

## Background information

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22 April 2016

### The advertising provisions of the National Law

#### Introduction

The National Registration and Accreditation Scheme (the [National Scheme](#)) was established under the Health Practitioner Regulation National Law as in force in each state and territory (the [National Law](#)).

The National Law establishes fourteen National Boards, one for each profession regulated by the National Scheme, and the Australian Health Practitioner Regulation Agency (AHPRA).

AHPRA is the national organisation responsible for implementing the National Scheme across Australia, in partnership with the 14 National Boards, including the Chiropractic Board of Australia (the Board). The Chiropractic Board's role is to regulate chiropractors in Australia under the National Law.

AHPRA and the Board work under the National Law to regulate chiropractors in the public interest. This includes registering chiropractors who are suitably trained and qualified for registration, and investigating concerns about registered chiropractors.

Members of the public, health practitioners, employers or any other organisations are encouraged to report any concern about the professional conduct, performance or health of registered health practitioners.

#### Health practitioners and the National Scheme

The National Scheme aims to protect the public by ensuring that only suitably trained and qualified practitioners are registered. It also facilitates workforce mobility across Australia, the provision of high-quality education and training of health practitioners and rigorous assessment of overseas-trained practitioners.

It is important to define our place in Australia's health system. AHPRA and the Board do not regulate health services; they regulate individual health practitioners. This is an essential distinction to make. However, health practitioners are also expected to meet the requirements of other parts of the health system within which they operate, whether a local hospital, health authority, government department or statutory authority. We expect that too.

New research and cutting edge treatments are constantly being introduced internationally to make sure the public get the best health services possible. This means the delivery of health care is often dynamic, with an evolving evidence base and practice.

Within this context, the National Scheme is there to protect the public and make sure health practitioners are providing safe care.

Breaches of advertising requirements are only one part of National Boards' and AHPRA's work to regulate registered health practitioners with the core objective of protecting the public. This work includes:

- National Boards setting national standards that define the requirements that applicants and registrants need to meet to be registered
- National Boards approving accreditation standards and overseeing 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
- National Boards and AHPRA registering health practitioners and maintaining 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
- investigating notifications about the health, performance and conduct of registered health practitioners
- monitoring practitioners who are subject to restrictions or conditions on their practice, and
- acting on complaints about advertising and other statutory offences under the National Law.

### What does the National Law say?

AHPRA and the National Boards must act within the National Law. In all our work we must apply the objectives and guiding principles set out in the National Law. In addition, we have developed regulatory principles to provide additional guidance to our work.

Advertising is the practice of drawing attention to a health practitioner's services. The ways in which this can be achieved are almost limitless and include all forms of printed and electronic media, and includes any public communication using television, radio, motion pictures, newspapers, billboards, books, lists, pictorial representations, designs, mobile communications or other displays, professional websites, the Internet or directories, and includes business cards, announcement cards, office signs, letterhead, telephone directory listings, professional lists, professional directory listings and similar professional notices.

The [National Law](#) provides that a person must not advertise regulated health services (a service provided by, or usually provided by, a health practitioner as defined in the National Law) 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.

Advertising breaches are a [statutory offence](#) under the National Law and may be prosecuted in the Magistrates or Local Court. On some occasions advertising matters may be dealt with via a disciplinary process and may result in the same range of outcomes as would any other disciplinary matter.

The maximum penalties that a court may issue for an offence under the National Law are as follows:

- for offences under sections 113 to 123 (title and practice protections) – a fine of \$30,000 in the case of an individual or \$60,000 in the case of a body corporate, per offence
- for offences under section 133 (advertising) – a fine of \$5,000 in the case of an individual or \$10,000 in the case of a body corporate, per offence.

The advertising restrictions in the National Law, including the prohibition on using testimonials, only apply to advertising a regulated health service (a service provided by a health practitioner as defined in the National Law) or a business providing a regulated health service. The same advertising requirements apply to all health professions in the National Scheme.

The National Law does not regulate advertising which is not about a regulated health service.

However, the Australian Consumer Law governs the practice of traders, which can include misleading and deceptive conduct, and is enforced by the [Australian Competition and Consumer Commission \(ACCC\)](#). Advertising of therapeutic goods and substances is also subject to additional regulation under the Commonwealth Therapeutic Goods Act 1989, which is administered by the [Therapeutic Goods Authority \(TGA\)](#).

