

Fair treatment?

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Summary of the Guide to the Trade Practices Act 1974 for the advertising or promotion of medical and health services

*with tips for consumers on interpreting
advertising and selection of medical
and health services*



**Australian
Competition &
Consumer
Commission**

Relaxing of the many previous legal restrictions on advertising has widened markedly the opportunities for medical and health sector professionals to communicate directly with consumers and is enabling consumers to make better-informed decisions. For many medical and health professionals advertising is not familiar territory. The Trade Practices Act 1974 (the Act) is one of the main national instruments for regulating advertising and other promotional activity. State and Territory regulators operating under their Fair Trading Acts provide additional important controls especially on professional businesses that are not companies. Health complaint offices and medical and other Health practitioners' registration boards in each of the States and Territories can also play a major role in regulation of advertising in the medical and health sectors.

The Australian Competition and Consumer Commission and the Health Care Complaints Commission of NSW (acting in consultation with and on behalf of its sister organisations in each of the other States and Territories) have produced the guide *Fair treatment? Guide to the Trade Practices Act for the advertising or promotion of medical and health services*. 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 requirements of the Act. The guide is available on the ACCC website at <<http://www.accc.gov.au>> or from ACCC offices or health complaints offices listed on the back page. This brochure summarises, for providers of medical and health services, the information in *Fair Treatment*. It also includes, for consumers, a brief discussion of relevant issues and a checklist.

How advertising can help health professionals and consumers

Consumers can be disadvantaged since a provider of a medical or health service knows more than the consumer about the service. This disparity in knowledge can tempt some providers into oversupplying services or advertising unrealistic expectations. Such deceptive conduct could cause a consumer to suffer long-lasting physical, psychological or financial effects. In contrast, honest and accurate information presented in a readily, understandable way can help consumers decide on services and procedures and choose between providers. Consumers are best protected when they are fully-informed and when medical and health professionals maintain professional and ethical standards.

Making your services known

The value of advertising as a way to inform consumers is often overlooked and its use not fully realised. It could be used more by medical and health practitioners to make themselves better known to prospective patients and referring doctors to promote their specialties and explain pricing of services. Consumers would benefit not only from knowing more about a service but also more about qualifications and experience of service providers. Professional bodies could also advertise more widely the differences between one another, the services their members provide and the value to be gained by choosing one of their members to provide the relevant services.



Honest and accurate advertising

While honest and accurate advertising about services and providers can be invaluable to consumers, it is equally true that false, misleading or deceptive advertising may lead to badly-informed decisions and cause harm.

The Act obliges companies (including professional-practice companies) to avoid advertising in a way likely to mislead or deceive. This can lead to disputes. For example, has an outcome been implied even though not stated explicitly? Are any predictions on outcomes justified? If an advertisement is disputed, the court will assess how ordinary healthcare consumers will perceive the message and what overall impression is created by the advertisement.

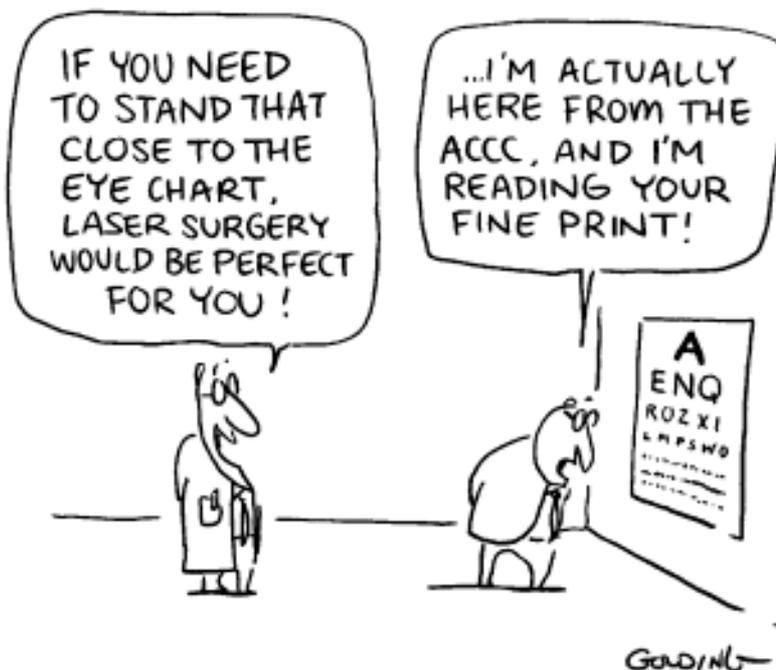
Complying with the Act

To ensure they are complying with the Act advertisers should know beforehand they can substantiate their claims, particularly those on outcomes. They should also consider whether what is left unsaid may be misleading or deceptive. Problems have arisen over the use of before and after photographs of patients and of photographs of models who have not undergone the procedure advertised.

