

**Submission  
No 48**

## **THE PROMOTION OF FALSE OR MISLEADING HEALTH-RELATED INFORMATION OR PRACTICES**

**Organisation:** NSW Fair Trading  
**Name:** Mr Reyhan Day  
**Position:** Coordinator Administrative Services  
Ministerial & Executive Services  
**Date Received:** 6/02/2014



**Fair  
Trading**

PO Box 972  
Parramatta NSW 2124  
Tel: 02 9895 0111 Fax: 02 9895 0222  
TTY: 1300 723 404 ABN 81 913 830 179  
[www.fairtrading.nsw.gov.au](http://www.fairtrading.nsw.gov.au)

Ref: FTMIN13/4939

Mrs Leslie Williams MP  
Chair  
Committee on the Health Care Complaints Commission  
Parliament of NSW  
Macquarie Street  
SYDNEY NSW 2000

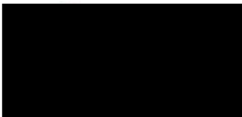
Dear Mrs Williams

Thank you for the opportunity to make a submission to the Inquiry into the Promotion of False or Misleading Health-Related Information or Practices.

There are overlapping responsibilities between NSW Fair Trading and the Health Care Complaints Commission when the promotion of false or misleading health-related information or practices is detrimental to the interests of consumers. Accordingly, there may be opportunities for Fair Trading and the Commission to work together to provide a more co-ordinated compliance regime to benefit the people of New South Wales, particularly through strengthening information sharing arrangements.

I attach Fair Trading's submission to the Inquiry.

Yours sincerely



Rod Stowe  
**Commissioner**

Encl. 5/2/14.

**PARLIAMENT OF NEW SOUTH WALES**  
**COMMITTEE ON THE HEALTH CARE COMPLAINTS COMMISSION**

*INQUIRY INTO THE PROMOTION OF FALSE OR MISLEADING HEALTH-RELATED INFORMATION OR PRACTICES*

**NSW FAIR TRADING SUBMISSION**

**BACKGROUND**

**1 Role of NSW Fair Trading**

- 1.1 NSW Fair Trading is a division of the NSW Department of Finance and Services. The Department's role is to make doing business in NSW simple, accessible and fair for employees, consumers and industry whilst providing best value for government.
- 1.2 Fair Trading administers fair trading laws. It looks after the rights of consumers and advises businesses and traders on fair and ethical practices, with the aim of achieving fairness for all in the marketplace.
- 1.3 The predominant fair trading legislation is the Australian Consumer Law (ACL) which sets out the rights and responsibilities for consumers and traders. For example, it covers refunds, consumer guarantees, unsafe and defective products, and misleading and deceptive conduct.
- 1.4 Fair Trading also regulates incorporated associations and co-operatives.
- 1.5 The *Associations Incorporation Act 2009* provides small, non-profit and non-commercial organisations in New South Wales with a simple and low-cost means of becoming a legal entity. Types of groups which are incorporated associations are sporting clubs, cultural and community groups. Incorporated associations are generally run by volunteers.
- 1.6 Co-operatives are people-centred organisations that are owned, controlled and used by their members. A co-operative's main purpose is to benefit its members. Co-operatives are based on the values of self-help, self-responsibility, democracy, equality, equity and solidarity.
- 1.7 In New South Wales there are approximately 37,000 incorporated associations currently registered and around 600 co-operatives.

**2 Australian Consumer Law (ACL)**

- 2.1 On 1 January 2011, the ACL came into effect nationally and as a law of each State and Territory. The ACL applies in New South Wales under section 28 of the *Fair Trading Act 1987*.
- 2.2 The ACL provides a single national consumer law, which is enforced jointly by the Australian Competition and Consumer Commission (ACCC) and state and territory fair trading agencies, and in respect of financial services, the Australian Securities and Investments Commission (ASIC). With few exceptions, the ACL applies across the entire Australian economy and regulates the conduct of all business in all sectors.