Registered practitioners must not advertise health benefits of their services when there is not clear evidence or proof that these benefits can be achieved. This is because such advertising statements are likely to be misleading or deceptive. Advertising that is false, misleading or deceptive, or advertising that is likely to be misleading or deceptive, is prohibited under section 133 of the National Law. Misleading someone may include lying to them, leading them to a wrong conclusion, creating a false impression, leaving out (or hiding) important information, and/or making false or inaccurate claims.

The ways in which advertising can be false, misleading or deceptive are almost limitless. It is the overall impression of the advertising that is to be judged and, as such, it is possible for statements that are technically true to be misleading or deceptive in certain contexts.

Advertising claims that are contrary to high level evidence are unacceptable.

The National Law also prohibits advertising that creates an unreasonable expectation of beneficial treatment. The claims of beneficial treatment can range from unsubstantiated scientific claims through to miracle cures.

The Board asks chiropractors to make sure that any information they publish about services is factual and verifiable.

- a. They should only make justifiable claims about the quality or outcomes of their services in any information provided to patients.
- b. They should not make claims either directly to clients or in advertising or promotional materials about the efficacy of treatment or services provided if those claims cannot be substantiated or have been refuted.
- c. They must not use their possession of a particular qualification to mislead or deceive clients or the public as to their competence in a field of practice or ability to provide treatment.

For more information read the *Guidelines for advertising regulated health services* and the Chiropractic Board's [statement on advertising](#).

### **Taking action to protect the public - when there is an issue we want to know about it**

The public are entitled to receive safe, ethical and competent care from chiropractors, and the Board's role is to regulate the profession to achieve this. The Board and AHPRA take their role in keeping the public safe very seriously and expect chiropractors to do the same.

The requirement for chiropractors to provide care to the public that is evidence-based is a key component of the professional standards, codes and guidelines that the Board expects practitioners to adhere to.

Each year when a chiropractor renews their [registration](#) (so they can practise as a chiropractor in Australia) they make declarations which state they meet registration requirements which the Board sets to make sure the public are safe.

When the Board and AHPRA are made aware that a practitioner falls short of these standards, or when a concern is reported to AHPRA and the Board they take regulatory action to assess risk to protect the public.

Where there is evidence that practice of a chiropractor or group of chiropractors may be unsafe or create a significant risk of harm to the public the Board will act in order to protect the public.

Practitioners are expected to practise safely and within the limits of their competency, training and expertise.

Under the National Law, a National Board can develop registration standards about various issues including the scope of practice of registered health practitioners and recommend to Ministerial Council for approval. National Boards must consult widely in developing a proposed registration standard.

The National Law uses a 'protection of title and restricted practice' and 'holding out' model that has protection of the public as the paramount concern, rather than a potentially more prescriptive scope of practice model used in some states and territories prior to the implementation of the COAG competition

policy reforms from the mid-1990s to around 2005/6. A title protection model does not require the scopes of practice of individual professions to be defined.

The development of a scope of practice registration standard would only be considered where there is a clear need and case for additional regulation, consistent with the usual test for new regulatory action.

The Board is keen for any matters where there are concerns about the advertising, conduct or performance of a chiropractor to be brought to its attention so it can take action when appropriate to protect the public.

The Code of conduct for chiropractors clearly outlines the ethical and professional requirements for chiropractors, specifically the need for practitioners to practice in an evidence based and patient centred manner.

All National Boards have agreed to a set of [risk-based regulatory principles](#) that underpin their work with registered health practitioners. The level of risk that may exist informs the Board's regulatory activities; these can range from taking action with an individual practitioner (through [managing a complaint or concern](#)) to dealing with the broader profession.

### **Statutory offences**

There are a number of offences created under the National Law, including the following:

- unlawful use of a protected title
- performing a restricted act
- holding out (claims by individuals or organisations as to registration), and
- unlawful advertising.

AHPRA looks at each allegation of advertising breaches on a case by case basis. In determining whether an advertisement is misleading, whether it creates an unreasonable expectation of beneficial treatment, or encourages (directly or indirectly) the indiscriminate or unnecessary use of regulated health services or medicines, AHPRA will consider the overall impression of the advertisement and the likely impact the advertisement may have on a member of the public. AHPRA will consider what conclusions a member of the public can reasonably infer from material contained within an advertisement and whether the material is likely to mislead or deceive.

