



Aboriginal and Torres Strait
Islander Health Practice
Chinese Medicine
Chiropractic
Dental
Medical
Medical Radiation Practice
Nursing and Midwifery
Occupational Therapy
Optometry
Osteopathy
Pharmacy
Physiotherapy
Podiatry
Psychology

Australian Health Practitioner Regulation Agency

Regulating advertising claims by registered health practitioners in the National Registration and Accreditation Scheme

Overview of the National Registration and Accreditation Scheme and advertising

The National Registration and Accreditation Scheme was established in mid 2010 by the Health Practitioner Regulation National Law, as in force in each state and territory (the National Law). The National Scheme has six key objectives set out in the National Law. In summary, the objectives are to:

- protect public safety
- facilitate workforce mobility for health practitioners
- facilitate high-quality education and training of health practitioners
- facilitate assessment of overseas-trained health practitioners
- facilitate access to health services, and
- development of a flexible, responsive and sustainable health workforce.

Fourteen National Boards and the Australian Health Practitioner Regulation Agency (AHPRA) work in partnership to achieve these objectives.

Regulatory principles for the National Scheme

Together we have developed regulatory principles (<http://www.ahpra.gov.au/About-AHPRA/Regulatory-principles.aspx>), which underpin our work to regulate health practitioners in the public interest. In these shared principles, we balance all the objectives of the National Scheme, but our primary consideration is to protect the public in accordance with good regulatory practice.

The principles shape our thinking about regulatory decision-making and have been designed to encourage a responsive, risk-based approach to regulation across all professions. This means that in all areas of our work we:

- identify the risks that we must respond to,
- assess the likelihood and possible consequences of the risks, and
- respond in ways that are proportionate and manage risks to protect the public.

Regulatory functions

We do this through our core regulatory functions, which include:

- National Boards set national standards that define the requirements that applicants and registrants need to meet to be registered
- National Boards approve accreditation standards and oversee the accreditation functions in the Scheme, which ensure that programs of study approved for registration give health practitioners the knowledge, skills and professional attributes to practise their professions
- we register health practitioners and maintain a public register of registered practitioners, which enables the public to check whether a health practitioner is registered and has any conditions on their registration
- we investigate notifications about the health, performance and conduct of registered health practitioners

- we monitor practitioners who are subject to restrictions or conditions on their practice, and
- we act on complaints about advertising and other statutory offences under the National Law.

Advertising and the National Law

The National Registration and Accreditation Scheme is not a dedicated advertising regulator, but has responsibility for advertising issues in the context of health practitioner regulation and the parameters of the National Law.

Section 133 of the National Law provides that a person must not advertise a regulated health service, or a business that provides a regulated health service, in a way that—

1. is false, misleading or deceptive or is likely to be misleading or deceptive, or
2. offers a gift, discount or other inducement to attract a person to use the service or the business, unless the advertisement also states the terms and conditions of the offer, or
3. uses testimonials or purported testimonials about the service or business, or
4. creates an unreasonable expectation of beneficial treatment, or
5. directly or indirectly encourages the indiscriminate or unnecessary use of regulated health services.

The National Boards have published common guidelines about advertising, which explain the requirements of the National Law in more detail. The Chiropractic Board of Australia has also published further advice to practitioners about some chiropractic specific advertising issues. All National Boards have a Code of Conduct or equivalent document that generally provides that practitioners must practice in a patient-centred manner, providing treatment options based on the best available information so that they provide the best possible healthcare for their patients. The Advertising Guidelines clarify that practitioners should not make claims in advertisements for which there is no evidence base.

1. Work with other regulators

The advertising provisions of the National Law complement broader regulation of advertising in legislation administered by the Australian Competition and Consumer Commission (ACCC) and the Therapeutic Goods Administration (TGA). While the National Law focuses on health practitioner regulation, and advertising in that context, the ACCC and TGA have wider and more general responsibilities to regulate advertising.

AHPRA has developed working relationships with the ACCC and TGA so that liaison occurs on relevant cases and the most appropriate regulator takes action. Some advertising matters relating to chiropractors have been referred to the ACCC for consideration, in acknowledgment of their broader remit and more extensive powers to deal with advertising issues.

