



Ahpra
& National
Boards

Responsible advertising in healthcare: keeping people safe

*Advertising compliance and
enforcement strategy for the
National Scheme*

December 2020

Contents

Executive summary	3
1. Introduction	4
a. What we do	4
b. Advertising and the National Law	5
c. Goals and aims	6
d. Principles	6
e. Using a risk-based approach	6
2. Compliance and enforcement strategies	7
a. Overview of compliance and enforcement model	7
b. Risk assessment framework	8
c. Education and engagement	8
d. Compliance and enforcement	9
e. Testimonials	10
f. Declaration about advertising obligations and audit	10
3. Review and evaluation	11
a. Our evaluation framework	11
b. Review	11

Executive summary

The Australian Health Practitioner Regulation Agency (Ahpra) and National Boards regulate health practitioners in Australia through the National Registration and Accreditation Scheme (the National Scheme).

Our primary role is public protection and we aim to do this through a risk-based approach to regulation, taking action proportionate to the risks to public health and safety we have identified.

Our goal is to ensure advertising about regulated health services is done responsibly to keep the public safe from unlawful advertising and to help the public make informed decisions about their healthcare. Unlawful advertising may compromise the healthcare choices of the public.

This strategy explains:

- how our risk-based approach is applied to advertising compliance and enforcement
- how we encourage voluntary compliance and deal with non-compliant advertising, and
- how we plan to evaluate and refine this strategy.

This strategy was originally published in 2017 and updated in 2020 to reflect changes following completion of the initial review and evaluation.

1. Introduction

a. What we do

The National Scheme regulates 16 health profession groups across Australia with more than 800,000 registered practitioners and 190,000 registered students.

There is a National Board for each health profession group that is part of the National Scheme, and the 15 National Boards work in partnership with Ahpra.

This infographic shows the objectives of the National Scheme and actions that support them.



* Nationally, except in NSW and Qld where this is managed by the Health Professional Councils Authority and the 15 health professional councils, and the Office of the Ombudsman, respectively.

The regulated professions are:

- Aboriginal and Torres Strait Islander health practice
- Chinese medicine
- chiropractic
- dental
- medical
- medical radiation practice
- midwifery
- nursing
- occupational therapy
- optometry
- osteopathy
- paramedicine
- pharmacy
- physiotherapy
- podiatry, and
- psychology.

Our work is governed by the Health Practitioner Regulation National Law, as in force in each state and territory (the National Law). Our responsibilities include registering practitioners and students, setting standards, and dealing with complaints.

b. Advertising and the National Law

Section 133 of the National Law makes it a criminal offence for any person (including registered health practitioners) to advertise a regulated health service, or a business that provides a regulated health service, in a way that:

- is false, misleading or deceptive or is likely to be misleading or deceptive
- 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
- uses testimonials or purported testimonials about the service or business
- creates an unreasonable expectation of beneficial treatment, or
- directly or indirectly encourages the indiscriminate or unnecessary use of regulated health services.

A regulated health service is a service provided by, or usually provided by, a health practitioner (as defined in the National Law). The definition of a regulated health service is broad and applies to public and private services. It is not limited to direct clinical services.

All National Boards have published [Guidelines for advertising a regulated health service](#) (the advertising guidelines) that explain the legal obligations of advertisers under the National Law. These apply to any person or business advertising a regulated health service.

We will continue to publish additional information and resources on the [Ahpra website](#) to help all advertisers understand their obligations under the National Law, and their requirements for responsible advertising of a regulated health service to the public.

The maximum penalty for each advertising offence is \$5,000 for an individual and \$10,000 for a body corporate. These penalties would apply for one-off instances of unlawful advertising, however ongoing breaches may be treated as separate offences, increasing the potential deterrent effect of the penalties.

Amendments to the National Law in 2019 introduced increases to penalties in relation to unlawful use of a protected title in all states and territories other than Western Australia. For an individual, there may be a financial penalty of up to \$60,000 per offence, imprisonment of up to three years per offence or both, and for a body corporate a financial penalty of up to \$120,000 per offence may apply.

However, if a registered health practitioner breaches the advertising offence provisions of the National Law there are other enforcement approaches available. A breach of the advertising offence provisions by a registered practitioner is also a breach of the National Board's advertising guidelines and code of conduct, so the practitioner's conduct is grounds for disciplinary action in relation to their registration. This is a core aspect of our enforcement approach.