As it is the overall impression of an advertisement that counts, an argument that conditions in fine print exempt an advertisement from being misleading may not be accepted by the court. Similarly, the court may decide that a disclaimer or qualification may not counteract the overall impression given by the main text. The promotional

method used will have a strong bearing on the acceptability of conditions. 'Fine print' qualifications that may be acceptable in a booklet may not satisfy the court if presented in a television commercial.

Comparative advertising, while potentially an effective promoter of competition, can easily create problems. The Act is less likely to be breached by comparative advertising if advertisers ensure, for example, they compare like with like (and include any conditions that apply to their offer) and are up-to-date with a competitor's service or prices.

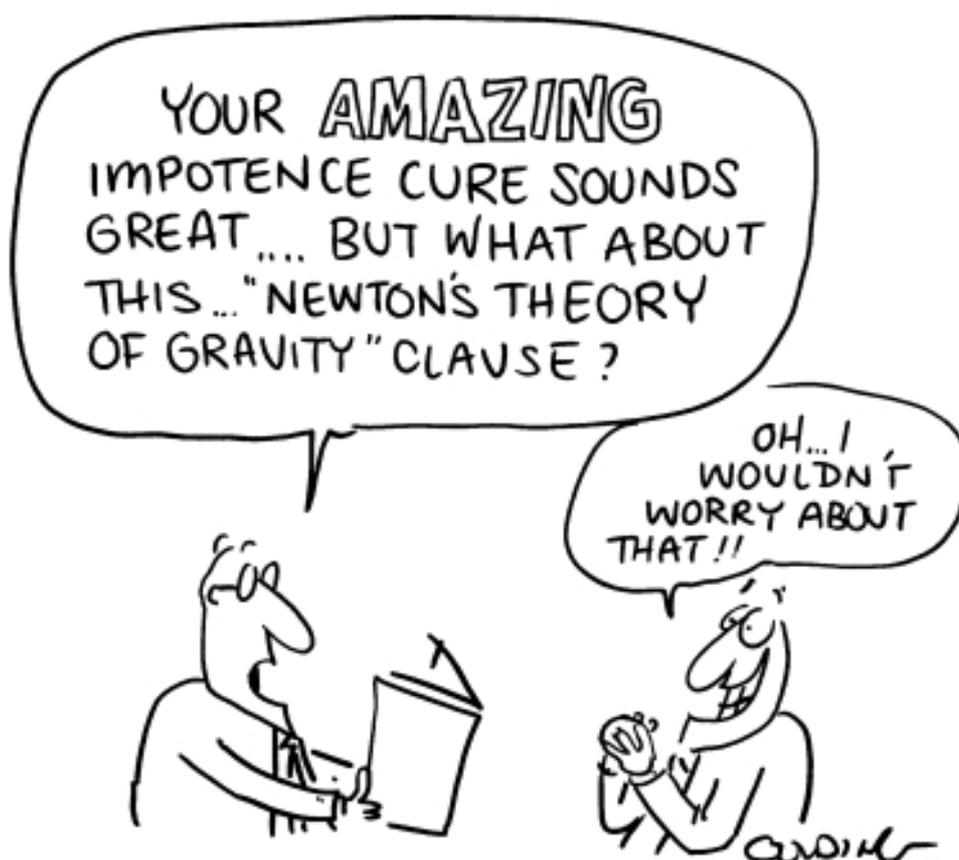


Tips for trouble-free advertising

- Ensure content and context of all promotional statements are honest and accurate.
- Although not necessarily illegal avoid, or use cautiously, self-evident exaggeration and 'puffery' in healthcare advertising.
- 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.
- Don't advertise advantages of your services or products that are based on guesses or predictions unless you have good reason to believe they will come true and have some facts and figures to back them up.
- If you provide advice in an advertisement to help a person assess whether they suffer from a condition, make it clear that it does not replace a detailed medical examination and consultation.