Regulatory tools

National Boards and AHPRA use a range of regulatory tools in our work, including:

- National Boards setting standards that practitioners must meet
- National Boards issuing guidelines and codes to provide guidance to registered health practitioners, which can be taken into account as evidence of what is appropriate professional conduct or practice for the health profession
- communicating National Boards' requirements and expectations to practitioners, including through newsletters, social media, public events and direct email
- auditing compliance with registration standards
- responding to notifications about health, performance or conduct of registered health practitioners by investigating and taking action where necessary
- educating practitioners by communicating with practitioners who are the subject of less serious notifications and complaints and providing them opportunity to rectify these matters

- taking immediate action against health practitioners where necessary to protect public health or safety
- making assessments of the health or performance of registered health practitioners, and
- prosecution, where a person commits an offence under the National Law.

2. Advertising complaints under the National Law

National Boards and AHPRA deal with most advertising breaches and possible statutory offences under the National Law initially through a risk-based approach which aims to achieve compliance with the law as quickly and simply as possible. approach is appropriate to the vast majority of less serious advertising complaints. It also allows resources to be focused on higher risk matters, which generally involve more direct and immediate risk of harm to the public than the less direct harm usually involved in advertising claims.

Under this strategy, AHPRA first writes to the health practitioner (under Part 7) inviting them to amend or remove their advertising to comply with the National Law. In appropriate cases, AHPRA may require a practitioner to provide information relevant to their advertising using compulsory powers.

Over the last five years since the National Scheme began, most practitioners have responded to the first AHPRA warning letter and amended their advertising, eliminating the need for and cost of further regulatory action.

If the practitioner does not amend or remove their advertising, AHPRA refers the matter to the National Board to consider possible disciplinary action (under Part 8) – for failing to comply with their professional obligations and the offence provisions of the National Law. AHPRA also refers matters to the National Boards for consideration of action under Part 8 when the advertising involves concerns about the health, performance or conduct of the relevant practitioner. Where there are concerns about a registered health practitioner's conduct, health or performance, including their advertising, National Boards can take action most effectively through Part 8 of the National Law. National Boards have extensive powers in relation to registered health practitioners under Part 8 of the National Law, and can take immediate action to protect the public including suspending a practitioner or applying conditions to their registration. Part 8 generally enables a more tailored, responsive and holistic approach to protecting the public and addressing concerns about the practitioner than prosecution. As a result, where a registered health practitioner does not respond to the first warning letter, action under Part 8 will often be the most appropriate response. Likewise, where a review of the advertising raises concerns about the underlying health, performance or conduct of a practitioner, Part 8 action will often afford the greatest level of public protection.

The National Law specifically contemplates that a practitioner's conduct or performance can be the subject of disciplinary proceedings and offence proceedings. Offence proceedings are prosecuted by AHPRA through the Magistrates or Local Courts.

The powers under Part 8 do not apply to corporations or unregistered individuals, so if the initial warning letter is ineffective, prosecution is the only option in these cases.

Among other considerations, in deciding whether to exercise its discretion to prosecute, AHPRA looks at the need for deterrence and whether there is a sufficient public interest.

Examples of action taken by National Boards about advertising claims include:

1. In *Medical Board of Australia v Lai* [2011], the Victorian Civil and Administrative Tribunal found that Dr Lai had engaged in unprofessional conduct in his advertising of chelation therapy, by creating an unreasonable expectation of beneficial treatment through making unqualified claims about the benefits of chelation therapy and by failing to state in the advertisement that the effectiveness of chelation therapy has not been established by peer-reviewed scientific research to have the benefits claimed.

