

Trade Practices Act implications for the Seafood Industry

Understanding the potential legal traps
for seafood suppliers under the
competition & consumer protection law

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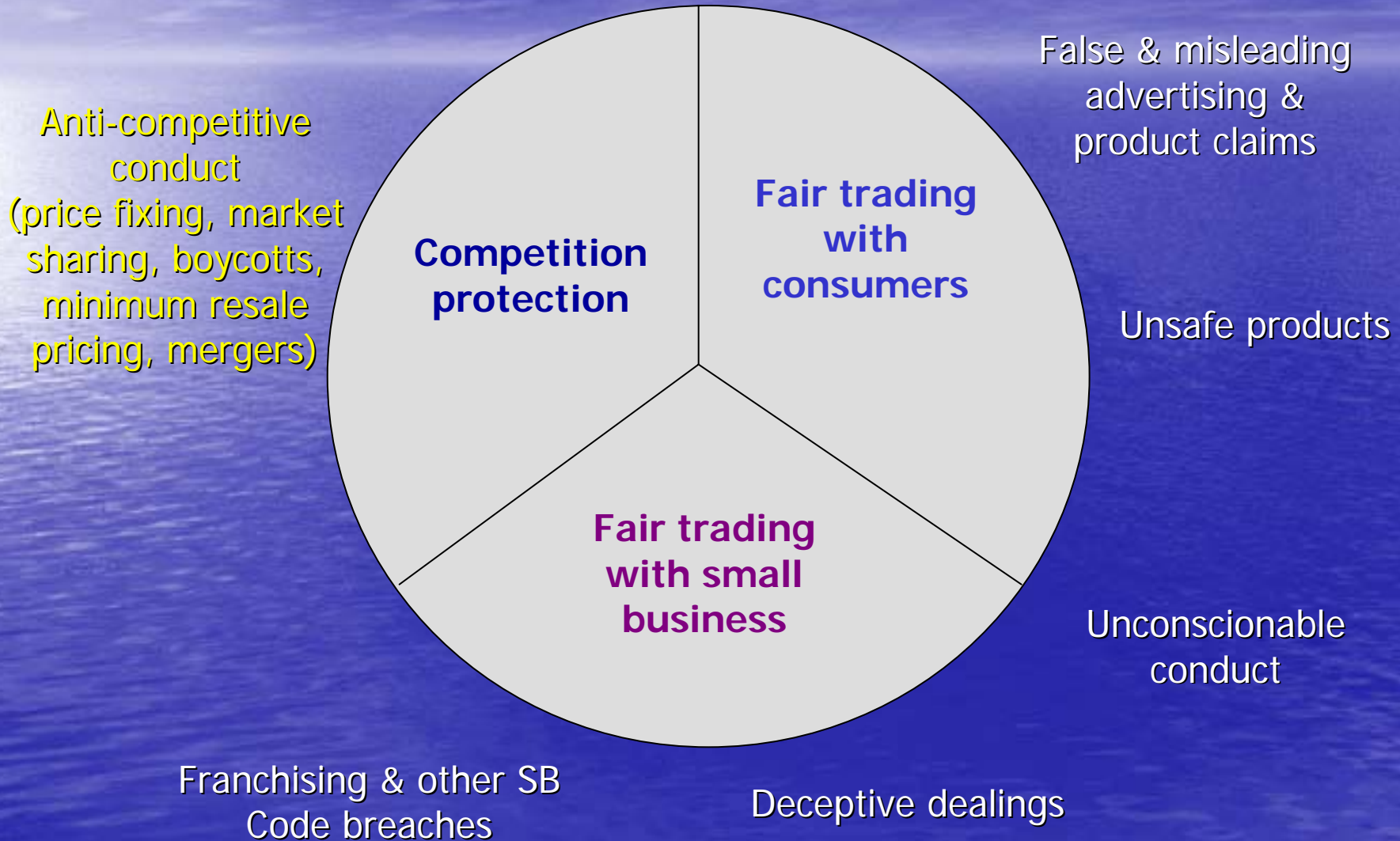
A couple of scenarios ...

- Several other seafood suppliers approach you to contribute to a joint marketing campaign promoting the common products at the same special price.
- The campaign promoted the product as originating from your State's waters, as only 20% needed to be sourced from interstate to meet the additional demand.
- Following the success of the promotion, you and the others arrange to supply all the parties' products through a distribution business set up by the group with an improved pricing structure.

Compliance in Public Interest

- Section 2 of the TPA ... *'to enhance the welfare of Australians through the promotion of competition and fair trading and by providing for consumer protection'*
- To seek compliance with competition, fair trading and consumer protection laws and to achieve appropriate remedies when the law is not followed.

The regulatory environment



Compliance – Enforcement Objectives

- to stop the unlawful conduct;
- to obtain compensation/restitution for victims where possible;
- to undo the effects of the contravention;
- to deter/prevent future unlawful conduct; and, in appropriate cases:
- to punish the wrongdoer

Compliance – enforcement pyramid



Who can take legal action under the TPA?