Some advertising that has attracted ACCC attention

Advertisements for some types of healthcare services — notable examples include laser eye surgery, impotency treatments, haemorrhoid treatments and hair removal treatments — have caused more concerns than others. Offending advertisements often exaggerate benefits of the service, require or suggest self-diagnosis, and misuse titles and qualifications, testimonials and photographs. The ACCC has acted against some advertisers of laser eye surgery who stated or implied, without suitable qualifying text, that those treated will not need to wear glasses again. Advertisements for an impotency treatment made exaggerated claims that the treatment was the only one ever proven to work and that four treatment programs gave guaranteed results. Hair removal promotions sometimes misleadingly imply that a given treatment or a specific number of treatments will permanently remove hair. The ACCC obtained compensation for purchasers of devices including an 'ion mat' and 'parasite zapper' on the grounds that claims had been advertised that could not be substantiated about their capacity to cure various ailments such as back problems, obesity, leukemia and AIDS.



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 included 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

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.

Use of '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. That is:

... 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 — laser refractive eye 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

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 — hair removal

The words 'gone for good' were used in advertisements by Beautician's Laser Clinic (BLC). The ACCC considered these words implied that once applied to an area of skin, hair would not grow there again. In fact it has been substantiated only that laser treatment may permanently prevent the regrowth of hair removed during growth phase. The advertisements ignored the possibility that hair may later grow from follicles that were inactive at the time of treatment. BLC offered a refund to consumers misled by the claim and a court enforceable undertaking to not make similar claims.



How is the Act enforced?

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 legal 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;
- refunds; and
- corrective advertising.

Enforceable undertakings

Rather than instituting legal proceedings, the ACCC may choose to settle a matter administratively. This can be done by accepting enforceable undertakings from an organisation or person who has allegedly breached the Act. Enforceable undertakings may include requirements for:

- compensating consumers;
- running corrective advertisements; and
- introducing a trade practices compliance program.

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. Breaching the Act can also lower the esteem in which a profession or its association is held by the community.

Enforcement action by health complaints offices, fair trading agencies and others

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 State or Territory health complaints offices contact details are located on the back page of this brochure.

The State and Territory Fair Trading agencies could also take action to enforce the consumer protection provisions of their Fair Trading Act which generally mirror the consumer protection provisions of the Act. Their contact details are on the back page of this brochure too.

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.

Checklist for practitioners

The following checklist provides a list of tips to help healthcare professionals avoid misleading or deceptive advertising of 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?
- Is the content of the promotional message appropriate for the media chosen?
- 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 vulnerability of our target audience?
- Have we considered the fact that the media chosen to reach our target audience may also reach other consumers?
- Can our claims be substantiated on an objective basis?
- Do we have reasonable grounds to make statements about future matters, including the effects of treatments?
- Have we explained all limitations and qualifications on promotional offers?
- Are all material terms and conditions located in the main text of promotional material?
- Where disclaimers and qualifications have been used, are they clearly drawn to the consumer's attention?
- If comparisons are made with other services or service providers, are these comparisons fair, accurate and current?
- Have we understated/overstated the risks involved?
- Have we understated/overstated the pain involved?
- Have we understated/overstated the likely effects or results?
- Have we used the terms 'surgeon', 'doctor' or 'specialist' in a way that may be misleading or deceptive?
- Have we used irrelevant qualifications or memberships as a marketing tool, without clearly explaining what those qualifications and memberships represent?
- Where reference has been made to certification or approval, is this reference accurate?
- Is the certification or approval relevant to the claim being made or implied?
- Where testimonials are used, are they an accurate representation of the outcomes of the treatment for the person giving the testimonial?
- Is the person providing the testimonial willing and able to be contacted?
- Is it clear the testimonial relates only to the outcome for that particular person, and should not be considered a guarantee it will be achieved for all?
- When before and after photographs are used, are they standardised — e.g. taken using the same light, poses and photographic techniques?
- Are those appearing in before and after photographs willing and able to be contacted?
- When models are used, is it clear to consumers that the models have not undergone the procedure being promoted?
- Are our claims about Medicare and insurance costs accurate and complete?
- Have we disclosed the full costs of services or treatment before a consumer is committed to purchasing the services or treatment?
- Are claims about the time taken for services or treatment and/or the possible effects accurate?
- Have we ensured that claims about time do not incorrectly imply services are minor and of minimal risk?
- Have we disclosed any relevant financial interests to consumers?
- Do we have a complaints mechanism and policy in place?

Tips for consumers on interpreting advertising and selection of medical and health services

Medical practitioners and many other health services providers are professional people. One of the characteristics of a profession is that their members should put the interests of the community and therefore their patients or clients before their private interests. Professional people also agree to abide by ethical obligations which generally means that they strive for excellence in their professional and personal dealings.



However, as with any sector in the community it is important to bear in mind that medical practitioners and other health sector professionals are human — that is, they are fallible — they do make mistakes and some members of a profession may not practise the level of professionalism that one would expect. Occasionally, some may even breach legal obligations.

