



Case study— impotency treatments

With new treatments like Viagra on the market there are now many specialist clinics treating impotency. Many of these clinics 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.

One 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.

The court found that the terms 'only' and 'ever' were quite unequivocal and admitted 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.



The ACCC has published a guide to the Trade Practices Act for the advertising or promotion of medical and health services called Fair treatment. A summary of the guide is also available.

Both publications are available on the ACCC website at <<http://www.accc.gov.au>> or contact the publishing unit on (02) 6243 1143 or at <publishing.unit@accc.gov.au>.

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 surgery clinics have promoted laser eye surgery as an alternative to corrective lenses. Promotional claims included that:

- the procedure was safe and effective
- the procedure was painless or virtually painless
- patients would never wear glasses again
- more than 99 per cent of patients could 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). Furthermore, some risks, including the risk of blindness, have been associated with laser refractive eye surgery.

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— Crowded Planet

In March 2002 the Federal Court in Sydney found that David Zero Population Growth Hughes had engaged in misleading and deceptive conduct and made false representations about the supply of oral contraceptives through his Crowded Planet website.

He had not disclosed significant health risks associated with the use of oral contraceptives by particular people, and that in Australia and the United States of America (where the server for the site was based) it is illegal to buy or supply oral contraceptives without a prescription.

The court made orders restraining the supply of oral contraceptives in Australia without making specific disclosures, and supply to people in the USA.

Hughes sought leave to appeal beyond the statutory time for appeal but this was refused.

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 ordinary members of the target audience will receive your promotion. 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 or 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.



One of the ACCC's roles is to look at whether proposed mergers will substantially lessen competition.

Section 50 of Part IV of the Trade Practices Act prohibits mergers or acquisitions which would have the effect, or be likely to have the effect, of substantially lessening competition in a substantial market for goods or services in Australia, in a state, territory or region.

However, under s. 87B of the Act the ACCC can accept written undertakings that address competition concerns from a party proposing a merger.

For example, a company might undertake to sell some of its assets to reduce the anti-competitive effect of any merger.

2. Queensland Medical Laboratory by Mayne Group Ltd—announced 22 July 2002.

The ACCC considered the relevant market was the approximately state-based markets for the supply of pathology services (excluding pathology services provided to public in-patients) in Queensland, New South Wales and the Northern Territory. The ACCC found the acquisition was unlikely to substantially lessen competition in any market.

because the market share figures of the proposed acquisition will not exceed the ACCC thresholds, the availability of substitutes and the countervailing power at the hands of the health funds.

5. Radclin and East Melbourne Medical Imaging by Medical Imaging Australia—announced 2 October 2001.

MIA is the largest supplier of radiology and nuclear medicine services in Australia. It encompasses a diverse range of practices from

Mergers

—the case for and against coming together

Unopposed acquisitions

1. Astrazeneca's dental injectable anaesthetic assets by Dentsply (Australia) Pty Ltd—announced 28 August 2002.

The parties distribute dental local anaesthetics throughout Australia. Astrazeneca was involved in the manufacturing process as the only Australian-based registered manufacturer of dental local injectable anaesthetics. The ACCC decided that the relevant market was the national market for the supply of dental local injectable anaesthetics.

Despite the fact that the merged entity's market concentration exceeded the ACCC concentration thresholds, the ACCC concluded that the merged entity's ability to exercise market power was likely to be constrained by the existence of high levels of imports, the likelihood of new entry and the countervailing power of customers.

3. Port Macquarie Medical Imaging by Mayne Group Ltd—announced 2 April 2002.

PMMI is a major provider of medical imaging services in the mid-north coast of NSW. Although PMMI is the largest provider of diagnostic imaging services in the region, the ACCC decided not to oppose Mayne's acquisition of PMMI as Mayne does not have any presence in diagnostic imaging in the region. The acquisition represents a change of ownership but not a change of the number of competitors.

4. Wagga Wagga Day Surgery by Calvary Health Care Riverina Inc—announced 19 March 2002.

The ACCC considered the relevant market to be the supply of surgical services to patients in the south-western region of NSW. The ACCC concluded that the proposed acquisition was unlikely to result in a substantial lessening of competition

general X-ray clinics to full-modality radiology practices. MIA was listed on the Australian Stock Exchange and consists of 115 member practices around Australia. Radclin services 20 locations throughout greater Melbourne, performing all imaging modalities, including MRI, nuclear medicine and CT.

The ACCC's concerns regarding an increase in market concentration were mitigated by the fact that public hospitals do compete against private radiology practices for private patient referrals. In addition, there were also a number of diagnostic imaging groups with multiple practice locations in the southern and eastern Melbourne metropolitan areas where the competitive overlap between MIA and Radclin was at its greatest.

Opposed acquisition

Benson Radiology by Medical Imaging Australia—announced 23 May 2001.

Benson Radiology is one of three main private radiology practices operating in the Adelaide region along with Perrett Medical Imaging and Dr Jones & Partners. MIA owns Perrett Medical Imaging.

The ACCC conducted extensive market inquiries and found that the proposed acquisition would lead to a substantial lessening of competition for the provision of radiology services to private patients in the Adelaide region. It found during the course of its inquiries that there was limited competitive overlap between private radiology and public radiology departments.

