



Australian  
Competition &  
Consumer  
Commission

# Determination

Application for authorisation

lodged by

the Australian Seafood Industries Pty Ltd

in respect of

the collection of a levy on purchases of  
Pacific oyster spat to address the  
POMS virus

Date: 3 December 2014

Authorisation number: A91444

Commissioners: Sims  
Rickard  
Cifuentes  
Court  
Featherston  
Walker

# Summary

**The ACCC grants authorisation to Australian Seafood Industries for ten years to collect a levy on the purchase of Pacific oyster spat to fund research to combat Pacific Oyster Mortality Syndrome.**

## The application for authorisation

1. On 14 July 2014, Australian Seafood Industries Pty Ltd (ASI) lodged an application for authorisation<sup>1</sup> (A91444) with the Australian Competition and Consumer Commission (ACCC), to make and give effect to arrangements with the Tasmanian Oyster Research Council Limited (TORC), the South Australian Oyster Growers Association (SAOGA), the South Australian Oyster Research Council (SAORC) a subsidiary of SAOGA, and Pacific oyster hatcheries, for the collection of a levy from oyster growers.
2. The levy is to be collected, either by ASI or on its behalf by oyster hatcheries, from oyster growers who purchase Pacific oyster spat from hatcheries. The levy will commence at \$2.80 per 1000 spat, indexed annually by CPI, and will be collected for a period of up to 10 years. ASI will use the collected monies to research and develop Pacific oyster broodstock with an increased resistance to the Pacific Oyster Mortality Syndrome (POMS).
3. ASI is seeking authorisation for ten years.
4. ASI also requested interim authorisation to enable it to engage in the proposed conduct while the ACCC considers the substantive application. The ACCC granted interim authorisation under subsection 91(2) of the *Competition and Consumer Act 2010* (the CCA) on 14 August 2014.<sup>2</sup>
5. 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.

## Background

6. Commercial oyster production is reliant on the provision of juvenile oysters (spat) by licensed oyster hatcheries to grow oysters. Upon receipt of the spat, oyster growers raise the oysters until they are of marketable size and ready for sale.
7. In Australia, oysters are primarily cultivated in Tasmania, South Australia and New South Wales. The two main species grown are the Sydney Rock oyster and the

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<sup>1</sup> Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (the CCA). Applicants seek authorisation where they wish to engage in conduct which is at risk of breaching the CCA but nonetheless consider there is an offsetting public benefit from the conduct. Detailed information about the authorisation process is available in the ACCC's Authorisation Guidelines at [www.accc.gov.au/publications/authorisation-guidelines-2013](http://www.accc.gov.au/publications/authorisation-guidelines-2013)

<sup>2</sup> See ACCC Interim Authorisation decision, 14 August 2014, available at [www.accc.gov.au/AuthorisationsRegister](http://www.accc.gov.au/AuthorisationsRegister)

Pacific oyster. The Angasi oyster, Milky oyster and Blacklip oyster are also grown in small quantities.<sup>3</sup>

