



AUSTRALIAN DENTAL
ASSOCIATION INC.

**Submission on
The Standing Committee of Officials of Consumer
Affairs' paper:
*An Australian Consumer Law: Fair Markets –
Confident Consumers***

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ABOUT THE ADA

The Australian Dental Association (ADA) is the peak national professional body representing about 10,000 registered dentists engaged in clinical practice. ADA members work in both the public and private sectors. The ADA represents the vast majority of dental care providers. The primary objectives of the ADA are to encourage the improvement of the health of the public and to promote the art and science of dentistry. There are Branches in all States and Territories other than in the ACT, with individual dentists belonging to both their home Branch and the national body. Further information on the activities of the ADA and its Branches can be found at www.ada.org.au

INTRODUCTION

The ADA welcomes the opportunity to comment on The Standing Committee of Officials of Consumer Affairs' consultation paper about a new national consumer policy framework.

COMMENTS

While professional health services are regulated by registration boards and health care complaints commissions, there are circumstances where health services might need to be considered in the present review. These circumstances relate in particular to:

- The provision of health services by unregistered persons who fall outside the jurisdiction of the health profession registration boards;
- The provision of health services by registered health professionals in areas other than those for which they are registered.

Guidance on the advertising of health services was well addressed in the ACCC paper *Fair Treatment: Guide to the Trade Practices Act for the advertising or promotion of medical and health services* (2000), which clarified a number of issues.

The ADA agrees with the consultation paper where it states that:

"The division of jurisdictional and functional responsibilities between the different regulators is not always straightforward and has been a long-term source of confusion for consumers and industry alike. While this is so, there exist formal and informal mechanisms for regulators to cooperate in relation to enforcement issues, which are designed to overcome these challenges."
(p. 16)

There is a plethora of activity at present focused on various complaint and quality systems. The community, and office based health professionals, are at risk of becoming even more confused by the complexity of these divisions.

It would be a retrograde development for Treasury to advocate another set of complaint measures and systems when a major national effort is already being expended in the health system on essentially the same issues pursuant to the Intergovernmental Agreement on National Registration and Accreditation of Health Professions.

We suggest that it would help consumers if information about the various jurisdictions in which they might seek remedy for a problem arising from a health treatment were coordinated and provided in a consistent and coherent manner. Examples might be given to indicate what types of complaints rightly belong with a registration board; which ones should be lodged with a health care complaints commission and which require a consumer affairs approach.

This might resemble a grid, like this:

Issue	Responsible body	Purpose
Professional misconduct or unprofessional conduct	Registration Board	Protecting community health and safety rather than on commercial settlements or punishment of practitioners. (Notifier is not a party to a dispute)
Regulated health service dispute	Health Care Complaints Commission or equivalent	Conciliated settlement of a dispute between a health consumer and a healthcare practitioner or recommendation for imposition of disciplinary action
Allegedly false, misleading or deceptive advertising of health services	ACCC	Determining whether claims of therapeutic or other benefits were reasonable
Non-regulated health Service dispute	ACCC, or other statutory body to be identified, using a negative licensing regime (the NSW model)	To ensure that health services provided by un-regulated practitioners still meet minimum standards
Wrongful injury / treatment failure	Commercial conciliation / arbitration	Dispute resolution. (Action for damages remains a right for consumers of all services). Such matters are often settled out of court

The consultation paper makes the following observations with regard to occupational licensing:

"The PC found that, out of approximately 100 consumer-related occupations licensed by the States and Territories, more than 30 are licensed in only one or two jurisdictions. This raises questions as to the necessity of such licensing schemes and their ongoing economic impacts." (p.14)

Page 29 - Unfair Contract Terms

On 2 October 2008, COAG agreed to the inclusion of a provision regulating unfair contract terms in the Australian Consumer Law, using the following definition:

"A term is 'unfair' when it causes a significant imbalance in the parties' rights and obligations arising under the contract, and it is not reasonably necessary to protect the legitimate interests of the supplier."

Page 31 - "Unfair contract terms" and the "issue of payment of fees for services not yet provided"

We suggest that there are numerous areas within our economy where full payment for services in advance is quite customary, without any suggestion that this practice is unfair. Examples include: payment of public transport fares, air fares, accommodation bookings, tickets for movies, theatre shows and amusement rides, and registration fees to attend seminars conferences and congresses.

