

25 November 2019

Mr Martin Fletcher  
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Dear Mr Fletcher

**MIGA submission – *Guidelines for advertising a regulated health service review***

1. MIGA appreciates the opportunity to provide a submission to the review of the National Boards' *Guidelines for advertising a regulated health service*.

**MIGA's position**

2. MIGA supports Option 2 outlined in the discussion paper, revising the existing guidelines.
3. The existing guidelines remain helpful, but various uncertainties need clarification.
4. The draft revised guidelines need to be harmonised with the AHPRA advertising resources developed over the last couple of years. Some of this has occurred, but more is needed. The resources have been important in clarifying advertising obligations and helping the professions understand them.
5. Greater clarity and specificity is needed in the final guidelines. More AHPRA advertising resources material should be incorporated into the final guidelines. This should include information which is more directive or instructive about what is considered appropriate or inappropriate advertising. There cannot be any confusion about what is considered by the National Boards to be appropriate professional conduct or practice, which could be caused by any disparity between the final guidelines and the AHPRA advertising resources. This would create uncertainty about what is appropriate professional conduct or practice under s 41 of the *Health Practitioner Regulation (National Law) (the National Law)*.
6. The AHPRA advertising resources should continue to evolve. The range of 'dos and don'ts' and case studies are helpful. More are needed over time for new, evolving and profession-specific issues. MIGA is willing to work with the Medical Board / AHPRA on further resources for the profession.
7. Promotion of the final guidelines should be accompanied by key messages so practitioners can understand the thrust of the National Law advertising obligations and final guidelines, including
  - Key aspects of the advertising obligations under s 133 of the National Law
  - Advertising covers a wide range of communications outside the therapeutic relationship
  - You are responsible for advertising under your control
  - Have the right evidence to back the claims you make
  - Be careful how you describe who you are and what you do as a practitioner.

**Summary of advertising obligations**

8. The 'Summary of advertising obligations' in the draft guidelines omits key elements from the 'Summary of advertising obligations' contained in AHPRA's advertising resources.<sup>1</sup> These should be harmonised.

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<sup>1</sup> Available at [www.ahpra.gov.au/Publications/Advertising-resources/Legislation-guidelines/Summary-of-advertising-obligations.aspx](http://www.ahpra.gov.au/Publications/Advertising-resources/Legislation-guidelines/Summary-of-advertising-obligations.aspx)

9. The elements which should be in the final guidelines include
- Under heading '4. Advertising must not create an unreasonable expectation of beneficial treatment' – add *“Practitioners should be careful about using words which can make people think they will get a certain result from treatment. These ‘cure’, ‘safe’, ‘effective’ and ‘treats’*
  - Guidance on title / specialty claims – add new heading and section as follows  
***Advertising should not say a practitioner is a registered specialist if they are not or claim that they ‘specialise’ in treating a health condition***  
*If a practitioner does not hold specialist registration (or endorsement) they may not use the title ‘specialist’, or present themselves to the public as holding specialist registration (or endorsement) in a health profession through advertising or other means.*
10. For clarity and the avoidance of doubt, the following sentence under the heading '3. Advertising must not include testimonials...' should be amended to read *“Advertisers are responsible for all published testimonials (solicited or unsolicited) that are within their control, such as those on **their own** social media”*.
11. The 'Summary of advertising obligations' in the draft guidelines should also contain
- Short explanations of
    - o What 'advertising' includes - *“Verbal, printed or electronic public communication that promotes and seeks to attract a person to a health service provider outside the consultation setting”*
    - o Who the guidelines apply to – practitioners, business and any person who has advertising under their control or responsibility
  - A web link to AHPRA's advertising resources for more information.

## 1.2 Compliance and enforcement

12. The final guidelines should explain that it is not just pecuniary penalties that practitioner advertisers may face if they breach s 133 of the National Law, but also a professional conduct matter which may result in disciplinary action.

## 2. Purpose of the guidelines

13. For clarity and the avoidance of doubt, the following sentence this section should be amended to read *“The guidelines do not prevent health service providers from informing the public about the services they provide or stop members of the community from discussing their experiences online **in forums outside the provider's control** or in person.”*

### 3.1 What is considered advertising?

14. In relation to this section MIGA proposes the following changes
- Inclusion of the range of examples of advertising from the 'Summary of advertising obligations' contained on AHPRA's website, namely
    - o Any public communication using television, radio, motion pictures, newspapers, billboards, books, lists, pictorial representations, designs, mobile communications or other displays
    - o Professional websites, the internet or directories
    - o Business cards, announcement cards, office signs, letterhead, telephone directory listings, professional lists, professional directory listings and similar professional notices
    - o Situations in which registered health practitioners give information for media reports, magazine articles or advertorials, including where they make comment or provide information on particular products or services, or about other health practitioners