- Competitors, associations, consumers, government agencies – in fact any person may institute civil proceedings against parties engaging in conduct in breach of the competition or consumer protection provisions of the TPA (or similar provisions of the *Fair Trading Act* in each State).
- The majority of actions taken under the consumer protection provisions are taken by businesses and consumers – not the ACCC.

ACCC enforcement priorities

- apparent **blatant** disregard of the law
- there appears to be **substantial damage to competition**
- there is **significant public detriment** affecting a **significant number of consumers**
- the conduct particularly effects **disadvantaged consumers**
- successful enforcement, by litigation or other means, would have a **significant deterrent or educational effect**
- an important **new market issue**, eg. one arising from economic or technological change
- a likely **outcome** that would justify the use of resources.

Anti-competitive practices (Pt IV)

- Part IV prohibits substantial anti-competitive conduct:
 - Agreements damaging competition
 - Price fixing & market sharing agreements (cartels)
 - Collective boycotts
 - Misuse of market power
 - Anti-competitive exclusive dealing
 - Resale price maintenance
 - Anti-competitive mergers

[TPA sections 45 - 50]

- Sanctions
 - **Court penalties:** the greater of: up to \$10m for corp'ns (\$500k for indiv's involved), 3x the value of the illegal gain, or 10% last year's turnover. Potential criminal sanctions in 2008.
 - Other orders (injunctions, declarations, damages etc)

Price fixing, market sharing, collusive tendering, boycotts

- **Price fixing:** competitors agreeing to fix, control or maintain the price of their products
- **Collusive tendering:** competitors colluding on tender bids to determine 'winner' & increase profits
- **Market sharing:** competitors agreeing to not compete re each other's customers / markets / products
- **Collective boycotts:** competitors agreeing not to deal with particular suppliers or buyers
- **Product withdrawal:** competitors agreeing to withhold (or limit) product from the market

Tasmanian salmon growers

- Atlantic salmon farmers association in Tasmania facilitated a 10% cull of members' salmon stocks to limit the amount for sale later in 2002-03 to avoid oversupply and likely price cuts
- One company culled 70 tonnes; others abandoned after ACCC began investigating
- In August 2003 the Federal Court found association facilitated an illegal agreement

Victorian abalone quota holders

- A group of Victorian abalone quota holders had arrangement to make their quota catch available via new coy, Aust Abalone, at a premium to licensed processors who were expected to enter irrevocable supply agreements with AA.
- In late 2006 the ACCC took proceedings in the Federal Court alleging quota holders & others entered illegal anti-competitive agreements.
- The matter is close to final determination by the Federal Court.

Authorisation

- ACCC can permit anti-competitive conduct in likely breach of TPA where there is a **net public benefit**
- **SA Oyster Growers Council**: Authorisation given for hatcheries levying \$1 per 1000 oyster spat sold to fund R&D by Research Council (mirrored 1991 Tas. auth.)
- **Tas vegetable growers**: Authorisation for collective bargaining of terms of growing contracts by TFGA members with processors McCain & Simplot
- **Wide range of possible areas re net public benefit**: R&D and controls re overfishing, disease, pollution effects, global warming etc
- Approval for small business **collective bargaining** available

Co-operative business marketing, group buying, selling, distribution

- Co-operative marketing can be beneficial in lifting the profile of a sector or product group
- Care is needed to avoid being drawn into collective selling price arrangements with competitors which are likely to breach TPA
- Group buying arrangements generally less likely to breach TPA unless group gains substantial market power
- Prudent to seek good **legal advice**

Consumer protection (Pt V)

- Prohibited for corporations in commerce to:
 - mislead or deceive (or likely to) *[section 52]*
 - make false or misleading claims about quality, value, composition, standard, characteristics, style, sponsorship, approval, benefits, price, **place of origin**, warranties etc *[section 53]*
 - liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for their purpose or the quantity of any goods *[section 55]*
- Sanctions
 - Courts fines up to \$1.1m (corp), \$220k (indiv'l)
 - Injunctions, declarations, damages, adverse publicity etc

Consumer protection (Pt V)

- John West 'Australian' Tuna (1996)
 - Promotion claimed that tuna in JW tuna slices was caught from Port Lincoln in South Aust or Aust fishing waters, when significant amount caught outside Aust waters & processed in Thailand
 - Federal Court found the claims to be misleading & deceptive, and restraining orders were made against the company

Product liability provisions (Pt VA)

- Imposes strict liability on manufacturers, 'deemed' manufacturers and importers of defective products causing injury/loss – *s.75AD+*
- Goods are defective if their safety is not what persons are entitled to expect in all the relevant circumstances (incl. marketing, labelling, uses) – *s.75AC*
- Sanctions
 - Damages / compensation (incl. class action), etc



Food and beverage industry

Food descriptors guideline to the
Trade Practices Act



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