

Fair treatment?

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Guide to the Trade Practices Act for the advertising or promotion of medical and health services

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Introduction

Nature of advertising

The medical and health sectors are characterised by a marked disparity in the amount of information available to consumers (e.g. patients, their families, carers and others) and to service providers.

Individual practitioners, professional associations, regulators, community and consumer organisations and governments all have a role in informing and educating consumers about medical and health services. Advertising and promotional activity is one means of fulfilling that role. Despite what some may think, advertising is not always directed to inducing people to buy a good or service. The *Macquarie Dictionary* provides three relevant definitions of 'to advertise':

- to give information to the public concerning
- to praise the good qualities of, in order to induce the public to buy or invest in
- to offer (an article) for sale or (a vacancy) to applicants ...

However, for many medical and health professionals advertising is not familiar territory perhaps partly because of previous restrictions on advertising in these sectors.

New environment

Recent changes in laws have relaxed many of the previous restrictions, giving professionals much wider opportunities to communicate directly with consumers and enabling consumers to make better-informed decisions.

The transition to this new environment appears to have created some problems, and members of the community, regulators and medical and health professionals have raised concerns. For example, both the Australian Competition and Consumer Commission (ACCC) and the State and Territory health complaints offices have received complaints from consumers and practitioners about inappropriate advertising. Some of these complaints have resulted in enforcement or other corrective action. The ACCC has also been approached by medical boards and other professional groups to provide advice on advertising in the new environment.

In addition, the New South Wales Government established an inquiry into cosmetic surgery, focusing on promotional activities, as well as quality and safety issues. It was at the public hearings for this inquiry that the ACCC suggested that a guide to promotional activity might assist the profession. The inquiry has recommended that the ACCC and the Health Care Complaints Commission

(HCCC) produce a guide to compliance with fair trading laws in the promotion of cosmetic surgery.

However, the ACCC and HCCC (acting in consultation with and on behalf of its sister organisations) decided instead to produce this broader guide on the entire Australian medical and health sector. This guide was produced through consultation with stakeholders around Australia.

Object of the guide

The main object of the guide is to help the health and medical sector associations, individual practitioners and others assisting in the provision of medical and health services develop strategies that will improve compliance with the *Trade Practices Act 1974* (the Act). The Act is one of the main regulatory instruments in relation to promotional activity. Improved compliance will reduce the need for intervention by regulators.

The guide summarises basic information about the provisions of the Act that affect promotional activity — and draws on examples directly relevant to the promotion of medical and health services.

It does not cover the whole of the Act and is not a substitute for legal advice. Moreover, it talks in general terms, avoiding legal language wherever possible. Some of the provisions referred to have exceptions or important qualifications. In most cases, the particular circumstances of the conduct need to be taken into account when determining the application of the Act.

Further information

Staff at any of the ACCC offices listed at the end of the guide will be happy to provide more information or answer specific queries about the Act.

The Act is, of course, not the only legislation applicable to medical and health professionals. Practitioners also need to be aware of the specific professional regulation and common law obligations applicable in their State or Territory. Compliance with the Act and State and Territory fair trading legislation does not detract from these professional obligations and responsibilities. **Consumers are best protected when they are fully informed and when medical and health professionals maintain professional and ethical standards.** Professional associations, community and consumer organisations and/or health regulators can provide advice on these issues.

Neither the ACCC nor health complaints offices can give legal advice or opinion and therefore cannot ‘vet’ advertisements or other promotional material. You should seek independent legal advice before running promotional material.

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What regulates the promotion of medical and health services? Who are the regulators?

As with all other professionals, health professionals need to know and understand their legal obligations and the regulatory framework in which they operate. The regulatory framework for promoting health services, for example, includes both Commonwealth and State/Territory components. The most important of these are the Commonwealth Trade Practices Act, and, at State and Territory level, the various Fair Trading Acts and medical and health regulations. The common law also obliges medical and health professionals to provide information to consumers (for example, to ensure informed consent). The ultimate aim of all these pieces of legislation is to ensure that consumers are protected.

Commonwealth level

Trade Practices Act

The Act aims to enhance the welfare of Australians by promoting competition and fair trading and providing for consumer protection. In general terms, the consumer protection provisions of the Act prohibit conduct that is misleading, unfair or dishonest. Among other things, the Act prohibits:

- conduct that is misleading or deceptive or is likely to mislead or deceive;
- misrepresentations about the standard, quality, value or grade of services;

- false representations about the agreement of a particular person to acquire services;
- false representations about the sponsorship, approval, performance characteristics, accessories, uses or benefits of goods or services;
- false representations about the sponsorship, approval or affiliation of a corporation;
- false or misleading representations about the price of goods or services or the need for goods or services;
- conduct that is likely to mislead the public about the nature, the characteristics, the suitability for their purpose or the quantity of any services; and
- unconscionable conduct. While this is not defined by the Act it is likely to be interpreted by the courts using the ordinary English meaning of the term. For example, the *Macquarie Dictionary* defines unconscionable as behaviour that is:
 - unreasonably excessive
 - not in accordance with what is just and reasonable
 - not guided by conscience;
 - unscrupulous.

The Act also requires service providers to warrant that their services are carried out with due care and skill and are fit for the purpose for which they are supplied.

The Act applies to corporations. However, it can sometimes apply to other forms of organisation (e.g. sole trader, partnership). Even if the Act does not apply to an organisation, it is likely that the mirror consumer protection provisions in the relevant State or Territory Fair Trading Act will apply.

The Australian Competition and Consumer Commission

The ACCC is an independent statutory authority responsible for ensuring compliance with the Act, including the consumer protection provisions discussed above. The ACCC aims to:

- secure compliance with the Act by responding to complaints and inquiries and by observing market conduct and initiating legal action for contraventions of the Act when required;
- foster competition, fair trading and protection of consumers by taking initiatives to overcome market problems; and
- inform the community at large about the Act and its specific implications for business and consumers.

The ACCC is primarily a law enforcement agency. However, enforcement ultimately takes place in the courts. The ACCC does not have powers to impose fines or other penalties for contravention of the law. Nor does it make the law.

It is also important to bear in mind that the ACCC shares its right to take legal action under the Act with private parties. For example, in the health and medical sectors, professional associations, professionals, patients and others can take legal action for breaches of the Act.

The contact details of the ACCC offices can be found at the end of this guide.

Therapeutic goods

Therapeutic goods, including medicines and devices, are often promoted hand-in-hand with medical and health services. While the provisions in the Act are applicable to advertisements for therapeutic goods in terms of prohibiting misleading or deceptive claims, the *Therapeutic Goods Act 1989* and Therapeutic Goods Regulations contain additional provisions. The recently released *Therapeutic Goods Advertising Code* is regulated by the Therapeutic Goods Act and is designed to ensure that the marketing and advertising of therapeutic goods to consumers is conducted in a way that promotes the quality use of therapeutic goods, is socially responsible and does not mislead or deceive the consumer. However compliance with this code will not exempt advertisements from the application of the Act or other relevant laws.

State and Territory level

Fair trading legislation

Each State and Territory has fair trading legislation that substantially mirrors the consumer protection provisions of the Act, including the prohibitions of misleading or deceptive conduct. The State and Territory legislation applies to individuals, partnerships, and other forms of professional association, as well as corporations. The provisions of the State and Territory legislation are monitored and enforced by State and Territory Consumer Affairs/Fair Trading agencies. However, as with the Act, it is open to private parties to take independent action under the State and Territory fair trading legislation.

