



Australian Competition & Consumer Commission

**ACCC and HCCC present a Joint Conference on:**

***ADVERTISING MEDICAL SERVICES  
– IN WHOSE INTERESTS?***

**OPENING ADDRESS**

**Mr Allan Asher  
Deputy Chairperson  
Australian Competition and Consumer Commission**

**Thursday, 14 October 1999**

**Sydney**

## **Introduction**

Ladies and Gentlemen,

I would like to welcome you to today's conference, jointly hosted by the Australian Competition and Consumer Commission (ACCC) and the Health Care Complaints Commission (HCCC).

Recent changes in laws have relaxed many previous restrictions on the advertising and promotion of professionals services, particularly in the health and medical sectors, and professionals now have much greater freedom to communicate directly with consumers. However, for many medical and health professionals, advertising and other promotional activities are unfamiliar territory.

Accordingly, it's not surprising that the transition to this new environment appears to have created some problems, and the community, regulators and medical professionals have raised concerns with the ACCC and the HCCC about inappropriate advertising.

Today's conference brings together specialist speakers from a variety of relevant fields to allow you to gain insights and understanding into, and to discuss, a range of important issues arising from the advertising and promotion of medical services. Whether you are a medical or health sector professional, or a professional adviser, we hope that at the end of today's conference you will have a greater appreciation of:

- the special characteristics of advertising in the health sector;
- the meaning and effect of the recent legislative changes;
- the restrictions that apply or should apply to the advertising or promotion of health and medical services; and
- the role of the Commonwealth Trade Practices Act, the State and Territory Fair Trading Acts and the New South Wales Health Care Complaints Act in the advertising or promotion of health or medical services.

Also, today's conference provides an opportunity for the ACCC and the HCCC to gain a better understanding of the issues of concern to participants in the health and medical sectors. I therefore encourage you to actively participate in the conference program and voice your views to the speakers.

### **The Role of the ACCC and the *Trade Practices Act 1974***

By way of background, the ACCC is a statutory authority that administers the *Trade Practices Act 1974* and complimentary legislation.

The objectives of the *Trade Practices Act 1974* (the Act) are to prevent anti-competitive conduct, thereby encouraging competition and efficiency in business, and resulting in a greater choice for consumers (and business when they are the purchaser) in price, quality and service; and to safeguard the position of consumers in their dealings with producers and sellers, and business in its dealings with other business.

The Act contains a range of provisions aimed at protecting consumers and businesses that qualify as consumers through:

- a general prohibition on misleading or deceptive conduct;
- specific prohibitions for false or misleading representations about a range of things such as a service's value, quality, place of origin or impact on the environment; and
- provision for statutory warranties that afford consumers refunds in certain circumstances.

Advertising and all other forms of promotion for medical services and products are covered by the Act, including electronic and print media advertising, information brochures, direct mail, Internet promotions, testimonials (including before and after photographs), and outdoor (or billboard) advertising. Magazine articles and so-called 'advertorials' can also be covered by the Act. Further, oral statements made by practitioners or employees are subject to the Act.

The role of the ACCC is to apply the Act properly, without fear or favour to anyone, no matter how powerful economically or politically, for the benefit of consumers of all kinds everywhere in Australia, including household consumers; small, medium and big business; farmers; local, state and federal governments; and all people everywhere, in capital cities and country towns. All have an interest in being supplied competitively and efficiently at low prices with good service; and where they sell, to sell to buyers who have to compete for their output.

The goals of the ACCC when enforcing the law are:

- to stop unlawful conduct;
- to seek compensation for those damaged by unlawful behaviour;
- to undo the effects of the contravention;
- to secure future compliance with the law; and
- to seek deterrence and, if appropriate, punishment.

The ACCC has already achieved outcomes in line with these goals as a result of action it has taken against inaccurate, misleading and deceptive advertising for health and medical services. For example:

### **Impotency treatment**

Following an ACCC investigation of *ON Clinic*'s advertisements for its impotency treatment, the Federal Court ordered ON Clinic to place corrective advertisements and provide injunctive relief to consumers.