Provision of health services should not be excluded from this common commercial practice. For instance with health services there are often circumstances where payment in advance is required to the practitioner because they in turn will incur up-front costs in providing the treatment to the patients e.g. booking a dental patient in to a Day Procedures Centre for treatment under a General Anaesthetic.

Further, in dentistry often treatments require preparatory work and the services of other allied dental personnel (with whom the dentist has a contractual liability to pay for services rendered), where payment in advance to the practitioner is reasonable. For example, a patient needing a crown involves two or three visits to the dentist to prepare the existing tooth, make a mould, fit a temporary crown and finally fix the permanent crown in place. Crowns are often made in a dental laboratory by a dental technician where laboratory fees are incurred in its preparation and the materials used. Due to the costs incurred and the amount of work involved before the patient's final visit where the permanent crown is cemented, up-front payment for the service is totally justified.

Page 31 - "Clauses that do not permit refunds to consumers when the goods or service are not provided, or which apply conditions to the way in which consumers are refunded"

A dental practice must be entitled to charge for a broken appointment because the patient's non-attendance ties up expensive staff and other resources which could have been earning income. The failure to notify of a cancellation prevents a replacement appointment being booked into the timeslot. In this case the 'service' that was provided to the patient was the readiness of the practice personnel and facilities to be applied to their needs. Failure to attend an appointment prejudices not only the dental surgery but all patients of the surgery. A missed appointment means an opportunity for treatment is lost and pushes back the ability for all patients to access care.

The discretion should exist for a dentist to waive the cancellation fee depending on the circumstances of the non-attendance, but there should be no suggestion that a cancelled appointment or a non-attendance cannot be subject to a fee. Provision of a fee discourages the creation of a wasted resource and should therefore be encouraged.

Page 33 - Standard form contracts

Noting that the discussion of standard form contracts includes:

"professional services, including services provided by lawyers, engineers, surveyors, architects, consultants and others,"

We ask whether the committee envisages that dentists and other health professionals would be included in this group of professions?

Page 40 – Deposits and Pre-payments

"Terms requiring consumers to pay deposits or pre-payments that do not leave a substantial amount of the price to be paid on delivery / installation / performance"

A distinction is drawn here between pre-payments (or part-payments) and deposits. A deposit is an amount that is intended to ensure that the consumer is serious/bona fide about proceeding with the contract in the situation where the supplier will refrain from dealing with other potential purchasers, proceed to allocate resources to the contract, or proceed to expend time and effort preparing for the performance of the contract.

The law allows a genuine deposit to be forfeited if consumers do not proceed with their contracts (provided it is a reasonable amount and not a disguised penalty), regardless of the actual losses suffered by the supplier.

Page 59 - Occupational licensing

On 3 July 2008, COAG agreed to develop a national trade licensing system that will remove inconsistencies across state borders and allow for a much more mobile workforce.

Page 67 - Unfair Practices

The ADA would like to ask the following questions:

Bearing in mind the principle that the Australian Consumer Law should apply to transactions in any sector of the economy, is there a need to augment the current scope of sections 53, 53A and 53B of the TPA with regard to the approaches outlined above? Is the scope of sections 53, 53A and 53B of the TPA sufficiently broad to cover these issues?"

In the context of preparations now in train for national registration, the Australian Consumer Law offers a potentially useful means by which to protect the public in their dealings with unregistered practitioners as well as with registered practitioners who provide services that are unrelated to their registration.

The ADA is aware that COAG has agreed to a set of guiding principles by which to assess the need for statutory regulation of unregulated health occupations, and we recognise that not all health occupations will participate in the national registration system.

Notwithstanding this situation, we suggest that the negative licensing approach now being used in NSW should be considered to exert greater influence over both unregistered health practitioners and unregistered owners of health practices - including those where registered persons are employed.

The risks posed to the public by practice owners purchasing sub-standard or out of date materials, or failing to ensure the maintenance of equipment, should be subject to regulatory controls which extend to practice owners, rather than simply targeting employees of the practice who happen to be registered. Those employees may have little real power to control decisions over the purchase and use of materials - the

people who make these decisions should be held personally accountable. They have the same capacity to harm patients treated in their practices as unregistered health practitioners.