AHPRA deals with possible advertising breaches under the National Law by implementing a risk-based approach which aims to achieve compliance with the law as quickly and simply as possible. This approach 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.

Generally AHPRA takes an educative approach in the first instance when advertising complaints are made. At first instance, practitioners are sent correspondence from AHPRA which gives them the opportunity to amend their advertising to ensure it complies with the National Law.

If the practitioner does not change their advertising, AHPRA may refer the matter to the National Board to consider possible disciplinary action for failing to comply with their professional obligations and the advertising requirements. AHPRA also refers matters to the National Boards to consider disciplinary action when the advertising raises concerns about the health, performance or conduct of the relevant practitioner. AHPRA will also prosecute practitioners in appropriate cases.

National Boards have extensive disciplinary powers in relation to registered health practitioners, including the ability to take immediate action to restrict a practitioner's right to practice in order to protect the public. This means that where advertising also involves health, performance or conduct concerns, disciplinary action will almost always achieve a more tailored and responsive approach to protecting the public than prosecution. In appropriate cases, disciplinary action can be taken in conjunction with prosecution.

### **Making a notification**

In addition to allegations of statutory offences such as breaches of advertising requirements, anyone can make a notification to AHPRA and the Board about the health, performance or conduct of registered practitioners.

After a complaint is made and is accepted as a notification, it is [assessed](#) by the Board. If the Board decides to refer a notification to an [investigation](#), there are different [possible outcomes](#). If a matter is referred to a panel or a tribunal, the possible outcomes are set down in the National Law. If you wish to find out more these are detailed in the fact sheet on [panel hearings](#) and the fact sheet on [tribunal hearings](#).

### **Cases of regulatory action**

As part of its focus on protecting the public, the Board takes regulatory action against registered practitioners and unregistered individuals for breaches of national standards or the National Law, including:

- successfully prosecuting two cases in 2014 of individuals who were not registered chiropractors but were presenting themselves as being registered
- imposing conditions on the registration of 14 chiropractors
- issuing 10 cautions, and
- cancelling/suspending the registration of one practitioner.

The Board also refers matters of the most serious concern to the relevant state or territory tribunal for hearing and decision.

All registered health practitioners have a professional and ethical obligation to protect and promote public health and safe healthcare.

The National Law requires registered health practitioners and employers of registered health practitioners, to advise AHPRA or a National Board if they have formed a reasonable belief that a health practitioner has behaved in a way that constitutes notifiable conduct in relation to the practice of their profession, this is often referred to as mandatory reporting.

For example, if a practitioner is alleged to have practised the practitioner's profession while intoxicated by alcohol or drugs, engaged in sexual misconduct in connection with the practice of the practitioner's profession, placed the public at risk of substantial harm in the practitioner's practice of the profession because the practitioner has an impairment; and/or placed the public at risk of harm because the practitioner has practised the profession in a way that constitutes a significant departure from accepted professional standards.

The Board also has the power to take immediate action in relation to a health practitioner's registration at any time if it believes this is necessary to protect the public. This is an interim step that Boards can take while more information is gathered or while other processes are put in place.

Immediate action is a serious step. The threshold for the Board to take immediate action is high and is defined in section 156 of the National Law. To take immediate action, the Board must reasonably believe that: because of their conduct, performance or health, the practitioner poses a 'serious risk to persons' and that it is necessary to take immediate action to protect public health or safety, or the practitioner's registration was improperly obtained, or the practitioner or student's registration was cancelled or suspended in another jurisdiction.

Please see the [facts and figures section](#) of this briefing for information on the outcomes of these actions by the Board and AHPRA for 2013/14 and 2014/15.

## Let's look at an example

An example of where a registered chiropractor has been the subject of tribunal or court findings about breaches of advertising requirements is the case of Malcolm Hooper, a formerly registered chiropractor.

In this case, the Board used its powers under the National Law and referred Malcolm Hooper in the Victorian Civil and Administrative Tribunal.

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.

As a result of the tribunal decision, his registration was cancelled and his name was removed from the public register of registered practitioners on 30 August 2013. Malcolm Hooper is now listed on the [List of cancelled practitioners](#).

## Recent action by the Chiropractic Board

In March 2016 the Board made contact with every chiropractor in Australia, to provide additional [advice on advertising matters](#), while asking practitioners to review their advertising. This reinforced the Board's position that it expects all registered chiropractors to meet the advertising requirements in the National Law. The Board wants all practitioners to take a proactive approach and make sure their advertising is compliant.