8. ASI was established by two not-for-profit shareholders, TORC and SAOGA, to unify the delivery of commercially oriented Pacific oyster research to the industry and to provide leadership in commercialising the research results. TORC and SAOGA provided seed funding for research by way of their respective levies.
9. TORC was established by industry members in 1990 to promote, encourage and coordinate research related to the Tasmanian cultured oyster industry.
10. SAOGA was formed by industry members in 1989 in order to take a collaborative approach towards the management of oyster farming in South Australia. SAOGA has approximately 100 members who account for approximately 98 per cent of all oyster licence holders in South Australia.<sup>4</sup>
11. ASI conducts a selective breeding program to produce Pacific oysters with particular genetic traits and increased resistance to diseases, and provides the oyster broodstock to hatcheries. There are no other commercial producers and suppliers of broodstock in Australia, although hatcheries do acquire additional broodstock on a less formal basis from oyster growers. Hatcheries produce Pacific oyster larvae from the broodstock provided by ASI and growers. The oyster larvae is raised to spat of 3-10mm and then sold to oyster growers.
12. Prior to the ACCC granting interim authorisation, ASI was marketing its spat through major hatcheries for which it was paid a royalty of \$2.00 per 1000 spat. Hatcheries collected this royalty from purchasers of ASI spat and paid it to ASI quarterly.
13. ASI proposed that upon implementation of the levy, hatcheries would cease marketing spat under ASI's name, and the royalty would cease to apply. However, ASI will continue to supply broodstock to hatcheries, and hatcheries will continue to sell the resulting spat to growers. Hatcheries will individually decide whether to continue acquiring broodstock from oyster growers.
14. The levy is intended to apply to all Pacific oyster spat purchased from a hatchery, regardless of the Pacific oyster spat's broodstock heritage. ASI anticipates that the removal of its royalty, coupled with the implementation of the levy, will result in reduced price discrepancy across Pacific oyster spat lines.

### ***Pacific Oyster Mortality Syndrome***

15. POMS has a 90-100 per cent mortality rate in infected oysters, and outbreaks have occurred in Pacific oysters in France, the United Kingdom, Ireland, the Netherlands and New Zealand. More recently, POMS outbreaks have occurred in the Georges and Hawkesbury rivers in New South Wales, and in wild Pacific oysters in Brisbane.
16. ASI submits that outbreaks of POMS can devastate the commercial production of Pacific oysters in the affected regions, and cause irreparable financial damage to affected growers. By way of example, ASI states that 66 per cent of the commercial operators in the Hawkesbury River exited the industry because of a POMS outbreak in that area.

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<sup>3</sup> Australian Seafood Industries Pty Ltd, *Submission in support of application*, 14 July 2014.

<sup>4</sup> [www.oystersa.com.au/south-australian-oyster-growers-association](http://www.oystersa.com.au/south-australian-oyster-growers-association), viewed 7 October 2014.

17. ASI submits that having an ubiquitous level of POMS resistance in farmed Pacific oysters is the only way to mitigate the risk of irreparable financial damage to affected growers, should a POMS outbreak occur.
18. ASI submits there is no government funding available to aid research and development to respond to the threat posed by POMS. ASI submits its research indicates that Pacific oysters may be selectively bred to produce Pacific oyster broodstock with POMS resistance. If successful, ASI proposes to supply POMS resistant Pacific oyster broodstock to hatcheries, so that hatcheries may act as multipliers and subsequent distributors of genetically improved oyster material.
19. ASI, together with peak industry bodies, will review the research and development progress to determine whether the goals are being achieved and whether the research and development and collection of the levy should continue. ASI submits the first review would occur at the end of the third year and if the levy is continued, will again be reviewed at the end of the sixth year. To ensure transparency and accountability there will also be formal annual reviews and reporting against key performance indicators developed by ASI in consultation with the industry.

### ***Previous authorisations***

20. TORC has been authorised to impose a levy on Tasmanian oyster growers since 1991.<sup>5</sup> The levy is intended to ensure that Tasmanian oysters would be of high quality and free of contamination, and to foster the economic development of aquaculture in Tasmania. This levy currently costs Tasmanian growers \$1.25 per 1000 spat.
21. Since 1999, SAOGA has been authorised to impose a levy on South Australian oyster growers to fund research and development.<sup>6</sup> This levy currently costs South Australian growers \$1.00 per 1000 spat. SAOGA subsequently created SAORC to use the levy to undertake relevant research and development. For example, one research project involved the study of the influence on commercial oyster growth production by fine scale plankton dynamics.<sup>7</sup>
22. This is the first authorisation application from ASI and the levy proposed in this authorisation application is intended to be used specifically to respond to the POMS threat and will therefore operate in addition to the levies imposed by TORC and SAOGA.