### **Haemorrhoid treatment**

In 1996 *Proctology Centres of Australia* gave court-enforceable undertakings to the ACCC to correct representations made in advertisements and to patients about the success and discomfort level of the Centres' haemorrhoid treatment.

### **Hair removal**

Recently, *Beautician's Laser Clinic Pty Ltd* published corrective advertisements, withdraw client advice signs and undertook to implement a trade practices program following an ACCC investigation of the claims made in its advertising for a laser hair removal service. The Clinic also undertook not to make similar claims in future advertising or promotions.

### **Laser eye surgery**

Following a warning letter from the ACCC, a number of advertisers of laser eye surgery clinics agreed to change or qualify the claims made in advertisements and to establish compliance guidelines for directors and staff who are involved in the preparation or approval of promotional material, or who have contact with the public.

### **Miracle Cures**

Recently, following ACCC legal action, the Federal Court declared that the representations made by Giraffe World Australia, the promoters of an ion mat that purported to cure or improve various medical conditions, breached the misleading or deceptive conduct provisions of the Act. The Court and imposed injunctions on Giraffe World and various executives, and gave leave for the ACCC to seek orders for compensation on behalf of affected consumers.

### **Weight loss treatments**

The ACCC has taken legal action on a variety of weight-loss and slimming matters. For example, in 1998, the ACCC instituted proceedings against *Swiss Slimming and Health Institute Pty Ltd* (Swisslim). The Federal Court found that Swisslim and its director had engaged in promotions of slimming services that were misleading and deceptive. 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.

My colleague, Commissioner Sitesh Bhojani, will discuss the Act and ACCC enforcement action in the health sector in greater detail later in the program.

### **Health is a top consumer protection priority for the ACCC**

While the ACCC is pleased with the outcomes it has achieved for consumers to date through its enforcement actions in the health and medical sector, we want to make it clear that less regulation of a prescriptive kind does not give health and medical professionals open slather to make unsubstantiated claims. Therefore achieving compliance with the Act within the health and medical sectors is a top consumer protection priority for the ACCC. We are currently conducting a number of investigations involving the health sector and we will continue to improve the focus of our enforcement goals, using innovative enforcement methods and seeking innovative outcomes where appropriate.

An example of the innovative approach taken by the ACCC in seeking compliance with the Act to the health and medical sector is provided by our coordination of the 1998 International Internet Sweep Day held by the International Marketing Supervision Network which targeted sites promoting 'miracle cures' and other potentially misleading health claims. The sweep day involved more than 60 law enforcement agencies from 28 countries. Over 1400 suspicious web-sites were identified and sent educational e-mail messages. When the sites were revisited one month later, over a quarter had been amended or removed.

Indeed, it may be argued that the issue of Internet commerce highlights the inability of state-based advertising restrictions to truly restrict the advertising and promotion of health and medical services within a state. Further, state-based restrictions essentially prevent health and medical sector participants within the state from competing fairly with those participants who advertise on the Internet.

### **Who benefits from advertising and promotion?**

Today's conference raises the question of "advertising medical services – in whose interests?". It is the ACCC's view that advertising and promotion of medical services can benefit consumers, the community at large and those professionals engaged in the advertising and promotion of their services.

Contrary to what some might think, advertising is not always directed to “inducing people to buy a product or services”. Advertising can serve a number of useful purposes. For example, advertising can:

- Provide a means of conveying general information on services and procedures to consumers, allowing them to get a better understanding of services and options available and enabling consumers to make informed decisions. The role of advertising as a conveyor of information is particularly important in the health and medical sector, where consumers generally have little knowledge of the detail of medical services.
- Enable medical practitioners to take the initiative to make themselves known to prospective patients and referring doctors.
- Be an effective means of giving consumers general information and guidance about price, which will be a key concern to consumers considering elective services.
- Act as a useful tool for members of professional medical bodies to differentiate themselves in the health sector from other groups of practitioners.