The Board is unable to comment on any matters or investigations which may be currently in progress.

The Chiropractic Board is holding a stakeholder forum about advertising later this year and will also provide chiropractors with more information on how to use scientific information in advertising.

## What to do if you have a concern

AHPRA and the Board receive and investigate complaints and concerns about the health, performance and conduct of registered practitioners. They can also investigate the behaviour of non-registered persons if they commit an offence under the National Law. Anyone who is concerned about the practices of an individual or organisation can notify AHPRA to enable the Board to investigate the matter.

When someone complains about the health, performance and conduct of a registered health practitioner to the Board or AHPRA, this is called a notification. Anyone with a concern about the health, conduct or performance of a registered health practitioner is encouraged to make a notification via the AHPRA website at: [www.ahpra.gov.au/Notifications/What-is-a-notification.aspx](http://www.ahpra.gov.au/Notifications/What-is-a-notification.aspx).

You can find further details and information on how to report someone if you feel they are not meeting the advertising requirements on the [APHRA website](#), where you can also find out how to [make a complaint about an offence](#).

Anyone can read the [Code of conduct](#) for chiropractors and this can help the public understand and ask the right questions about the health, conduct or performance expected of their chiropractor. There is also information on [common types of notifications](#) and how to raise a concern about a registered health practitioner.

There are different processes for making notifications in New South Wales and Queensland. [Find out more](#).

## Regulating chiropractors – additional facts and figures

The Board has recently released a profession summary which reports on its work regulating practitioners to minimize the risk to the public during 2014/15. A profession summary is also available for 2013/14. For information on detail about the wider National Scheme or to check previous year's annual reports go to you can check out the [AHPRA and National Boards annual report publication page](#).

\*Note where the data below includes NSW, this data has been provided to AHPRA by the [Health Professional Council's Authority \(HPCA\)](#). NSW is part of the National Scheme but notifications about practitioners' health, performance and conduct are handled by the [Health Care Complaints Commission \(HCCC\)](#) and the NSW health professional councils supported by the HPCA.

Table 1 showing the number notifications received about chiropractors, by state or territory for 2013/14 and 2014/15

	2013/14	2014/15
<b>ACT</b>	1	3
<b>NT</b>	1	-
<b>QLD</b>	8	5
<b>SA</b>	18	5
<b>TAS</b>	3	-
<b>VIC</b>	34	16
<b>WA</b>	14	12
<b>Subtotal</b>	<b>79</b>	<b>41</b>
<b>NSW inc</b>	32	34
<b>Total</b>	<b>111</b>	<b>75</b>

Table 2 showing the percentage base of notifications received about chiropractors compared to the total number of registered chiropractors, in the financial years 2013/14 and 2014/15

	chiropractors (excl NSW)	chiropractors (incl NSW)
<b>2013/14</b>	2.2%	2.0%
<b>2014/15</b>	1.3%	1.5%

Table 3 showing the number of notifications closed about chiropractors, by state and territory in the financial years 2013/14 and 2014/15

	2013/14	2014/15
<b>ACT</b>	-	3
<b>NT</b>	-	1
<b>QLD</b>	9	14
<b>SA</b>	10	10
<b>TAS</b>	2	1
<b>VIC</b>	27	26
<b>WA</b>	10	13
<b>Subtotal</b>	<b>58</b>	<b>68</b>
<b>NSW inc</b>	31	30
<b>Total</b>	<b>89</b>	<b>98</b>

Table 4 number of notifications closed for chiropractors by stage of notification, in the financial years 2013/14 and 2014/15 (inc NSW)

	2013/14	2014/15

<b>Assessment</b>	54	36
<b>Investigation</b>	24	48
<b>Health or performance assessment</b>	3	5
<b>Panel hearing</b>	7	6
<b>Tribunal hearing</b>	1	3
<b>Total</b>	<b>89</b>	<b>98</b>

Table 5 number of notifications closed for chiropractors by outcomes, in the financial years 2013/14 and 2014/15 (excl NSW)