Although there is a broad definition included at the end of the draft guidelines, a short summary which 'covers the field' at this point in the draft guidelines is necessary, along with mention that the definition of 'advertising' at the end of the guidelines contain more information, particularly around what is not considered advertising

- Amending the following sentence for the purpose of clarity to read *“A practitioner providing information about treatment or cost related issues to their patient or client within the context of a*

*healthcare consultation, whether in person, by telephone or video or via other digital means, is not considered advertising”.*

### 3.2 Who is an advertiser?

15. The concept of ‘control’ over advertising needs to be clarified.
16. MIGA proposes a new paragraph in this section, including consolidated material from both footnote 3 in the draft guidelines and the ‘Summary of advertising obligations’ contained on AHPRA’s website, as follows
 

*All advertisers, including registered health practitioners, are responsible for all advertising within their control. An advertiser is deemed to have control of the advertising if they publish or authorise content or direct someone to publish, copy or draft content (including a third party, a patient, staff member or marketing agency) or if there is a mechanism for the advertiser to modify or remove content published by an unrelated publisher. This does not include material which is created by another, based on what the advertiser has provided, without the advertiser’s knowledge or consent. If a practitioner is the principal health practitioner of a clinic, they are considered responsible for the clinic’s advertising including the associated website.*
17. Further clarity on what are ‘therapeutic goods’ regulated by the Therapeutic Goods Administration (TGA) should be provided in footnote 4 by indicating that ‘therapeutic goods’ include medicines and medical devices, and that the TGA imposes various obligations in relation to advertising therapeutic goods.

#### 4.1 False, misleading or deceptive advertising

18. MIGA proposes the following changes to individual provisions in this section
 

*Suggests a practitioner is a registered health practitioner or holds specialist registration, **qualifications or an endorsement when they do not, by using a title and/or other means – further information is available in ‘Titles in health advertising’ available on the AHPRA website** [include web link]*

There should also be a new footnote containing web links to the lists of professions and divisions, and specialities and speciality fields, on the AHPRA website

##### 4.1.2 What is acceptable evidence?

19. In addition to a web link to the new AHPRA *Guide to assessing the evidence for advertising claims* yet to be published, additional information already available within AHPRA’s advertising resources should be included in this section of the final guidelines, namely
  - The framework / diagram of factors for assessing whether evidence is acceptable
  - Short bullet points on what each factor means,<sup>2</sup> i.e. ‘Source – Is the evidence supporting my claim from a publicly accessible and reliable source?’

Given this is a higher level methodology for considering acceptable evidence for advertising, it should be included in the guidelines, not just the new guide specifically on assessing evidence for advertising, or the AHPRA website resources.

##### 4.1.3 Titles and claims about registration, competence and qualifications

20. MIGA proposes the following additions to this section
  - Indicate that specific, higher penalties can apply for breach of the National Law title protection provisions, which can apply both to advertising and more broadly
  - Mention that consolidated lists of titles, professions, divisions, specialities and speciality fields are available on the AHPRA website and provide the relevant web links
  - Provide the AHPRA ‘Titles in health advertising’ guide as a further reference, including a web link
  - Indicate that further information and examples of non-compliant advertising relating to registration, competence and qualifications are contained in the ‘Self-assessment tool’ and ‘Check and correct’ sections of AHPRA’s website, and provide a web link.

<sup>2</sup> Available at [www.ahpra.gov.au/Publications/Advertising-resources/Acceptable-evidence-in-health-advertising.aspx](http://www.ahpra.gov.au/Publications/Advertising-resources/Acceptable-evidence-in-health-advertising.aspx)

21. As is the case for advertising cases, it would be helpful for AHPRA to include a range of title protection cases in its website resources.

#### 4.2 Gifts, discounts and inducements

22. This section of the draft guidelines needs further information. It considers
- There should be an indication that use of unclear or misleading terms and conditions are insufficient and inappropriate
  - Reference to “*price information that is inexact*” as a possible contravention of the National Law should also include mention of price information which is incomplete or misleading
  - Examples of possible National Law contraventions should also include
    - o Mentioning an instalment amount without mentioning total cost from the current guidelines
    - o The existing example of “*make one consultation appointment, get one free*” from the current guidelines
  - Indicate that further information and examples of gifts, discounts and inducements which may breach the National Law are contained in the ‘Self-assessment tool’ and ‘Check and correct’ sections of AHPRA’s website, and provide a web link

It would also be helpful to include additional examples of non-compliant gifts, discounts and inducements from AHPRA notifications over the past few years on the AHPRA website resources

#### 4.3 Testimonials

23. The distinction drawn between clinical and non-clinical testimonials (second paragraph in this section) is not entirely clear. The references to what are ‘clinical aspects’ of comments which are considered testimonials are helpful, but more clarity is needed to indicate what is a ‘non-clinical’ comment which is not a testimonial. The reference to comments ‘customer service’ as being an example of something not caught by the National Law and guidelines is potentially confusing and out of place. MIGA suggests the relevant paragraph be reworded to read

