research and development.

2.10. The levy is listed as a separate item on invoices for the growers. Growers are able to seek a refund of the levy that the grower has paid in any financial year. If a farmer seeks a refund they cease to have access to the results of research published or generated from the levy in that year.

2.11. SAOGA submits that the amount of money raised by the levy each financial year since it was introduced is:

- 1999/00 - $37 666
- 2000/01 - $70 423
- 2001/02 – $102 768
- 2002/03 – $125 008
- 2003/04 - $96 352
- 2004/05 - $126 110
- 2005/06 - $134 524
- 2006/07 - $122 892
- 2007/08 - $131 648
- 2008/09 - $119 932
- 2009/10 – figures not yet available.[6]

2.12. In seeking reauthorisation SAOGA initially proposed that:

- 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) (CPI) for the preceding 12 month period, or in the alternative
- the levy be revised to $1.50 per 1000 oyster spat, or

[6] 1999/00 to 2002/03 figures taken from SAOGA letter to ACCC, 25 May 2005. 2003/04 to 2008/09 figures taken from SAOGA submission, 12 July 2010.

- 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 CPI (all Groups – Adelaide) for the preceding 12 month period.

2.13. SAOGA later advised that it now proposes that the levy either:

- be revised to $1.00 per 1000 oyster spat, adjusted on 1 January each year commencing 2011 to reflect any increase in the CPI (all Groups – Adelaide) for the preceding 12 month period, or in the alternative
- remain unchanged from the previous authorisations – at $1.00 per 1000 oyster spat.

2.14. SAOGA submits that the industry remains very competitive and SAOGA's research remains a crucial element of the continued competitiveness of the South Australian oyster industry, noting that it has been engaged in its research activity for in excess of 10 years and does not foresee a likely change to that situation. SAOGA submitted that it wishes to reduce the costs it incurs in reapplying for authorisation and seeks authorisation for (in descending order of preference):

- an indefinite period from the date of substitution, or in the alternative
- for a period of 10 years, or
- for a period of five years.

3. Submissions received by the ACCC

3.1. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process. To this end the ACCC aims to consult extensively with interested parties that may be affected by the proposed conduct to provide them with the opportunity to comment on the application.

Prior to the draft determination

3.2. Broadly, SAOGA submits that under the existing authorisation funds collected in oyster spat levies have been applied in the furtherance of SAORC's research objectives to the competitive advantage of the industry and consumers. SAOGA submits that the levy and the research activities retain the full support of the industry.

3.3. SAOGA submits that any detriment from the arrangements restricting supply is limited by growers' ability to seek a refund of the levy monies paid in any financial year. SAOGA submits that although the arrangements involve fixing a component of the price charged for spat, hatcheries do not profit from the levy as the levy is collected for research and development purposes, and as the levy applies equally to spat sold into South Australia it does not preclude price competition amongst growers.

3.4. The ACCC sought submissions from over 50 interested parties potentially affected by the application, including South Australian oyster growers, state and federal departments and seafood industry representative groups. Submissions were received from:

- the South Australian Aquaculture Corporation (SAAC)
- Boylan Oysters
- Pacific Estate Oysters
- JB & CJ Holmes
- Eyre Island Oysters
- Pure Coffin Bay Oysters
- Primary Industries and Resources South Australia (PIRSA)
- the Fisheries Research and Development Council (FRDC)
- a party that requested that its identifying particulars be excluded from the ACCC's public register.

3.5. The submissions generally supported the oyster spat levy arrangements. However a number of submissions objected to the proposed increase in the levy.

3.6. The ACCC also received one submission from a party which requested that the submission be excluded from the ACCC's public register. The submission also objected to the proposed increase in the levy.

Following the draft determination

3.7. On 20 August 2010 the ACCC issued a draft determination in relation to the applications for authorisation. The draft determination proposed to grant authorisation.

3.8. A conference was not requested, and no submissions were received, in relation to the draft determination.

3.9. The views of SAOGA and interested parties are outlined in the ACCC's evaluation of the oyster spay levy agreement in Chapter 4 of this determination. Copies of public submissions may be obtained from the ACCC's website (www.accc.gov.au/AuthorisationsRegister) and by following the links to this matter.

4. ACCC evaluation

4.1. Broadly under section 91C(7) the ACCC must not make a determination revoking an authorisation and substituting another authorisation unless the ACCC is satisfied that the relevant statutory tests are met.

4.2. The ACCC's evaluation of the oyster spat levy agreement is in accordance with tests found in:

- section 90(8) of the Act which states that the ACCC shall not authorise a proposed exclusionary provision of a contract, arrangement or understanding, unless it is satisfied in all the circumstances that the proposed provision would result or be likely to result in such a benefit to the public that the proposed contract, arrangement or understanding should be authorised.
- sections 90(6) and 90(7) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding, other than an exclusionary provision, unless it is satisfied in all the circumstances that:
  - the provision of the proposed contract, arrangement or understanding in the case of section 90(6) would result, or be likely to result, or in the case of section 90(7) has resulted or is likely to result, in a benefit to the public and
  - that benefit, in the case of section 90(6) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement was made and the provision was given effect to, or in the case of section 90(7) has resulted or is likely to result from giving effect to the provision.
- sections 90(5A) and 90(5B) of the Act which state that the ACCC shall not authorise a provision of a proposed contract, arrangement or understanding that is or may be a cartel provision, unless it is satisfied in all the circumstances that:
  - the provision, in the case of section 90(5A) would result, or be likely to result, or in the case of section 90(5B) has resulted or is likely to result, in a benefit to the public and
  - that benefit, in the case of section 90(5A) would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if the proposed contract or arrangement were made or given effect to, or in the case of section 90(5B) outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from giving effect to the provision.

