



Australian  
Competition &  
Consumer  
Commission

# ACCC *update*

Issue 12, January 2003



Fair treatment—advertising and the health sector

Protecting consumers

Mergers—the case for and against coming together

Keeping it competitive

ACCC keeps an eye on health funds



Australian  
Competition &  
Consumer  
Commission

# ACCC update

Issue 12, January 2003

© Commonwealth of Australia 2003  
ISSN 1443-0681

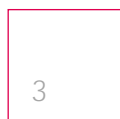
## IN THIS ISSUE



The ACCC and  
the health sector



Looking before leaping—  
checking up on  
medical advertising



ACCC to monitor medical  
indemnity insurance



Getting immunity from  
court action



Q & A with  
Sitesh Bhojani,  
ACCC Commissioner



Fair treatment—  
advertising and  
the health sector



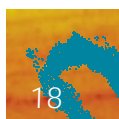
Protecting consumers



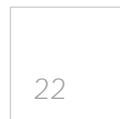
Where there's smoke...  
the ACCC and the  
tobacco industry



The search for scammers



Mergers—the case for and  
against coming together



Meet some of the  
ACCC health team



Keeping it competitive



ACCC health sector  
publications



ACCC keeps an  
eye on health funds



Wilkinson review—  
finding and keeping  
country doctors



Commission contacts



ACCC Chairman leaving





## The ACCC and the health sector

The health sector—including the professionals themselves, professional associations, health funds and private hospitals—is not immune from the Trade Practices Act.

Like other businesses across Australia, those within the sector have to comply with the Act, which aims to ensure fair play—between professionals competing for business, and between professionals and their customers.

This means that all health professionals (except those who are employees) are liable if they engage in anti-competitive conduct. They are also liable under consumer protection provisions for misleading or deceptive conduct.

Since advertising restrictions for health products and services were lifted, professionals in the industry must now be extremely vigilant in how they represent themselves to the public. The same vigilance applies to health funds in promoting their products.

This special health issue of *ACCC update* will give professionals, funds and hospitals information that will help them avoid breaching the Act and understand the ACCC's role and obligations in enforcing the Act.

It also aims to give consumers information to help them avoid being taken advantage of by unscrupulous traders.

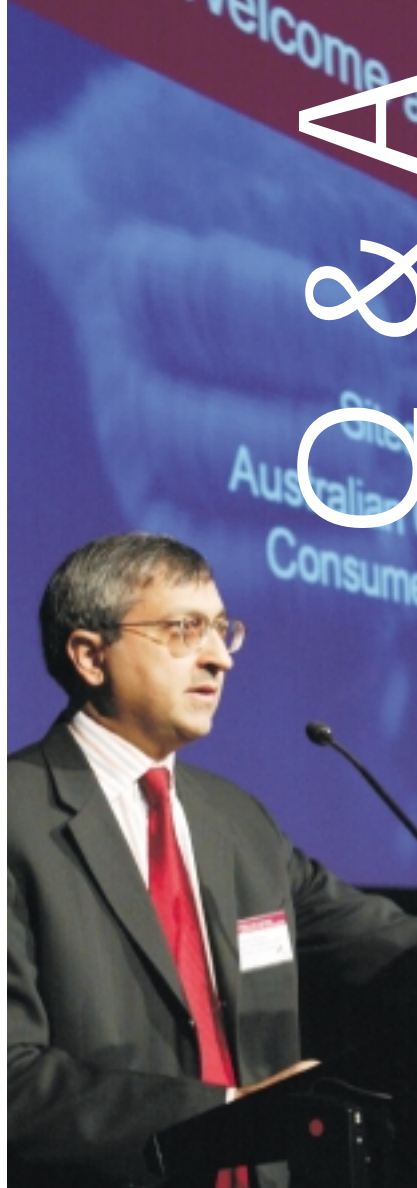
*ACCC update* also takes a look at what the ACCC has been up to in recent times in regard to the health sector, including some of the cases it has been involved with and the important work it has undertaken for the Commonwealth Government.



On 23 October 2002 the Prime Minister announced a new medical indemnity framework that would address rising medical indemnity insurance premiums and ensure a viable and ongoing medical indemnity insurance market.

As part of that package the PM has asked the ACCC to monitor medical indemnity premiums to determine whether they are actuarially and commercially justified.