Health specific regulations

Each State and Territory has legislation to regulate the medical and health sectors and the conduct of professionals working in those sectors (e.g. the Medical Practice Acts and the Medical Boards established under them). It is not the role of this guide to detail all relevant regulation of each State or Territory. Regulation typically covers:

- restrictions on entry to the profession and/or reservation of title;
- maintenance of standards;
- conditions of registration;
- complaints handling and disciplinary procedures;
- restrictions on commercial conduct and/or business structure;
- restrictions on activities by persons who are not registered;

- information disclosure; and
- advertising.

The regulation of some healthcare providers is currently achieved by non-legislative strategies, as is the case for occupational therapists, dieticians and complementary healthcare technicians.

For information on sector specific regulations, you should contact the medical or other health-related boards, health department or professional associations in your State or Territory.

In the past, regulation of medical and health professionals included strict controls on advertising and promoting medical and health services. However, as part of implementation of the National Competition Policy, State and Territory governments have reviewed, or are reviewing, these and other restrictions for any anti-competitive effects. Where anti-competitive effects do not have countervailing public benefits, National Competition Policy requires the restrictions to be eased.

As discussed in the Introduction, these changes in the laws create a new environment for medical and health professionals. **However, this new environment is not a ‘free for all where anything goes’.** Advertising and promotional activity must comply with the rules of the Act (and Fair Trading Acts), in addition to any specific medical and health practitioner regulations that remain.

Health regulators

Complaints about medical and health professionals can be made to health complaints offices in each State or Territory (contact details for these can be found at the end of this guide). These bodies are established to investigate and conciliate complaints about the medical and health sector.

Example

In New South Wales, the HCCC performs this role. The HCCC was established by the *Health Care Complaints Act 1993*. The objectives of that Act are to:

- facilitate the maintenance of standards of health services in New South Wales;
- promote the rights of clients in the New South Wales health system by providing clear and easily accessible mechanisms for the resolution of complaints;

- facilitate the dissemination of information about clients' rights throughout the health system; and
- provide an independent mechanism for assessing whether the prosecution of disciplinary action should be taken against health practitioners who are registered under health registration acts.

The HCCC's mission is to act in the public interest by investigating, monitoring, reviewing and resolving complaints about healthcare with a view to maintaining and improving the quality of healthcare services in New South Wales. Complaints can be made about any aspect of treatment and care from registered and unregistered health providers and hospitals, nursing homes, private clinics and other places providing healthcare.

3 Rationale for promotional activity in the medical and health sector

Information needs

Consumers are often disadvantaged as patients (or potential patients) when it comes to considering medical and health services. They will usually have less access to the relevant information than may be available to service providers. This amounts to an information inequality between consumers and suppliers, the consequences of which may include:

- the temptation to oversupply services;
- the temptation to create unrealistic expectations through promotional activities;
- incentives to decrease overall quality where consumers are not able to effectively judge quality differences; and
- the potential for consumers to make incorrect choices which risk their financial, psychological and physical welfare.

Reducing this information imbalance is essential to improving the protection of consumers. Another feature common to medical and health services is that consumers can be severely affected by misleading or deceptive conduct physically, psychologically and financially — and the effects can be long-lasting. It is therefore imperative that information provided to consumers be honest, accurate and complete.

To make an informed decision about whether to purchase medical and health services (and particularly elective services such as cosmetic surgery) consumers need reliable and accurate information about the service or procedure. Practitioners are already obliged by common law and professional practice obligations to provide sufficient information to ensure informed consent by patients. This includes information about:

- risks, side effects, permanency of outcome, and other aspects of the nature and quality of treatment;
- the consequences of not having treatment and alternative treatment options;
- post-treatment care and complications; and
- charges (including charges for ancillary and add-on services).

This duty to provide information and warn of material risks is even more onerous if procedures are elective and not medically necessary.

In addition to information about the procedure or service, consumers would benefit from more information about medical and health practitioners, in particular their qualifications and experience. Information about Medicare

and health insurance coverage of particular treatments and payment methods can also be relevant.

Practitioners and professional associations should also recognise that consumers are not homogeneous and that, as a consequence, their information needs differ due to cultural, language and knowledge differences. For example, consumers have different levels of background knowledge about medical and health services and medical conditions, and different levels of ability to digest and process complex information. Patients also respond differently to drugs and treatments so it is important that the medical and health professional assesses the patient accurately both to give and receive information.

In preparing advertising and promotional material, practitioners and professional associations should ensure that they take into account the differing information needs of the consumers for whom the material is intended.

Advertising is a source of information

Contrary to what some might think, advertising is not always directed to inducing people to buy a product or service. It can also be a way of providing some of the information needed by consumers, although it is not necessarily always the only or most effective vehicle.

This role of advertising, in providing information to consumers about medical and health services, has not yet reached its full potential. There are various ways

advertising could be used to contribute to consumer information and understanding.

For example, advertising enables medical and health practitioners to make themselves known to prospective patients and referring doctors. It can assist practitioners to promote their particular skills or knowledge. Advertising can provide consumers with general information on services and procedures, making them more aware of services and options, particularly in specialised fields such as cosmetic surgery.

Advertising can be an effective way to provide general information and guidance about price, which may be one of the concerns of consumers considering elective services.

It can also be a way to inform consumers about the information they could seek from practitioners when considering medical and health services. For example, advertising could be used to make consumers aware that they can ask about complication rates and other risk factors.

Advertising and other promotional activity can foster innovation in the delivery of medical and health services and in communicating with target groups. For example, a national medical group for HIV+ medicine in the United States used advertising and marketing strategies to develop an outreach program. The objective of the program was to inform the HIV/AIDS population of the scope of the group's services and treatment options. More importantly, from a public service perspective, the program made available information in the form of a list of

commonly asked questions with the most up-to-date medical answers.

Finally, advertising can be a useful tool for members of professional bodies to differentiate themselves in the medical and health sectors from other groups of practitioners. Indeed, professional bodies can use advertising to explain to the community the services their members provide and the benefits to be gained from choosing one of their members.

Advertising medical and health services and products can help consumers to make informed choices. However, it is imperative that the information provided be honest, accurate and complete (i.e. no omissions likely to mislead or deceive). False, misleading or deceptive advertising may lead to badly-informed decisions and cause harm.

Of course, advertising cannot provide a substitute for detailed medical examination and consultation specific to the individual seeking treatment and this should be made clear in advertising or promotional material where there might otherwise be a risk of misleading consumers.

Other promotional activity

All forms of promotions for medical and health services and products are covered by the Act, including electronic and print media advertising, information brochures, direct mail, Internet promotions and outdoor advertising. Magazine articles and ‘advertorials’ can also be covered by the Act. Information provided by any of these

forms of promotional activity must not be misleading or deceptive.

Advertising is not the only type of promotional conduct covered by the Act. It also applies to **oral** statements made by practitioners or employees. Representations about medical and health services that are made in consulting rooms or reception areas must be honest, accurate and complete. If they are not, practitioners may be subject to legal action for contravention of the Act. Practitioners may also be at risk of legal action for negligence or breach of the duty of care.

Moreover, corrective statements made during consultations cannot generally remedy misrepresentations or exaggerations made in printed material. Equally, oral misrepresentations may not be able to be remedied by later distributing contradictory written material (especially if the contradiction is in the fine print).

