

13 July 2014

Dr Richard Chadwick
General Manager Adjudication Branch
Australian Competition & Consumer Commission
23 Marcus Street
CANBERRA ACT 2601

Dear Dr Chadwick

AUTHORISATION APPLICATION

I am instructed by Australian Seafood Industries Pty Ltd ACN 095 165 165 ("Applicant").

On behalf of the Applicant, I hereby lodge an application for authorisation of conduct in accordance with sub-sections 88 (1A)/88 (1) of the *Competition and Consumer Act 2010* (Form B).

Also attached is a submission regarding the application and a copy of the fee waiver granted by the Australian Competition & Consumer Commission on 27 May 2014.

I look forward to your response.

Yours faithfully



Rick Davies
Corporate Commercial Law

Form B

Commonwealth of Australia

Competition and Consumer Act 2010 — subsections 88 (1A) and (1)

AGREEMENTS AFFECTING COMPETITION OR INCORPORATING RELATED CARTEL PROVISIONS: APPLICATION FOR AUTHORISATION

To the Australian Competition and Consumer Commission:

Application is hereby made under subsection(s) 88 (1A)/88 (1) of the *Competition and Consumer Act 2010* for an authorisation:

- to make a contract or arrangement, or arrive at an understanding, a provision of which would be, or might be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which would also be, or might also be, an exclusionary provision within the meaning of section 45 of that Act).
- to give effect to a provision of a contract, arrangement or understanding that is, or may be, a cartel provision within the meaning of Division 1 of Part IV of that Act (other than a provision which is also, or may also be, an exclusionary provision within the meaning of section 45 of that Act).
- to make a contract or arrangement, or arrive at an understanding, a provision of which would have the purpose, or would or might have the effect, of substantially lessening competition within the meaning of section 45 of that Act.
- to give effect to a provision of a contract, arrangement or understanding which provision has the purpose, or has or may have the effect, of substantially lessening competition within the meaning of section 45 of that Act.

(Strike out whichever is not applicable)

PLEASE FOLLOW DIRECTIONS ON BACK OF THIS FORM

1. Applicant

- (a) Name of Applicant:
(Refer to direction 2)

A91444

Australian Seafood Industries Pty Ltd
Tasmanian Technopark, Innovation Drive, Glenorchy Tasmania 7010

- (b) Short description of business carried on by applicant:
(Refer to direction 3)

The Applicant provides molluscan (oyster) selective breeding services including the delivery of enhanced selected attribute oyster stock bred to suit particular regional conditions, survival and traits of growth, shape and condition. As a selective oyster breeder, the Applicant supplies live Pacific oyster spat featuring the

enhanced traits through commercial hatcheries to wholesale commercial Pacific oyster growers.

- (c) Address in Australia for service of documents on the applicant:

C/- Corporate Commercial Law

11 / 79 Pennington Terrace, North Adelaide, South Australia 5006

2. Contract, arrangement or understanding

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

(Refer to direction 4)

The proposed agreement is for the imposition of a \$2.80 per 1,000 oyster spat (live juvenile oyster stock) on all Pacific oysters (*crassostrea gigas*) supplied to Australian oyster growers, which levy will either be collected by Pacific oyster spat hatcheries and paid to the Applicant or invoiced and collected by ASI on confidential sales data provided by hatcheries to ASI. The Applicant will in turn utilise those levies for research and development of Pacific oysters with resistance to the Pacific Oyster Mortality Syndrome (POMS).

- (b) Description of those provisions of the contract, arrangement or understanding described at 2 (a) that are, or would or might be, cartel provisions, or that do, or would or might, have the effect of substantially lessening competition:

(Refer to direction 4)

The proposed agreement will have the result that most, if not all, commercial Pacific oyster hatcheries will directly increase the price of Pacific oyster spat by the amount of the proposed levy. The collected levy will be paid to the Applicant, which at present markets ASI oyster spat through hatcheries on a sales based royalty. The hatcheries are in competition with each other.

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

The supply of Pacific oyster spat to commercial Pacific oyster growers.

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

10 years, together with interim authorisation. Refer to paragraph 5.5 of the attached submission.

3. Parties to the proposed arrangement

- (a) Names, addresses and descriptions of business carried on by other parties or proposed parties to the contract or proposed contract, arrangement or understanding:

The parties set out in paragraph 3 of the attached submission together with any additional persons or organisations who seek to become parties to the proposed arrangement.

- (b) Names, addresses and descriptions of business carried on by parties and other persons on whose behalf this application is made:
(Refer to direction 5)

Refer to paragraph 3 of the attached submission.