*Not all reviews or positive comments made about a regulated health service are considered testimonials (as defined in these guidelines). **Reviews or comments about non-clinical aspects of healthcare are not considered testimonials.** For example, comments about **a patient’s general experience at a practice** ~~customer service~~ that do not include a reference to clinical aspects of care are not considered testimonials for the purposes of the National Law.*

24. In section 4.3.2 there needs to be greater clarity around what patient reviews are considered a testimonial (being under control of the advertiser) and those which are not (not under the advertiser’s control). MIGA proposes the following rewording the second and third sentences in the first paragraph

*The prohibition on using testimonials (or purported testimonials) to advertise a regulated health services does not affect consumers sharing information, expressing their views online or posting reviews on review platforms **which are outside an advertiser’s control**. The National Law does not regulate how members of the public can interact with review sites or discussion for a **in a setting where the public or third parties control what is expressed. This includes information which is created or edited by a third party without the advertiser’s knowledge or consent***

25. The table in section 4.3.3 setting out who is responsible for compliance with the prohibition on use of testimonials is helpful, but needs the following changes / additions
- Clinic or practitioner’s website that publishes (or republishes) reviews or testimonials - clarify that it is whoever has control over the website, being it the clinic business owner or practitioner, that has responsibility for compliance
  - Clinic or practitioner’s social networking site or social media site that has reviews / testimonial function
    - o Clarify that it is whoever has control over the site, being it the clinic business owner or practitioner, that has responsibility for compliance
    - o Potential need for removal of / disabling function for reviews / testimonials if they pose a risk to the public – it is unclear how to assess whether there is a risk. It might be misinterpreted as

introducing a new obligation for removal of testimonials going beyond the advertising context. The reference to risk to the public should be replaced with *“if they appear to breach the National Law provisions or guidelines on advertising”*

#### 4.4 Advertising that creates an unreasonable expectation of beneficial treatment

26. Given the emphasis placed in the AHPRA advertising resources on ‘words to be wary about’,<sup>3</sup> these should be included in the final guidelines.
27. MIGA proposes the section on this in the AHPRA advertising resources be incorporated into section 4.4, covering the words / phrases ‘cure’, ‘can help / improve / treat’, ‘effectively treats’, safe and ‘effective’.
28. The section should also indicate that further information and examples of advertising that creates an unreasonable expectation of beneficial treatment which may breach the National Law are contained in the ‘Self-assessment tool’ and ‘Check and correct’ sections of AHPRA’s website, and provide a web link.
29. Given concerns about not disclosing / detailing risks in advertising material, which is mentioned in the current guidelines, this should be included as an example of advertising which may breach the National Law and guidelines.
30. On issues of using images and photographs, it would be helpful to indicate
  - This type of advertising may contravene the National Law where images / photographs are not put in context, such as through providing a realistic range of potential outcomes
  - Use of before and after images are less likely to be misleading if used within a variety of before and after images, showing a range of potential outcomes

#### Definitions

31. There should be web links in the online version of the final guidelines to terms clarified elsewhere in the draft guidelines, namely ‘acceptable evidence’, ‘testimonial’ and ‘within their / your control’.
32. The definition of ‘social media’ should also make reference to AHPRA’s recently revised social media guide, and provide a web link to it.

#### Appendix 1 – Associated legislation and agencies

33. For the Australian Consumer Law, reference should be made to the Federal Government’s Australian Consumer Law website, which contains a range of relevant information and resources. This is available at [www.consumerlaw.gov.au](http://www.consumerlaw.gov.au)
34. For therapeutic goods, a web link should be provided to the TGA’s advertising hub / resources. This is available at [www.tga.gov.au/advertising-hub](http://www.tga.gov.au/advertising-hub)
35. Provision of links to legislation for drugs and poisons legislation across the country may not be particularly useful. It would be preferable to provide a central resource / web link where information can be obtained in a more digestible form, such as the TGA’s contacts and web links for state and territory medicines and poisons regulation units. This is available at [www.tga.gov.au/contacts-stateterritory-medicines-poisons-regulation-units](http://www.tga.gov.au/contacts-stateterritory-medicines-poisons-regulation-units)
36. If you have any questions or would like to discuss, please contact [REDACTED], [REDACTED] / [REDACTED]

Yours sincerely

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

<sup>3</sup> Available at [www.ahpra.gov.au/Publications/Advertising-resources/What-health-practitioners-and-healthcare-providers-need-to-know.aspx](http://www.ahpra.gov.au/Publications/Advertising-resources/What-health-practitioners-and-healthcare-providers-need-to-know.aspx)