Professionals or their representatives also need to take care when speaking through the media. Public figures need to be well versed in the requirements of the Act.

Practitioners and professional associations also need to be conscious of the fact that some messages and information will not be suitable for all forms of media. A message that may be legitimate and appropriate for one medium (e.g. print advertising) may not be appropriate for another (e.g. television).

4

What does the Act require?

All claims must be correct and current

Generally, professionals must not, in their promotional activities, act in a way that is misleading or deceptive, or is **likely** to mislead or deceive. The courts have interpreted these words to mean that all statements, taking account of both their content and context, must be honest and truthful.

Consumers may be uncertain and confused about medical and health services, particularly if they are elective procedures. This means that practitioners must take special care to explain their services and products. Particular attention should be given to the following areas.

- Each claim or statement in a promotional statement must be correct. This includes not only what is actually **said** or **written** but also what is **implied**.
- While there is a clear distinction at common law between representations and puffery or self-evident exaggeration, the Act makes no such distinction. However this does not mean that the courts will regard all puffery as misleading conduct. It will depend on all the facts and circumstances. In *Pappas v Soulac Pty Ltd* (1983), Justice Fisher said:

Many of the statements ... were also essentially the type of introductory comments, in the nature of puffery, made at the start of negotiations, for the purpose of attracting the interest of a possible purchaser. As such they become irrelevant or of little, if any, significance when detailed information is subsequently given ... To the extent that they are essentially puffery, it is proper to be reluctant to elevate them to the status of potentially misleading conduct.

However, especially in complex subjects like medical and healthcare, such statements should be avoided or used with extreme caution.

- In deciding whether a promotional statement is misleading, the court will consider what ordinary members of the target audience would understand by the statement. It will not assume special knowledge or insight that ordinary members of the audience would not usually have. The fact that the target audience may be vulnerable, or potentially vulnerable, as a result of a medical condition, will also be relevant in assessing whether a statement is misleading.
- The court will look at the **overall impression** created by an advertisement in deciding whether it is misleading or deceptive.

In practical terms, this means that how a promotional statement will be received by ordinary members of the target audience should be carefully considered. If the audience's perception is likely to differ from the true state of affairs, then the risk of breaching the Act may be greater.

Promotion tips

Both content and context of all promotional statements must be honest and accurate.

Self-evident exaggeration and 'puffery' are generally okay. However, such statements should be avoided or used with extreme caution in complex subjects like healthcare.

Carefully consider how your promotion will be received by ordinary members of the target audience.

Be aware that some target audiences may have particular vulnerabilities.

Can you substantiate your claims?

It is simply good risk management to ensure that you can substantiate representations made in your promotions before you run them. This will put you in a better position to defend any allegations that they are false or misleading. Any difficulty in substantiating a claim will alert you to the risk in making it.

Substantiating claims beforehand is particularly important if they predict outcomes, including the likely success of treatment. Such future claims are taken to be misleading unless the person making them has a reasonable basis for doing so.

Example

In a recent case against Giraffe World, the promoters of an 'ion mat' represented that it would cure or improve various medical conditions such as:

- the ion mat enabled a woman to walk who for a period of two years had been confined to a wheelchair
- the ion mat can cure asthma
- the ion mat heals cuts and ulcers and helps the growth of scar tissue

The Federal Court held that these claims were misleading because Giraffe World did not discharge the onus on it to show that it had reasonable grounds for making those and other claims.

Promotion tips

Don't advertise advantages of your services or products that are based on guesses or your own opinion about the future unless you have good reason to believe that they will come true, and have some facts to back them up.

Don't make predictions you can't back up.

Rely on facts and figures, not guesses or unsupported opinions.

Remaining silent

Omissions may be as crucial as what is actually stated. Not only what is said but also what is left unsaid may be misleading or deceptive. While there is no general duty of disclosure under the Act, it is up to you to make sure that the combination of what is said and not said does not give consumers the wrong overall impression.

For example, avoid:

- ‘before and after’ photographs of patients who have undergone the advertised treatment if they do not accurately convey the **long-term** benefits or effects;
- photographs of models suggesting the benefits of a medical or health procedure if those models have not undergone the procedure advertised.

Silence can be misleading if it is reasonable to expect that certain information would be disclosed.

Additionally, medical and health practitioners have positive obligations under common law to provide patients with sufficient information, in an appropriate manner, to form the basis for informed consent. This disclosure must include information on all material risks.

Fine print

It is the overall impression created by advertising that counts. The main selling points of an advertisement may make such an impression that associated fine print will not dispel it. Material terms or conditions should not be buried in fine print, but

located in the main text of the promotional material.

The fees and important conditions attaching to a service or product are often included in the fine print of advertisements. Advertising in this way is acceptable only where it is necessary (because of the size or format of the advertisement or the complexity of the information) and only where it clearly states the nature of the fees and conditions.

Disclaimers and qualifications

Disclaimers and qualifications do not always correct possible misleading or deceptive representations because the courts will view a representation **as a whole**. Clearly, best practice would be to advertise in a way that minimises or eliminates the need for qualification. A representation that does not need qualification is less likely to breach the Act.

If a qualification, or reference to the existence of a qualification, is used it must sufficiently change the **overall effect** of the representation to dispel any misrepresentation that might otherwise result.

Accordingly, qualifications should be:

- as bold, precise and compelling as the body of the representation so that they have equal prominence, force and impact;
- unambiguous;
- placed in the advertisement so that the target audience recognises them as easily as the representation itself; and
- stated in accurate, clear and precise terms. The party relying on a disclaimer

must be able to show that it is likely to be understood by all those who would otherwise be misled.

The timing of a disclaimer is also critical. Because an advertisement will be judged on a stand-alone basis, a disclaimer must be introduced at the same time as the representation it qualifies. Post-advertising steps such as disclosure in the clinic or surgery will not excuse omissions from the initial advertisement.

Because the courts have adopted an approach that focuses on the overall impression of the representation, their attitude is that disclaimers have a limited role and will be effective only in rare cases.

Any reference to qualifications or limitations in press advertisements should be clearly identifiable and easily read. Consumers cannot be expected to search for the facts of the matter. Generic disclaimers, such as 'conditions apply', will not help to avoid breaches of the Act if the conditions are important and should have been included in the body of the advertisement. Advertisements must clearly direct attention to terms and conditions significant enough to affect purchasing decisions.

The best way to reduce the risk of misleading consumers and breaching the Act is to include details of qualifications and limitations in the body of advertisements where they are more likely to be read.

Choosing your promotional vehicle

The amount of information about a service or product that can be included in an advertisement will vary between different media.

It is inappropriate to have important qualifying information in fine print on billboards or taxi advertisements because people cannot be expected to read it as they drive by.

Similarly media such as television and radio may not be suitable for advertising complicated features of services because the advertisements can only be of short duration and transitory.

For example, television advertisements should display textual information at a reasonable size and for long enough to be easy to read against the background. This can make it difficult to adequately describe complicated offers with detailed 'fine print' qualifications.

The better options for conveying complex offers requiring detailed qualification include careful print advertising, together with well drafted booklets and fully informed assistants such as paramedics and receptionists. Promotional vehicles such as radio and television advertising are generally more suitable for advertising that:

- promotes the **general availability** of medical and health services;
- helps the community to understand the services offered by a member of a particular professional association; or
- distinguishes the services provided by members of particular professional associations.

