



AUSTRALIAN COMPETITION  
& CONSUMER COMMISSION

# Draft Determination

Application for revocation of authorisations A91229 & A91230 and the substitution of authorisation AA1000531

lodged by

South Australian Oyster Growers Association Inc and South Australian Oyster Research Council Pty Ltd

in respect of a levy arrangement with South Australian oyster hatcheries for the supply of juvenile oysters to oyster growers

Authorisation number: AA1000531

Date: 19 February 2021

Commissioners: Sims  
Keogh  
Rickard  
Brakey  
Court  
Crone  
Ridgeway

## Summary

The ACCC proposes to re-authorise the South Australian Oyster Growers Association (SAOGA) and the South Australian Oyster Research Council (SAORC) to continue to charge a levy on purchases of juvenile oysters (spat) by oyster growers. The levy is used to fund research and development activities. This levy arrangement was first authorised by the ACCC in 1999 and has been most recently authorised since 1 October 2010.

The ACCC is satisfied that the arrangement is likely to result in public benefit by continuing to facilitate 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, compared to a situation with no levy arrangement in place.

The ACCC considers that the arrangement is unlikely to result in anti-competitive supply restrictions because it includes a refund scheme which allows growers to choose not to participate in the arrangement without their supply of oyster spat being jeopardised. Re-authorisation does not permit the hatcheries to collectively refuse to supply spat to an oyster grower for the reason that the grower is not paying the levy or has requested a refund of the levy.

The levy is also unlikely to result in significant price increases for spat or oysters because prices cannot be increased more than the Consumer Price Index in any given year.

Overall, the ACCC considers that the public benefit likely to result from the arrangement will outweigh the likely public detriment and proposes to re-authorise the arrangement for 10 years.

The ACCC invites submissions in relation to this draft determination by 12 March 2021 before making its final decision.

## 1. The application for authorisation revocation and substitution

- 1.1. On 9 October 2020, the South Australian Oyster Growers Association Inc (**SAOGA**) and the South Australian Oyster Research Council Pty Ltd (**SAORC**) (together, the **Applicants**) lodged an application to revoke authorisations A91229 and A91230 and substitute authorisation AA1000531 (referred to as **re-authorisation**) with the Australian Competition and Consumer Commission (the **ACCC**).
- 1.2. The Applicants are seeking re-authorisation for 10 years on behalf of themselves, current and future South Australian oyster hatcheries and current and future oyster growers (together the **levy arrangement participants**) to continue to participate in a levy arrangement concerning all purchases of juvenile oysters (known as spat) by oyster growers from oyster hatcheries in South Australia. The levy will be used to collectively finance SAORC's research and development activities for the benefit of the South Australian oyster industry.
- 1.3. This application for re-authorisation AA1000531 was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**).
- 1.4. The ACCC may grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching competition law but are not harmful to competition and/or are likely to result in overall public benefits.

- 1.5. At the time of lodging their application, the Applicants also requested interim authorisation given authorisations A91229 and A91230 were due to expire on 23 October 2020.
- 1.6. On 22 October 2020, the ACCC granted interim authorisation under subsection 91(2) of the Act, which suspended the operation of authorisations A91229 and A91230 and enabled SAOGA and other parties that had the benefit of authorisations A91229 and A91230, to continue to participate in the oyster spat levy agreement on the same basis as previously authorised by A91229 and A91230, while the ACCC is considering the substantive application for re-authorisation.<sup>1</sup>

## The Applicants

- 1.7. SAOGA is a not-for-profit membership-based organisation that provides support and advocacy services for its members, which include South Australian oyster growers. SAOGA currently has 80 members, which represents approximately 86 per cent of all oyster farming licence holders in South Australia.<sup>2</sup>
- 1.8. SAORC is a wholly owned subsidiary of SAOGA and is dedicated to research and development for the benefit of the oyster industry. All South Australian oyster growers are members of SAORC.<sup>3</sup>

## The Conduct

- 1.9. The Applicants are seeking re-authorisation for:<sup>4</sup>
  - a) the imposition of a levy on:
    - i. the acquisition of spat (on a per 1000 spat basis) by oyster growers from current and future South Australian spat hatcheries; and
    - ii. spat retained by the hatcheries (on a per 1000 spat basis) for the purpose of growing oysters for eventual sale as a food product;
  - b) the levy commencing at \$1.00 per 1000 spat acquired;
  - c) the collection of the levy by the hatcheries (with the levy listed as a separate item on each invoice for the purchase of spat);
  - d) remittance of the levy by the hatcheries to the SAORC which will pool funds in order to fund research and development activities associated with growing oysters for human consumption;
  - e) the ability to increase the levy on 1 January of each year by an amount equal to or less than the Consumer Price Index (All Groups – Adelaide) for the preceding 12 months (but not a requirement to increase the levy by this amount each year);

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<sup>1</sup> See ACCC decision of 22 October 2020 available at <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/south-australian-oyster-growers%E2%80%99-association-inc>.