- 2.3 The ACL ensures that traders do not gain an advantage over their competitors through unfair trading practices and places obligations on suppliers to be proactive in ensuring that their services are compliant with consumer protection objectives. In particular, the strict liability nature of certain offences under the ACL means that ignorance of the law will not provide a defence.
- 2.4 Under the ACL it is unlawful for a business to make statements in trade or commerce that are misleading or deceptive or would be likely to mislead or deceive. Misleading or deceptive conduct includes actions and statements in, for example, advertisements, promotions, quotations, statements and any representation made by a person.
- 2.5 Misleading or deceptive conduct by a business in trade and commerce can result in civil remedies including injunctions, declarations, damages, compensatory orders, orders for non-party consumers and non-punitive orders. Fair Trading can also accept court-enforceable undertakings, issue substantiation notices and public warnings. Penalties may apply if the conduct also breaches the ACL in other ways.

### **3 Incorporated Associations – unacceptable names**

- 3.1 Under section 11 of the Associations Incorporation Act, Fair Trading can direct an association that has an unacceptable name, to adopt a new name.
- 3.2 If an association does not comply with a direction for the change of name, section 76(1)(i) provides that Fair Trading may cancel an association's registration.
- 3.3 On 21 December 2012, the Associations Incorporation Amendment (Unacceptable Names) Regulation 2012 commenced. This expanded the classification for unacceptable names to include a name likely to mislead the public in relation to the nature, objects or functions of an association.

### **4 Discussion Paper**

- 4.1 On 25 October 2013, Fair Trading released the Discussion Paper: "Improving governance within incorporated associations". Proposals in the Discussion Paper are aimed at strengthening governance within incorporated associations without placing undue burdens on them.
- 4.2 The Discussion Paper explored ten focused governance solutions, including:
  - the cancellation of an incorporated association's registration on the grounds it is in the public interest to do so; and
  - allowing Fair Trading to take action against incorporated associations for misleading or deceptive conduct.
- 4.3 A range of remedies were discussed in the paper, including court-enforceable undertakings, damages and financial penalties.
- 4.4 The closing date for submissions on the Discussion Paper was 13 December 2013. Comments and feedback received will inform the statutory review of the Associations Incorporation Act, which will be undertaken in 2014. A report on the review is to be tabled in Parliament in early 2015.

## RECENT ACTIONS BY FAIR TRADING

### 5 Fair Trading investigations

- 5.1 Fair Trading has investigated a number of traders that have made claims about being able to cure medical conditions contrary to accepted medical practice. Where traders are engaging in false and misleading conduct or are making false and misleading representations to consumers about the performance characteristics, uses or benefits of the goods and services they are promoting, such investigations consider possible contraventions under the ACL and the Fair Trading Act.
- 5.2 These investigations will commonly involve the issue of a substantiation notice to the trader, requiring them to provide Fair Trading with evidence that substantiates their claims, and may require medical experts to provide evidence of acceptable medical practice.

#### Trevor Francis Robinson (trading as Reverend Trevor Robinson)

- 5.3 Following a Fair Trading investigation, on 21 May 2013 Trevor Francis Robinson (trading as Reverend Trevor Robinson) was found by a Court to have made false and misleading statements about his abilities to cure cancer and to have failed to substantiate his claims after he was issued with a substantiation notice. No conviction was recorded on the grounds he enter into a two year good behaviour bond under section 10(1)(b) of the *Crime (Sentencing Procedure) Act 1999*.

#### Samuel Faraj Cohen, Institute of Hair Regrowth and Beauty

- 5.4 Fair Trading has also investigated and prosecuted Mr Samuel Faraj Cohen, of the Institute of Hair Regrowth and Beauty (IHRB). IHRB promoted hair regrowth solutions to consumers, including products with approved medications (Minoxidil) that have been combined with other ingredients, for which Mr Cohen charged consumers a high fee. On 22 July 2011, Mr Cohen was convicted and fined for providing false and misleading information to the then Consumer, Trader and Tenancy Tribunal (the Tribunal).

### 6 Fair Trading direction under the Associations Incorporation Act

#### Australian Vaccination Network (AVN)

- 6.1 Australian Vaccination Network (AVN) is an organisation established to critique the immunisation of children. As an incorporated association, it is regulated by Fair Trading. Fair Trading had concerns that AVN's name did not accurately reflect the organisation's purpose and aims, which was to promote an anti-vaccination message.
- 6.2 Accordingly, Fair Trading directed AVN to change its name. AVN commenced proceedings in the Administrative Decisions Tribunal challenging Fair Trading's direction. On 25 November 2013, the Tribunal upheld Fair Trading's direction to AVN to change its name on the grounds it was unacceptable.
- 6.3 The *Associations Incorporation Act 2009* provides that an association's name cannot be changed until the members' approval is obtained by special resolution. Following the Tribunal's decision, Fair Trading has provided a timeframe to AVN to complete this process by 24 March 2014.