	2013/14	2014/15
<b>No further action</b>	39 (66.1%)	24 (35.2%)
<b>Refer all or part of the notification to another body</b>	-	-
<b>HCE to retain</b>	2 (3.4%)	3 (4.4%)
<b>Accept undertaking</b>	-	16 (23.5%)
<b>Caution or reprimand</b>	3 (5.1%)	10 (14.7%)
<b>Impose conditions</b>	12 (20.3%)	14 (20.6%)
<b>Cancel registration</b>	1 (1.7%)	-
<b>Accept surrender of registration</b>	-	-
<b>Suspend registration</b>	1 (1.7%)	1 (1.5%)
<b>Fine registrant</b>	-	-
<b>Not permitted to reapply for 12 months</b>	1 (1.7%)	-
<b>Total</b>	<b>59</b>	<b>68</b>

Table 6 number of immediate actions taken against chiropractors, in the financial years 2013/14 and 2014/15 (inc NSW)

	2013/14	2014/15
<b>No action taken</b>	2	2
<b>Suspend registration</b>	-	-
<b>Accept surrender of registration</b>	-	-
<b>Impose conditions</b>	1	3
<b>Accept undertakings</b>	3	-
<b>Total</b>	<b>6</b>	<b>8</b>

Table 7 number of chiropractors under active monitoring by stream, as at 30 June, in the financial years 2013/14 and 2014/15

	2013/14 (exc NSW)	2014/15 (inc NSW)
<b>Conduct</b>	14	28
<b>Health</b>	5	-
<b>Performance</b>	7	22
<b>Suitability/Eligibility</b>	8	18
<b>Total</b>	<b>34</b>	<b>68</b>

Table 8 number of advertising complaints received about chiropractors, by state and territory, in the financial years 2013/14 and 2014/15

	2013/14	2014/15

<b>ACT</b>	2	-
<b>NT</b>	-	1
<b>NSW</b>	69	3
<b>QLD</b>	25	34
<b>SA</b>	19	-
<b>TAS</b>	-	-
<b>VIC</b>	53	16
<b>WA</b>	18	0
<b>Total</b>	<b>186</b>	<b>54</b>

Table 9 number of advertising complaints closed about chiropractors, in the financial years 2013/14 and 2014/15

	<b>2013/14</b>	<b>2014/15</b>
<b>Total</b>	104	96

Table 10 Number of mandatory notifications received by profession, as a percentage of the registrant population and per 10,000 practitioners.

In relation to this table please note:

- In 2014-15, four mandatory notifications were made about chiropractors, two of these notifications alleged harm was caused by a significant departure from accepted professional standards, one alleged a practitioner practised while intoxicated by alcohol or drugs, and one alleged sexual misconduct.
- Only 0.08% of the registrant base were the subject of a mandatory notification in 2014/15.

Profession	2014-15				2013-14			
	Mandatory notifications	Registered practitioners	% of practitioners who were subject of mandatory notifications	Practitioners who were subject of mandatory notifications 10,000 practitioners	Mandatory notifications	Registered practitioners	% of practitioners who were subject of mandatory notifications	Practitioners who were subject of mandatory notifications 10,000 practitioners
Aboriginal and Torres Strait Islander health practitioner	2	391	0.51%	51	-	343	0.00%	-
Chinese Medicine Practitioner	1	4,494	0.02%	2		4,271	0.00%	-
Chiropractor	4	4,998	0.08%	8	7	4,845	0.14%	14
Dental Practitioner	22	21,209	0.10%	10	26	20,707	0.13%	13
Medical Practitioner	212	103,133	0.21%	21	351	99,379	0.35%	35
Medical Radiation Practitioner	6	14,866	0.04%	4	8	14,387	0.06%	6
Nurse & Midwife	492	370,303	0.13%	13	624	362,450	0.17%	17
Occupational Therapist	4	17,200	0.02%	2	9	16,223	0.06%	6
Optometrist	1	4,915	0.02%	2	2	4,788	0.04%	4
Osteopath	1	2,000	0.05%	5		1,865	0.00%	-
Pharmacist	38	29,014	0.13%	13	55	28,282	0.19%	19

Physiotherapist	6	27,543	0.02%	2	14	26,123	0.05%	5
Podiatrist	2	4,386	0.05%	5	4	4,129	0.10%	10
Psychologist	42	32,766	0.13%	13	45	31,717	0.14%	14
<b>Total</b>	<b>833</b>	<b>637,218</b>	<b>0.13%</b>	<b>13</b>	<b>1,145</b>	<b>619,509</b>	<b>0.18%</b>	<b>18</b>