4.3. For more information about the tests for authorisation and relevant provisions of the Act, please see Attachment C.

The relevant area of competition

4.4. The first step in assessing the effect of the conduct for which reauthorisation is sought is to consider the relevant area of competition affected by that conduct.

4.5. SAOGA submits the relevant area of competition is that for the supply of spat to South Australian growers which is raised and cultivated for sale as oysters.

4.6. For the purpose of assessing this application, the ACCC considers the relevant areas of competition affected by the proposed conduct are those associated with:

- the supply of oyster spat to South Australian oyster growers
- the wholesale and retail supply of oysters in Australia.

4.7. With regard to the supply of oyster spat to South Australian oyster growers, the ACCC notes that SAOGA submits that the five hatcheries that are party to these arrangements supply all spat requirements to oyster growers in South Australia.

4.8. With regard to the wholesale and retail supply of oysters in Australia, the ACCC notes that in 2007/08 Australia imported 726 tonnes ($7.27 million) of edible oysters, most of which were from New Zealand.[7] By way of comparison, in 2007/08 Australia produced a total of 12 460 tonnes ($88.51 million) of edible oysters, of which 5448 tonnes ($30.132 million) was produced in South Australia.[8] The ACCC notes that less than 2 percent by weight (228 tonnes or $2.133 million) of all farmed edible oysters were exported in 2007/08.[9]

The counterfactual

4.9. The ACCC applies the 'future with-and-without test' established by the Australian Competition Tribunal (the Tribunal) to identify and weigh the public benefit and public detriment generated by conduct for which authorisation has been sought.[10]

4.10. 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'.

4.11. Given the concerns that the oyster spat levy arrangements may breach the Act, the ACCC considers that the most likely situation absent reauthorisation is that the arrangements would not continue in their current form.

4.12. That is, the levy would no longer be imposed on sales of oyster spat for cultivation in South Australia and the funds raised by the levy would no longer be available to support the research and development initiatives undertaken by SAORC.

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[7] ABARE website, Australian Fisheries Statistics 2008, visited 4 August 2010, http://www.abare.gov.au/publications_html/afs/afs_09/AFS_Imports.xls.
[8] ABARE website, Australian Fisheries Statistics 2008, visited 4 August 2010, http://www.abare.gov.au/publications_html/afs/afs_09/AFS_Production.xls.
[9] ABARE website, Australian Fisheries Statistics 2008, visited 4 August 2010, http://www.abare.gov.au/publications_html/afs/afs_09/AFS_Exports.xls.
[10] *Australian Performing Rights Association* (1999) ATPR 41-701 at 42,936. See also for example: *Australian Association of Pathology Practices Incorporated* (2004) ATPR 41-985 at 48,556; Re *Media Council of Australia* (No.2) (1987) ATPR 40-774 at 48,419.

4.13. 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 this application 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. This issue is discussed further in the ACCC's discussion of the public benefits of the arrangements.

Public benefit

4.14. Public benefit is not defined in the Act. 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.[11]

4.15. SAOGA submits that the oyster spat levy assists SAORC in fulfilling its objectives, including encouraging, promoting and coordinating research and development for the South Australian cultured oyster industry.

4.16. SAOGA submits that in the period of operation of the current authorisations (2005 to 2010) approximately $590 000 has been collected in levies and applied in the furtherance of research objectives. The levies have been applied to projects including:

- research into the toxicity of pinatoxin in oysters in relation to human health
- reduction in Pacific oyster mortality by improving farming and processing technologies in South Australia
- financial support for the Australian Seafood Cooperative Research Centre and related projects including cool chain management, supply chain temperature profiles, genetic improvement of oysters, oyster supply chain studies, benchmarking, retail transformation and oyster consumption research
- enhancement of the Pacific oyster selective breeding program.

4.17. SAOGA submits that reauthorisation of the arrangements would permit continuity of research activities to the competitive advantage of both the industry and consumers, and result in general competition, enterprise and consumer benefits.

4.18. SAOGA submits that the levy and the research activities retain the full support of the participants and no grower has requested any refund of levies or raised concerns regarding the use of monies raised.

4.19. SAOGA also submits that the levy, by supporting the South Australian oyster industry, also supports rural and regional employment.

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[11] *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

4.20. SAAC considers that the funds raised by the levy have contributed to both the public good and the development of the South Australian and Australian Pacific oyster farming industry, as well as benefitting the South Australian and Australian oyster industries more generally.