4. Public benefit claims

- (a) Arguments in support of authorisation:
(Refer to direction 6)

Refer to paragraphs 4.5 and 6 of the attached submission.

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

Refer to paragraphs 4.5 and 6 of the attached submission.

5. Market definition

Provide a description of the market(s) in which the goods or services described at 2 (c) are supplied or acquired and other affected markets including: significant suppliers and acquirers; substitutes available for the relevant goods or services; any restriction on the supply or acquisition of the relevant goods or services (for example geographic or legal restrictions):

(Refer to direction 7)

The market is the commercial wholesale supply of live Pacific oyster spat to commercial Pacific oyster growers in South Australia, Tasmania and New South Wales. In turn those commercial Pacific oyster growers supply the wholesale and retail Pacific oyster markets, the restaurant and retail food industries and the live Pacific oyster export market (particularly Asia). There are no direct alternative substitute supplies of Pacific oysters and strict quarantine requirements apply in relation to the import of live Pacific oysters. Further, the POMS virus is prevalent in overseas markets affecting the potential to import live Pacific oysters even if all other fiscal and regulatory burdens could be overcome. It is improbable that alternative supplies could be imported into the country at a cost that would be acceptable to the consumer.

6. Public detriments

- (a) Detriments to the public resulting or likely to result from the authorisation, in particular the likely effect of the contract, arrangement or understanding, on the prices of the goods or services described at 2 (c) and the prices of goods or services in other affected markets:

(Refer to direction 8)

The proposed levy is considered modest in relation to the overall cost of production of oysters, the cost of spat being typically in the range of \$25.00-50.00 per 1,000. The proposed adds \$0.0028, or 5-10% to the cost of each oyster spat. The levy cost represents less than 1% (0.4-0.7%) of the typical final farm gate sale price of oysters as ‘buffets’ – middle range priced oysters. There is unlikely to be any significant public detriment.

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

Refer to paragraph 5.3 of the attached submission.

7. Contract, arrangements or understandings in similar terms

This application for authorisation may also be expressed to be made in relation to other contracts, arrangements or understandings or proposed contracts, arrangements or understandings, that are or will be in similar terms to the abovementioned contract, arrangement or understanding.

- (a) Is this application to be so expressed?

No. It is envisaged that all parties will enter into a common agreement and that any new parties wishing to join at a later date will accede to the agreement.

- (b) If so, the following information is to be furnished:

- (i) Description of any variations between the contract, arrangement or understanding for which authorisation is sought and those contracts, arrangements or understandings that are stated to be in similar terms:

(Refer to direction 9)

Not applicable

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

Not applicable

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

Not applicable

8. Joint Ventures

- (a) Does this application deal with a matter relating to a joint venture (See section 4J of the *Competition and Consumer Act 2010*)?

No

- (b) If so, are any other applications being made simultaneously with this application in relation to that joint venture?

Not applicable

- (c) If so, by whom or on whose behalf are those other applications being made?

Not applicable


9. Further information

- (a) Name and address of person authorised by the applicant to provide additional information in relation to this application:

Geoffrey Richard Davies, Corporate Commercial Law, 11 / 79 Pennington Terrace,
North Adelaide SA 5006

Dated: 13 July 2014

Signed on behalf of the applicant


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Geoffrey Richard Davies

Solicitor, Corporate Commercial Law

DIRECTIONS

1. Use Form A if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision and which is also, or might also be, an exclusionary provision. Use Form B if the contract, arrangement or understanding includes a provision which is, or might be, a cartel provision or a provision which would have the purpose, or would or might have the effect, of substantially lessening competition. It may be necessary to use both forms for the same contract, arrangement or understanding.

In lodging this form, applicants must include all information, including supporting evidence, that they wish the Commission to take into account in assessing the application for authorisation.

Where there is insufficient space on this form to furnish the required information, the information is to be shown on separate sheets, numbered consecutively and signed by or on behalf of the applicant.

2. Where the application is made by or on behalf of a corporation, the name of the corporation is to be inserted in item 1 (a), not the name of the person signing the application and the application is to be signed by a person authorised by the corporation to do so.
3. Describe that part of the applicant's business relating to the subject matter of the contract, arrangement or understanding in respect of which the application is made.
4. Provide details of the contract, arrangement or understanding (whether proposed or actual) in respect of which the authorisation is sought. Provide details of those provisions of the contract, arrangement or understanding that are, or would or might be, cartel provisions. Provide details of those provisions of the contract, arrangement or understanding that do, or would or might, substantially lessen competition.

