

Note: Drs AA and BB applied to VCAT for a review of the Board's determination in this matter. On 15 June 2007, Senior Member Davis of VCAT replaced the Board's finding and determinations with the following:

- i) The applicants have pursuant to s 47(2)(b) of the *Dental Practice Act 1999* engaged in unprofessional conduct not of a serious nature;
- ii) Drs AA and BB are reprimanded for their conduct; and
- iii) Drs AA and BB are cautioned against a repetition of that conduct.

The full text of the VCAT decision can be found on VCAT's website

DENTAL PRACTICE BOARD OF VICTORIA

RE: Dr AA and Dr BB

[2006] DPBV 6

PANEL:

Mr Victor Harcourt (Chair)
Dr Gerard Condon
Ms Gabrielle MacTiernan

DATE OF HEARING: 17 May 2006
DATE OF DECISION: 1 November 2006

FINDINGS

The Panel, having considered the evidence and submissions placed before it, finds the following allegations in the Notice of Formal Hearing under section 45 of the *Dental Practice Act 1999* (Vic) ("the Act") dated 24 April 2006 ("the Notice") to be established:

- 1 At all material times Dr AA and Dr BB have been registered as dental care providers in Victoria under the Act having been registered as dentists since 9 December 1999 in the case of Dr BB and 5 December 2002 in the case of Dr AA.
- 2 At all material times, Drs AA and BB have practised as dentists under the practice name AA Dental at one or more of the following addresses in Mildura, Robinvale and Ouyen.
- 3 Section 64(1) of the *Dental Practice Act 1999* provides as follows:

"A person must not advertise a dental care provider's practice or dental care provider's services in a manner which -

 - (a) is or is intended to be false, misleading or deceptive; or
 - (b) ...; or
 - (c) refers to, uses or quotes from testimonials or purported testimonials; or
 - (d) creates an unreasonable expectation of beneficial treatment."
- 4 Drs AA and BB advertised their practice and services in the Sunraysia Daily newspaper (the regional daily newspaper with a wide circulation in the Mildura area and north-western Victoria) during June 2005, and in particular on Thursday, 23 June 2005 ("the Advertisement"). The copy of the Advertisement attached to the Notice was admitted.
- 5 The Advertisement refers to, uses and quotes from a testimonial from a patient "I had 6 upper and 6 lower porcelain veneers using the Empress II system" and quoting the patient as saying:

"I travelled all the way from for my dental make over at AA Dental and couldn't be happier with the results."

- 6 The Advertisement also included before and after photographs of Mr XY's teeth, as part of the testimonial.
- 7 Further, the Advertisement included the following words and photographs:
- 7.1 "AA Dental also provides all the latest orthodontic techniques"
- 7.2 "Ignite the white ZOOM! You too can now have white teeth in one hour. The most effective way to whiten your teeth."
- 7.3 A set of "before" and "after" photographs demonstrating the whitening of teeth, as well as the "before" and "after" photographs of Mr XY; and
- 7.4 A series of other photographs of unnamed and unidentified persons ("the photographs of unidentified persons") including a set of three photographs demonstrating the Invisalign orthodontic technique.
- 8 The Advertisement read as a whole (and in particular the words quoted above and the photographs referred to above, taken in their context) is false, misleading or deceptive in the following respects:
- 8.1 The Advertisement falsely claims that "AA Dental also provides all the latest orthodontic techniques" whereas this statement is false, misleading and deceptive and Drs AA and BB have since acknowledged that they "cannot prove this statement and will retract it from all future advertising";
- 8.2 The Advertisement falsely claims that the ZOOM whitening system/process is "the most effective way to whiten your teeth", whereas this statement is false, misleading and deceptive and Drs AA and BB have since acknowledged that they "are unable to prove this statement and will retract it from all future advertising";
- 8.3 The Advertisement uses "before" and "after" photographs (relating to the whitening process) which are not photographs of any of the patients of Drs AA or BB or AA Dental Practice, and which have simply been extracted from other promotional material. This is false, misleading and deceptive as it suggests to the reader that the photographs are in fact of one of the patients of Drs AA and BB or AA Dental Practice and, properly interpreted in its context, that the person appearing in those photographs has had the relevant treatment done at the AA Dental Practice;
- 8.4 Both sets of "before" and "after" photographs are misleading or deceptive in that they falsely suggest that identical (or equivalent) results can be obtained for other patients whereas in truth and in fact every patient is different and such results cannot be indicated or promised or guaranteed; and
- 8.5 The photographs of unidentified persons which appear in the Advertisement are misleading and deceptive in that they wrongly suggest to a reader in their context that they are photographs of patients of AA Dental, and that those patients had the relevant dental treatment done at AA Dental.
- 9 Accordingly, Drs AA and BB have advertised their practice and services in a manner which is false, misleading and deceptive.
- 10 Further, the Advertisement creates an unreasonable expectation of beneficial treatment in that it suggests to all readers of the Advertisement that they could reasonably expect

identical (or equivalent) results to those portrayed in the “before” and “after” photographs and in the photographs of unidentified patients when this is not necessarily the case.