2. In *Chiropractic Board of Australia v Hooper* [2013], the Victorian Civil and Administrative Tribunal found that Dr Hooper's claims on his website about hyperbaric oxygen treatment were misleading and deceptive because he did not present a balanced view about the effectiveness of hyperbaric oxygen treatment for specified conditions, including that such treatment was not conventionally used in Australia and in western countries with a comparable health service culture and was not supported by medical and scientific evidence.
3. In *Psychology Board of Australia v Greco No 2 (Review and Regulation)* [2014], the Victorian Civil and Administrative Tribunal found that Mr Greco had engaged in professional misconduct by advertising in a way which misled victims of crime and professionals who supported them to believe that he was associated with VOCAT in an official capacity. The Tribunal found that Mr Greco had also engaged in unprofessional misconduct by using details of two clients' traumatic experiences on a blog on his practice website to promote his business.
4. In *Dental Board of Australia v Paino (Occupational and Business Regulation)* [2010], the Victorian Civil and Administrative Tribunal fined Dr Paino \$3,500 for publishing advertising that was false and misleading, contained testimonials and created an unreasonable expectation of beneficial treatment.
5. In *Chinese Medicine Board of Australia v Ghaffurian (Occupational and Business Regulation)* [2012], the Victorian Civil and Administrative Tribunal found that Mr Ghaffurian had engaged in professional misconduct by publishing advertising that created an unreasonable expectation of beneficial treatment and contained testimonials. The Tribunal found that his advertising incorrectly suggested that the BICOM Bioresonance Machine is especially effective for treatment of allergic illnesses such as rash, asthma and hay fever, acute and chronic inflammation of the gastric mucosa, rheumatic diseases, diseases of the internal organs, migraine / all sorts of pains, injuries / scar interference fields, problems of the teeth / jaw region. The Tribunal found that the advertising also inaccurately stated the machine could treat 'almost all illnesses...with varying results' and misrepresented that the machine could successfully treat depression, irritable bowel syndrome, eczema, bloating, fertility issues, weight loss, arthritis, back pain, candida, allergies, fatigue, acne and cholesterol and blood pressure.

6. Current work

Consistent with the National Scheme's general philosophy of continual improvement, we are considering how to enhance our approach to advertising complaints.

For example, the Chiropractic Board and AHPRA have been working closely to refine our risk-based approach to advertising matters, through a new triage approach that will expedite disciplinary action and prosecution pathways where matters present a higher risk to the health and safety of the public.

Based on experience to date, the risk to the public posed by advertising is usually of itself a lower risk than other statutory complaints, such as a person 'holding out' as being a registered health practitioner when they are not. However, AHPRA and the Chiropractic Board recognise that where complaints about advertising overlap with concerns about health, performance and conduct, the risk to the public is greater, as outlined above.

Higher risk matters will be assessed by a liaison group comprising of both AHPRA and Chiropractic Board representatives and the matter diverted into the most appropriate pathway as quickly as possible. Lower risk matters will continue to be managed via a compliance pathway but can be diverted and escalated at any time if indicated.

AHPRA and the Chiropractic Board will prioritise any matters where the advertising is likely to lead to unnecessary or inappropriate treatment or delays in appropriate treatment of serious health conditions, particularly in vulnerable sections of the community such as children, the mentally ill, the disabled, and the very ill. Conduct that is recalcitrant or suggests underlying health or other issues will also be prioritised with the liaison group to determine whether a matter should be progressed under Part 7 and/or Part 8 of the National Law.

Publishing information about regulatory action

The National Boards and AHPRA are keen to explore how public confidence in the National Scheme could be improved by publishing more information about actions taken under the National Law to deal with advertising complaints and professional conduct matters, within the parameters of the law.

The National Law defines what outcomes of regulatory action can be published. By law, reprimands, conditions / limitations on registration and suspensions of registration are public and published on the [register of practitioners](#).

We publish the outcomes of relevant Tribunal and court matters on the AHPRA website. As part of continuing work to refine the approach to achieving compliance with the advertising requirements of the National Law, the National Boards and AHPRA will consider scope to publish further information about examples of non-compliant advertising.

We regularly publish media releases when practitioners are charged with offences, and on the outcome of Tribunal and Panel hearings. Media releases are published on the 'news' sections of both the AHPRA and Board websites for maximum coverage and ease of access. Panel decisions are published at: <https://www.ahpra.gov.au/Publications/Panel-Decisions.aspx>

Cautions, and cases when the regulatory process itself has changed a person's practice and the Board has decided that no further regulatory action is needed to manage risk to patients, are not published.