<sup>2</sup> SAOGA and SAORC, Letter to ACCC, 11 November 2020, available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/south-australian-oyster-growers%E2%80%99-association-inc>.

<sup>3</sup> SAOGA and SAORC Application for Authorisation, p. 4, available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/south-australian-oyster-growers%E2%80%99-association-inc>.

<sup>4</sup> The Applicants clarified the Conduct in a submission to the ACCC on 14 December 2020, available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/south-australian-oyster-growers%E2%80%99-association-inc>

- f) the ability for an individual hatchery to stop supplying a grower with spat following non-payment of the levy;
- g) the maintenance of a refund mechanism whereby an oyster grower can request the SAORC refund the levy paid to the hatcheries; and
- h) the ability to exclude non-levy paying growers from the benefit of the research and development activities funded by the levy if they were to request a refund of the levy

(the **Conduct**).

- 1.10. The Applicants state that the Conduct does not extend to the hatcheries *collectively* withholding spat supply from oyster growers that do not wish to pay the levy. The Applicants are seeking authorisation for individual hatcheries to not supply spat if a grower does not pay the levy at the time of purchase.<sup>5</sup> There would be no prohibition on the oyster grower approaching a different hatchery for the supply of spat.<sup>6</sup>
- 1.11. The Applicants also state that if re-authorisation is granted, where an oyster grower refuses to pay the levy, this will likely amount to breach of the contract by the oyster grower which in turn may give the hatchery a contractual right to cease providing spat for non-payment of an invoiced amount.
- 1.12. The Applicants submit that the ability to increase the levy by the Consumer Price Index will ensure the levy continues to bear some relationship to increasing research activity costs while also being capped from increasing above what is reasonably reflective of the overall cost and pricing pressures on oyster growers.

## 2. Background

- 2.1. The South Australian oyster industry is one of the largest in Australia, and is important to many local communities and the broader oyster market. However, the Applicants note that, in recent years, the South Australian oyster industry has faced major disease challenges. The Applicants consider developing disease resistance and undertaking research and development to alleviate the impact of disease to be vital.
- 2.2. The levy arrangement was first authorised by the ACCC in 1999 and then re-authorised in 2005, and 2010.

## 3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Conduct.
- 3.2. The ACCC invited submissions from potentially interested parties including government entities, industry associations and South Australian oyster growers.<sup>7</sup>

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<sup>5</sup> While the Applicants have sought authorisation for a hatchery to refuse to supply spat to an oyster grower following a refusal to pay the levy upfront, this has not been, and there is no intention of making this, a mandatory requirement for the hatcheries.

<sup>6</sup> SAOGA, 14 December 2020, *Response to Additional Questions from the ACCC dated 7 December 2020*, Available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/south-australian-oyster-growers%E2%80%99-association-inc>

<sup>7</sup> A list of the parties consulted and the public submissions received is available from the ACCC's public register at <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/south-australian-oyster-growers%E2%80%99-association-inc>.

- 3.3. The ACCC received one public submission from Pacific Estate Oysters, which submitted that the levy is an efficient and effect way of sharing the burden of research and development across the industry and minimising the free-rider problem. This submission is on the Public Register for this matter.

## 4. ACCC assessment

- 4.1. The ACCC's assessment of the Conduct is carried out in accordance with the relevant authorisation test contained in the Act.
- 4.2. The Applicants have sought authorisation for conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act, or may substantially lessen competition within the meaning of section 45 of the Act, or may constitute exclusive dealing within the meaning of section 47 of the Act. Consistent with subsection 90(7) and 90(8) of the Act,<sup>8</sup> the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result (the authorisation test).
- 4.3. To assist with the assessment of the Conduct, the ACCC considers that the:
- Relevant areas of competition likely to be affected by the Conduct are the supply of oyster spat in South Australia and the supply of oysters within and outside South Australia. Oyster growers in South Australia cannot currently source spat from outside South Australia, although oysters grown in South Australia may be exported to broader oyster markets.
  - Likely future without the Conduct is one without an oyster spat levy in South Australia, which would significantly reduce SAORC's funding and result in less research and development outcomes for the industry and result in greater risk to the oyster industry in South Australia.