In providing these details:

- (a) to the extent that any of the details have been reduced to writing, provide a true copy of the writing; and
 - (b) to the extent that any of the details have not been reduced to writing, provide a full and correct description of the particulars that have not been reduced to writing.
5. Where authorisation is sought on behalf of other parties provide details of each of those parties including names, addresses, descriptions of the business activities engaged in relating to the subject matter of the authorisation, and evidence of the party's consent to authorisation being sought on their behalf.
 6. Provide details of those public benefits claimed to result or to be likely to result from the proposed contract, arrangement or understanding including quantification of those benefits where possible.

7. Provide details of the market(s) likely to be effected by the contract, arrangement or understanding, in particular having regard to goods or services that may be substitutes for the good or service that is the subject matter of the authorisation.
8. Provide details of the detriments to the public which may result from the proposed contract, arrangement or understanding including quantification of those detriments where possible.
9. Where the application is made also in respect of other contracts, arrangements or understandings, which are or will be in similar terms to the contract, arrangement or understanding referred to in item 2, furnish with the application details of the manner in which those contracts, arrangements or understandings vary in their terms from the contract, arrangements or understanding referred to in item 2.



**Australian
Competition &
Consumer
Commission**

GPO Box 3131
Canberra ACT 2601

23 Marcus Clarke Street
Canberra ACT 2601

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www.accc.gov.au

Contact Officer: Nikita Harrison
Contact Phone: (03) 9658 6497

27 May 2014

Rick Davies
Corporate Commercial Law
11/79 Pennington Terrace
NORTH ADELAIDE SA 5006

By email: rick@corpcol.com

Dear Mr Davies

Fee waiver request

I refer to your letter of 20 May 2014 to the Australian Competition and Consumer Commission (ACCC) in respect of an application for authorisation proposed to be lodged by the Australian Seafood Industries Pty Ltd (the Applicant). In your letter you requested that the ACCC grant a fee waiver in respect of the proposed arrangements.

In support of your request, you submitted that:

- The Applicant is a research and development company. Its underlying structure is not-for-profit, as its two shareholders are not-for-profit oyster industry associations. The Applicant conducts a breeding program for Pacific oysters, in which oysters are selectively bred to develop key traits and resistance to disease.
- The Pacific Oyster Mortality Syndrome (POMS) virus poses a real and significant threat to the Australian oyster industry, and the Applicant's methods have a potentially useful application in the selective breeding of Pacific oysters resistant to POMS.
- Payment of the application fee would divert funds away from crucial research and development work that could respond to the POMS threat and ensure the long-term viability of the Australian oyster industry. As such, payment of the application fee would cause detriment to the Applicant, the oyster industry and the broader public.

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

This decision will remain in force for a period of three months. The three month period will expire on 27 August 2014

A copy of this letter should accompany the application for authorisation to be lodged by the Applicant. The cover letter to the application should mention that a letter from the ACCC regarding a fee waiver is enclosed with the application. The application together with this letter will be placed on the public register at that time.

If the application for authorisation is lodged by the Applicant after 27 August 2014, a full application fee of \$7500 will apply, unless a subsequent request for a fee waiver is made and ultimately approved by the ACCC.

Should you have any queries in relation to this matter, please do not hesitate to contact Nikita Harrison on (03) 9658 6497.

Yours sincerely

A handwritten signature in blue ink, consisting of a stylized 'R' followed by a long horizontal line.

Dr Richard Chadwick
General Manager
Adjudication Branch

SUBMISSION

RELATING TO

***APPLICATION FOR AUTHORISATION LODGED UNDER
SUBSECTIONS 88(1A)/88(1) OF THE COMPETITION AND
CONSUMER ACT 2010***

BY

AUSTRALIAN SEAFOOD INDUSTRIES PTY LTD

APPLICANT DETAILS

1. Applicant

Australian Seafood Industries Pty Ltd ACN 095 165 165.