The ACCC intends to provide its first report to the government by the end of 2003.



Sitesh Bhojani, ACCC Commissioner since 1995, oversees activities in the health sector. Here he answers some of the most frequently asked questions about the ACCC and the health sector:

## Q & A with Sitesh Bhojani, ACCC Commissioner

### Q. What is the role of the ACCC in the health sector?

A. For most sectors, including health, the ACCC's major role is to ensure compliance by businesses with the requirements of the Trade Practices Act. In some other sectors, for example telecommunications, it also has a significant regulatory role.

### Q. How does competition between businesses help consumers get better quality products or lower prices?

A. Customer choice is a powerful incentive for the suppliers of any goods or services to keep their quality high and prices low. By ignoring what customers want or by not keeping prices competitive a business will lose its competitive place in the marketplace.

### Q. Is it true you have said the ACCC will vigorously enforce compliance with Australia's competition and consumer protection laws?

A. Yes, we will pursue compliance without fear or favour.

### Q. What's the benefit of these laws being vigorously enforced?

A. Commonwealth, state and territory parliaments have passed these laws to prohibit businesses from engaging in specified anti-competitive or unfair trading practices—in the public interest and to protect consumers. While some businesses may have modified their behaviour on learning about their legal obligations others may not.

Vigorous enforcement encourages businesses to respond to what consumers want rather than doing cosy deals among themselves for their own benefit, or unlawfully using their market power—which is all ultimately to the detriment of consumers. In short, it helps clarify how the law applies; stops, prevents and deters unlawful conduct and/or provides redress for victims of the unlawful conduct.

Let me give you two examples. The breaking up of price fixing cartels gets rid of artificial arrangements between competitors to increase or maintain prices. And legal action for false, misleading or deceptive conduct can provide benefits ranging from protecting the public from consumer fraud in trade or commerce to ensuring there is an acceptable standard for commercial conduct in the public interest.

### Q. When the ACCC takes legal action what are its objectives?

A. Broadly they can be summarised as follows:

- to establish that there has been unlawful conduct (including clarifying the law or establishing precedent)
- to stop the unlawful conduct
- to seek compensation/restitution for victims of the conduct
- to undo the effects of the contravention

- to prevent/deter future contraventions (repetition by the same person or first contravention by someone else)
- to punish the wrongdoer.

The details are dealt with case by case.

### Q. How else does the ACCC try to achieve compliance with Australia's competition and consumer protection laws?

A. By major educational efforts to help people understand their rights and obligations. For example, we issue guidelines and other publications for specific sectors, and we give presentations at conferences, seminars or association meetings. Other examples include the competing fairly forums that are broadcast to hundreds of regional and rural communities, and our small business, and rural/regional outreach programs.

### Q. In your view how can consumers of health and medical services best be protected?

A. I think there are three elements. First, when consumers are fully informed. Second, when medical practitioners and other healthcare professionals maintain professional and ethical standards (that is, they strive for excellence in their professional and personal dealings). Third, when effective laws exist to provide quick and effective remedies for consumers who become victims of those occasional instances when professionals breach their legal obligations.

### Q. Isn't the application of competition and consumer protection laws inconsistent with the ethical obligations professionals have towards their clients or patients?

A. In my view ethical obligations are not about prescriptive rules and regulation nor are they about

complying with the law (that is, legal obligations). Ethics is really about achieving something much higher than obeying the law—it is about pursuing excellence. As such I don't believe there is any conflict between a professionals ethical obligations and compliance with the competition and consumer protection laws (that is, a professionals legal obligations).

**Q. What about the fiduciary obligations professionals have towards their clients or patients?**

A. In Australia there are certain relationships that the law recognises as fiduciary relationships. These are relationships of trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. However, it cannot properly be said that a relationship between any professional and a client is a 'fiduciary relationship'.

There is probably nothing about the fiduciary relationship between a professional and a patient or client that requires a professional to engage in price fixing with competitors; or to engage in a misuse of market power; or to engage in exclusive dealing, resale price maintenance or other conduct prohibited by competition laws.

In the Australian context there is also a further response when something that is anti-competitive is really for the patient's or client's benefit—that is, for the public's benefit as distinct from being a private benefit for the doctors/lawyers etc. The Parliament has set up a mechanism that allows that type of conduct to continue with immunity from court action, namely, through authorisation. That is, if professionals can demonstrate that the public benefit of that conduct outweighs its anti-competitive detriment they can obtain immunity from court action for that conduct.