## **ACCC assessment**

23. The ACCC's assessment of the Conduct is in accordance with the relevant net public benefits tests<sup>8</sup> contained in the CCA.
24. In its assessment of the application the ACCC has taken into account:

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<sup>5</sup> Tasmanian Oyster Research Council Limited - A80008 and A80009, 31 January 1991.

<sup>6</sup> South Australian Oyster Growers Association Inc – A60023, 8 September 1999; South Australian Oyster Growers Association Inc – A60024 and A60025, 3 August 2005; South Australian Oyster Growers Association Inc - A91229 and A91230, 1 October 2010.

<sup>7</sup> Australian Seafood Industries Pty Ltd, *Submission in support of Application*, at paragraph 4.4.5.

<sup>8</sup> Subsections 90(5A), 90(5B), 90(6), 90(7) and 90(8) of the CCA.

- the application and submissions received from the applicant and interested parties<sup>9</sup> noting that no submissions were received in response to the Draft Determination
- other relevant information available to the ACCC, including information from consideration of previous matters<sup>10</sup>
- the likely future without the arrangement that is the subject of the authorisation.<sup>11</sup> In particular, the ACCC considers that, absent the arrangement it is unlikely that ASI would collect a levy from Pacific oyster growers and ASI would be unlikely to have sufficient resources to undertake research and development of POMS resistant oysters
- the relevant areas of competition likely to be affected by the arrangement, particularly competition for the supply of Pacific oyster spat to Australian oyster growers and the wholesale and retail supply of oysters in Australia
- the ten year authorisation period requested.

## Public benefits

25. The ACCC is satisfied, based on the information before it, that the proposed arrangement is likely to result in public benefit because:

- a. In the absence of government funded research, ASI's proposed levy is an efficient way to respond to the POMS threat. An agreement that all spat will be subject to the levy addresses the issue that growers or hatcheries would have an incentive to seek to free ride<sup>12</sup> on the research undertaken by others – which would lead to a sub-optimal level of research being undertaken.
- b. Applying the levy to all Pacific oyster spat is likely to result in more widespread use of ASI's POMS-resistant Pacific oyster spat, thereby resulting in a benefit by reducing the adverse impact of any outbreak of the disease on the industry's ability to meet customer demand for Pacific oysters – particularly given restrictions on imports.

## Public detriments

26. The ACCC considers that the arrangement is likely to result in minimal detriment because:

- a. The ACCC understands the levy generally has industry support.
- b. The introduction of the levy will increase the price that growers pay for Pacific oyster spat by \$2.80 per 1000 spat, however the levy applies equally to all growers of Pacific oysters in Australia and the cost of the levy represents less

<sup>9</sup> Please see the ACCC's Public Register for more details.

<sup>10</sup> South Australian Oyster Growers Association Inc – A91229 and A912230, 1 October 2010; Tasmanian Oyster Research Council Limited - A80008 and A80009, 31 January 1991.

<sup>11</sup> For more discussion see paragraphs 5.20-5.23 of the ACCC's Authorisation Guidelines.

<sup>12</sup> Free-riding is an economic term used to describe a situation where a person can enjoy the benefits of a good or service (because they cannot be excluded from consuming it) without having contributed to paying for the provision of that good or service.

than one per cent of the typical final farm gate sale price of oysters as ‘buffets’ (middle range priced oysters).