The health services that might require consideration in the present review are not restricted to dentistry, and indeed there are many issues in the area of natural therapies that require consumer protection. The ADA knows that there have been some questionable activities offered and delivered by dental practices, including (but not limited to):

- **Use of oral appliances** for headaches, bedwetting, impaired libido, and back conditions (Chirodantics)
- **Homeopathic** treatment
- **Herbal remedies** in the practice or sold for home use
- **Naturopathic** treatment
- Relaxation **Massage**
- **Therapeutic massage**
- **Prayer** and/or faith healing
- **Prescribing** scheduled substances for non-dental conditions (possibly in breach of Drugs and Poisons Regulations)
- **Dispensing** scheduled substances for dental and/or non-dental conditions
- **Selling** non scheduled therapeutic substances
- **Diagnosis** of non-dental conditions e.g. heart disease, diabetes and cancer
- **Botox injections** outside the mouth (possibly in breach of Drugs and Poisons Regulations)
- local anaesthetic injections preparatory to a person receiving lip tattooing or piercing in a nearby beauty salon or tattoo parlour

The use of an occlusal splint implies that the treatment is a dental treatment. However, if the purpose of the treatment is to treat an illness or condition that is non-dental, we argue that complaints about such treatment are most likely to relate to its failure to satisfactorily address the non-dental illness or condition. This means that the treatment would not fit comfortably within the definition of dentistry proposed for the new registration system and the issue would therefore fall outside of the jurisdiction of the soon to be established Dental Board of Australia. (See Appendix for chirodantics and biological dentistry examples).

The negative licensing regime established by NSW is commended as a mechanism by which to protect consumers where the treatments and services offered fall outside the scope of regulated practice. This may be as necessary for registered practitioners offering treatments or services outside their regulated field as for non-registered persons.

"On 1 August 2008, a [Code of Conduct for unregistered health practitioners](#) came into force. The Code underpins the amendments made by the *Health Legislation Amendment (Unregistered Health Practitioners) Act 2006* which broadened the Commission's powers in relation to unregistered health practitioners – that is:

- health providers who are not registered with a registration board, such as naturopaths, acupuncturists, and psychotherapists;
- practitioners whose registration has been suspended or cancelled, and who seek to practise in an area where they do not need registration;
- registered practitioners who provide health services that are unrelated to their registration. "

(http://www.hccc.nsw.gov.au/html/Code_Conctuct_Unregistered_page.htm)

This Code is incorporated into the Public Health (General) Regulations 2002 under the Public Health Act 1991. We understand that an alleged breach of the Code would be dealt with in a Magistrates Court, with a maximum possible fine of 20 penalty

units. Adoption of a similar approach was recommended by the Victorian Health Services Commissioner in the Noel Campbell Inquiry Report of July 2008 (see http://www.health.vic.gov.au/hsc/noel_campbell_inquiry.htm). In his response to that report the Victorian Minister for Health proposed:

"that Victoria lead work on options for future regulatory arrangements for unregistered health professionals, in the context of the National Registration and Accreditation Scheme. This work is currently underway and involves consideration of current arrangements in New South Wales."

(Source: Health Services Commissioner Inquiry into the activities of Mr Noel Campbell, - Minister for Health statement in response to recommendations of the Inquiry, August 2008)

There are a number of other activities which occupy a **grey zone** on the boundaries of dental practice and which have been the subject of concern and advice to members on behalf of the ADA's professional indemnity (PI) insurer (indicating that such activities would not be covered). These include:

- Provision of local anaesthetic preparatory to lip tattooing, piercing or other procedures being conducted by a beauty therapist or other operator. These procedures are generally conducted at another location, and consequently the patient may not be adequately assessed before, or supervised after, administration of a local anaesthetic. (This may be in breach of State Drugs and Poisons Regulations).
- Provision of botox injections in the lips and other facial areas for non-dental purposes (possibly breaching local Drugs and Poisons Regulations).
- Use of dental (occlusal) splints for bed-wetting, impotence problems, headaches, and back conditions.