**Q. Are there any exceptions?**

A. The exception is misuse of market power.

**Q. What is 'authorisation'?**

A. The decision to grant or not grant authorisation is a balancing exercise between public benefits and anti-competitive detriment.

Authorisation is a public process. The Trade Practices Act requires submissions to be made publicly available. They are placed on a public register located in Canberra and may be also placed on the ACCC's website. The ACCC has to issue both draft and final decisions in writing.

**Q. What public benefits does the ACCC recognise for the purposes of the authorisation process?**

A. Public benefit is not defined in the Act, but the ACCC considers that the concept is capable of wide interpretation. It supports the Trade Practices Tribunal's view that public benefit may constitute 'anything of value to the community generally, any contribution to the aims pursued by the society'.

Consistent with this broad interpretation, over the years the ACCC has recognised benefits which can be characterised as non-economic such as safety, public health and ethical obligations.

**Q. Does the ACCC have the final say on what is public benefit for authorisations?**

A. No. The ACCC's decisions can be appealed to the Australian Competition Tribunal which is independent to the ACCC and the government. It is headed by a Federal Court judge.

**Q. What is the ACCC's role regarding mergers of businesses in the health sector?**

A. It's to ensure that the structure of various markets in the health sector remains competitive. That is, we don't end up with such a concentration of firms through mergers that there is a substantial lessening of competition.

**Q. Do you think advertising of professional services should be allowed?**

A. In general, yes I do. For two broad reasons. First, advertising that is honest and accurate and doesn't leave out material relevant to the message can be very useful in helping consumers to understand the services to be provided or the professionals who provide these services. The advertisements could also provoke thoughts on issues for

consumers which they can follow up and discuss with practitioners during the consultations.

Secondly, I think it's important to recognise that some people in the community may find it useful to receive and understand information presented visually, or in small bits, or outside consultations. Provided the information is honest and accurate and helps consumers to question practitioners during consultations, I am in favour of allowing professionals wider opportunities to communicate directly with consumers through advertising.

**Q. Advertising isn't going to change the fact that professional practitioners will always know more than consumers about the services to be provided, is it?**

A. Professionals will always know more about the service to be provided—just as telecommunications experts will always know more than consumers about telecommunication services or motor mechanics will know more about repairing cars.

The point of addressing the information imbalance is not to try to make the consumer a professional. The aim is to ensure they have sufficient knowledge to help them understand their professional or health or legal or other problem; the services to be provided; and to have confidence in their adviser. That is, to reduce the extent of paternalism in the supply of services and to minimise the potential for consumers to make wrong choices which risk their financial, psychological and physical welfare. Consumers are entitled to make well-informed decisions.







One of the ACCC's most important roles is consumer protection and one of the ways it does this is by enforcing the Trade Practices Act. In the health sector this has meant taking court action against unscrupulous traders who make false or misleading claims about products, and profit from the desire of vulnerable people to change their appearance or improve their wellbeing in some way.

As is almost always the case if something sounds too good to be true, it usually is. But this doesn't stop people falling for claims that a product can miraculously improve their appearance, especially in the area of weight loss or body shaping.

Below are some of the cases the ACCC has taken in its effort to ensure that companies don't get away with false or misleading advertising.

## PROTECTING CONSUMERS

### The Abtronic

In May 2002 the ACCC started court proceedings against the promoters of a health and fitness industry product, the Abtronic.

The ACCC alleges that Danoz Direct Pty Ltd, sole director Mr Moshe Ozana and other individuals, engaged in misleading and deceptive conduct or were knowingly concerned in the conduct while promoting the Abtronic as a muscle stimulating machine. The Abtronic was promoted on Channel 10's *Good Morning Australia* and *Bright Ideas* programs, during infomercials on Channels 10 and 7, in a Danoz product catalogue and on the company's website.