The National Law imposes strict confidentiality and privacy obligations on us which limit the information that can be provided to the public, particularly when an investigation is ongoing. National Boards and AHPRA do not generally make public comment about specific matters given the potential to compromise investigations and prosecutions. Further, a 'naming and shaming' approach could be considered punitive, which does not align with our regulatory philosophy. Where there is a need for public deterrence, this is the mandate of the Tribunals and Courts.

AHPRA will inform offence complainants of the outcome of their complaints in all cases to the extent permissible under the National Law.

Stakeholder engagement

In addition, National Boards and AHPRA will consider what else the National Scheme can do to ensure all registered health practitioners fully understand their obligations in relation to advertising under the National Law and to help consumers understand what they can expect from registered health practitioners' advertising.

We are keen to engage with consumer organisations beyond our own Consumer Reference Group more broadly about our work on statutory offences and advertising, and what to expect from registered health practitioners and welcome our participation in the 17 March 2016 seminar as a first step.

7. Recent and planned actions by the Chiropractic Board

The Chiropractic Board and AHPRA are actively assessing complaints received about chiropractic advertising, ahead of possible disciplinary and/or prosecution action.

In dealing with advertising breaches by chiropractors, AHPRA has also had discussions with the ACCC about matters which might raise concerns under the Australian Consumer Law, which also prohibits false or misleading representations.

While most matters are effectively dealt with under the National Law, the ACCC has agreed to explore a small number of matters which appear to be more serious or involve corporate chiropractic practices.

The 10 cases referred to health regulators by Professor Ken Harvey in September 2015 are under active investigation. As a result, the Board and AHPRA are not able to comment further on these

matters at this stage to maintain the integrity of these processes. However, we will advise complainants about the outcome when the matters are closed.

AHPRA and the Board urge anyone with concerns about advertising breaches or professional conduct to provide this information to regulators, as AHPRA and the Board can only investigate issues once they are raised with us.

Complaints about a health practitioner's advertising can be made [online to AHPRA](#) or by calling 1300 419 495 or in person at an [AHPRA office](#).

The Board's expectations

The Chiropractic Board of Australia expects that all registered chiropractors practise in a patient centred manner informed by the best available evidence. The delivery of health services is dynamic with an evolving evidence base and practice. The Board has been active in educating and raising awareness about these issues and the Board's expectations. The Board has met regularly with professional bodies and many state branches about the advertising requirements of the National Law and the board's expectations of registered chiropractors, and this will continue.

The September 2015 newsletter to registrants was dedicated to advertising and the Board has promoted the *Code of Conduct* and the revised *Advertising Guidelines* which are published on the Board's website. The Board has also published a position statement on paediatric care.

On 7 March 2016 the Board released a further statement which provided advice about advertising claims about spinal manipulation and treatment of children and anti-vaccination statements. This statement is very clear that:

- a. there is insufficient scientific evidence to support claims in advertising that manual therapy for spinal problems is directly effective in achieving general wellness or treating various organic diseases and infections or that spinal problems may have a direct role in various organic diseases or infections; and
- b. claims suggesting that manual therapy for spinal problems can assist with general wellness and/or benefit a variety of paediatric syndromes and organic conditions (including developmental and behavioural disorders, ADHD, autistic spectrum disorders, asthma, infantile colic, bedwetting, ear infections and digestive problems are not supported by satisfactory evidence; and
- c. chiropractors should not display, promote or provide materials, information or advice that is anti-vaccination in nature and should not make public comment discouraging vaccination; and
- d. as chiropractors are not trained to apply direct treatment to an unborn child, chiropractic care must not be represented or provided as treatment to an unborn child or an obstetric breech correction technique.

Next steps for the Board

Building on this ongoing education and awareness campaign, the Board:

- a. wrote to all chiropractors on 8 March 2016 individually reminding them of their ethical and professional obligations (including the code of conduct, advertising guidelines, and the Board's new public statement)
- b. will, with AHPRA, launch a campaign on professional standards issues including advertising, by way of audio visual presentations, face to face meetings with practitioners and professional groups and written materials

AHPRA is also working with the Chiropractic Board of Australia on engaging with stakeholders about their current concerns about advertising, including through a stakeholder forum probably in April or May 2016 to build an understanding of our work and issues arising.