Comparative advertising

Comparative advertising is one form of promotion that can be a powerful competitive weapon in many sectors. Unfortunately, comparative advertisements generate many complaints because advertisers often do not check that each individual claim is correct and that the overall message is also correct. It is essential that all claims and representations be accurate. Sometimes advertisers forget that the market response of those with whom the comparison was made may quickly invalidate claims in the advertisement.

Attention to the following points can reduce the likelihood of breaching the Act.

- Compare like with like, i.e. the same type of services or products currently offered by other professionals.
- Disclose any limitations or restrictions on your offer that do not apply to the compared offers. Highlighting all relevant exclusions and limitations will help avoid misleading consumers.
- Other practitioner's prices can change at any time without notice. It is up to you to check that the rates you quote are up-to-date and correct each time your advertisement is run. Old rates may be misleading. To help consumers, state the date at which the comparison was made.
- State all of the assumptions on which your comparison is based.
- Check and re-check all figures. Others will.

Tips and safeguards for compliance

Four basic safeguards will help reduce the risk of promotional activity breaching the Act.

1. Staff training

Each practitioner and their employees or advisers involved in promotional activity should be aware of the need to comply with the Act and what obligations this entails. Trade practices training will help equip the practitioner and their employees to meet their obligations.

2. Compliance checks

All promotional material should be checked against the requirements of the Act. Where appropriate, legal advice should be sought.

3. Sign-off procedures

Every practitioner, partnership, clinic or association that advertises should have clear procedures for signing-off on promotional campaigns and materials, and procedures for regular reviewing of any existing promotion. Assigning responsibility will reduce the risk of running problem advertisements and also provide an audit trail if corrective action is ever needed.

4. Complaints handling

Practitioners and staff dealing with consumers should implement effective complaints handling procedures. In large practices or clinics, there should also be an effective referral mechanism from reception to the practice manager or managing partner so they will have a feel for the way consumers perceive their advertising.

5

Some common advertising problems in the medical and health services sector

This section of the guide provides detailed guidance specific to the medical and health services sector, in addition to the general advice given earlier.

Advertising and promotional activity in this sector frequently focuses on services that are not medically necessary or not medically urgent. These include such services as cosmetic surgery, laser refractive eye surgery, and hair removal and replacement. However, advertising and promotional activities based around general medical conditions (impotency, haemorrhoids and others) are also common, as is advertising and promotional activity for so-called 'miracle cures'.

Many of the problems that have arisen in medical advertising are common to a variety of services. The experience of the ACCC and health complaints offices indicates that medical and health service providers should pay particular attention to:

- exaggerations or claims that cannot be substantiated;
- advertisements requiring or suggesting self-diagnosis;
- use of titles and qualifications;
- certification and approval claims;
- testimonials;
- use of photographs;

- claims about price and/or cost;
- claims about time; and
- disclosure of conflicts of interest.

Exaggerated and unsubstantiated claims

Many complaints about medical and health services advertising arise from the use of exaggerated claims that cannot be substantiated. It is clear that no medical procedure can be considered risk free, painless or 100 per cent effective. It is not always possible to successfully predict the outcome of medical and health services as individuals may react differently to medical procedures, and there are many factors that will affect outcomes. In addition, medical and health services that involve surgical invasion or administration of drugs will always involve some risk.

In the context of many medical and health services, using unequivocal terms such as 'painless' or 'virtually painless', 'no risk' and 'guaranteed' exploits the disparities in information between consumers and service suppliers and promotes unrealistic expectations. These claims cannot usually be substantiated by reliable and objective evidence. Particular care needs to be taken with the use of phrases that understate risks or pain levels, or overstate results or effects.

Even greater care needs to be taken for consumers who are vulnerable as a result of their specific condition.

Examples of this type of conduct have occurred in such areas as laser eye refractive surgery, impotency treatments and hair removal treatments. Some examples, including examples of terms that may be high risk, are provided below.

Case study — impotency treatments

The availability of Viagra and other treatments for impotency has resulted in a proliferation of specialist impotency clinics, many of which have engaged in high profile advertising campaigns. Because of the emotive and sensitive nature of the subject matter, the claims made are likely to make a strong impression on persons suffering from, or in fear of, impotence.

Example

On Clinic placed newspaper advertisements which made the following representations:

- the ONLY Impotence Treatment Ever Proven to Work
- improve your SEX LIFE with the ONLY impotency treatment EVER proven to work
- 4 treatment programmes with GUARANTEED RESULTS
- PROVEN AND GUARANTEED to work
- diagnosis using unique medical equipment

The ACCC received a complaint about the content of these advertisements from other medical

professionals, alleging the comments were misrepresentations. The Federal Court found that the representations were misleading and deceptive, made declarations to that effect, and ordered corrective advertisements and injunctive relief.

'Only' and 'ever'

The court found that these terms are quite unequivocal and admit no exceptions and that, on the facts, they had a misleading aspect to them.

The ambiguous use of terms without qualification

The court found that the use of language that can reasonably suggest either a true proposition or a false one can come within the ambit of misleading conduct. Further, it held that:

if it is sought to attract public attention and custom by the use of unqualified assertions of fact then such assertions should be true as a matter of fact, if they are not to mislead and contravene the norms of conduct prescribed by the Trade Practices Act.

Case study — haemorrhoid treatment

Many proctology clinics offer treatments for the cure of haemorrhoids, however when advertising they may use words or phrases to unnecessarily embellish the process or its end result.

Example

In 1996 the ACCC investigated advertisements by an Australian proctology chain about the success and discomfort level of its haemorrhoid treatment.

The advertisements claimed that the treatment was 100 per cent effective; involved minimum discomfort; gave instant relief; and needed only one visit. In fact, the ACCC had received complaints from patients that: in some cases the treatment may be unsuccessful; some pain and discomfort may be experienced; sometimes more than one treatment was necessary; and that the procedure was new and has not yet been scientifically validated by long-term study.

Proctology Centres of Australia acknowledged these concerns, and gave court enforceable undertakings to the ACCC to correct representations made in advertisements and to patients about the treatment.

Case study — hair removal

Advertisements for hair removal treatments sometimes use words or phrases that imply that a given treatment or a specific number of treatments will permanently remove hair. For example, the ACCC has received complaints about the use of terms such as ‘eliminate unwanted hair’, ‘permanent hair removal’ and ‘gone for good’ in relation to laser hair removal treatments.

Current literature suggests that laser hair removal treatments may achieve the permanent removal only of hair in growth phase at the time of the treatment. Patients may later grow new hairs from follicles that were inactive or resting during treatment. A laser hair removal treatment, when applied to a particular area on a person’s skin, may not completely eliminate the growth of hair in that area.

Examples

1. A hair removal clinic used the term ‘Gone for good’ in advertisements for its laser hair removal treatments. In the ACCC’s view, the term ‘Gone for good’ is likely to convey to readers the impression that, if the treatment offered is applied to a particular area of skin, it will remove the hair growing in that area and will prevent any hair regrowing in that area.

The clinic informed the ACCC that, during consultations, patients are given a clear understanding as to the potential limitations and risks associated with the treatments. However, later advice given during consultations may not be sufficient to overcome the effect of the original misleading representation.