## Public benefits

- 4.4. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:
- ...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*<sup>9</sup>
- 4.5. The Applicants submit the Conduct is intended to facilitate investment in research and development in the oyster industry, and thereby potential efficiencies and improvements in oyster growing, where there previously was little or no incentive to do so due to the cost to individual growers and limited capacity for financial return.
- 4.6. The Applicants advise that, between 2010 and 2020 (under the current authorisations), approximately \$1.48 million in levies was collected and applied in furtherance of SAORC's research objectives. The levies have been applied to projects to:

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<sup>8</sup> Also see subsection 91C(7) of the Act.

<sup>9</sup> Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

- identify South Australian mudworms and describe their lifecycle
  - better understand tide anomalies and weather variability
  - use remote environmental sensors to provide growers with real-time measurements to assist with oyster farm management decisions
  - better understand and deal with oyster mortality
  - make growers more compliant with the rules and regulations governing the industry
  - improve both traceability in the event of problems and oyster lease management, and
  - increase understanding about the breeding of certain oyster species.
- 4.7. The Applicants also note that SAORC has contributed to funding for the Fisheries Research and Development Corporation (FRDC) in times where its funding was limited, which has allowed the industry to continue accessing the FRDC's research and assistance.
- 4.8. The ACCC recognises that 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.
- 4.9. 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 adopted by the Applicants capture growers' collective willingness to pay and facilitate the collective funding of research and development.
- 4.10. The ACCC considers that the Conduct supports the research objectives of the SAORC and this is evidenced by the range of projects which have been funded by the levy arrangement to date.
- 4.11. The ACCC is satisfied that the Conduct is likely to result in public benefit by continuing to facilitate 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, compared to a situation with no levy arrangement in place. This is likely to increase the competitiveness and productivity of the South Australian oyster industry and likely to be of benefit to consumers more generally.

## Public detriments

- 4.12. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...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.*<sup>10</sup>

4.13. The ACCC has considered the following public detriments:

- potential restrictions in the supply of oyster spat and access to research, and
- potential for increases in the price of spat and the retail price of oysters.

### **Potential restrictions in the supply of oyster spat and access to research**

4.14. There are two potential scenarios that may arise where a grower does not wish to participate in the Conduct.

#### ***An oyster grower pays the levy upfront and then seeks a refund***

4.15. It is intended that where a grower does not wish to participate in the Conduct, they will still be charged the levy and then, at a later date, they can seek a refund of levies paid during a previous financial year. In these circumstances, the oyster grower will cease to have access to the research published or generated from the levy in that year.<sup>11</sup>

4.16. The Applicants submit that the ability to seek a refund eliminates any detriment that a grower may suffer as a consequence of the Conduct. They further note that no grower has requested any refund of the levies paid or raised concerns regarding the use of the funds.<sup>12</sup>

4.17. The ACCC accepts that the operation of this refund scheme significantly diminishes the likelihood of anti-competitive detriment arising from the Conduct. That is, the refund scheme allows growers to recover money they have paid under the levy without their supply of oyster spat being jeopardised.

#### ***Where an oyster grower refuses to pay the levy upfront***

4.18. In its application for re-authorisation, the Applicants initially sought authorisation for previously authorised conduct, which included hatcheries agreeing to collectively stop supplying oyster spat where an oyster grower refused to pay the levy.<sup>13</sup>

4.19. The Applicants later clarified that hatcheries collectively stopping supply of spat following non-payment of the levy was not part of the Conduct for which it sought authorisation and that the Applicants were seeking authorisation for individual hatcheries to not supply spat if a grower does not pay the levy at the time of purchase. There would be no prohibition on the oyster grower approaching a different hatchery to source oyster spat.<sup>14</sup>

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<sup>10</sup> Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

<sup>11</sup> SAOGA and SAORC Application for Authorisation, p. 7, available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/south-australian-oyster-growers%E2%80%99-association-inc>.

<sup>12</sup> SAOGA and SAORC Application for Authorisation, p. 11, available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/south-australian-oyster-growers%E2%80%99-association-inc>.

