



Fair treatment

—advertising and the health sector

A few years ago many of the legal restrictions on advertising were relaxed which meant that medical and health sector professionals had far more opportunity to communicate directly with consumers. This also meant that consumers were able to make more informed decisions about health services and products.

However, with the opportunity to reach consumers more directly came the responsibility to comply with the Trade Practices Act and state and territory fair trading laws.

The Act is one of the main ways of regulating advertising and other promotional activity.

Honesty is the best policy

Providing accurate, honest and easily understood information protects consumers and helps them to decide on services and procedures and choose between providers.

However, professional people, who generally know a lot more about medical and health services, can be tempted to use that difference in knowledge to oversupply services or advertise unrealistic expectations.

This deceptive conduct can cause consumers long lasting physical, psychological or financial problems. The Trade Practices Act obliges companies (including professional-practice companies) to avoid advertising in a way that is likely to mislead or deceive; which can lead to disputes. For example, has an outcome been implied even though it has not been stated explicitly? Are any predictions on outcomes justified?

If an advertisement is disputed the court will assess how ordinary consumers will perceive the message and what overall impression is created by the advertisement.

Complying with the Act

To make sure they comply with the Act advertisers should be certain 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, that they compare with similar services (and include any conditions that apply to their offer) and are up-to-date with a competitor's service or prices.

Attracting ACCC attention

Advertisements for some types of healthcare services—notable examples include laser eye surgery and impotence, haemorrhoid and hair removal treatments—have caused more concern than others.

Offending advertisements often exaggerate the 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 surgery who stated or implied, without suitably qualifying text, that some of those treated would 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

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.