4.21. SAAC submits that research funded by the levy includes:

- studies on environmental and animal health and disease risks, ensuring safety of the product
- studies into growth rates and genetic improvements, assisting the viability of oyster farming
- future critical research into preparing for the effects of climate change, which may alter marine weather conditions, temperature, salinity, acidity, oxygen and carbon dioxide levels and could increase the incidence of toxic algal blooms or other emergencies.

4.22. SAOGA also submits that it would not be possible 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.

4.23. The FRDC supports the levy. The FRDC notes that some of the funds collected by SAOGA are passed on to it via the South Australian Government. FRDC submits that it invests levies collected from various jurisdictions into research and development that benefits oyster growers.

4.24. PIRSA, Pacific Estate Oysters and Eyre Island Oysters all support the application for reauthorisation. Eyre Island Oysters submits that the levy provides security to the industry and facilitates long term planning.

ACCC view

4.25. 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 would be the case without the levy.

4.26. In a competitive market, growers would likely undertake some research and development independently of each other, to the extent that this would provide a private benefit to the grower undertaking the research. However, the nature of the research undertaken by SAOGA is such that it tends to provide a collective benefit to producers and, as noted by SAOGA, those benefits cannot be fully quarantined to only those growers who choose to pay the levy. All growers receive a benefit from the development and improved viability and productivity of the industry, improved competitiveness of the industry and the improved quality and safety of oysters produced as a result of research undertaken using levy funds, regardless of whether they pay the levy.

4.27. This reduces incentives for any individual grower to fund the research and provides incentives to ‘free ride’ on the research contributions of other growers. If a significant number of growers adopted this approach, funding, and the research and development it

underpins, would be jeopardised. Further, to the extent that individual growers did fund research and development independently of each other there would likely be duplication of research and development undertaken.

4.28. In these circumstances, an efficient level of research and development depends on the collective, rather than individual, willingness of growers to pay to fund the research and development. Levy arrangements such as those proposed by SAOGA capture growers collective willingness to pay and facilitate the funding of research and development.

4.29. The current arrangements for collecting the levy do not completely eliminate incentives for individual growers to 'free ride' as growers are still able to seek a refund on levies paid at the end of each year. Any grower seeking a refund does not have access to the results of research and development undertaken in that year. However, the grower still receives a benefit from the improved productivity and competitiveness of the industry.

4.30. However, by requiring that the levy be paid up front and that growers must explicitly seek a refund at the end of the year, the arrangements increase the likelihood that growers will participate in the scheme. So called 'opt out' provisions tend to be much less likely to be taken up than 'opt in' provisions. Furthermore, at the point where they are able to seek a refund, the way in which growers levy payments have contributed to research initiatives is more apparent than at the time of paying an up front levy. In this respect, no grower has ever sought a refund of levies paid.

4.31. The ACCC therefore considers that by capturing growers' collective willingness to pay for research and development and deterring opting out, the levy arrangements are likely to result in more optimal levels of research and development than a competitive market would achieve.

4.32. The ACCC notes that SAOGA and SAAC have provided details of a number of research projects conducted using the funds provided by the levy (paragraphs 4.16 and 4.21) and that submissions have been generally supportive of the levy and argue that research and development undertaken with levy funds has benefitted the industry.

4.33. The ACCC considers that benefits flowing from the research undertaken by SAORC may include improved safety of oysters for consumption, improved supply chain efficiency, and improved oyster quality and yields due to improved husbandry, farming technology and processing technology.

4.34. The ACCC also notes that in the past, funds raised by the levy have been directed to improved environmental management and expanding exports of oysters. The ACCC has previously accepted that raising levy funds to support these initiatives also contributes a public benefit. In respect of the current application the ACCC notes that there is also potential for funds raised in the future to again be directed to these types of initiatives.

4.35. More broadly, SAORC's research objectives contribute to the development and improved viability and productivity of the oyster growing industry, improving the competitiveness of the industry and the quality and safety of oysters produced, which the ACCC considers to be a public benefit.

4.36. The ACCC also accepts that to the extent that the arrangements contribute to the growth in the South Australian and national oyster industries, this will support rural and regional employment and communities.

4.37. The fact that no grower has exercised their right to a refund on levies paid and that no growers have raised concerns regarding the arrangements, except with regards to a proposal to increase the amount of the levy, 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.

Public detriment

4.38. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

> …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.[12]

4.39. SAOGA submits that there has been no discernible detriment to the public through the imposition of the levy.

4.40. Other than in relation to the proposal to increase the levy, no interested party has raised concerns with the levy arrangements.

Refusal to supply

4.41. SAOGA notes all hatcheries supplying South Australian oyster growers are party to the oyster spat levy arrangements. However SAOGA submits that while the hatcheries agreeing that they may choose not to supply spat where the levy has not been paid has the potential effect of restricting supply, because growers can seek a refund of levies paid the arrangements do not generate significant detriment. SAOGA submits that the ability to seek a refund means that growers cannot be forced to pay the levy against their will.

4.42. Further, SAOGA submits that the agreement does not preclude the hatcheries from supplying spat if the levy is not paid. Rather, hatcheries agree that each can 'choose' not to supply a grower that does not pay the levy.