Our regulatory work on advertising compliance includes acting on complaints, educating practitioners and other advertisers about what is and is not acceptable and taking action against unlawful, misleading or harmful advertising in the best interests of consumers of regulated health services. We also engage regularly with other regulators who are responsible for protecting consumers such as the Therapeutic Goods Administration (TGA) and Australian Competition and Consumer Commission (ACCC).

c. Goals and aims

Our goal is to ensure advertising about regulated health services is done responsibly to keep the public safe from unlawful advertising.

This goal includes that the advertising of regulated health services complies with the National Law, so the public has access to clear and correct information to help them make informed choices about their healthcare.

This strategy sets out how we aim to achieve advertising compliance, including how we will use the range of regulatory tools we have available. Publishing this strategy makes it clear what our approach is and what to expect from us.

Our approach is evolving. We have included ongoing evaluation as a core part of our strategy, and we will continue to look for ways to refine and improve our approach.

d. Principles

Our [Regulatory principles](#)¹ underpin all our work regulating Australia's health practitioners in the public interest. These principles shape our thinking about regulatory decision-making and encourage a responsive, risk-based approach to regulation.

Informed by our regulatory principles, the key principles that support our strategy are:

- **Risk-based:** We focus our resources on the highest risk matters and those with most potential benefit for the public. We will take different types of compliance and enforcement action depending on the risk posed.
- **Targeted:** We recognise there is no one size fits all approach. Our compliance and enforcement actions will be focused, fit for purpose and depend on the type of behaviour identified. We take an evidence-based approach, including looking to research and other regulators for examples of best practice regulation and behaviour change approaches, with ongoing evaluation central to our strategy.
- **Proportionate:** We take the minimum compliance and enforcement action appropriate to manage the risk posed, to protect the public.
- **Transparent:** We set clear benchmarks for advertising of regulated health services and provide authoritative guidance on what advertisers need to do to comply. We are clear about our planned approach to advertising compliance and how we enforce compliance when appropriate. Our processes for decision-making and dealing with complaints support consistent enforcement outcomes and provide clarity for the public and advertisers about what is and is not acceptable in advertising. We are committed to reporting on action taken including through publishing case studies and enforcement outcomes.
- **Engaged:** Collaboration is central to our strategy. We work with the public to understand and be responsive to their expectations. We work with professional associations and health practitioners to support better advertising practices. We explore varied opportunities for learning and joint work with government, other regulators and stakeholders.

e. Using a risk-based approach

We are a risk-based regulator. Applying a risk-based approach to advertising compliance and enforcement means we take different actions depending on the level of risk identified and what action is likely to have the most impact in the circumstances.

We will focus our resources on the highest risk matters and those with most benefit to the public, recognising that we have finite resources.

Our risk-based approach is also about being responsive. Our strategy is flexible so we can respond to new or different types of risks, new or emerging ways to advertise, and evolving public expectations.

¹ The *Regulatory principles for the National Scheme* are currently being reviewed and this text will be updated when the revised version is available.

2. Compliance and enforcement strategies

a. Overview of compliance and enforcement model

Effective compliance and enforcement strategies help support voluntary compliance and build community confidence in regulation. Such strategies promote evidence-based, well thought out and integrated approaches to achieve improved compliance behaviour.

In developing and evaluating this strategy we considered our work in reviewing the advertising guidelines and other resources explaining the advertising rules, our data and experience related to receiving complaints about advertising, and other advertising compliance work.

We also reviewed the approaches of other regulators and have drawn on feedback from stakeholders. Our ongoing work with consumers to gain a better understanding of their experience of healthcare advertising is important and will help us design interventions that support good outcomes for consumers.

There are many factors that influence whether registered health practitioners and other advertisers comply with the advertising provisions under the National Law. These include their professional experience, knowledge of the advertising requirements, how effectively we communicate with them about their responsibilities, and professional norms, practices and expectations within the professions. There are also other general factors, including social and financial drivers.

In developing our approach, we have considered these factors that influence compliance behaviour, including advertiser attitudes to compliance. This helps us identify the most appropriate and targeted compliance and enforcement strategies to target different groups of advertisers.