The ACCC has sought orders granting permanent injunctions against Danoz Direct Pty Ltd for various breaches of the Trade Practices Act. In particular, the ACCC is seeking to prevent Danoz from representing that the Abtronic has the following, or similar, performance characteristics, uses or benefits:

- that it is a brilliant training and toning tool
- that it can be used to work out and tone different muscle groups

- that it provides a vigorous workout for the abdominal region, the 'love handles', arms, buttocks, thighs
- that it can flatten your stomach 'once and for all'
- that you just sit and relax and watch your abs tighten, your 'love handles' disappear and your thighs and bottom firm up—with no sweating involved
- that you can get the results of up to 600 sit-ups in just 10 minutes without any effort.

Danoz is defending the matter and the trial is set down for 19 March 2003.

### The Feminique

The ACCC was involved in a similar case to the one above in 2001—this time against The Buyers Group. The case involved the Feminique muscle stimulation device promoted in infomercials on Channel 10's *Good Morning Australia* and *Bright Ideas* programs, Channel 7's *Morning Shift*, and the company's website.

On 10 August 2001 the Federal Court in Brisbane imposed interlocutory injunctions, by consent,

restraining The Buyers Group, Josephus Schoonenberg (sole director) and employees Marianne Schoonenberg and David Simons from representing that the Feminique or any other muscle stimulation product can:

- exercise, tone, firm or pull back into shape any part of the user's body without effort by the user
- burn up fat
- flatten the user's stomach without any effort by the user
- result in the user losing 3 kilograms in weight and reduce the user's waist measurements by 3 centimetres in 4 weeks
- is ideal for people who want to see effective and immediate results.

### Purple Harmony Plates

In August 2001 the Federal Court in Melbourne found Purple Harmony Plates had published misleading health claims on its website about pieces of anodised aluminium plate.

The ACCC had alleged, and the court ruled, that Purple Harmony Plates Pty





Ltd, based in Melbourne, had made unsubstantiated claims about the future benefits for its products, which were made of anodised aluminium in various shapes, sizes and colours.

The claims included that the plates:

- protected against electromagnetic radiation from computers, televisions, mobile telephones etc.
- energised water and freed it from odour and chlorine
- lowered body stress and fatigue levels
- grouped together heavy metals and other impurities (in water) into larger molecules so that they could not be absorbed by the body
- helped strengthen the immune system
- increased general health
- accelerated healing
- reduced less severe aches and pains or niggly coughs and colds
- improved plant growth
- ionised car fuel to allow a more complete fuel burn.

The court ordered injunctions, refunds, and the company to send corrective statements in writing to customers and place them on its website. When Purple Harmony failed to comply with the court's orders the ACCC began contempt proceedings and on 9 April 2002 the court imposed fines of \$20 000 on the company and \$10 000 each on Helen Therese Glover and Neal Arthur Lyster (its directors) for contempt.

The matter was back in court on 24 October 2002 following the company's continued failure to comply with the court's orders and not paying the fines. On 2 December 2002 the judge handed down his decision, again finding Lyster and Glover guilty of contempt. He issued warrants of committal for one month prison terms suspended on condition they comply with orders including transferring the domain name <www.purple-plates.com> to the ACCC for the purpose of placing a consumer notice on the site.

### Giraffe World

This case, which began in 1998 in the Federal Court in Sydney, involved a product called a 'negative ion' mat which Giraffe World Pty Ltd claimed alleviated the suffering of people with ailments including arthritis, asthma, heart problems, insomnia and stress.

In April 1999 Giraffe World gave an undertaking to the court that until the judge gave his judgment it would not represent that the 'negative ion' mat produced negative ions, relieved ailments or promoted health. However, in June 1999 the court found that the company was guilty of contempt of court by making those claims.

On 26 August 1999 the court found that Giraffe World (which was by then in liquidation) had engaged in misleading or deceptive conduct and promoted a referral and pyramid selling scheme. The court found that Akihiko Misuma, founder and director of Giraffe World, and Robin Han, its president and chief executive officer until November 1998, were knowingly concerned in, and a party to, Giraffe World's pyramid and referral selling contraventions.

The liquidator has commenced Supreme Court proceedings against the chairman of Giraffe World to recover funds for distribution to creditors. If successful, the liquidator intends to seek judicial advice over admitting claims by members of Giraffe World in respect of commission payments for recruiting new members to the company.

The ACCC will be seeking leave to appear and make submissions in those proceedings that members' claims for unpaid commission income from an illegal pyramid selling scheme should not be admitted, but that claims for refunds for the negative ion mat that did not perform as represented should be admitted.



... if something sounds  
too good to be true,  
it usually is.