Opposed, then allowed

Australian Hospital Care by Mayne Nickless Limited—opposed 16 January 2001; allowed 29 January 2001.

If this merger had gone ahead without modification Mayne would have had market shares close to 90 per cent on the Gold Coast and 40 per cent in Melbourne.

After the ACCC announced that it proposed to oppose the merger, Mayne offered undertakings to divest four hospitals. This meant the merged company's market share of private hospital beds in metropolitan Melbourne would be reduced to around 30 per cent and that the current market concentration levels on the Gold Coast were maintained. It also meant that health insurers would have an option other than Mayne when negotiating Hospital Purchaser Provider Agreements in each of the areas.

Authorised merger

The ACCC can also grant an authorisation of a merger under Part VII of the Act. (See article on authorisations and notifications on p 15)

On 12 September 2002 the ACCC announced that it would not authorise the merger of Australian Pharmaceutical Industries and Sigma, as there was insufficient public benefit to outweigh the harm to competition. The ACCC had previously announced on 17 April 2002 that it would oppose the proposed merger between API and Sigma under the s. 50 test.

In making the decision the ACCC considered that the merger would have created a company with 60 per cent of the pharmaceutical wholesaling market in NSW, Victoria and Queensland and more than 50 per cent in other states. Together with Mayne, the only other major wholesaler, the two companies would account for almost 90 per cent of the market.

The ACCC said the scope for parallel conduct between the merged entity and Mayne would be significant. Over time, the real possibility of decreased service levels and higher prices to pharmacists exists and there is a danger that this could be transferred and passed on to consumers in the form of higher prices in some instances.

Loyalty arrangements, such as banner groups and financial guarantees for pharmacists, which effectively tie pharmacists to wholesalers, limit the likelihood of entry by new competitors into the market.

The deterioration in competitive pressures as a result of the merger would be a major public detriment.

API and Sigma had claimed there would be benefits from the merger which outweighed any detriment, including efficiency gains, continued community access to pharmaceuticals, enhanced community health services and reduced Commonwealth expenditure on the Pharmaceutical Benefits Scheme.

However, while accepting there would be some public benefit the ACCC decided that the benefits did not outweigh the harm to competition.

The ACCC was not satisfied that proposed undertakings given by the applicants would resolve key competition concerns or that they would shift the balance of public benefit and public detriment.

During the authorisation process the ACCC received over 120 submissions from a diverse range of interested parties including pharmacists, pharmaceutical manufacturers, pharmaceutical wholesalers, logistics providers, financial analysts and government agencies.

See the ACCC's *Merger guidelines*, hard copy available for \$10 from <publishing.unit@accc.gov.au> or (02) 6243 1143. Also available on our website at <<http://www.accc.gov.au>>.



—finding and keeping country doctors

On 29 August 2001 the Federal Government announced a review of the impact of Part IV of the Trade Practices Act on the recruitment and retention of medical practitioners in rural and regional Australia. The review was chaired by Mr Warwick Wilkinson.

The ACCC made two submissions to the review, submitting that there is no evidence the TPA hinders the recruitment or retention of doctors in the bush and that the shortages in rural health could be attributed to a multitude of reasons such as, lifestyle considerations, remuneration, family issues and indemnity insurance.

There are continuing assertions that genuine rosters are a breach of the Act. The ACCC has repeatedly and publicly said the Act doesn't prevent doctors from taking a much needed break from work while reaching an agreement with their colleagues to ensure that medical services continue to be available. **Genuine rosters are not a breach of the Act.**

Some interest groups want doctors exempted from the Act, saying the medical profession is different to any other sector in the community. Essentially, this is asking for doctors to be able to engage in anti-competitive conduct such as price-fixing and boycotts without restraint.

The professions, including the health sector, remain a priority area for the ACCC. It will investigate claims of independent doctors getting together and collectively agreeing to boycott bulk-billing, or independent doctors agreeing among themselves not to bulk bill and charge a collectively fixed fee to patients.

To help general practitioners understand trade practices law, the ACCC is writing a guide specifically for doctors. It will be finalised soon and will take into account the recommendations from the Wilkinson Review and the ACCC's final determination on the Royal Australian College of General Practitioners.



ACCC chairman leaving



Professor Allan Fels, AO, Chairman of the ACCC and its predecessor the TPC from 1991, has announced he will leave the ACCC on 30 June 2003. This cuts short his current appointment by one year.

He will resign to become Foundation Dean of the new Australia and New Zealand School of Government (ANZSOG).

Highlights during his TPC and ACCC chairmanships include:

- TPC enforcement of the competition and consumer

protection sections of the Trade Practices Act was substantially increased

- substantial increases in court-determined penalties
- extended coverage of the Trade Practices Act through *The Competition Policy Reform Act 1995*
- the 1995 merger of the Prices Surveillance Authority and the Trade Practices Commission to form the Australian Competition and Consumer Commission

- ACCC's role extended to cover major public utilities at federal level
- a general access regime under Part IIIA of the Act introduced
- the ACCC's three year enforcement role during the transition to the GST
- Trade Practices Act extension to deal with issues concerning small business
- Most recently, the ACCC submission to the Dawson Inquiry on the adoption of criminal sanctions for hard core collusion under Part IV of the Act.

The Treasurer has indicated he will be calling for nominations for Professor Fels' successor and the deputy chair position which has been vacant since the departure of Allan Asher.