4.43. SAOGA states that information about obtaining refunds was provided in publications and during meetings when SAORC was formed and at various meeting since that time. SAOGA states that it understood that growers were aware that a refund could be requested and was surprised to learn through the course of the ACCC's consideration of the current application for revocation and substitution that some growers did not appear to be aware that a refund could be requested. SAOGA states that it now proposes to ensure that documentation about the availability of refunds is provided prior to each SAORC annual general meeting.

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[12] *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

4.44. During the course of considering the application for revocation and substitution the ACCC asked SAOGA to comment about how asking growers at the start of the year whether they wished to pay the levy, rather than automatically collecting the levy and then providing an opportunity for growers to seek refunds at the end of the year, would affect the operation of the scheme.

4.45. SAOGA responded that if such a system operated on an 'opt out' basis which automatically assumed that the growers agreed to pay the levy unless they indicated otherwise it may have little practical effect on the process of raising levies beyond adding some degree of administrative burden in having to organise variations to billing arrangements for growers that opted out.

4.46. However, SAOGA argued that if such a system operated on an 'opt in' basis the administrative burden would likely be greater as positive action would be required in approaching each grower with necessary follow up where no response was received and administrative issues associated with changing billing arrangements for hatcheries.

4.47. SAOGA submitted that in either case, the administrative burden on itself and hatcheries would rise and that such a change is unnecessary given the widespread support for the arrangements as they stand.

ACCC view

4.48. Agreements between competitors which impose restrictions on their decisions as to what they deal in, or with whom they deal, can result in allocative inefficiencies. Such agreements distort market signals and can suppress competitive dynamics that would exist in a competitive market.

4.49. These agreements also have the potential to increase barriers to market entry or expansion, which reduces the competitive restraint applying to market participants. Both can lead to increased prices and reduced choice for consumers and significant inefficiencies.

4.50. In this instance, the proposed arrangements include an agreement between competing hatcheries, who between them supply oyster spat to all South Australia's oyster growers, not to supply spat to growers if they do not pay the levy.

4.51. The ACCC notes SAOGA's argument that the arrangements do not require hatcheries to withhold supply but rather provides them with the option to 'choose' whether or not to withhold supply to growers that do not pay the levy. However, given that the arrangements provide for the option of withholding supply the ACCC does not place great weight on this argument. Although, it is relevant to note that no grower has, to date, been refused supply because they have refused to pay the levy.

4.52. 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 arrangements is significantly diminished by the operation of the refund scheme. Specifically, the refund scheme allows growers to choose not to participate in the arrangements without their supply of oyster spat being jeopardised.

4.53. The ACCC notes that no grower has ever sought a refund of the levy and the continued widespread industry support for the levy suggesting that growers do not consider that its imposition results in any significant detriment to them.

4.54. The mitigating effect of the refund scheme would be reduced if not all growers were made aware of their option to seek a refund. In this respect, the ACCC accepts SAOGA's submission that it will now include information about obtaining a refund in documentation preceding each annual general meeting.

4.55. The ACCC also notes that it may be possible for SAORC research and development to be funded by asking growers at the start of the year whether they wished to pay the levy, either through an opt in or opt out system.

4.56. However, as noted in the ACCC's consideration of the public benefits of the arrangements, because many of the benefits of the research and development cannot be quarantined to only those growers who choose to pay the levy, there is an incentive for individual growers to not pay the levy and free ride on the contribution of others. This would result in less research and development being undertaken. The system whereby growers are required to pay the levy up front and then exercise the option of seeking a refund at the end of each year increases the likelihood that growers will participate in the scheme.

4.57. In addition, as also noted by SAOGA, having to seek the consent of each grower at the start of the year to the imposition of the levy, either on an opt in or opt out basis, would increase the administrative burden and costs of the scheme.

4.58. More generally, the ACCC notes that the levy arrangements in their current form, through the operation of the refund scheme, broadly reflect a user pays principal. The fact that no grower has sought a refund on levies paid and that submissions from growers have generally been supportive of the arrangements, 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.

Agreement on price

4.59. SAOGA submits that if it had unrestricted discretion to increase the levy, with consequential potential increases in price, this could distort competition. However, SAOGA submits the arrangements as structured do not provide them with the discretion to increase price other than within the parameters set out in their application for revocation and substitution.

4.60. SAOGA also submits that the hatcheries do not profit from the levy, as it is collected purely for the purposes of research and development. SAOGA also submits that as the levy applies equally to all spat sold into South Australia, competition on price is not restricted.

ACCC view

4.61. Agreements between competitors which influence the pricing decisions of market participants have the potential to result in allocative inefficiencies. That is, they can move prices away from levels that would be set in a competitive market. This can

result in higher prices for consumers and send market signals which direct resources away from their most efficient use.

4.62. In this instance, the arrangements involve an agreement between competing hatcheries to fix an element of the prices they charge for oyster spat.

4.63. However the ACCC notes SAOGA's submission that hatcheries do not profit from the levy and that the levy is used only for research and development purposes to the benefit of the South Australian oyster industry. Further, the levy is applied equally to all growers such that none are at a competitive disadvantage under the arrangements. In addition, the cost of the levy may be offset by a reduction in oyster farming costs as a result of the research and development undertaken by SAORC.