Beyond these activities, phone directories and press advertisements confirm that there are dental practices which also offer entirely **non-dental services**. These include:

- Tattooing
- Body Piercing
- Massage

Issues raised by activities carried out in dental practices which are adjunctive to or extraneous to dental treatment include:

- Informed consent – is the patient advised that a non-dental service is not part of their dental care and therefore is not subject to dental board approved codes and guidelines? (Consider Dental Practice Board of Victoria Information Sheet I002 Consent: Assisting patients to make well-informed decisions <http://www.dentprac.vic.gov.au/docs/i002.pdf>).
- Practitioner qualifications to provide health treatments beyond dentistry or non-regulated care / services.
- Advertising – false, misleading and/or deceptive descriptions of treatments and outcomes offered.
- Infection control where non-dental treatments and services are involved.
- Jurisdictional cross-over with confusion between regulators as to which is responsible and empowered to take the required action.
- Professional Indemnity cover held for the practitioner's dental treatment activities is unlikely to cover adverse outcome's resulting from "non-dental treatment" activities. Does the practitioner have suitable additional PI insurance coverage, and if not, are patients/clients being appropriately informed?

Responses to these issues could include:

- Modification of existing dental board Codes of Practice and Policy Statements to clarify no-go zones / activities.
- Creation of new dental board Codes, Guidelines or Policies to address areas which are considered within the Board's ambit.
- Referral of advice to other agencies regarding areas and activities that may warrant regulatory attention.
- A recommendation to the Minister to consider legislation similar to the negative licensing regime in NSW.

Schedule 3 Code of Conduct in the NSW negative licensing arrangement includes the following obligations that unregistered health practitioners must observe:

"3 Health practitioners to provide services in safe and ethical manner

(1) A health practitioner must provide health services in a safe and ethical manner.

(2) Without limiting subclause (1), health practitioners must comply with the following principles:

- (a) a health practitioner must maintain the necessary competence in his or her field of practice,
- (b) a health practitioner must not provide health care of a type that is outside his or her experience or training,
- (c) a health practitioner must prescribe only treatments or appliances that serve the needs of the client,
- (d) a health practitioner must recognise the limitations of the treatment he or she can provide and refer clients to other competent health practitioners in appropriate circumstances,
- (e) a health practitioner must recommend to his or her clients that additional opinions and services be sought, where appropriate,
- (f) a health practitioner must assist his or her clients to find other appropriate health care professionals, if required and practicable,
- (g) a health practitioner must encourage his or her clients to inform their treating medical practitioner (if any) of the treatments they are receiving,
- (h) a health practitioner must have a sound understanding of any adverse interactions between the therapies and treatments he or she provides or prescribes and any other medications or treatments, whether prescribed or not, that the health practitioner is aware the client is taking or receiving,
- (i) a health practitioner must ensure that appropriate first aid is available to deal with any misadventure during a client consultation,
- (j) a health practitioner must obtain appropriate emergency assistance (for example, from the Ambulance Service) in the event of any serious misadventure during a client consultation."

In the provision of health regulated services, the concept of **informed consent** is well understood. Obtaining such consent is a basic requirement in the delivery of such services. We suggest that it is just as important, if not more so, in the delivery of unregulated health services. It is not sufficient for a non-registered health practitioner to merely have a sound understanding of any adverse interactions that might arise (as in the highlighted passage above), but they must advise their client of these and obtain their consent on the basis of that person's genuine understanding of the risks and consequences of the treatment they are agreeing to. They must also provide the client with adequate information of alternative treatment plans to that proposed by the individual practitioner.

Who is holding these unregulated practitioners accountable for the harm they may cause to their clients?

Pages 43-52 - Agreed reforms to consumer law enforcement powers

The paper has proposals for the provision of:

- civil pecuniary penalties;
- disqualification orders;
- substantiation notices - requiring a supplier to provide a consumer regulator with a basis for representations made in regard to the supply of goods and services;
- public warning powers (naming and shaming);
- infringement notices; and
- non-party redress (to reverse the effect of the decision on Medibank Private v Cassidy which negated section 12GD of the ASIC Act and sec 80 of the Trade Practices Act which had been understood to allow for non party redress).

We have **no** objection to these proposals.