2. Address

Tasmanian Technopark, Innovation Drive, Glenorchy Tasmania 7010

3. Names and address of other parties and other persons on whose behalf the application is made

| Party | Address |
|---|--|
| South Australian Oyster Growers Association Inc | PO Box 757, Stirling SA 5152 |
| South Australian Oyster Research Council Pty Ltd ACN 083 574 001 | PO Box 757, Stirling SA 5152 |
| Tasmanian Oyster Research Council Limited ACN 050 205 297 | C/- Tasmanian Seafood Industry Council PO Box 878 SANDY BAY TAS 7008 |
| The South Australian Oyster Hatchery Pty Ltd ACN 060 490 511 | 246 Somerton Road, Somerton Park SA 5044 |
| Cameron of Tasmania Pty Ltd ACN 009 579 168 | Arthur Highway, Dunalley Tas 7177 |
| Shellfish Culture Ltd ACN 009 519 719 | 299 Macquarie Street, Hobart Tas 7000 |
| M & I Securities Pty Ltd t/a Geordy River Aquaculture ABN 32 692 376596 | 228 Binalong Bay Road, St Helens Tas 7216 |
| Southern Cross Shellfish Pty Ltd ACN 128 452 380 | 25 Aquaculture Drive, St Helens Tas 7216 |
| EP Shellfish | 451 Kellidie Bay Road, Kellidie Bay, SA 5607 |
| Port Stephens Fisheries Institute | Taylors Beach Rd, Taylors Beach, NSW, 2316 |

DESCRIPTION OF BUSINESS DETAILS

4. Industry background

4.1. History

4.1.1. In the late 1940's the Pacific oyster (*Crassostrea gigas*) was introduced from Japan and Korea into Tasmania and found to be highly suited to southern temperate waters. It was cultivated in Tasmania and eventually introduced into South Australia in 1969, on the Eyre and York Peninsulas. It entered New South Wales waters in the 1980's.

4.1.2. The Sydney Rock Oyster (*Saccostrea glomerata*) is native to New South Wales and cultivated in that State, but is slower growing than the Pacific oyster. As these 2 species require the same spawning conditions, the Pacific oyster has the tendency to crowd out the Sydney Rock oyster, resulting in it's declaration as a noxious species in New South Wales other than in the Port Stephens area where cultivation has been permitted since 1990.

4.1.3. The Angasi oyster (*Ostrea angasi*) is also native to Australia and farmed in small volumes across Australia, as are the Milky oyster (*Sacostrea*

cucullata) and the Blacklip oyster (*Striostria mytiloides*), but in smaller quantities.

- 4.1.4. The oyster is a bivalve which feeds by filtering the algae and other nutrients from the sea water in which they live. Pacific oysters are osmo and thermo conforming organism meaning they have no ability to regulate their physiological function in regards to temperature and salinity. In Australia, Pacific oysters are grown in water temperatures ranging from 10-23 degrees and Sydney Rock Oysters from 14-30 degrees.

4.2. Oyster cultivation industry

- 4.2.1. Oysters are cultivated primarily in the 3 States of South Australia, New South Wales and Tasmania with several thousand workers directly engaged in cultivation across the country.
- 4.2.2. Over 95% of the oysters cultivated for sale in South Australia are Pacific oysters as is the vast bulk of Tasmanian oysters. Around 20% of the New South Wales annual reported cultivation is Pacific oysters, the vast bulk being Sydney Rock Oysters. The NSW system of bag reporting of sales and the “road-side” sale of product in the State is known to result in the material understatement of the value and volume of NSW production.
- 4.2.3. Pacific oysters comprise in the vicinity of 70% of the Australian annual reported cultivation.
- 4.2.4. The industry produces a product which is generally eaten raw and the health and safety aspects of growing oysters are crucial not only to the consumers, but for the survival of a commercially viable oyster production industry.
- 4.2.5. Government regulates the industry and both leases and licences are generally required for growers. Hatcheries must be licensed.

4.3. Pacific oyster growing

- 4.3.1. Oysters reproduce in nature by spawning and the fertilised, free-swimming larvae attach themselves to a hard surface (settle) to grow
- 4.3.2. Licensed hatcheries use broodstock Pacific oysters for spawning and fertilisation and rear the larvae in special tanks until they reach a stage where they are ready to settle. Methods have been developed which inhibit the oyster attaching to a substrate. These juvenile metamorphosed oysters are referred to as single seed spat. The spat are then on grown in various nursery systems to a size of around 3 to 10 mm in length at which point they are transferred to cultivation farms.
- 4.3.3. Upon receiving the spat, the oyster farmer places them in a high nutrient, sheltered nursery to encourage growth and minimise the risk of exposure to predators and high wave action. Once reaching around 30 to 40 mm in length, the Pacific oysters are places in trays, baskets or bags and located in sub-tidal or inter-tidal growing areas. The oysters are regularly graded and sorted until the reach ready-for market size.
- 4.3.4. Oyster production accounted for around 5% of the roughly \$2.3bn gross value of reported production of fisheries and aquaculture in Australia in 2011/12, roughly \$107m.¹ Unreported NSW sales of Sydney Rock Oysters

¹ http://data.daff.gov.au/data/warehouse/9aam/afstad9aamd003/2012/AustFishStats_2012_v1.0.0.pdf

are known to cause this number to be materially understated. Based upon a 70% market share of reported production, the Pacific oyster contributed around \$71m to that value.