4.64. The levy could potentially increase the price wholesalers pay for oysters purchased from South Australian growers. Any such increase in wholesale prices could also be reflected in retail prices. However the ACCC notes that the current levy represents only around 3 percent of the purchase price of spat and a much smaller proportion again of the end retail price of oysters. 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 remains competitive. For these reasons the ACCC considers any increase in wholesale or retail prices would be minimal.

4.65. Moreover, research and development undertaken using the levy funds may improve the overall competitiveness of the South Australian oyster industry and may in fact lead to lower wholesale and retail prices. The fact that the overwhelming majority of growers continue to pay the levy despite it being, in effect voluntary, supports this assertion.

Increase in the oyster spat levy

4.66. SAOGA submits that the effects of inflation have negatively affected the value of the oyster spat levy, which has remained $1.00 per 1000 oyster spat since its introduction in 1999. Originally, SAOGA's application for reauthorisation proposed that:

- 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 (CPI) (all Groups – Adelaide) for the preceding 12 month period, or in the alternative
- the levy be revised to $1.50 per 1000 oyster spat, or
- 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 CPI (all Groups – Adelaide) for the preceding 12 month period.

4.67. SAOGA initially submitted that increasing the levy in this manner would ensure that SAOGA cannot increase the levy above what is reasonably reflective of the overall cost and pricing pressures on the growers whilst ensuring that the amount of levies collected bears some relationship to the increasing research activity costs.

4.68. Boylan Oysters, JB and CJ Holmes, Eyre Island Oysters, Pure Coffin Bay Oysters and one submission excluded from the public register at the request of the party making the submission do not support increasing the levy in the manner originally proposed.

4.69. Boylan Oysters and JB and CJ Holmes submit that they do not support an increase in the levy in an environment where grower costs have increased. Eyre Island Oysters submits that the volume of spat being purchased has increased dramatically in the past 10 years, proportionately increasing the levy contributions sufficiently to avoid an increase in the levy.

4.70. In response SAOGA advised that, having considered the views of interested parties who had commented on the proposal to increase the levy and in recognition of the concerns about the increase, SAOGA was no longer seeking to increase the levy from $1.00 to $1.50. Instead, it requests that the levy either:

- be revised to $1.00 per 1000 oyster spat, adjusted on 1 January each year commencing 2011 to reflect any increase in the CPI (all Groups – Adelaide) for the preceding 12 month period, or
- remain unchanged from the previous authorisations – at $1.00 per 1000 oyster spat.

ACCC view

4.71. As noted, one factor mitigating against any public detriment potentially generated by the levy arrangements is that the levy constitutes only a small proportion of the price of oyster spat.

4.72. The ACCC accepts SAOGA's submission that with the levy having remained constant since 1999, the real value of funds raised by the levy, per 1000 spat sold, has fallen. While one submission argued that this reduction in the real value of funds raised per 1000 spat sold has been offset by an increase in the volume of spat sold, figures provided by SAOGA, as summarised at paragraph 2.11, suggest that the amount collected through levies has remained roughly constant for the last five years. Accordingly, the real value of funds raised by the levy, both per 1000 spat, and in total, has fallen significantly in the last five years.

4.73. The ACCC also notes that when the ACCC last considered the arrangements in 2005, the $1.00 levy represented approximately 6 percent of the purchase price of spat.[13] Based on the information provided by SAOGA, the $1.00 levy currently represents approximately 3 percent of the purchase price of spat.[14]

4.74. The ACCC considers that, in order to maintain funding levels to support research and development initiatives undertaken by SAORC at their current level, in real dollar terms, the levy should be indexed to the inflation rate.

4.75. Even if the $1.00 levy was increased annually, indexed to the inflation rate (CPI – all Groups – Adelaide), the levy would remain modest in comparison with the price of spat.

[13] SAOGA submission in support of applications A60024 and A60025. Based on an average spat price of $17.
[14] SAOGA supporting submission. Based on SAOGA estimate that, if increased to $1.50 per 1000 oysters the levy would represent less than 5 percent of the purchase price of spat.

Balance of public benefit and detriment

4.76. In general, the ACCC may only grant authorisation if it is satisfied that, in all the circumstances, the oyster spat levy agreement is likely to result in a public benefit, and that public benefit will outweigh any likely public detriment.

4.77. In the context of applying the net public benefit test in section 90(8)[15] of the Act, the Tribunal commented that:

> … something more than a negligible benefit is required before the power to grant authorisation can be exercised.[16]

4.78. In a competitive market, incentives for individual growers to undertake research and development of the type undertaken by SAORC would be limited. While the cost of undertaking research and development would be borne by the individual grower, much of the benefit from the types of research SAORC undertakes, which is aimed at improving the viability and competitiveness of the South Australian oyster industry, is shared by all growers. Therefore, absent industry wide arrangements, there are strong incentives for individual growers to free ride on the provision of research and development by others.

4.79. Efficient levels of research and development of this type depend on growers' collective willingness to pay for the research and development rather than their individual willingness to pay. Levy arrangements such as those proposed by SAOGA capture growers' collective willingness to pay and facilitate the efficient funding of research and development.

