COVID-19 Prevention and Cure Claims: Advertisers Beware!

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The COVID-19 pandemic has led Australian regulators to issue warnings about advertisers making claims regarding their products' effectiveness in combatting the virus. The Australian Competition and Consumer Commission (**ACCC**), for example, issued a warning to consumers about COVID-19 scams on 20 March 2020, which included claims by online stores that their products are a cure for coronavirus.[1] The Therapeutic Goods Administration (**TGA**) has also issued numerous warnings about therapeutic goods, for example, complementary medicines and disinfectants being advertised inappropriately as preventing or treating COVID-19 infections.[2]

The TGA's warning to consumers refers to various claims including: "unregistered products that 'kill COVID-19', air purifiers that help fight the coronavirus, complementary medicines that prevent the virus, and a medical device that treats a number of serious diseases including COVID-19, HIV AIDs and cancer".[3] Yet, there is currently no treatment or cure for COVID-19.

This is a timely reminder for direct selling companies (**DSOs**) to ensure that their independent sales persons (**ISPs**) are aware of their obligations which arise under, for example, the *Therapeutic Goods Advertising Code (No. 2) 2018* (**TGAC**) and the *Australian Consumer Law* (**ACL**). If a DSO is a member of Direct Selling Australia (**DSA**), there are also obligations under DSA's Code of Practice.

We provide an overview of the obligations which apply to both DSOs and ISPs when making product claims including claims about product performance characteristics and steps DSOs and ISPs should take to ensure compliance obligations are met.

What are your obligations?

Obligations arise under the ACL, the Therapeutic Goods Act 1989 (**TG Act**) and the TGAC. In short, claims must be truthful, able to be substantiated and not likely to mislead or deceive.

The ACL

The ACL prohibitions apply to all advertising and promotional activities of DSOs and ISPs in Australia. When promoting their products, DSOs and ISPs **must not** make:

[1] See ACCC media release Warning on COVID-19 scams 20 March 2020
[2] See TGA media releases: Warning about products claiming to treat or prevent the novel coronavirus 7 February 2020 and TGA issues warning about illegal advertising relating to COVID-19 24 March 2020
[3] See TGA media release, TGA issues warning about illegal advertising relating COVID-19 24 March 2020

- statements that are misleading and deceptive or which or are likely to be misleading and deceptive; or
- false representations that, for example, a product is of a particular standard, quality, grade, composition or style. Similarly, false representations concerning product testimonials are also prohibited.

The maximum penalties are substantial! For companies, the maximum penalties are the greater of:

- $10 million;
- three times the value of the benefit the company received from the false representation; or
- if the benefit cannot be determined, 10 per cent of annual turnover in the preceding 12 months.

For individuals, the maximum penalty is $500,000.

The TG Act and TGAC

Therapeutic claims are not permitted to be made in respect of a product unless the product (with few exceptions) has first been entered on the Australian Register of Therapeutic Goods (**ARTG**). Once the product has been entered on the ARTG, the only claims which may be made are the "indications" for which the product has been entered. Indications are the product's intended therapeutic uses. Appropriate evidence must be held to support a product's therapeutic indications.

In a manner similar to the ACL, the objective of the TGAC is to ensure that advertising is ethical and does not create unrealistic expectations about a product's performance or mislead or deceive consumers. The TGAC prohibits numerous types of advertising claims, including the following:

- claims referring to a serious form of a disease unless the TGA has provided prior approval (claims of this nature are known as "restricted representations" and the TGA considers that representations referring to coronavirus are restricted representations);
- claims which exaggerate product efficacy or performance;
- claims which are likely to lead to people delaying necessary medical attention;
- claims which encourage inappropriate or excessive use of therapeutic goods;
- claims that therapeutic goods are infallible, magical or miraculous;
- claims which suggest that the therapeutic good's use will result in a cure;
- claims which suggest harmful consequences may arise from the therapeutic goods not being used;
- endorsements (or implied endorsements) from a health professional; and

- testimonials from a person involved in the sale, supply or marketing of the goods.

The TG Act contains a number of criminal offences, with some being punishable by imprisonment and maximum fines of $4.2 million (for a company) and $840,000 (for individuals). Civil penalties include maximum fines of $10.5 million for companies and $1.05 million for individuals. In recent proceedings commenced by the TGA, the Federal Court awarded $10 million in civil penalties in respect of breaches of the advertising provisions of the TG Act.[4]

Direct Selling Australia's Code of Practice

Further, DSOs which are members of DSA and their ISPs are required to comply with DSA's Code of Practice (**Code**) which includes prohibitions against making false or misleading claims concerning a product's standard, quality, value or grade; its performance; a need for the product; and false or misleading claims concerning any supporting testimonial.

What should you be doing?

DSOs and their ISPs should ensure that all claims which are made in respect of the products they promote and sell are truthful and able to be substantiated. The overall impression created by marketing material must not be likely to mislead or deceive. No claims should be made that a product treats or cures COVID-19. Therapeutic claims must not be made in respect of products unless entered on the ARTG (with very few exceptions to this rule). Advertising claims in respect of therapeutic goods which have been entered on the ARTG must be limited to the indications for which the product has been listed or registered.

DSOs should be regularly monitoring their own websites and official social media pages to ensure that all posts comply with legal requirements and where non-compliant posts are identified, those posts are removed immediately. DSOs will be considered the "publisher" of the posts on their official social media pages if they are aware that a third party post is misleading but do not remove the post.

DSOs should ensure that they are regularly reminding their ISPs of their advertising compliance obligations. Indeed, it is usually a requirement of an ISP's independent contractor agreement that the ISP complies with all laws and regulatory requirements relating to advertising and promotional activities. ISPs should be encouraged to review their social media content and to remove any non-compliant material, particularly any express or implied claims that a product prevents, treats or cures COVID-19.

DSOs should also regularly monitor their ISPs' advertising, including on social media, to ensure that no inappropriate claims are made, including claims that a product may have a particular effect in respect of COVID-19. Where inappropriate claims are identified, ISPs should be notified, reminded of their contractual

[4] See TGA media release, $10 million penalty ordered against Peptide Clinics Pty Ltd for advertising breaches, 23 July 2019

obligations and required to remove immediately the claims. Depending on the circumstances, taking steps to terminate the DSO's independent contractor relationship with the ISP may be warranted.

Don't delay – now is the time to ensure that all marketing claims comply fully with legal requirements!

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