The ACCC informed the clinic that the wording ‘Gone for good’ is liable to lead consumers into error as it conveys the first impression that the treatment offered would result in permanent hair removal of **all** hair in the treated area whether in the growth phase or not. The clinic decided to withdraw the term from all future advertising.

2. More recently, Beautician’s Laser Clinic Pty Ltd (BLC) provided a court enforceable undertaking to the ACCC in which it acknowledged that claims made in its advertising may have breached the Act. Among other things, BLC had claimed that its laser hair removal service:

- was guaranteed progressively permanent;
- resulted in permanent laser hair removal;

- was FDA¹ certified for permanent hair removal (in fact it was certified for permanent hair reduction); and
- was scientifically shown to be progressively permanent.

BLC has published corrective advertisements apologising to consumers and competitors and offered a refund to consumers misled by the claim. BLC has undertaken not to make similar claims in the future, to withdraw misleading client advice signs and to implement a trade practices compliance program.

Case study — laser eye refractive surgery

Laser refractive eye surgery generally uses laser light to abrade the cornea or mid-corneal stroma to correct a patient's eyesight. It is arguable that this treatment is an invasive surgical procedure. Some laser eye surgery clinics have promoted laser eye surgery as an alternative to corrective lenses. Promotional claims have included:

- safe and effective
- painless or virtually painless
- never wear glasses again
- throw away your glasses
- over 99% of our patients can drive without the use of glasses after their ... procedure

In the ACCC's view, patients undergoing laser treatment cannot be guaranteed that they will never need corrective lenses again. There is a real chance that reading glasses could be required after the age of 40 (because of ageing). Further to this, some

risks, including the risk of blindness, have been associated with laser refractive eye surgery.

Example

In October 1997 the ACCC wrote to a number of advertisers of laser eye surgery clinics to request that they refrain from making representations, either orally or in promotional material, which state or imply without suitable qualification that refractive eye surgery is safe and effective and that those treated will not need to wear corrective lenses again.

All parties who were contacted agreed to modify their advertising and to establish compliance guidelines for directors and staff involved in the preparation or approval of promotional material or who have contact with the public.

Case study — miracle cures

Promoters of services or products claimed to be a cure for what are currently considered incurable diseases need to be very aware of their obligations under the Act. Claims that a particular service or product can cure diseases such as cancer, HIV/AIDS, arthritis, asthma and other serious illnesses should not be made unless the claims can be substantiated by reputable scientific evidence.

Additionally, professionals should be aware that in some States and Territories claims that a service or product can 'cure' some diseases (such as cancer and HIV/AIDS) are prohibited by legislation. The Therapeutic Goods Advertising Code, underpinned by the Therapeutic Goods Act, is also relevant.

1 United States Food and Drug Administration.

Example

The ACCC recently took proceedings against Giraffe World, the promoters of an 'ion mat' purported to cure or improve various medical conditions. Among other things, Giraffe World made representations that:

- The ion mat will cure back problems
- The ion mat relieves acute arthritis
- The ion mat alleviates the symptoms of heart trouble
- The ion mat will slow down the progress of AIDS and/or cure AIDS

In his summary, Justice Lindgren stated:

Giraffe World sought to portray the case as a battleground between conventional and alternative health care systems, and between the approaches of modern Western science and medicine on one hand and an older Oriental approach to human health and wellbeing on the other. But my function has been limited to deciding the issues presented for decision, by applying the law to the facts proved by evidence.

Although Giraffe World defended the case, it did not call on any medical or other expert evidence to support the evidence of users of the mat that their health had improved. The court found that:

- the mat did not emit negative ions or generate them within the body of a person lying on it;
- there was no scientific support for the proposition that the mats, by means of negative ions, produced

or would produce benefits for human health; and

- Giraffe World misrepresented that various bodies supported its claims that the mat offered the health benefits claimed for it.

The court declared that Giraffe World's conduct breached the misleading or deceptive provisions of the Act. It also imposed injunctions on Giraffe World and various executives, and gave leave for the Commission to seek orders for compensation on behalf of affected consumers.

Example

In August 1999 the ACCC instituted proceedings against the promoters of a 'Parasite Zapper' and a 'colloidal silver kit'. Advertisements claimed that the Parasite Zapper passes an electric current through a person's blood and that this was effective in treating a number of serious medical conditions including HIV, hepatitis, herpes and obesity. The promoters also claimed that the colloidal silver kit was able to produce colloidal silver that had killed intestinal bacteria and viruses, and that it had been used successfully to treat a number of serious medical conditions including AIDS, leukaemia and cholera.

Raylight and its director Mr Herbert Nathan and an operator of two Internet sites, Mr Ronald Dixon, have since given undertakings to the Federal Court of Australia. The undertakings that Raylight provided were that it would not make representations as set out above and

will provide refunds to persons who may have been misled into purchasing either the Parasite Zapper or the Colloidal Silver Generator. Mr Nathan also gave undertakings not to design, create, settle or procure the publication of advertising concerning the above products. He also gave an undertaking to attend a trade practices seminar to ensure future compliance with part V of the Act.

Case study — weight loss treatments

Promoters of weight loss treatments need to be wary of making claims that cannot be substantiated. In particular, claims about the effect of the treatment must be complete, accurate and objectively based.

Claims about the amount of weight that can be lost in a particular period are also problematic. Anecdotal information from consumers who have used the treatment will not generally be sufficient to substantiate unqualified claims.

Example

In 1997 the ACCC alleged that advertising promoting the Swiss Slimming and Health Institute Pty Ltd (Swisslim) method made false, misleading or deceptive claims including that:

- by using the slimming services, persons are able to reduce fat deposits in such areas of their bodies and to such degree as they desire, without reducing fat from other areas of their bodies without surgery, when this is not physiologically possible;

- by using the slimming services, persons have achieved or are able to achieve specified amounts of weight loss in specified numbers of consecutive days, when in fact the specified days are not consecutive days and the weight loss was not lost in the specified number of consecutive days;
- persons can use slimming services, to obtain benefits, including reduction of fat deposits, the loss of 10 kilograms of weight in 24 or 25 days and overall achievement of their weight loss and figure goals, without altering their diet or undertaking any diet program or undertaking any exercise, when this is not true; and
- weight loss could be easily achieved by the use of ‘body wraps’ — i.e. a slimmer sitting wrapped in cold bandages.

In 1998 the Federal Court found that Swisslim and its director had engaged in promotions of slimming services that were misleading and deceptive. The court said that information given to the clients about the regime ‘is all nonsense’. During the course of the ACCC action, the court agreed to freeze assets held by the institute and its director. These assets will be available for part-refund of the clients’ claims.

The ACCC has taken legal action on other weight-loss and slimming matters. In 1997 it obtained injunctions restraining Buyers Network International from making misleading claims about the health and weight loss benefits of honey, garlic and vinegar, as well as ‘negative calories’ contained in

certain foods. In that same year, the ACCC also obtained a court order restraining Jayco Pty Ltd from making unsubstantiated claims about its weight-loss products and aids.

Advertising requiring or suggesting self-diagnosis

Concerns have been raised about advertising that promotes consumer self-diagnosis. Such advertising is most commonly distributed by specialist clinics which focus on treatment for only one type of condition.

This type of advertising is unlikely to contravene the Act simply by implicitly encouraging self-diagnosis. Indeed, advertisements of this type can have a valuable educational role by making consumers aware that there are treatments available for particular conditions.