As most people would readily acknowledge a person's good health and medical welfare is one of their greatest assets in life.

Unfortunately one doesn't always get the opportunity to select the medical or health service or the professional practitioner of choice to provide it — for example in urgent or emergency situations. However, there are many instances where medical and health services are not required urgently and medical and health services are often chosen on an elective basis (that is, where there is no medical necessity for the service).

In these many instances, to safeguard or even enhance your health asset it is important for you to be vigilant in choosing the appropriate medical and health care provider and service.

In addition to appropriate qualifications and experience, effective communication is a key to good health and medical care. The aim is to form a trusting partnership with your medical or health service provider. Worry can be common for people with health or medical concerns. One of the best ways to overcome worry is knowledge. It is appropriate to seek out and if necessary demand the knowledge. It is not a question of trying to become a medical or health services practitioner. It is a question of having sufficient knowledge to help you understand your medical or health problem and the treatment you receive — and of having confidence in your health or medical services provider for the most effective medical care and outcome.



While a picture may say a thousand words and information presented in glossy or other advertisements may make it easier for some people to absorb or understand the information — as with all ways of providing information there are limitations and/or costs.

Get as much information you can from healthcare advertising but use the information wisely. Ask yourself whether you feel there may be insufficient or inaccurate information supplied and, if so, see if the service provider can tell you more.

Beware of advertising that promotes self-diagnosis. While consumers can benefit from more information on diseases, diagnosis and treatments, bear in mind that advertising is no substitute for undergoing a detailed medical examination and consultation.

Look for and read any conditions or qualifications that may be supplied in fine print or away from the main message of the advertisement. Before deciding whether to undergo a procedure, discuss the claims made with the provider. Under questioning, the provider may qualify assertions made in an advertisement.

Checklist for consumers

The following checklist provides a list of tips to help consumers of medical and health services interpret advertising and seek advice to help them decide on services and procedures. It does not try to be exhaustive — it does try to encourage consumers to be vigilant whenever they are choosing medical and health services or practitioners.

- If an advertisement predicts an outcome (e.g. cure) ask yourself whether it appears exaggerated and unlikely to be backed up by reasonable evidence. If in doubt ask the provider about proof of their claims.
- Be wary of 'miracle cure' advertisements. If a 'medical breakthrough' really has occurred in the treatment of a serious illness — would the news be announced first in an advertisement? Ask others (e.g. another doctor, pharmacist and healthcare professional) about the 'medical breakthrough'.
- Read limitations and qualifications on the value of a procedure carefully. Ask if you think there may be other limitations that could apply.
- Are there terms and conditions perhaps in small print or at the bottom of an advertisement that you have not read?
- When testimonials are included, can you be sure they accurately represent the outcomes claimed?
- Is it clear the testimonial relates only to the outcome for that particular person, and should not be considered a guarantee the same outcome will be achieved for all? Is the person providing the testimonial willing and able to be contacted?

- Be cautious when basing decisions on before and after photographs used to promote a service. They may not be standardised (e.g. different lighting, poses and photographic techniques).
- Note that an advertisement may show a model who has not undergone the procedure being promoted.
- If comparisons are made with other services or service providers, do the comparisons appear fair, accurate and current.
- Do you know what qualifications a provider has? Can you understand what the letters after a provider's name mean? Do you have doubts about whether the provider is using terms such as 'surgeon', 'doctor' or 'specialist' accurately.
- Beware of irrelevant qualifications or memberships used as a marketing tool in advertisements. If in doubt ask.
- Do you know whether the advertised 'treatment' or 'procedure' actually involves surgery?
- Ask if you don't understand the risks or side-effects associated with a procedure or service.
- Is the result from the treatment/procedure or surgery likely to be 'permanent'? What are the factors affecting the long term effects of the treatment/procedure or surgery?
- How many visits will I need?
- What other services do I need as part of this treatment/procedure or surgery, e.g. pathology services, radiology services, anaesthesia services, rehabilitation services? Who provides these and what does that involve?
- Have others needed follow-up treatment/procedure/surgery? How often? Why? With what outcome?
- Am I likely to need follow-up treatment/procedures/surgery? What factors make it more likely or less likely for me?
- Do you know how long it will take to recover, e.g. from pain or achieving movement after a procedure? Ask if you need more information on the level of pain you may feel during or after a procedure or how long it will take to recover.
- Check with the provider if you think the likely effects or results of a procedure have been understated/overstated in an advertisement.
- Be cautious about claims that a procedure or device has been approved by, for example, an association of practitioners or a government department. In particular, is the approval a general one and not specifically for the claims being made?
- Do you understand what rebates you can expect from Medicare or private insurance? And that even though you have private insurance you may have to pay for the gap between the amount charged and the health insurance rebate.
- Make sure the provider has disclosed the full costs of services or treatment before you commit yourself.
- Ask a healthcare professional advising you if you suspect there may be a conflict of financial interest (e.g. between a practitioner and clinic or other service provider) that could be influencing their advice.
- If you feel that your medical practitioner or health service provider is not listening to you or is dismissing you — you have the right to seek a second opinion.
- When choosing elective treatment or surgery — take your time in making the decision. If possible, talk it over first with other trusted advisers including family members, friends or other professionals.
- If you think misleading healthcare advertising has caused you to make a wrong decision, contact a health complaints office in your State or Territory, one of your State or Territory consumer affairs or fair trading agencies, or the ACCC (see back page for contact details).