4.4. Pacific oyster research and development

- 4.4.1. The Pacific oyster industry across Australia has undertaken extensive research and development over a considerable period of time as oyster broodstock can be selectively bred to pursue particular traits and to suit particular farm conditions.
- 4.4.2. The Tasmanian Oyster Research Council Limited (“TORC”) was formed as a not for profit industry based company limited by guarantee on the 21st of September 1990 by the initial subscribers:
- Tasmanian Aquaculture Co-operative Society Limited;
 - Tasmanian Shellfish Co. Pty Ltd;
 - Shellfish Culture Limited; and
 - Messrs Forrest, Yates, Davis, Dix and Murdoch,
- to promote, encourage and co-ordinate research related to the Tasmanian cultured oyster industry. In 1991 TORC was granted authorisation by The Trade Practices Commission (“TPC”) for the imposition of a levy on purchases of oyster spat sold for cultivation of oysters within Tasmania. It was the TPC’s view that the imposition of the levy:
- should ensure that all Tasmanian oysters produced will be of the highest quality and free of contamination; and
 - will foster the economic development of aquaculture and business efficiency in farming Pacific oysters and will open up new opportunity in export markets and create employment in a new environmentally friendly industry.
- 4.4.3. The ACCC approved the levy imposition by its authorisation determinations A80008 and A80009 on the 31st of January 1991.
- 4.4.4. In 1998 interested South Australian oyster industry members formed the not for profit South Australian Oyster Growers Association Inc (“SAOGA”). Following the TORC lead, SAOGA sought Australian Competition and Consumer Commission (“ACCC”) approval for the imposition of a levy on oyster spat supply to South Australian growers to fund research and development.
- 4.4.5. ACCC approval was given in its authorisation determination A60023 on 8 September 1999 after which SAOGA arranged the collection and payment of levies to its subsidiary company, South Australian Oyster Research Council Pty Ltd (“SAORC”), to undertake the relevant research and development. The first 2 research projects undertaken were into the influence on commercial oyster growth production by fine scale plankton dynamics and into the selective breeding of the Pacific oyster.
- 4.4.6. The latter project, selective breeding of the Pacific oyster, has been undertaken by the CSIRO (Hobart) and University of Tasmania since 1996 with support from both the South Australian and Tasmanian Pacific oyster industries.
- 4.4.7. In 2000 TORC and SAORC/SAOGA established Australian Seafood Industries Pty Ltd (the Applicant). Whilst the applicant is a proprietary limited company, its two shareholders are both not for profit.
- 4.4.8. The Applicant was established to unify the delivery of commercially oriented Pacific oyster research to the industry and to provide leadership

in commercialising the research results. Both TORC and SAORC provided seed funding for the research by way of their respective levies.

- 4.4.9. The Applicant conducts an industry recognised, technically well-designed and effective family based selective breeding program for Pacific oysters. Its program structure is flexible and capable of producing genetic improvement for key traits and facilitating effective selection for improved resistance to diseases.
- 4.4.10. In commercialising the selective breeding research and development results, the Applicant supplies its own line of spat to growers and includes a royalty of \$2.00 per 1,000 spat in the price, the royalty being approximately 4-8% of the total price per spat and a relatively insignificant element in the overall cost of production.
- 4.4.11. In addition to the royalty for spat provided by the Applicant, South Australian and Tasmanian growers also pay the respective levies under authorisations A91229 and A91230 (South Australia – currently \$1.00 per 1,000 spat) and A80008 and A80009 (Tasmania – currently \$1.25 per 1,000 spat).