However, practitioners should remember that self-diagnosis by a consumer does not relieve the practitioner of his or her obligations to undertake a thorough examination before confirming (or not confirming) the consumer's diagnosis. Nor does self-diagnosis relieve a practitioner of his or her obligations to provide information about all possible treatments for the diagnosed condition. Practitioners must always put the patient's interests first, and have professional obligations to disclose to patients any direct financial interest in treatments offered or facilities made available.

Titles and qualifications

Another issue of concern is the use of titles and qualifications of professionals.

Having less information about the qualifications of medical and health professionals than the professionals themselves disadvantages consumers. Consumers may assume that a person who uses the title 'surgeon' has undertaken a particular level of training in surgical procedures. However, there is in fact no legal restriction on the use of the term 'surgeon' by those who are registered medical practitioners.

In assessing whether the use of the term 'surgeon' is misleading or deceptive in a particular case, a court would be likely to have regard to the community understanding of the term. An authoritative dictionary can provide guidance on community understanding. The *Macquarie Dictionary* provides the following relevant definitions:

surgeon — 1. someone who treats injuries, deformities and diseases by manual operation or instrumental appliances. 2. a medical practitioner or physician qualified to practise surgery.

surgery — 1. the art, practice or work of treating diseases, injuries, or deformities by manual operation or instrumental appliances. 2. the branch of medicine concerned with such treatment. 3. treatment, operations etc., performed by a surgeon.

Practitioners wishing to promote themselves as surgeons should ensure that they are not using the term in a way that may mislead or deceive consumers.

Another such term is ‘specialist’. In some States or Territories (Queensland and South Australia), doctors are required to record their specialist qualifications. They are then permitted to use the term ‘accredited specialist’.

In other States or Territories, all medical practitioners are recorded in a general register. Practitioners are not prohibited by medical regulations from calling themselves a ‘specialist’, and there is no external accreditation process for awarding specialisation to an individual practitioner.

A court would be likely to have regard to community understanding of the term specialist in assessing a matter where the use of this term was questioned. The *Macquarie Dictionary* provides the following definition:

specialist — 1. someone who is devoted to one subject, or to one particular branch of a subject or pursuit. 2. a medical practitioner with advanced qualifications in a particular field of medicine, usually acting as a consultant.

Practitioners using the term ‘specialist’ as a promotional tool in circumstances where they cannot comply with the above definition may be at risk of contravening the Act. Another area that may cause confusion for consumers is the use of professional qualifications and memberships. Consumers may be easily impressed by medical and health professionals who include a string of letters and memberships after his or her name. However, they may not be in a position to ascertain the extent to which those letters or memberships convey useful information about the skill level of the practitioner.

For example, some memberships or qualifications may represent the fact that the practitioner has participated in a specialised course of training over a number of years. Others may simply mean that the practitioner has taken part in a two-day course.

Advertising qualifications or memberships may be misleading or deceptive if it tends to imply that the practitioner is more skilled, or has had greater experience, than is the case. Practitioners should therefore be wary of using obscure qualifications or memberships as a marketing tool without clearly describing what the qualification or membership represents.

The context in which qualifications or memberships are used is also relevant. For example, listing all qualifications and memberships on a business card may not be misleading or deceptive (assuming the qualifications and memberships were genuine). However, listing irrelevant qualifications in promotional material, without explaining those qualifications, may be more problematic.

Certification and approval

Claims about certification and approval by health authorities and other regulatory authorities are sometimes made for medical and health services.

It goes without saying that such claims should be truthful. However, it is also important to note that such claims may be misleading or deceptive if they:

- state or imply that approval will occur as a matter of course, when there is no guarantee this is the case; or

- state or imply that an approval was granted for specific purposes when in fact it was granted for other purposes.

For example, in relation to its ion mat, Giraffe World claimed that:

- the ion mat had received approval from the Ministry of Health in Japan and was a proven therapeutic device; and
- Giraffe World was close to finalising approval from the Australian Department of Health for the ion mat.

In fact, the court found that the approval from the Japanese Ministry of Health was only an approval for the manufacture of the mat, and said nothing about its effectiveness. The court also found that, apart from some hearsay evidence, there was no evidence that Giraffe World had applied to any Department of Health for any approval in respect of the mat. Nor was there any evidence of the progress of any application within the Commonwealth department.

Testimonials

Testimonials can be an emotive and effective way of promoting medical and health services. They provide a real life example of possible outcomes from the treatment being considered.

Testimonials are not misleading or deceptive when they are representations by genuine consumers who have received the particular service and are willing to testify to this experience. However, testimonials may mislead or deceive if the person providing the testimonial does not exist, did not have the advertised treatment, does not truthfully

represent the outcomes of the treatment, or has been offered some inducement (e.g. free treatment) to give the testimonial.

Practitioners should also consider advising consumers that a testimonial can only represent the outcome of the treatment or procedure for that individual person. In medical and health services, there are many factors peculiar to an individual patient that will affect the ultimate outcome.

There may be a need to place greater controls on the use of testimonials to reduce the risk of misrepresentations. For example, it is not unreasonable to expect that, subject to some safeguards, the person providing the testimonial can be, and is willing to be, contacted. Practitioners should be wary of using testimonials where this cannot be guaranteed.

Photographs

Before and after photographs can also be considered to be a pictorial form of testimonials, and they can also be a very effective way of promoting particular medical and health services. They are commonly used in advertising and promotional material for such procedures as cosmetic surgery, hair removal and laser treatment.

However, the use of before and after photographs in advertising can create an unrealistically favourable impression of the results of services by using:

- varying light;
- varying poses;
- varying photographic techniques; and
- computer enhancement.

If before and after photographs are not standardised, there may be a risk they will mislead or deceive consumers about potential results of treatment.

Additionally, before and after photographs should not exaggerate the long-term effects of treatment.

Photographs may also misleadingly indicate that the person photographed has undergone the particular medical or health procedure being promoted.

Particular care therefore needs to be taken when using photographs. It would be prudent to ensure that:

- before and after photographs are taken in similar circumstances, with similar lighting, poses and photographic techniques;
- photographs, or statements accompanying them, do not exaggerate the long-term effects of treatment;
- computer-enhanced photographs are not used to infer that they represent actual treatment by the particular provider;
- if models are used, the advertisement does not give an overall impression that the models have undergone the particular procedure promoted (fine print disclaimers will not usually be sufficient to correct an otherwise misleading impression); and
- those appearing in photographs are able and willing, subject to appropriate safeguards, to be contacted.

A further difficulty arises when consumers are led to believe that the outcome achieved for one person can necessarily be achieved for others. Every person is different, and healthcare providers need to communicate with consumers about what is a realistic expectation for them. While photographs can be used effectively for this purpose in the context of the doctor–patient consultation, there is a great propensity to mislead when used in advertising. Before and after photographs in advertising should therefore be used with great caution.

There is a need for practitioners to be able to utilise photographs of cases and treatment procedures, even if not carried out by the actual practitioner, to illustrate a planned treatment. This is often a necessary part of providing information to the patient. If it is clear the practitioner is not claiming these cases as his or her own and is merely using them as examples to educate patients, such methods are considered appropriate.

Claims about price and costs

Consumers should be given accurate and complete details of the price and any additional costs likely for medical and health services. This is particularly the case where the medical and health services are elective and/or not medically necessary. Inaccurate claims about prices and costs may induce consumers to seek particular medical and health services when they would not do so if the true costs were revealed.