<sup>13</sup> See both, SAOGA and SAORC Application for Authorisation, pp. 10-11, Available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/south-australian-oyster-growers%E2%80%99-association-inc>

<sup>14</sup> SAOGA, 14 December 2020, *Response to Additional Questions from the ACCC dated 7 December 2020*, Response to question 1, Available: <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/south-australian-oyster-growers%E2%80%99-association-inc>

4.20. The ACCC notes and accepts that there are circumstances where an individual supplier might decide not to supply goods, including where a customer decides not to pay an invoice, which in this case includes the levy.

4.21. The ACCC notes that, unlike previous applications for authorisation, the Applicants are now not seeking authorisation to collectively refuse to supply oyster spat to an oyster grower that decides not to pay the levy and accordingly, the ACCC proposes that re-authorisation not extend to this collective boycott conduct.

### **Potential for increases in the price of spat and the retail price of oysters**

4.22. The Applicants note that, as the arrangement involves an agreement to fix an element of the total price charged for oyster spat by competing hatcheries, increases in the levy may result in price increases that could distort competition in the industry.

4.23. However, the Applicants submit that:

- hatcheries do not profit from the levy since it is collected purely for the purposes of research and development and is remitted to SAORC by the hatcheries
- price competition is not precluded in the supply of South Australian oysters because the levy applies equally to all spat sold in South Australia
- the levy comprises, on average, three per cent of the overall price paid by oyster growers to hatcheries for oyster spat and
- authorisation is sought in a manner that would prevent unregulated increases in the levy.

4.24. The ACCC accepts the mitigating factors identified by the Applicants and notes that there is no evidence to suggest that the levy arrangements have resulted in any significant increases in the price of oysters since first being implemented in 1999.

4.25. The ACCC also considers that, in order to maintain funding levels to support research and development initiatives undertaken by SAORC, in real dollar terms, it would be appropriate for the levy to be indexed to the inflation rate.

4.26. Overall, the ACCC considers that the Conduct is unlikely to result in any public detriment in the form of significant price increases for the supply of spat or oysters as a result of the levy.

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

4.27. For the reasons outlined in this draft determination, the ACCC is satisfied that the Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Conduct.

### **Length of authorisation**

4.28. The Act allows the ACCC to grant authorisation for a limited period of time.<sup>15</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.

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<sup>15</sup> Subsection 91(1).

- 4.29. In this instance, the Applicants seek re-authorisation for 10 years.
- 4.30. There were no submissions from interested parties on the appropriate length of authorisation.
- 4.31. In light of the ACCC's net public benefit assessment set out above, and the fact that the Conduct has been in place under authorisations since 1999 without any adverse effect on the relevant areas of competition, the ACCC proposes to re-authorise the Applicants to engage in the Conduct for a further 10 years.

## 5. Draft determination

### The application

- 5.1. On 9 October 2020 the Applicants lodged an application to revoke authorisations A91229 and A91230 and substitute authorisation AA1000531 for the ones revoked (referred to as re-authorisation). This application for re-authorisation AA1000531 was made under subsection 91C(1) of the Act.
- 5.2. The Applicants seek authorisation, on behalf of the levy arrangement participants to engage in the Conduct, as outlined in paragraph 1.9. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

### The authorisation test

- 5.3. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Conduct.
- 5.4. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Conduct, including any lessening of competition.
- 5.5. Accordingly, the ACCC proposes to grant re-authorisation.

### Conduct which the ACCC proposes to authorise

- 5.6. The ACCC proposes to revoke authorisations A91229 and A91230 and grant authorisation AA1000531 in substitution to enable the levy arrangement participants to continue to impose a levy on all purchases of oyster spat by oyster growers from oyster hatcheries in South Australia as described in paragraph 1.9 and defined as the Conduct.
- 5.7. The Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act, or may have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act, or may constitute exclusive dealing within the meaning of section 47 of the Act.
- 5.8. The ACCC proposes to grant authorisation AA1000531 for 10 years.
- 5.9. This draft determination is made on 19 February 2021.

## Conduct which the ACCC proposes not to authorise

- 5.10. The proposed re-authorisation does not extend to permitting the hatcheries to collectively refuse to supply spat to an oyster grower for the reason that the grower is not paying the levy or has requested a refund of the levy.

## 6. Next steps

- 6.1. The ACCC now invites submissions in response to this draft determination by 12 March 2021. In addition, consistent with section 90A of the Act, the Applicants or an interested party may request that the ACCC hold a conference to discuss the draft determination.