4.5. Pacific oyster mortality syndrome

- 4.5.1. The *Ostreid herpesvirus* μ Variant 1 is the virus associated with the Pacific Oyster Mortality Syndrome (“POMS”), environmental influences such as water temperature are also factors affecting mortality of oysters. The initial outbreaks hit the French industry in 2008, with close to 100% mortality of Pacific oysters. The virus quickly spread (suspected through stock transfers) to other European Pacific oyster producing nations, including the United Kingdom, Ireland, and the Netherlands. 90-100% mortality was also the experience of these industries. .
- 4.5.2. In March 2010 the disease was found in dead and dying Pacific oysters in New Zealand with a 90-100% mortality rate in affected bays. Late in 2010 the disease was also found in dead and dying Pacific oysters in the Georges River in New South Wales with a 90%+ mortality rate.
- 4.5.3. Any significant level of deaths, and certainly death rates greater than 50% to 60%, make the harvest for survivors a non-commercial task. Oysters are traditionally sold live and what may outwardly appear a viable oyster may in fact be one near death and the risk to consumers precludes sales. On-farm processing to bottle is an option, but the cost results in a commercially marginal operation. The bottled product has lower market value. As the rate of non-surviving oysters increases, cost of opening dead and dying product renders the operation unviable.
- 4.5.4. For reasons relating to public perception the Pacific oyster industry agreed to use the term Pacific Oyster Mortality Syndrome to refer to the disease.
- 4.5.5. Further POMS outbreaks with high mortality rates occurred in New South Wales in late January 2013 in the Hawkesbury River and in February 2013 in wild Pacific oysters at Brisbane Water.
- 4.5.6. The Sydney Rock Oyster is not susceptible to POMS, but is susceptible to other disease and mortality issues. Until the POMS outbreak, Pacific oysters had been regarded as relatively secure from such issues.
- 4.5.7. The mode of infection for the POMS virus is currently not fully understood. It is known that a major trigger for viral activity is water temperatures above 16 degrees. All commercial Pacific oyster production areas in

Australia are subjected to water temperatures above 16 degrees at some point throughout the year. It is known that adult oysters have a higher survival rate than spat and that mature oysters exposed to the POMS virus can act as carriers for the disease. Transmissibility of the POMS virus from mature oysters through reproduction is not currently known in the wild but protocols have been developed that can allow use of previously exposed animals for commercial breeding.²

- 4.5.8. The POMS virus is not transmissible to humans and the virus is of no human health and safety concern, however it is a notifiable disease.
- 4.5.9. Other than avoidance through quarantine, once POMS is present there are no known cure and prevention mechanisms for the disease. Research has shown that some management regimes, such as decreased stocking density and increased growing height may reduce mortality rates slightly but not sufficiently to be used as a stand-alone tool. Increased spat inputs should not be viewed as an option due to the high cost of extra seed purchases and resultant infrastructure and management required. Given the finite nature of oyster leases, stocking densities would need to be increased and this may in fact increase the severity of any disease outbreak. In France the hatchery sector has had to undergo significant investment to increase production to compensate. Australian hatcheries would require a similar response, which would require considerable additional investment and time to respond. Current production capacity is unlikely to be sufficient to meet demand for this strategy if a wide spread outbreak of POMS occurred in the Australian Pacific oyster industry.
- 4.5.10. An alternative strategy of breeding from wild survivors has been suggested but this is not a viable strategy. Quarantine restrictions would prohibit the movement of oysters from an infected area to one that is free meaning that no progress could be made up until the time the virus hits. Growers would then be faced with a significant time period (2-3 years at least) of little to no spat inputs before resistant stock was to become available and then another significant time period (1.5 -2 years) before they reach market size. Such long periods are beyond the financial capacity of many commercial operations. In the Hawkesbury River, 66% of the commercial operators exited the industry as a result of the outbreak, reflecting the trend in other nations.
- 4.5.11. Given the unpredictable, but generally high level of mortality (particularly in spat) and the unavailability of financially assessable mitigation strategies, a widespread outbreak of POMS has the potential to devastate Pacific oyster commercial production in any affected region. It has the potential to cause irreparable financial damage to affected growers.
- 4.5.12. Research undertaken by the Applicant in conjunction with the industry, Government and industry peak bodies (including TORC and SAOGA) has determined that its selective breeding broodstock has potentially useful levels of genetic variation for POMS. The Applicant has determined that POMS resistance is heritable and that as a proportion of spat survive infection, this has led to the conclusion that selective breeding for POMS resistance is possible. Other nations' industries have also identified this, and refer to "The Ultimate Solution: production of selected oysters".³

² Horizontal transmission happens, vertical transmission is avoidable – Cawthron- Achim Janke

³ Report on the impact of recent *Crassostrea gigas* mortality in France and its consequences to oyster farming in Northern Ireland