Particular areas to be wary of include:

- misleading claims about Medicare funding and bulk-billing — for example, in the case of On Clinic the court found that the following claims were misleading:

- Bulk billing. (no charge to you, only Medicare); and
- All visits 100% Bulk billed. Medicare (no cost to you).

The court considered that a reasonable construction of the claims would be that the total treatment was at no cost to the patient. In fact, in this case, while the consultations were bulk-billed, consumers were required to pay for the course of treatment;

- misleading claims relating to private health insurance and the extent to which costs incurred in medical and health services can be claimed through private health insurance (e.g. offering rebate-only work, such as bulk-billing or charging only what will be refunded by private health insurance);
- failing to disclose the full cost of medical and health services before consumers are committed to purchasing those services. This appears to be an issue for some cosmetic surgery clinics.

GST and misleading or deceptive claims

The introduction of the New Tax System places new emphasis on the misleading or deceptive conduct provisions of the Act. Practitioners should take care in making any representations about the impact of tax changes on prices or the existence of tax-related obligations in pricing claims. In particular, practitioners should be careful

not to attribute price changes to the New Tax System when, in fact, they are unrelated to the tax changes. Where practitioners are displaying the prices of goods or services, where that supply is taxable, they must be GST-inclusive.

Price exploitation

The ACCC also has special powers in respect of the New Tax System changes to ensure that consumers receive the full benefit of indirect tax reductions, and are not exposed to greater than necessary price rises. The key to the ACCC's power is the new contravention of price exploitation. Practitioners must ensure that any New Tax System savings they receive are passed on to their patients by way of cheaper prices, or they risk engaging in price exploitation. For further information please see the ACCC guidelines on price exploitation which sets out what, in the ACCC's opinion, constitutes price exploitation.

Claims about time

Another problem area relates to claims about the time period over which medical and health services or treatments are likely to have effect or the time that provision of those services or treatments are likely to take. Clearly, claims about these issues must be accurate, as they will often influence consumers when they are choosing whether or not to purchase the services or treatment.

Claims such as:

- 4 treatment programs with **GUARANTEED RESULTS**, in just 2 visits ...
- fast recovery (effective within 15 minutes)

-
- both eyes can be treated within 30 minutes
 - lunchtime surgery

should be made only if they can be substantiated. Practitioners should also be wary of making such claims if they are accurate in only a small percentage of cases, if they do not include recovery time, or if they represent only the very best-case scenario.

It is also crucial that claims about the time taken for services are used very cautiously as they may incorrectly imply that the services are minor and of minimal or low risk. Such claims may amount to misleading or deceptive conduct.

Disclosure of financial interests

In some specialist areas of medical and health services, professionals may have financial or other interests in promoting particular services, products, practitioners, clinics or hospitals. The existence of such financial interests may create a conflict of interest for practitioners or lead to over servicing and/or restrict the consumers freedom of choice.

Consumers rely heavily on the understanding that professionals will have their best interests as the prime consideration. However, a practitioner's ability to provide dispassionate advice about the most appropriate course of action for a patient could be compromised if the practitioner has a financial interest in promoting one course of action over another.

Such conflicts of interest may contravene the professional obligations of medical and health practitioners.

In addition, practitioners should be aware that failures to disclose financial interests to patients may, in some circumstances, contravene the Act. The Act does not impose a general duty to disclose information. However, the courts have held that silence is to be assessed as a circumstance like any other in determining whether the conduct is misleading or deceptive.

Disclosure of financial interests, either as a part of promoting particular medical and health services or at a relevant time in a consultation, is also important for ensuring informed decision-making by patients.



Other consumer protection issues

The Act includes consumer protection provisions other than those discussed above that may be relevant to medical and health professionals.

It prohibits unconscionable conduct where services or goods are supplied and those services or goods are of a kind ordinarily acquired by consumers for their personal, domestic or household use. In these dealings, the stronger party (usually the service provider) must not engage in conduct that is in all the circumstances unconscionable.

Although the Act does not define ‘unconscionable conduct’, it does include a non-exhaustive list of factors that may be taken into account by the court. These include:

- the relative bargaining strengths of the parties;
- whether the consumer understood any documentation used;
- the use of undue influence or pressure, or unfair tactics;
- the imposition of unreasonable conditions; and
- how much the consumer would have to pay, and under what conditions, to buy equivalent services or goods from another supplier.

From the current case law it is the ACCC’s view that for a person to establish unconscionable conduct for the purposes of the relevant consumer protection provision of the Act, the person must show that the alleged conduct can properly be characterised as serious misconduct; or is clearly unfair or unreasonable; or shows no regard for conscience; or is irreconcilable with what is right or reasonable (i.e. immoral, wrong, unreasonably excessive or unscrupulous).

The Act also implies a number of conditions and warranties into consumer contracts for the supply of services or goods. These include warranties that services must be carried out with due care and skill and that services (and any materials associated with them) must be fit for the purpose for which they are supplied.

These conditions and warranties cannot be excluded by the supplier. If a supplier fails to comply with the conditions and warranties, affected consumers can take legal action for damages.

The Act provides for underpinning of either mandatory or voluntary codes by regulation. This prohibits contraventions of such codes by corporations in a particular industry. Penalties and remedies can include injunctions, corrective advertising, damages or ancillary orders.

These issues are not directly related to the promotional activities of medical and health professionals, and are therefore not discussed further here. However, further information and advice on these obligations can be sought from ACCC offices and/or the ACCC website (<http://www.accc.gov.au>). The ACCC also publishes information booklets on unconscionable conduct and the statutory warranties. Contact details for ACCC offices are listed at the end of this guide.

7

Enforcement of the Act

Anyone — an individual, another medical and health professional, or a professional association — can take providers of medical and health services to court for breaking the consumer protection, fair trading or restrictive trade practices provisions of the Act. The ACCC can also institute proceedings for a breach of the Act. If a court decides that the law has been breached, it may make orders including:

- fines or penalties;
- damages;
- injunctions;
- declarations that the law has been breached;
- findings of fact that can be used in subsequent actions for damages;
- refund of money;
- specific performance (ordering an individual or organisation to do something such as making good a contract);
- rescission of contract; and/or
- corrective advertising.

Enforceable undertakings

Sometimes, rather than instituting legal proceedings, the ACCC chooses to settle a matter administratively. This can be done by accepting formal, enforceable undertakings from an organisation or person who has allegedly breached the Act. This means they offer a solemn promise to the ACCC to comply with or follow a list of actions that could include one or more of the following:

- compensating consumers who suffered from the conduct;
- running corrective advertisements of similar frequency and prominence to those which misled consumers;
- paying for a compliance program that could be used by other practitioners in the sector; and/or
- making administrative changes within the organisation to reduce the risk of future misleading conduct.

Enforceable undertakings are not an easy option because they can often be expensive and embarrassing. Once entered into, an enforceable undertaking is not optional. If the undertakings are not honoured, the ACCC will ask the court for an order, telling the organisation or individual to comply with the undertaking. Ignoring such a court

order would be contempt of court, and this in turn may lead to fines or imprisonment.

Generally, the most significant costs of the enforcement process to any professional, or a professional who breaches the Act, are lost practitioner and staff time, legal costs, and loss of a hard-won professional reputation. Being involved in a breach of the Act can also lower the esteem in which a profession or its association is held by the community.