## LEGISLATION

### 7 Overview

- 7.1 There are overlapping responsibilities for Fair Trading and the Health Care Complaints Commission (HCCC) in relation to persons promoting unscientific health-related information or practices which may be detrimental to individual or public health and to the interests of consumers.
- 7.2 The ACL, the Fair Trading Act and the *Health Care Complaints Act 1993* each provide useful provisions for protecting individual and public health. There may also be opportunities to improve outcomes if these provisions are used in combination.
- 7.3 Fair Trading and the HCCC could seek opportunities to work together to provide a more co-ordinated compliance regime for the benefit of the people of New South Wales.

### 8 Types of complaints that the HCCC can investigate

- 8.1 Prior to amendment by the *Health Legislation Amendment Act 2013*, the scope of section 7(1)(b) of the Health Care Complaints Act was quite narrow in relation to the type of complaint the HCCC could investigate. The NSW Supreme Court in *Australian Vaccination Network Inc v Health Care Complaints Commission* [2012] NSWSC110 found that "Complaints about health services that have a tendency to affect a person or group, but which cannot be shown to have had an effect, would appear to be excluded." The Amendment Act expanded section 7(1)(b) to allow the HCCC to deal with complaints where a health service affects, *or is likely to affect*, the clinical management or care of an individual client. This amendment, which received assent on 14 May 2013, was introduced to address the limitation identified by the Court in 2012 as to the matters about which the HCCC could receive complaints.
- 8.2 Under the ACL it must be proved that the conduct is misleading or deceptive, or is likely to mislead or deceive, but not that the misleading or deceptive conduct has led any individual consumer to take a specific action as a result of the conduct.
- 8.3 While the definition of matters about which a complaint can be made to the HCCC was enhanced by the 2013 amendment, there may still be cases where the ACL provides a more appropriate power for investigating consumers' complaints.

### 9 Referrals

- 9.1 Sections 9 and 9A of the Fair Trading Act permit Fair Trading to receive complaints from other agencies for investigation, and to refer matters to other, appropriate agencies to investigate.
- 9.2 Section 8 of the Health Care Complaints Act allows for the Commissioner for Fair Trading to lodge a complaint with the HCCC.
- 9.3 Section 26 of the Health Care Complaints Act provides that the Commission may refer a complaint to any person or body if it appears that the complaint raises issues which require investigation by that person or body. The scope of this section is narrower than the provisions under the Fair Trading Act as a complaint must first be established under section 7(1)(b) of the Health Care Complaints Act.

## 10 Information sharing and joint investigations

- 10.1 Under section 9A of the Fair Trading Act, Fair Trading is able to enter into an arrangement to share information and jointly investigate matters with other agencies involved in the prosecution of offences in any jurisdiction. This has proven useful where there is overlapping jurisdiction and common issues. Decisions can be taken at the conclusion of the investigation about the appropriate enforcement action to be initiated by each agency to meet the compliance strategy for the trader.
- 10.2 Section 99B(1)(e) of the Health Care Complaints Act provides for the HCCC to be able to disclose information obtained in exercising a function under the Act to "any investigative or prosecuting authority established by or under legislation". Section 99B(1)(g) of the Act also provides for the disclosure of information to "an investigator carrying out an investigation, examination or audit in relation to a health service provider".

## CONCLUSION

### 11 Recommendations

- 11.1 It is recommended that consideration be given to expanding the type of complaint that can be investigated by the HCCC to include conduct by a health service that is misleading or deceptive or is likely to mislead or deceive.
- 11.2 It is recommended that NSW Fair Trading and the HCCC take appropriate steps, including an amendment of the Health Care Complaints Act if required, so that:
- referrals can be made to NSW Fair Trading by the HCCC;
  - information sharing arrangements can be entered into between Fair Trading and the HCCC; and
  - joint investigations can be conducted by Fair Trading and the HCCC.