- 4.5.13. Having a ubiquitous level of POMS resistance in farmed Pacific oysters prior to a POMS outbreak is the only strategy which can mitigate the risk of irreparable financial damage to affected growers.
- 4.5.14. Research and development of POMS resistance traits through selective breeding is one of the primary actions available to industry to prepare a defence against a potentially industry threatening disease.
- 4.5.15. The Applicant is the only body reasonably capable of undertaking the necessary selective breeding activities and coordination of the different agencies required for success. Funding is required to enable that to occur.
- 4.5.16. Overseas activities in selective breeding for POMS resistance is also under way, but it is not feasible to import material as it comes with the risk of increased POMS exposure. Further, the research and development activities of the Applicant on POMS resistance are recognised as world leading.
- 4.5.17. The Applicant, in conjunction with industry peak bodies, has formulated a proposal for research and development and its funding through a levy. The Applicant has approached the Pacific oyster hatcheries to discuss and develop the plan and has held a one-day seminar with industry participants to fine tune the proposal.
- 4.5.18. The industry supported proposal is for a separate levy of \$2.80 per 1,000 spat to be imposed on all Pacific oyster spat supplied by hatcheries in Australia with the proceeds being provided to the Applicant to undertake the POMS resistance selective breeding research and development.
- 4.5.19. The Applicant proposes to provide genetically improved oyster material to hatcheries so that the hatcheries may act as multipliers and subsequent distributors of the genetically improved material.
- 4.5.20. Currently the Applicant markets spat under its own name through major hatcheries for which it is paid a royalty of \$2.00/1000 spat. The hatcheries collect the royalty from purchasers and pay it to the Applicant quarterly. The Applicant has proposed that upon implementation of the levy, the Applicant would cease the marketing of spat under its own name and cease arrangements for collection of the royalty from hatcheries supplying growers with its genetic selected lines.
- 4.5.21. The existing levies set out in paragraph 4.4.11 above will remain. The funds collected from those levies will continue to be used for the intended purposes, which do not include development of POMS resistant traits.
- 4.5.22. The proposal has broad industry support. Government funding is not available and there is no other viable alternative to privately funding the necessary research and development.
- 4.5.23. The Applicant's accounts are audited annually. Those reports are published and freely available to participants in the oyster industry. If the levy proposal is authorised and enacted, the annual report and audit will include details of levy receipts and expenditure together with an overview of activities. Transparency and accountability to the industry will be maintained.

5. Description of the contract, arrangement or understanding

- 5.1. The conduct under consideration relates to giving effect a proposed arrangement amongst:

- 5.1.1. the Applicant;
- 5.1.2. SAORC;
- 5.1.3. TORC;
- 5.1.4. Pacific oyster hatcheries:
 - 5.1.4.1. The South Australian Oyster Hatchery Pty Ltd;
 - 5.1.4.2. Cameron of Tasmania Pty Ltd;
 - 5.1.4.3. Shellfish Culture Ltd;
 - 5.1.4.4. M & I Securities Pty Ltd t/a Geordy River Aquaculture;
 - 5.1.4.5. Southern Cross Shellfish Pty Ltd;
 - 5.1.4.6. RGJ Hatchery, Kellidie Bay SA 5607;
 - 5.1.4.7. Port Stephens Fisheries Institute and
 - 5.1.4.8. other currently unidentified hatcheries.
- 5.2. The proposed arrangement:
 - 5.2.1. provides for the collection of a levy from all Australian purchasers of Pacific oyster spat for cultivation, either by or on behalf of the Applicant, with the collected monies being used for research and development of Pacific oysters with increased resistance to the POMS virus;
 - 5.2.2. provides for all participating Pacific oyster hatcheries to have access to broodstock developed by the Applicant with increased POMS virus resistance for commercial use;
 - 5.2.3. sets the levy at \$2.80 per 1,000 spat, indexed annually by CPI; and
 - 5.2.4. would result in the withdrawal of the current royalty paid to the Applicant by purchasers of its spat (currently \$2.00 per 1,000).
- 5.3. The proposed levy is considered modest in relation to the overall cost of production of oysters, the cost of spat being typically in the range of \$25.00-50.00 per 1,000. The proposed adds \$0.0028, or 5-10% to the cost of each oyster spat. The levy cost represents less than 1% (0.4-0.7%) of the typical final farm gate sale price of oysters as 'buffets' – middle range priced oysters.
- 5.4. It is proposed that the levy be collected by direct charge against the individual oyster farmers as they receive their spat on broadly the same terms that the individual hatcheries invoice for the spat. This would entail the Applicant receiving transaction details from hatcheries, possibly through an independent agent to maintain commercially confidentiality of aggregated hatchery trade, and hatcheries have indicated their agreement to this. Alternatively, one of the major hatcheries has recently advised a possible willingness for it to collect the levy on the Applicant's behalf and remit the collections to the Applicant on a regular basis in line with what already occurs with other industry contributions.
- 5.5. Given the importance of the research and development of POMS resistance in Australian Pacific oyster stock for the survival of commercial cultivation of the Pacific

oyster in Australia and maintenance of a mature domestic and export economic contributor, authorisation is sought for a period of 10 years.