Regulatory action by health complaints offices

The State and Territory health complaints offices can also take action if promotional material contravenes specific professional regulations. The responsibilities and powers of the different offices vary; however, in each State or Territory they have the authority to raise an issue of unsatisfactory professional conduct before the relevant medical board or any other health practitioner registration board. The contact details of State or Territory health complaints offices are located at the end of this guide.

Private litigation

The vast amount of litigation under the consumer protection provisions of the Act is private litigation — not involving public agencies. These cases can range from individuals taking legal action to recover loss or damage to class actions on behalf of many consumers affected by conduct in breach of the Act.

8

Avoiding problems

Information for consumers

The clear message from all of the problems discussed in the earlier chapters is that consumers of medical and health services need better information — and in particular, better information about the qualifications and experience of the provider and about the benefits and risks associated with the services.

Most consumers have little knowledge of the detail of medical and health services, particularly those that are complex and difficult to understand. In particular, it is often difficult for consumers to fully understand the risks and possible side-effects of medical and health services.

Practitioners have an obligation to ensure that consumers are fully informed about the services being offered. If promotional material is to play a role in meeting some or all of consumers' information needs, it must be honest, accurate and complete.

Practitioners should take note of the examples and specific problem areas discussed in the guide.

Consumer guides to various types of medical and health services would also be useful for consumers. It is understood that a number of the medical colleges have already produced material of this type.

Brochures can provide information about common procedures and possible risks, describe the steps to be followed when contemplating a particular service, and include a checklist of questions consumers could ask a practitioner to ensure that the service and practitioner meet their particular needs.

Complaints handling

Many of the problems discussed in this guide have been brought to the attention of the ACCC and/or the State or Territory health complaints offices by complaints from consumers. Practitioners and medical and health service providers should not overlook the benefits that can flow from listening to and reacting to complaints. An effective complaints-handling system can turn many disgruntled people into satisfied consumers and reduce the risks of regulator intervention and costly and time-consuming litigation.

There are various publications and documents that provide advice on establishing effective complaints-handling systems. Your local health complaints office will be able to provide further details and assistance for complaints-handling systems specific to the medical and health sectors.



Promotional checklist

The following checklist provides a list of tips to help medical and health professionals avoid engaging in misleading or deceptive conduct when advertising or promoting their services. Practitioners who cannot answer ‘yes’ to these questions should reconsider their actions.

- Have we thought about the appropriate media for this promotional activity? (page 13)
- Is the content of the promotional message appropriate for the media chosen? (page 9, 13)
- Have we thought about our target audience and how they are likely to receive the promotional message? In particular, have we considered any special characteristics or vulnerabilities of our target audience? (page 7, 10–11, 16–20)
- Have we considered the fact that the media chosen to reach our target audience may also reach other consumers? (page 13)
- Can our claims be substantiated on an objective basis? (page 11)
- Do we have reasonable grounds to make statements about future matters, including the effects of treatments? (page 11)
- Have we explained all limitations and qualifications on promotional offers? (page 12–13)
- Are all material terms and conditions located in the main text of promotional material? (page 12)
- When disclaimers and qualifications have been used, are they clearly drawn to the consumer’s attention? (page 12)
- If comparisons are made with other services or service providers, are these comparisons fair, accurate and current? (page 14)
- Have we understated/overstated the risks involved? (page 15–16)
- Have we understated/overstated the pain involved? (page 15–16)
- Have we understated/overstated the likely effects or results? (page 15–20)
- Have we used the terms ‘surgeon’, ‘doctor’ or ‘specialist’ in a way that may be misleading or deceptive? (page 21–22)
- Have we used irrelevant qualifications or memberships as a marketing tool, without clearly explaining what those qualifications and memberships represent? (page 21–22)

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- When reference has been made to certification or approval, is this reference accurate? (page 22)
 - Is the certification or approval relevant to the claim being made or implied? (page 22)
 - When testimonials are used, are they an accurate representation of the outcomes of the treatment for the person giving the testimonial? (page 23)
 - Is the person providing the testimonial willing and able to be contacted? (page 23)
 - Is it clear that the testimonial relates only to the outcome for that particular person, and should not be considered a guarantee that the same outcome will be achieved for all? (page 23)
 - When before and after photographs are used, are they standardised, with, among other things, both photographs taken using the same light, same poses, and same photographic techniques? (page 23–24)
 - Are those appearing in before and after photographs willing and able to be contacted? (page 24)
 - When models are used, is it clear to consumers that the models have not undergone the procedure being promoted? (page 29)
 - Are our claims about Medicare and insurance costs accurate and complete? (page 24–25)
 - Have we disclosed the full costs of services or treatment before a consumer is committed to purchasing the services or treatment? (page 24)
 - Are claims about the time taken for services or treatment and/or the possible effects accurate? (page 25–26)
 - Have we taken care to ensure that claims in relation to time do not incorrectly imply that services are minor and of minimal risk? (page 25–26)
 - Should any relevant financial interests be disclosed to consumers? If so, have they been? (page 26)
 - Do we have a complaints mechanism and policy in place? (page 31)
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10

More information

The ACCC publishes a wide range of information about the Act. Publications are available from all of the offices listed at the end of this guide.

Much of this material is also available online at the ACCC's Internet websites at <http://www.accc.gov.au> and <http://gst.accc.gov.au>

The ACCC also sells a comprehensive multimedia trade practices compliance training package called *Best & Fairest*. It covers all provisions of the Act and is suitable for either self-instruction or as a teaching resource by an instructor/teacher. Many businesses, both large and small, have now introduced compliance training based on *Best & Fairest*.

Some private commercial operators also provide trade practices information and training services.

While ACCC staff are pleased to discuss with you how the Act may apply to your business, they cannot give you specific legal advice or make authoritative determinations of law. These are matters for your own legal advisers and the courts.

Further information about your rights and obligations under the Act can be obtained from your own solicitor, and in some cases, from your professional association. Trade practices compliance programs are available from various professional agencies, including solicitors and specialist consultants.

Your local State or Territory consumer affairs or fair trading agency will also be able to provide information on the operation of the relevant Fair Trading Act.

Your local health department, registration board and health complaints office can also provide advice on specific professional regulations that may apply to your practice.

ACCC offices

ACT (national office)

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Health complaints offices

ACT

Health Complaints Unit
GPO Box 1321
CANNBERRA ACT 2601

Tel: (02) 6205 2222

New South Wales

Health Care Complaints Commission
Locked Bag 18
STRAWBERRY HILLS NSW 2012

Tel: (02) 9219 7444

Victoria

Health Services Commissioner
30th floor
570 Bourke Street
MELBOURNE VIC 3000

Tel: (03) 8601 5222

South Australia

SA State Ombudsman
5th floor, East Wing
50 Grenfell Street
ADELAIDE SA 5000

Tel: (08) 8226 8699

Queensland

Health Rights Commission
Level 19, Jetset Centre
288 Edward Street
BRISBANE QLD 4000

Tel: (07) 3234 0272

Western Australia

Office of Health Review
7th floor, Albert Facey House
469 Wellington Street
PERTH WA 6000

Tel: (08) 9426 0100

Tasmania

Health Complaints Commissioner
23 Kirksway Place
HOBART TAS 7000

Tel: (03) 6233 6348

Northern Territory

Health & Community Services
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GPO Box 1344
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Tel: (08) 8981 8699

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