Regulatory research has developed a compliance pyramid which is a well-established model for considering compliance attitudes and developing targeted strategies.² A key element of this model is acknowledging that most people are willing or trying to do the right thing.

Attitude to compliance

Compliance and enforcement action we will take



The compliance pyramid

² Ayres I, Braithwaite J. *Responsive regulation: transcending the deregulation debate*. New York: Oxford University Press, 1992.

We know that most health practitioners want to comply with their professional obligations, and most people (including advertisers who are not registered health practitioners) want to comply with the law. The focus of our strategy is to make compliance easier for those who are willing to do the right thing. We recognise some people need more help than others to comply, and we will target activities to help this group achieve compliance.

We also recognise that there are a small number of people, both practitioners and other advertisers, who will need more incentives to comply. This is where we target our enforcement action.

b. Risk assessment framework

All complaints that raise concerns about alleged criminal offences under the National Law are risk assessed. The issues considered when assessing risk include the offence type and risk (such as allegations of potential or actual harm).

Types of matters we have identified as high risk (critical or major) include advertising practices that:

- raise concerns of actual harm to consumers
- make misleading claims about curing serious illnesses, such as cancer or public health emergencies e.g. COVID-19
- target vulnerable groups, such as advertising directed at consumers with serious illnesses or parents of children with certain childhood conditions that are not easily treated
- are widespread in a profession, and have potential to have significant adverse impacts on healthcare choices, and/or
- may also involve allegations of a person holding themselves out to be a registered health practitioner or unlawfully using a protected title.

We will periodically review and update this list as needed.

c. Education and engagement

Education and engagement are regulatory tools that have been shown to be key parts of an effective strategy in achieving behaviour change.

We will focus resources on these activities as we think these are the best way to encourage and support compliance among the majority of advertisers who want to advertise responsibly.

Education and engagement activities we will carry out to support compliance include:

- working more with consumers to understand their experiences of healthcare advertising and using these insights to develop interventions to support better outcomes for consumers
- developing further guidance for practitioners and other advertisers about the advertising rules, consumer experience of advertising and tips for how to advertise responsibly
- comprehensive educational campaigns for advertisers (for example, common mistakes made in advertising)
- developing profession-specific, evidence-based and user-tested resources to target the types of non-compliance most common in each profession, including providing resources in different media
- engaging with advertisers and other stakeholders through webinars, social media, forums and other activities
- letting advertisers and the public know when we take action for non-compliant advertising, to make it clear what is and is not acceptable when advertising
- making it clear to advertisers when there are specific types of claims and areas we are concerned about (for example, specific claims which are misleading and not supported by acceptable evidence)
- writing to practitioners and other advertisers if they are identified to be non-compliant
- partnerships with consumer groups, professional associations and other regulators on projects that support the strategy
- working with organisations that provide advertising advice and services, to make them aware of advertisers' obligations and the resources they can use to support their clients' compliance, and
- applying behaviorally informed approaches to our interactions with advertisers, including how to increase rates of compliance in response to our initial correspondence and exploring whether there is value in carrying out further work to understand advertisers' attitudes to compliance in order to inform more targeted communication approaches and resources.

d. Compliance and enforcement

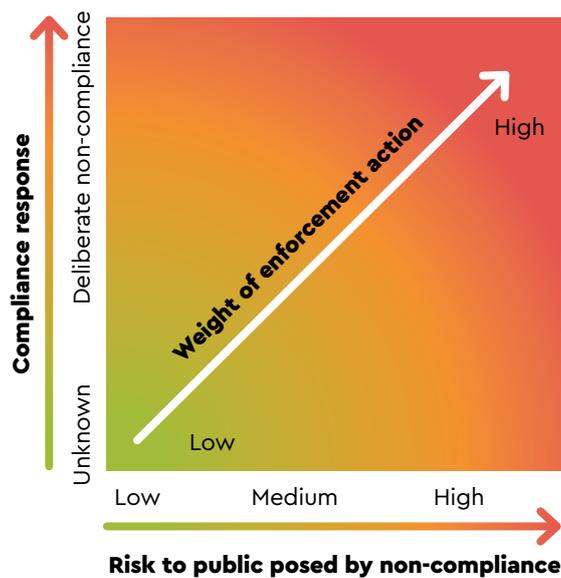
The strategy outlines our general approach to compliance and enforcement. We will respond to all complaints about advertising and use a range of regulatory tools to address non-compliant advertising.