- 5.6. Further, the peak sales periods for spat are the periods from 1 September to 31 October and 1 January end February each year. Upon public announcement of this authorisation application there may be a tendency for growers to attempt to draw forward purchases of spat in the before authorisation is granted. If that were to occur, some hatcheries have concerns that it would skew the regular production/demand cycle with potential to adversely affect the supply chain. This in turn may adversely affect the live oyster production process and affect supply of mature oysters to market. It would also result in a reduction of vital levies for the POMS research. For these reasons, the Applicant requests interim authorisation on an urgent basis.
- 5.7. In the event that the authorisation is granted, the Applicant, in conjunction with, and led by, the industry peak bodies proposes to 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. This would occur at the end of the third year and, if continued, again at the end of the sixth year. Additionally, there would be formal annual reviews and reporting against key performance indicators developed by the Applicant in consultation with the industry peak bodies

6. Grounds for grant of approval

- 6.1. Approval of the proposed conduct would enable the Applicant to obtain the funds necessary to undertake the research and development of POMS resistant Pacific oysters.
- 6.2. The POMS virus poses a serious threat to commercial cultivation of the Pacific oyster in Australia. Such research and development is recognised by Government, industry peak bodies and industry in general as being the highest priority activity in relation to the survival of the industry.
- 6.3. The Applicant is at the forefront of global research and development in the area of POMS resistance and it is not feasible to import overseas Pacific oyster broodstock to overcome the threat. Current quarantine requirements preclude the import of live oysters other than the import of spat into South Australia under very stringent conditions. In any event, sufficient gains have not yet been made overseas to countenance the possibility of live spat import. Further, the Australian pacific oyster is recognised for its distinctive cup shape and benefits from genetic gains already made through Australian research and development.
- 6.4. Commercial cultivation of Pacific oysters in Australia currently contributes in the vicinity of \$71 million (South Australia \$39.8M, Tasmania \$24M and NSW \$7.2M at farm gate values) to the economy in domestic and export sales, with associated direct on-farm employment of approximately 950 (South Australia 563, Tasmania 300 and NSW 90 (it is expected that NSW's \$7.2M turnover and 90 direct jobs would be twice the advised numbers if it wasn't for the forced farm closures due to the limited POMS outbreaks in NSW). Given that oyster farms are typically well removed from cities and larger regional centres there is a very significant multiplier for employment and economic sustainability in regional areas from oyster farms. Previous studies have concluded that for every on farm position there are between the equivalent of two and three jobs created in local services, transport and down-stream processing.
- 6.5. Without authorisation of the proposed conduct and subsequent collection of the proposed levy, the Applicant will not have the financial resources necessary to undertake the POMS resistance research and development work. The work will not

be undertaken. In that event, the industry may be forced to wait until the disease hits to commence breeding work but as previously mentioned the time delay in having resistant stock will force many out of the industry in the event of a widespread POMS outbreak. Evidence of the impact can be seen in the Hawkesbury where 66% of the oyster farmers have exited the industry and those that have retained their leases and shore facilities are all engaged in employment elsewhere pending an opportunity to return to oyster farming with POMS resistant oysters.

- 6.6. The proposed conduct is an industry supported form of “self-insurance” aimed at providing long term stability in the industry in the face of the threat of disease, whilst maintaining the current market settings by applying the costs equally to all industry participants within the relevant State markets, which costs should be capable of being passed on to consumers should the participants individually choose to do so.

7. Facts and contentions relied upon in support of the proposed conduct

- 7.1. The Applicant asserts that the proposed conduct, being the collection of a levy to be paid to the Application for use in the research and development of POMS resistance in Pacific oysters has broad industry support.
- 7.2. TORC and SAOGA have variously been granted authorisations by ACCC to impose levies to conduct industry research and development activities. Those authorisations are not affected by this application but have value as precedents.
- 7.3. The Applicant asserts that as the proposed levy would apply to all supply of Pacific oyster seed within Australia, that its implementation would cause no detrimental effect or barrier to competition. The Applicant asserts that the proposed conduct satisfies the tests contained in Sections 90(5A), (5B), (6), (7) and (8) of the *Competition and Consumer Act 2010* (“Act”) and seeks authorisation from the ACCC.

8. Exclusionary provisions, anti-competitive conduct and cartel provisions

As the proposed conduct may be otherwise prohibited under Sections 44ZZRD(2) and (3)(a), some of the parties are in competition with each other may involve a contravention of Section 45(2) of the Act, authorisation of the conduct is sought.