4.80. The ACCC considers that by supporting SAORC's research objectives the imposition of the levy is likely to result in public benefits. The imposition of the levy is likely to lead to the availability of more funding, greater coordination of research and development for the South Australian oyster industry, and wider dissemination of the results of this research and development.

4.81. SAORC's research objectives contribute to the development and improved viability and productivity of the oyster growing industry, improving the competitiveness of the industry and the quality and safety of oysters produced.

4.82. The ACCC also considers that to the extent that the arrangements contribute to the growth of the South Australian and national oyster industries, this will support rural and regional employment and communities.

4.83. 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 arrangements is very limited given the operation of the refund scheme. The refund

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[15] The test at 90(8) of the Act is in essence that conduct is likely to result in such a benefit to the public that it should be allowed to take place.

[16] *Re Application by Michael Jools, President of the NSW Taxi Drivers Association* [2006] ACompT 5 at paragraph 22.

scheme allows growers to choose not to participate in the arrangements without their supply of oyster spat being jeopardised.

4.84. The levy, at $1 per 1000 spat, constitutes around 3 percent of the purchase price of spat. The fact that no grower has sought a refund on levies paid, and the general widespread industry support for the arrangements, 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.

4.85. The ACCC considers that, in order to maintain funding levels to support research and development initiatives undertaken by SAORC at their current level, in real dollar terms, the levy should be indexed to the consumer price index as proposed by the applicant.

4.86. Accordingly, the ACCC considers the public benefit that is likely to result from the conduct is likely to outweigh the public detriment, including the detriment from any lessening of competition that would result. The ACCC is therefore satisfied that the tests in sections 90(6), 90(7), 90(5A) and 90(5B) are met.

4.87. In addition, the ACCC is satisfied that the test in section 90(8) is met as the re-authorisation sought is likely to result in such a benefit to the public that the arrangements should be allowed to take place.

Length of authorisation

4.88. The Act allows the ACCC to grant authorisation for a limited period of time.[17] The ACCC generally considers it appropriate to grant authorisation for a limited period of time, so as to allow an authorisation to be reviewed in the light of any changed circumstances.

4.89. The SAOGA submits that it wishes to reduce the costs it incurs in reapplying for authorisation and seeks authorisation for (in descending order of preference):

- an indefinite period, or
- 10 years, or
- five years.

4.90. The oyster spat levy has been operating successfully for 10 years with widespread industry support. No concerns have been raised with the ACCC about the arrangements other than with respect to the initial proposal to increase the levy to $1.50. This concern is addressed at paragraphs 4.71 to 4.75. In addition the ACCC notes the ability to seek a refund for levies paid.

4.91. Given the widespread industry support for the arrangements and the ability for any grower dissatisfied with the levy to seek a refund the ACCC grants authorisation to the arrangements for a further 10 years.

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[17] Section 91(1).

4.92. The ACCC may review the authorisation, prior to the expiry of the authorisation, if there has been a material change of circumstances since the authorisation was granted.

Variations to the oyster spat levy agreement

4.93. The ACCC notes that any amendments to the oyster spat levy agreement during the term of this authorisation would not be covered by the re-authorisation.

5. Determination

The application

5.1. On 17 May 2010 the South Australian Oyster Growers Association Inc (SAOGA) lodged an application for revocation of authorisations A60024 and A60025 and substitution of authorisations A91229 and A91230 for the ones revoked.

5.2. Applications A91229 and A91230 were made under section 91C(1) of the Act. The initial authorisation was made under subsection 88(1).

5.3. In particular, SAOGA seeks authorisation to give effect to an agreement between SAOGA and five oyster hatcheries for the imposition of a levy on purchasers of oyster spat for cultivation in South Australia.

5.4. Section 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

The net public benefit test

5.5. For the reasons outlined in Chapter 4 of this determination, the ACCC considers that in all the circumstances the conduct for which authorisation is sought are likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition arising from the arrangements. The ACCC is therefore satisfied that the tests in sections 90(6), 90(7), 90(5A) and 90(5B) are met.

5.6. In addition, the ACCC is satisfied that the test in section 90(8) is met as the re-authorisation sought is likely to result in such a benefit to the public that the arrangements should be allowed to take place.

5.7. The ACCC therefore **revokes** authorisations A60024 and A60025 **and grants** authorisations A91229 and A91230 in substitution.

Conduct for which the ACCC grants authorisation

5.8. The ACCC revokes authorisations A60024 and A60025 and grants authorisations A91229 and A91230 in substitution.

5.9. The ACCC grants authorisation under section 91C(4) of the Act to SAOGA for the oyster spat levy agreement.

5.10. The ACCC grants authorisation to SAOGA for the oyster spat levy agreement for 10 years.

5.11. The ACCC grants authorisation for the levy, currently set at $1.00 per 1000 oyster spat, to be adjusted on 1 January of each year commencing in 2011 to reflect any increase in the Consumer Price Index (all Groups – Adelaide) for the preceding 12 months.

5.12. Further, the reauthorisation is in respect of the oyster spat levy agreement as it stands at the time authorisation is granted. Any changes to the oyster spat levy agreement during the term of the re-authorisation would not be covered by the re-authorisation.