ACCC offices

ACT (national office)
470 Northbourne Avenue
DICKSON ACT 2602

Tel: (02) 6243 1111 Fax: (02) 6243 1199
Email: cbrcompl@acc.gov.au

New South Wales

Level 5, Skygardens
77 Castlereagh Street
SYDNEY NSW 2000

Tel: (02) 9230 9133 Fax: (02) 9223 1092
Email: glen.barnwell@acc.gov.au

Tamworth

39 Kable Avenue
TAMWORTH NSW 2340

Tel: (02) 6761 2000 Fax: (02) 6761 2445
Email: tamworth@acc.gov.au

Victoria

Level 35, The Tower Melbourne Central
360 Elizabeth Street
MELBOURNE VIC 3000

Tel: (03) 9290 1800 Fax: (03) 9663 3699
Email: melcompl@acc.gov.au

South Australia

ANZ House
13 Grenfell Street
ADELAIDE SA 5000

Tel: (08) 8213 3444 Fax: (08) 8410 4155
Email: adlcompl@acc.gov.au

Queensland

10th floor, AAMI Building
500 Queen Street
BRISBANE QLD 4000

Tel: (07) 3835 4666 Fax: (07) 3832 0372
Email: bnecompl@acc.gov.au

North Queensland

Level 6, Commonwealth Bank Building
Flinders Mall,
TOWNSVILLE QLD 4810

Tel: (07) 4729 2666 Fax: (07) 4721 1538
Email: inquiries.townsville@acc.gov.au

Western Australia

3rd floor, East Point Plaza
233 Adelaide Terrace
PERTH WA 6000

Tel: (08) 9325 3622 Fax: (08) 9325 5976
Email: percompl@acc.gov.au

Tasmania

3rd floor, AMP Building
86 Collins Street
HOBART TAS 7000

Tel: (03) 6215 9333 Fax: (03) 6234 7796
Email: hbtcompl@acc.gov.au

Northern Territory

Level 8, National Mutual Centre
9-11 Cavenagh Street
DARWIN NT 0800

Tel: (08) 8946 9666 Fax: (08) 8946 9600
Email: dwncompl@acc.gov.au

Health complaints offices

ACT

Health Complaints Unit
GPO Box 1321
CANBERRA 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
Complaints Commission
GPO Box 1344
DARWIN NT 0801
Tel: (08) 8981 8699

Fair Trading offices

ACT Consumer Affairs Bureau

Level 2, GIO HouseCity Walk
CANBERRA ACT 2600

Tel: (02) 6207 0400

NSW Department of Fair Trading

Ground Floor, 1 Fitzwilliam Street
PARRAMATTA NSW 2150

Tel: (02) 9895 0111

WA Ministry of Fair Trading

219 Georges Terrace
PERTH WA 6000

Tel: 1300 30 40 54

NT Office of Consumer Affairs and Fair Trading

Minerals House
66 The Esplanade
DARWIN NT 0801

Tel: (08) 8999 5184

Queensland Office of Consumer Affairs

21st floor, State Law Building
Cnr George & Ann Streets
BRISBANE QLD 4000

Tel: (07) 3246 1500

Tasmanian Consumer Affairs & Fair Trading

15 Murray Street
HOBART TAS 7000

Tel: (03) 6233 4567

SA Office of Consumer and Business Affairs

Level 4, Chesser House
91-97 Grenfell Street
ADELAIDE SA 5000

Tel: (08) 8204 9777

Consumer and Business Affairs Victoria

Level 2, 452 Flinders Street
MELBOURNE VIC 3000

Tel: (03) 9627 6000