# the search for SCAMMERS

The Internet is a valuable tool for both consumers and businesses. However, as it continues to grow, Internet transactions between countries grow with it, bringing new challenges for law enforcement.

Unfortunately, the Internet has provided a fast and effective medium for scammers seeking to make a fast buck by taking advantage of vulnerable consumers.

The Internet gives consumers easy access to health information but it also provides promoters of fraudulent health products and treatments with that same easy access to consumers all over the world.

This year the ACCC led a world-wide search for cyber health scams by 58 consumer and health protection agencies from 19 countries.

Thousands of websites were searched to uncover shonky health claims in the International Marketing Supervision Network (IMSN) Internet sweep.

The IMSN is a network of law enforcement agencies in 30 countries which aims to prevent and redress deceptive marketing practices with an international component.

Conducted each year by the IMSN, the Internet sweep this year targeted websites offering 'miracle' health products and services, as well as sites promoting legitimate products with claims that the products have properties which don't exist.

Some of the sites assessed promoted oral treatments such as pills; devices; weight loss products; 'cures' for HIV/AIDS, cancer and arthritis; skin treatments such as lotions; folk and traditional treatments; and sexual performance enhancing products.

Of particular concern were products that claimed to be a cure for serious or life threatening diseases such as cancer and HIV/AIDS. Also attracting concern were products that advertised a delayed effect, forcing consumers to make an additional purchase before seeing any evidence of the effectiveness of the product.

## Sweep facts »

More than 1400 suspicious websites (77 in Australia) were identified all over the world. Of these:

- » 48.5 per cent used testimonials to sell the product or service, and only 38.6 per cent of these testimonials claimed to be relevant experts or professionals
- » only 37.7 per cent made reference to clinical studies or scientific experiments
- » 13.2 per cent claimed approval or authorisation from an official agency (52.6 per cent of these from an agency outside their own jurisdiction)
- » costs of the products ranged from US\$0.86 to US\$6930.90.

Some websites have already received email warnings from law enforcers. Others will be investigated further and action, including administrative settlements, enforceable undertakings and in some cases, court action, will be taken.

ACCC Commissioner, Sitesh Bhojani, said health scams not only waste consumers' money but in extreme cases may harm their well being.

'Worryingly, there seems to be a belief in some quarters that the Internet means "anything goes" and the business medium is a "free for all". This is not true and suggests a misunderstanding or ignorance of the consumer protection parts of the Trade Practices Act and equivalent fair trading acts of the states and territories.

'The IMSN is a valuable forum for addressing scams of this nature, and the ACCC is happy to be playing its part in helping to stamp out Internet fraud.'

To make it easier for people to understand the role of the network it is likely to change its name in 2003 to International Consumer Protection and Enforcement Network (ICPEN).

## Sweep strikes around the world

Actions coming out of the sweep include Biopulse Inc, which has settled Federal Trade Commission charges in the USA against Biopulse's Internet advertising of therapies claiming to treat cancer and other serious diseases. Court action was raised with 11 traders in New Zealand, most of whom settled law enforcement concerns without going to court. The

Portuguese Consumer Institute's actions led to four websites being deleted entirely.

The Swedish authorities have reached out-of-court settlements with 14 businesses, including ceasing to supply the identified products. The Austrian Consumer Protection agency obtained undertakings from two businesses, and took another business to court. Switzerland has shut down various websites and commenced legal action against one business.

## Testimony baloney

The use of fake or unsubstantiated testimonies on many suspicious websites prompted this warning from the IMSN.

'Do not be persuaded by testimonials alone, as there is no way of verifying that they are legitimate. Rather, speak to a health professional or seek independent evidence. If you feel that you have been the victim of a cross-border health scam over the Internet, report your complaint to IMSN members at <<http://www.econsumer.gov>> so that IMSN members can use the complaints to decide whether to take law enforcement action.'

ACCC Commissioner and current IMSN President, Sitesh Bhojani, said health is a person's most valuable asset.

'Businesses that prey on consumers with a special vulnerability such as an illness will not be tolerated by the IMSN.'

'The level and frequency of cooperation between members of the IMSN is growing.'

'Sweeps are not just an information gathering exercise. They help consumers through the provision of information, and lead to law enforcement action by agencies in up to 30 countries in Europe, North America, and the Asia-Pacific region.'