However, advertising that is inaccurate, misleading or deceptive does not assist consumers in making informed decisions and can sometimes cause harm. Indeed, there is potential for inaccurate or misleading advertising of health or medical services to cause great harm. It is therefore imperative that the information provided in advertising be honest, accurate and complete.

### **Why is regulation necessary?**

While the ACCC recognises that health and medical professionals are generally ethical and honourable individuals, it is also well aware that, when restrictions on advertising in a particular sector are lifted, participants have no experience in using advertising as a tool to provide information to consumers, and there may be a misconception with some participants

that everything and anything is allowed. Therefore, a regulatory framework is necessary to ensure that consumers are protected from inappropriate advertising.

The ACCC expects that the responsibility for ensuring that advertising of health and medical services is honest, accurate and complete will be shared between practitioners, professional associations, State and Federal Government health departments, and State and Federal Government regulators.

Indeed, the ACCC expects that a degree of cooperation between these various organisations will be needed to enforce the legal requirements of the regulatory framework, particularly with respect to local and regional advertising of medical services. To foster such cooperation, the ACCC has entered into a number of Memorandums of Understanding with various agencies, including State fair trading departments and the HCCC. Further, the ACCC is planning to convene a round-table discussion with relevant agencies to discuss general consumer protection matters and particularly issues arising from the recent legislative and regulatory changes in the health sector.

It is important to highlight that while advertising and promotion of health and medical services must comply with the legal requirements of the regulatory framework, it can nonetheless be innovative and effective in its ability to convey information to consumers about the provision of medical services.

### **Codes of Conduct**

As discussed in the ACCC's submission to the NSW Inquiry into Cosmetic Surgery, codes of conduct may address the consumer protection problems identified in the provision of health and medical services (including cosmetic surgery).

Codes of conduct in general can deliver large benefits to both the providers of the medical service and consumers. While they advance consumer confidence in individual practitioners and their services, they also promote good business practices. Properly conceived and



drafted, they are as much a positive tool for service providers as they are a safeguard for consumers.

Developed voluntarily at the initiative of the service providers or professionals associations, in consultation with consumer/community groups and government agencies, codes can provide a flexible, cost-effective approach to problem areas. Codes have advantages over legislation in that they offer the flexibility and sensitivity to market circumstances, and can respond more readily to the dynamics of the market place and changing circumstances.

To be effective, codes of conduct need a commitment from the relevant sector and a backing in resources.

It should be noted that the new sections 51AD and 51AE of the Act provide for codes to be prescribed in regulations and for the ACCC to take enforcement actions against breaches of such codes. Final guidelines on prescribing codes under the Act were released in May of this year. In any event, the decisions as to whether a particular code should be prescribed or not is the responsibility of the relevant Minister not the ACCC.

The ACCC considers that of all the sectors of the Australian economy, the professions could be expected to be the most reliable in terms of complying with a voluntary code of conduct, due to the implicit ethical and honourable nature of the professions.

My colleague, Mr Carl Buik, and Ms Susan Johnston from the Consumer Affairs Division of Treasury will discuss codes of conduct and regulation issues in greater detail later in the program.

### **Launch of Guide**

Finally, I am pleased to release today for public comment the consultative draft of the *ACCC / HCCC Guide for the promotion of medical and health services*. In addition to actively participating in today's conference program, I urge you to provide comments to us on the

draft Guide. The purpose of the Guide will be to assist medical and health professionals who are contemplating advertising or other promotional activity to be better informed of their legal obligations insofar as Australia's consumer protection laws are concerned. It will also provide an insight as to when the ACCC is likely to take action for breaches of the Trade Practices Act.

Thank you for your attention. I hope you find today's conference informative and useful. Again, I encourage you to actively participate in the program.