We have refined our communication to be more concise and targeted and we are progressively developing further materials to help advertisers to comply, including educational resources and examples of acceptable and unacceptable advertising.

Compliance and enforcement action will escalate depending on the ongoing assessment of risk and the response of the advertiser. Depending on patterns of advertising, there may be a need for an escalated approach on specific topics or in particular professions.

In future, we will publish summaries of compliance and enforcement action taken.

Approach to enforcement action



Compliance and enforcement tools available under the National Law include the power to:

- investigate a practitioner's conduct
- impose conditions on the practitioner's registration restricting their ability to advertise their services
- take disciplinary action against a registered health practitioner in a panel or tribunal, and/or
- prosecute an advertiser of a regulated health service (which may be a registered health practitioner, another person or a business).

Low risk

For alleged advertising breaches by an advertiser who has not received a complaint about their advertising before and where the breach is assessed as low risk, we will write to advertisers to advise that their advertising is non-compliant and provide resources to help them comply with the National Law.

We will provide a timeframe for the non-compliant advertising to be amended, and will advise how and whether compliance will be checked, such as an audit. We expect that many advertisers will want to change their advertising once they are made aware of non-compliance and the range of possible consequences.

Matters assessed as low risk but where the advertiser has a history of non-compliant advertising will be managed according to the process for medium risk and repeated non-compliance.

Medium risk and repeated non-compliance

For alleged advertising breaches which are assessed as medium risk we will write to advertisers to advise that their advertising is non-compliant and provide resources to help them comply with the National Law.

Following the initial correspondence to advertisers, compliance will be checked by targeted audits.

Where continuing non-compliance by a practitioner is identified, either because a practitioner with a medium-risk breach has not corrected their advertising or the practitioner has a history of non-compliant advertising (including low risk breaches), the practitioner will receive a show cause letter proposing to impose conditions on their registration restricting the practitioner's ability to advertise their services, and providing a further timeframe to amend their advertising.

If the practitioner's advertising is not rectified, the conditions will be imposed and before they are removed the practitioner will need to demonstrate their understanding of the advertising requirements. Enforcement action will escalate depending on the ongoing assessment of risk and whether the practitioner is willing to comply. Continued non-compliance after the imposition of conditions may result in referral to a tribunal.

High risk

Certain high-risk matters will be identified as suitable for prosecution or disciplinary action from the outset.

e. Testimonials

When considering breaches on the prohibition of using testimonials in advertising regulated health services, we will focus our compliance and enforcement action on testimonials which involve greater risk. These are testimonials that also breach another element of section 133 of the National Law, because they are false, misleading or deceptive, offer a gift or inducement without stating the terms and conditions, create an unreasonable expectation of beneficial treatment or encourage the unnecessary use of health services. These testimonials will be subject to the compliance and enforcement approach outlined in section 2d. However, we may take a different approach to testimonials which involve very low or negligible risk to the public, for example, by providing or publishing general advice rather than addressing individual issues.

f. Declaration about advertising obligations and audit

This second version of the strategy includes the staged implementation of a new proactive approach to advertising compliance. We will ask registered health practitioners to declare that, if they advertise, their advertising meets the National Law's advertising requirements. We will conduct audits to check practitioner compliance with these declarations and advertising requirements. The audit sample will be sufficient to generalise the outcomes to the entire profession and will enable Ahpra to advise the National Boards of the overall advertising and non-compliance rates for their profession. This will also help in determining what profession-wide education interventions would be effective as a compliance mechanism.

3. Review and evaluation

a. Our evaluation framework

Our strategy involves a mix of approaches, some of which are tried and tested, and some that we are piloting. We use an evaluation framework to check whether what we are doing is improving advertising compliance, and to make sure our strategy remains contemporary and responsive.

We report on the achievements of the strategy annually, and also look at other ways to report on our progress, including in online news items and newsletters for practitioners.

b. Review

The first review of the strategy occurred two years after its initial implementation. Future reviews of the strategy will occur as required to check whether the objectives of the strategy are being met.

We will review and update supporting documents as the strategy is implemented, this includes piloting new approaches and implementing the evaluation framework.

Acknowledgements

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