- c. The overall impact of the levy on many growers will be lessened by ASI ceasing to collect a royalty from hatcheries who supply growers with spat produced from ASI broodstock. This means that growers who currently purchase Pacific oyster spat from ASI will cease paying the \$2.00 (per 1000 spat) royalty once the levy is implemented and commence paying the \$2.80 (per 1000 spat) levy. These growers will therefore only see an \$0.80 increase in the price of 1000 spat. The removal of the \$2.00 royalty will also reduce price discrepancy between Pacific oyster spat from ASI and Pacific oyster spat from any non-ASI broodstock that hatcheries may choose to acquire from oyster growers. This reflects the oyster industry’s intention for ASI to act as a service provider to the industry by developing and supplying POMS-resistant broodstock to hatcheries, and for the resulting POMS-resistant spat to be available to growers at a commercially attractive price.
- d. ASI will be the primary supplier of broodstock to hatcheries. However, the ACCC notes that ASI is an industry-owned service provider with no commercial incentive to raise more funds through the levy than is reasonably required to fund the research. Moreover, ASI’s commitment to transparency and accountability of its research activities<sup>13</sup> substantially reduces the risk that the research and development of a POMS-resistant Pacific oyster is conducted inefficiently. The ACCC anticipates that any concerns from industry or elsewhere about how the levy is spent and the progress and outcomes of the research and development activities will be raised with the ASI and ultimately the ACCC. ASI’s commitment to undertake the formal reviews and reporting has been an important factor in the ACCC’s assessment.

## **Balance of public benefit and detriment**

27. For the reasons outlined in this Determination, on balance, the ACCC considers that the proposed arrangement is likely result in public benefit that would outweigh any public detriment, including from any lessening of competition. Accordingly, the ACCC is satisfied that the relevant net public benefit tests are met.

## **Length of authorisation**

28. The CCA allows the ACCC to grant authorisation for a limited period of time.<sup>14</sup> This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

29. In this instance, ASI seeks authorisation for ten years. In part, ASI submits that this is because it is difficult to predict the timeframe for successfully developing Pacific oysters with a resistance to POMS.

30. ASI submits that, in conjunction with and led by peak industry bodies, it will review the research and development progress to determine whether the goals are being achieved and whether the research and development, and collection of the levy should continue. ASI submits this will occur at the end of the third year, and if

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<sup>13</sup> Australian Seafood Industries Pty Ltd, *Submission / Support of Application*, at paragraph 4.5.23

<sup>14</sup> Subsection 91(1)

continued, at the end of the sixth year. In addition, formal reviews and reporting against key performance indicators will be conducted annually.

31. In these circumstances, the ACCC considers that a 10 year period of authorisation is appropriate.

## **Determination**

### **The application**

32. Application A91444 was made using a Form B, under subsection 88(1 and 1A) of the CCA. Authorisation is sought for the collection of a levy on Pacific oyster spat from oyster growers to combat the POMS virus.

33. Authorisation is sought as the proposed arrangement may contain a cartel provision or may have the purpose or effect of substantially lessening competition or be an exclusionary provision within the meaning of section 45 of the CCA.

### **The net public benefit test**

34. For the reasons outlined in this Determination, pursuant to sections 90(5A), 90(5B), 90(6) and 90(7) of the CCA, the ACCC is satisfied that in all the circumstances the arrangement for which authorisation is sought is likely to result in a public benefit that would outweigh any likely detriment to the public constituted by any lessening of competition arising from the proposed arrangement.

35. The ACCC therefore grants authorisation to application A91444.

### **Conduct authorised**

36. The ACCC grants authorisation A91444 to enable ASI to make and give effect to arrangements with TORC, SAOGA, SAORC and Pacific oyster hatcheries, for the collection of a levy from oyster growers. The levy will commence at \$2.80 per 1000 spat and will be indexed annually by CPI.

37. Authorisation is granted until 24 December 2024.

### **Date authorisation comes into effect**

38. This Determination is made on 3 December 2014. If no application for review of the Determination is made to the Australian Competition Tribunal, the Determination will come into force on 25 December 2014.

## Attachment A - Public benefit tests in CCA

**Subsections 90(5A) and 90(5B)** provide 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 subsection 90(5A) would result, or be likely to result, or in the case of subsection 90(5B) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 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 subsection 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.

**Subsections 90(6) and 90(7)** 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 subsection 90(6) would result, or be likely to result, or in the case of subsection 90(7) has resulted or is likely to result, in a benefit to the public; and
- that benefit, in the case of subsection 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 subsection 90(7) has resulted or is likely to result from giving effect to the provision.