



Advertising Fact Sheet

These fact sheets are for information of health practitioners. These fact sheets are not legal advice, and are advice of a general nature. If you need advice in relation to advertising, then seek advice from appropriately experienced legal practitioners.

LEGISLATION

Advertising for dentists and indeed all health practitioners is covered in each state by the *Health Practitioner Regulation National Law*, at section 133 which deals with advertising.

The most important sections are (1) through to (3) however it is important to note that s118 is often enlivened in circumstances where practitioners publish material that would suggest that they may be a specialist. This is particularly so in the areas of orthodontics and oral surgery.

Relevantly, section 133 provides as follows:

Subdivision 4 — Advertising

Section 133 Advertising

- (1) *A person must not advertise a regulated health service, or a business that provides a regulated health service, in a way that —*
 - (a) *is false, misleading or deceptive or is likely to be misleading or deceptive; or*
 - (b) *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*
 - (c) *uses testimonials or purported testimonials about the service or business; or*
 - (d) *creates an unreasonable expectation of beneficial treatment; or*

(e) directly or indirectly encourages the indiscriminate or unnecessary use of regulated health services.

Penalty:

(a) in the case of an individual — a fine of \$5 000;

(b) in the case of a body corporate — a fine of \$10 000.

(2) A person does not commit an offence against subsection (1) merely because the person, as part of the person's business, prints or publishes an advertisement for another person.

(3) In proceedings for an offence against this section, a court may have regard to a guideline approved by a National Board about the advertising of regulated health services.

(4) In this section — regulated health service means a service provided by, or usually provided by, a health practitioner.

Explanation of the operation of the section

Section 133 will have the effect of allowing all advertising about health services except for five (5) exceptions.

Exception 1 is if the advertising is false misleading or deceptive or is likely to be misleading or deceptive. For those reasons, if there is anything which could be false, misleading or deceptive or likely to be, then it would be prohibited.

Exception 2 is whether the practitioner offers a gift, discount or other inducement.

Exception 3 is where the advertising uses testimonials or purported testimonials about the service or business.

Exception 4 is unreasonable expectation of beneficial treatment.

Exception 5 is 133(1)(e), being whether the advertising directly or indirectly encourages the indiscriminate or unnecessary use of health services

Penalties

It should be noted that the penalties are, in the case of an individual, \$5,000, but it could be deemed that the advertising was by a corporate and the fine is doubled to \$10,000.

Practical Reality

Complaints are generally made by other dental practitioners, not members of the public.

Briefly, if a practitioner is deemed to have breached section 133 or other sections, then AHPRA can prosecute, they can take action for unprofessional conduct if it was a continual series of breaches.

The area of practice which most dentists fall into error, is misleading and deceptive advertising and there is a useful passage about misleading and deceptive advertising

in the Guidelines, and I reproduce it here.

The ACCC has provided tips on how to avoid being misleading and deceptive when advertising:

- 1. Sell your professional services on their merits;*
- 2. Be honest about what you say and do commercially;*
- 3. Look at the overall impression of your advertisement and ask yourself who the audience is and what the advertisement is likely to mean or say to them; and*
- 4. Remember, at a minimum, that it is the viewpoint of a layperson with little or no knowledge of the professional service that you are selling that should be considered.*

If a practitioner were to promote for example implants as treatment and advertise, then they need to be very careful that they explain to people the risks and consequences, that all implants are not suitable for all patients and that patients need to be taken through an extensive process of risks, benefits and outcomes for implant surgery for example.

The second area where dentists seem to get into problems is with testimonials.

Testimonials are not defined under the National Law and it is given its ordinary and normal meaning. However, it seems an element for consideration is whether it was solicited or not.

“A formal statement testifying to someone's character and qualifications.”

That means that what people normally expect a testimonial to be, in broad terms that might mean something that a person writes at the invitation of a practitioner to promote the services of that practitioner.

If a patient were to write, “that Dr X is the best dentist they had ever seen in their lives and were an excellent implant surgeon”, that would be a testimonial.

It has been generally held that Google reviews, while they are testimonials because people are plainly going and writing what they believe, are not caught by the National Law unless they were made at the clear invitation of the practitioner.

Applying that, if a practitioner were to use a Facebook page and ask people to write a testimonial on that page, then they could be in breach of the law in that regard.

However, social media is rapidly overtaking the anticipated regulatory framework and I think it would be very difficult for a practitioner to be prosecuted if someone liked a Facebook page and said that they were happy with their treatment. However, it is probably important that practitioners do not invite these comments from patients on their Facebook page.

There might be an argument that review pages on Facebook need to be taken down once the reviews are made and patients need to be asked not to make those comments or reviews, but it is difficult to distinguish a difference between Facebook and Google in this regard.

What happens when there are complaints made or AHPRA does seek information about advertising, they will typically send the practitioner a letter advising him/her of the complaint or of the potential breach and asking them to rectify it.

That may be the case in various professions but it is true to say that practitioners will

get plenty of warning from AHPRA about how to respond to any such alleged breaches.

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