Pages 63-66 - Suggested reforms to definitions - "consumer"

The paper discusses the benefits of a consistent definition of "consumer" in the Consumer Law and poses a number of questions about whether the current limit of \$40,000 be revised, and expansion to cover commercial purposes and small business and farming. However, the Paper does not discuss the merits of consistency with the Corporations Act which we would support.

Even if this consistency is not achieved, there would be benefits if health practitioners and their insurers had only to deal with one definition of "consumer" rather than the differing Commonwealth and State definitions as at present (see pages 121-126).

Thank you for the opportunity to comment.

A handwritten signature in black ink, appearing to read 'Neil Hewson', with a horizontal line underneath.

Dr Neil Hewson
Federal President

Appendix

According to an online Natural Therapies Directory:

"The aim of Chirodontics is to correct the body's structures while supporting its nutritional needs. The cranial system is also balanced using a combination of cranial manipulation and dental orthopedics. After this, orthodontics, prosthetics, and cosmetic dentistry are used in order to align the dental occlusion (bite) with a balanced body and cranium. Lastly, the electromagnetic aspects are considered, using acupuncture, herbal medicine, homoeopathy, and emotional techniques in order to fully balance the person in regards to their posture and occlusion."

(<http://www.naturaltherapypages.com.au/article/chirodontics>)

According to chirodontics.com:

Chirodontics© is a multi-disciplinary healthcare model and series of courses for health care providers created by Robert Walker DC. ...

While Chirodontics is applicable to many different healthcare situations or concerns, it is especially useful in the treatment of chronic complaints, and invaluable in treating conditions like TMJ dysfunction, Headaches and Cranio-facial pain syndromes. Chirodontics is also essential for those practitioners involved in Cranial Manipulation techniques of any type, as well as those involved in any form of Dental Orthopedics and Orthodontics. If you are a Chiropractor, Dentist, Osteopath, Naturopath, Nutritionist, Psychologist, Medical Doctor or therapist of any kind, Chirodontics offers you a healthcare model in which you can do your very best work.

(<http://www.chirodontics.com/>)

A Google search for 'Chirodontics' reveals a number of dental practices across the country, especially in Victoria, NSW and Queensland, offering these services. Issues raised by the advertising of these services include:

- Whether there is scientific validity to the claims of therapeutic benefit from chirodontic treatments.
- Whether patients are subject to use of *"acupuncture, herbal medicine, homoeopathy, and emotional techniques"* in dental practices, and, if so, whether the requirements of the Traditional Chinese Medicine and Drugs and Poisons regulations are being met.
- Whether the services offered form part of the practice of dentistry.
- Whether additional consent issues arise where a patient attending for dental treatment is then provided with non-regulated non-dental treatment at the same visit.
- Whether the diagnosis of non-dental conditions is regulated in some other way than via a State or Federal Health Practitioners Registration Act - and if a patient were to suffer injury as a result of such non-regulated treatment, what recourse they would have.
- Whether the honorary title 'Dr', which is permitted for dental practitioners in connection with their practice of dentistry, is potentially being misused in relation to non-dental services.

The evidence base for claims of therapeutic benefit from such treatments is not established at an acceptable level and the public should therefore be protected from being misled. For sleep disorders, dentists may be able to assist a physician and/or other members of a treatment team in the treatment of headaches, but a dentist is not qualified to diagnose headaches that may arise from vision, neurological (e.g. tumours) and other non-dental causes.

Advocates of biological dentistry define that field as one which extends well beyond the traditional boundaries of dental treatment. The following extract from the website of the International Academy of Biological Dentistry and Medicine states:

"Above all, Biological Dentistry is aesthetic, relatively nontoxic and individually biocompatible. Its practitioners use physiologic and electronic means to locate chronic areas of disease that are difficult to locate with conventional clinical methods. It incorporates the time-proven healing methods of homeopathy, acupuncture, nutrition, physical therapy and herbology, as well as the more modern sciences of neural therapy, hematology, immunology and electro-acupuncture. Such modalities complement the many scientific disciplines that encompass the field of clinical dentistry. The curative measures of Biological Dentistry are applied in accordance with each patient's natural abilities of regulation, regeneration, adaptation and self-cure. Biological dental treatment removes the stress burdens that conventional treatment may induce. "

(<http://www.iabdm.org/cms/index.php?id=72>)