5.13. This determination is made on 1 October 2010.

5.14. The attachments to this determination are part of the determination.

Interim authorisation

5.15. On 26 July 2010, SAOGA requested interim authorisation for the oyster spat levy agreement. The ACCC granted interim authorisation to the substitute authorisation on 20 August 2010.

5.16. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Date authorisation comes into effect

5.17. This determination is made on 1 October 2010. If no application for review of the determination is made to the Australian Competition Tribunal (the Tribunal), it will come into force on 23 October 2010.

Attachment A — the authorisation process

The Australian Competition and Consumer Commission (the ACCC) is the independent Australian Government agency responsible for administering the *Trade Practices Act 1974* (the Act). A key objective of the Act 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.

The Act, however, allows the ACCC to grant immunity from legal action in certain circumstances for conduct that might otherwise raise concerns under the competition provisions of the Act. One way in which parties may obtain immunity is to apply to the ACCC for what is known as an 'authorisation'.

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.

The ACCC conducts a public consultation process when it receives 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.

After considering submissions, the ACCC issues a draft determination proposing to either grant the application or deny the application.

Once a draft determination is released, the applicant or any interested party may request that the ACCC hold a conference. A conference provides all parties with the opportunity to put oral submissions to the ACCC in response to the draft determination. The ACCC will also invite the applicant and interested parties to lodge written submissions commenting on the draft.

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 determination. Should the public benefit outweigh the public detriment, the ACCC may grant authorisation. If not, authorisation may be denied. However, in some cases it may still be possible to grant authorisation where conditions can be imposed which sufficiently increase the benefit to the public or reduce the public detriment.

Attachment B — chronology of ACCC assessment for applications A91229 & A91230

The following table provides a chronology of significant dates in the consideration of the application by the South Australian Oyster Growers Association Inc.

DATE	ACTION
17 May 2010	Application for revocation and substitution lodged with the ACCC.
16 June 2010	Closing date for submissions from interested parties in relation to the substantive application for authorisation.
12 July 2010	Submission received from SAOGA in response to interested party submissions.
26 July 2010	Application for interim authorisation lodged with the ACCC.
4 August 2010	Closing date for submissions from interested parties in relation to the request for interim authorisation.
20 August 2010	Draft determination issued and the ACCC granted interim authorisation.
10 September 2010	Closing date for submissions from interested parties in relation to the draft determination.
1 October 2010	Final determination.

Attachment C — the tests for authorisation and other relevant provisions of the Act

Trade Practices Act 1974

Section 90—Determination of applications for authorisations

(1) The Commission shall, in respect of an application for an authorization:

(a) make a determination in writing granting such authorization as it considers appropriate; or

(b) make a determination in writing dismissing the application.

(2) The Commission shall take into account any submissions in relation to the application made to it by the applicant, by the Commonwealth, by a State or by any other person.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

(4) The Commission shall state in writing its reasons for a determination made by it.

(5) Before making a determination in respect of an application for an authorization the Commission shall comply with the requirements of section 90A.

Note: Alternatively, the Commission may rely on consultations undertaken by the AEMC: see section 90B.

(5A) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a proposed contract, arrangement or understanding that would be, or might be, a cartel provision, unless the Commission is satisfied in all the circumstances:

(a) that the provision would result, or be likely to result, in a benefit to the public; and

(b) that the benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:

(i) the proposed contract or arrangement were made, or the proposed understanding were arrived at; and

(ii) the provision were given effect to.

(5B) The Commission must not make a determination granting an authorisation under subsection 88(1A) in respect of a provision of a contract, arrangement or understanding that is or may be a cartel provision, unless the Commission is satisfied in all the circumstances:

(a) that the provision has resulted, or is likely to result, in a benefit to the public; and

(b) that the benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision.

(6) The Commission shall not make a determination granting an authorization under subsection 88(1), (5) or (8) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a proposed contract, arrangement or understanding, in respect of a proposed covenant, or in respect of proposed conduct (other than conduct to which subsection 47(6) or (7) applies), unless it is satisfied in all the circumstances that the provision of the proposed contract, arrangement or understanding, the proposed covenant, or the proposed conduct, as the case may be, would result, or be likely to result, in a benefit to

the public and that that benefit would outweigh the detriment to the public constituted by any lessening of competition that would result, or be likely to result, if:

(a) the proposed contract or arrangement were made, or the proposed understanding were arrived at, and the provision concerned were given effect to;

(b) the proposed covenant were given, and were complied with; or

(c) the proposed conduct were engaged in;

as the case may be.

(7) The Commission shall not make a determination granting an authorization under subsection 88(1) or (5) in respect of a provision (not being a provision that is or may be an exclusionary provision) of a contract, arrangement or understanding or, in respect of a covenant, unless it is satisfied in all the circumstances that the provision of the contract, arrangement or understanding, or the covenant, as the case may be, has resulted, or is likely to result, in a benefit to the public and that that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result, from giving effect to the provision or complying with the covenant.

(8) The Commission shall not:

(a) make a determination granting:

(i) an authorization under subsection 88(1) in respect of a provision of a proposed contract, arrangement or understanding that is or may be an exclusionary provision; or

(ii) an authorization under subsection 88(7) or (7A) in respect of proposed conduct; or

(iii) an authorization under subsection 88(8) in respect of proposed conduct to which subsection 47(6) or (7) applies; or

(iv) an authorisation under subsection 88(8A) for proposed conduct to which section 48 applies;

unless it is satisfied in all the circumstances that the proposed provision or the proposed conduct would result, or be likely to result, in such a benefit to the public that the proposed contract or arrangement should be allowed to be made, the proposed understanding should be allowed to be arrived at, or the proposed conduct should be allowed to take place, as the case may be; or

(b) make a determination granting an authorization under subsection 88(1) in respect of a provision of a contract, arrangement or understanding that is or may be an exclusionary provision unless it is satisfied in all the circumstances that the provision has resulted, or is likely to result, in such a benefit to the public that the contract, arrangement or understanding should be allowed to be given effect to.

(9) The Commission shall not make a determination granting an authorization under subsection 88(9) in respect of a proposed acquisition of shares in the capital of a body corporate or of assets of a person or in respect of the acquisition of a controlling interest in a body corporate within the meaning of section 50A unless it is satisfied in all the circumstances that the proposed acquisition would result, or be likely to result, in such a benefit to the public that the acquisition should be allowed to take place.

(9A) In determining what amounts to a benefit to the public for the purposes of subsection (9):

(a) the Commission must regard the following as benefits to the public (in addition to any other benefits to the public that may exist apart from this paragraph):

(i) a significant increase in the real value of exports;

(ii) a significant substitution of domestic products for imported goods; and

(b) without limiting the matters that may be taken into account, the Commission must take into account all other relevant matters that relate to the international competitiveness of any Australian industry.

Variation in the language of the tests

There is some variation in the language in the Act, particularly between the tests in sections 90(6) and 90(8).

The Australian Competition Tribunal (the Tribunal) has found that the tests are not precisely the same. The Tribunal has stated that the test under section 90(6) is limited to a consideration of those detriments arising from a lessening of competition but the test under section 90(8) is not so limited.[18]

However, the Tribunal has previously stated that regarding the test under section 90(6):

[the] fact that the only public detriment to be taken into account is lessening of competition does not mean that other detriments are not to be weighed in the balance when a judgment is being made. Something relied upon as a benefit may have a beneficial, and also a detrimental, effect on society. Such detrimental effect as it has must be considered in order to determine the extent of its beneficial effect.[19]

Consequently, when applying either test, the ACCC can take most, if not all, public detriments likely to result from the relevant conduct into account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

Given the similarity in wording between sections 90(6) and 90(7), the ACCC considers the approach described above in relation to section 90(6) is also applicable to section 90(7). Further, as the wording in sections 90(5A) and 90(5B) is similar, this approach will also be applied in the test for conduct that may be a cartel provision.

Conditions

The Act allows the ACCC to grant authorisation subject to conditions.[20]

Future and other parties

Applications to make or give effect to contracts, arrangements or understandings that might substantially lessen competition or constitute exclusionary provisions may be expressed to extend to:

- persons who become party to the contract, arrangement or understanding at some time in the future[21]

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[18] *Australian Association of Pathology Practices Incorporated* [2004] ACompT 4; 7 April 2004. This view was supported in *VFF Chicken Meat Growers' Boycott Authorisation* [2006] AcompT9 at paragraph 67.

[19] *Re Association of Consulting Engineers, Australia* (1981) ATPR 40-2-2 at 42788. See also: *Media Council case* (1978) ATPR 40-058 at 17606; and *Application of Southern Cross Beverages Pty. Ltd., Cadbury Schweppes Pty Ltd and Amatil Ltd for review* (1981) ATPR 40-200 at 42,763, 42766.

[20] Section 91(3).

- persons named in the authorisation as being a party or a proposed party to the contract, arrangement or understanding.[22]

Six- month time limit

A six-month time limit applies to the ACCC's consideration of new applications for authorisation[23]. It does not apply to applications for revocation, revocation and substitution, or minor variation. The six-month period can be extended by up to a further six months in certain circumstances.

Minor variation

A person to whom an authorisation has been granted (or a person on their behalf) may apply to the ACCC for a minor variation to the authorisation.[24] The Act limits applications for minor variation to applications for:

> … a single variation that does not involve a material change in the effect of the authorisation.[25]

When assessing applications for minor variation, the ACCC must be satisfied that:

- the proposed variation satisfies the definition of a 'minor variation' and
- if the proposed variation is minor, the ACCC must assess whether it results in any reduction to the net benefit of the conduct.

Revocation; revocation and substitution

A person to whom an authorisation has been granted may request that the ACCC revoke the authorisation.[26] The ACCC may also review an authorisation with a view to revoking it in certain circumstances.[27]

The holder of an authorisation may apply to the ACCC to revoke the authorisation and substitute a new authorisation in its place.[28] The ACCC may also review an authorisation with a view to revoking it and substituting a new authorisation in its place in certain circumstances.[29]

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21 Section 88(10).
22 Section 88(6).
23 Section 90(10A)
24 Subsection 91A(1)
25 Subsection 87ZD(1).
26 Subsection 91B(1)
27 Subsection 91B(3)
28 Subsection 91C(1)
29 Subsection 91C(3)