- 11 Further, the Advertisement creates an unreasonable expectation of beneficial treatment in that it leads readers of the Advertisement to believe (wrongly) that the ZOOM system is “the most effective way to whiten your teeth” whereas that claim is not correct and cannot fairly and reasonably be made.
- 12 Further, the Advertisement creates an unreasonable expectation of beneficial treatment in that it suggests:
 - 12.1 it contains the words “ Also specialising in orthodontics, porcelain crowns, bridge and veneers ...”; and
 - 12.2 it creates an expectation that patients will receive specialist treatment in the areas of orthodontics, porcelain crowns, bridge and veneers whereas the dentists working at the practice are not in fact specialists but are only general dentists.
- 13 In the circumstances, Dr AA and Dr BB have breached the provisions of section 64(1)(a), (c) and (d) of the *Dental Practice Act 1999*.
- 14 Dr AA and Dr BB have accordingly engaged in unprofessional conduct, as defined in section 3 of the *Dental Practice Act 1999*.
- 15 That unprofessional conduct constitutes unprofessional conduct of a serious nature.

DETERMINATION

Having considered the matter and having given due weight to the submissions placed before the Panel, the Panel considers it appropriate under section 47(2) of the Act to impose the following determinations:

- 1 Dr AA and Dr BB are reprimanded for their conduct found to be unprofessional conduct of a serious nature.
- 2 Dr AA and Dr BB are cautioned against a repetition of that conduct.

REASONS

- 1 Dr AA and Dr BB admitted certain of the allegations in the Notice, being findings 1-7, 8.1-8.3, 9-14. These admissions left in issue whether the photographs in the Advertisement were misleading or deceptive in a particular manner, and whether their unprofessional conduct was of a serious nature. The Panel accepted the admissions and has made the findings for the following reasons.
- 2 The offending Advertisement was placed in the Sunraysia Daily newspaper on Thursday, 23 June 2005. It would seem that the Advertisement was placed by the practice manager and director of AA Dental Pty Ltd, who is not a registered dental care provider, without first obtaining the approval of Drs AA and BB. In response to a communication from the Board, AA Dental Pty Ltd apologised for the mistake in advertising the patient’s testimonial and agreed to stop any further advertising of this nature.
- 3 Following further communication the Board received a letter from the directors of AA Dental Pty Ltd, including Drs AA and BB, which included the following frank admissions:

“We, the Directors of AA Dental, realise that the advertisement placed in the Sunraysia Daily newspaper on Thursday, 23rd June 2005, was extremely unprofessional and in breach of the advertising codes of conduct.

We sincerely apologise for this and will ensure such advertising will never occur in the future. It was a mistake on our behalf to place this advertisement. We now understand that not only does it break the advertising laws, but it also raises the expectations of our patients, so we fully understand why there are advertising restrictions are in place.”

- 4 The Panel appreciates the admissions which have been made by Drs AA and BB which reflect an honest and genuine appraisal of their own unprofessional conduct. These admissions have been given particular weight in making the determinations.
- 5 We will turn firstly to the findings made in paragraphs 8.4 and 8.5. Counsel for Drs AA and BB explained the matter in issue concerning paragraph 8.4 in the following way. It was accepted that every patient is different and that such results as depicted in the before and after photographs could not be indicated or promised or guaranteed for every patient. The objection was not directed to the Panel looking at the photographs in the context of the Advertisement as a whole, but rather in looking at the photographs in isolation. In respect of paragraph 8.5, counsel contended that the photographs were clearly promotional, not suggesting that the particular patient had been at the practice but promoting a particular treatment.
- 6 The Panel disagrees that the findings in paragraphs 8.4 and 8.5 direct attention away from reading the Advertisement as a whole. They are particular aspects of the Advertisement which, when read as a whole, is false, misleading or deceptive. Further, it was plainly apparent the photographs did more than promote treatment, presenting a person as a patient of the practice.
- 7 As stated above, Drs AA and BB not only made substantial admissions about the findings but admitted that they had engaged in unprofessional conduct as defined in section 3 of the *Dental Practice Act* 1999. They put in issue whether however that unprofessional conduct was of a serious nature. Much of the argument before the Panel was directed to this point and in particular a consideration of recent decisions by the Board in similar matters.
- 8 The Panel found that the unprofessional conduct of Drs AA and BB was of a serious nature given the extent to which the Advertisement was false, misleading or deceptive, used testimonials and created an unreasonable expectation of beneficial treatment. The prominence of the Advertisement which made extensive use of photographs and text, the blatant breaches of the Act which were not merely incidental, and their extent were factors the Panel considered in reaching its finding.
- 9 The Advertisement was directed to and had the effect of asserting that readers could obtain better dental care from AA Dental than other dental practices in the area. The claims made by the Advertisement were false, misleading and deceptive and did use testimonials. The Advertisement also used false claims to create an unreasonable expectation of beneficial treatment. Further, the Advertisement was published in a daily regional newspaper with a wide circulation.
- 10 In these circumstances, the Panel found that the unprofessional conduct was of a serious nature. The Panel did however consider it was appropriate that Drs AA and BB be reprimanded and cautioned about their conduct and that no other determination was necessary in the circumstances. The Panel took into account the circumstances in which the Advertisement was published, the insight of Drs AA and BB into the error of their ways, their early admissions and their assurances not to engage in a repetition of the unprofessional conduct. At the hearing, Drs AA and BB formally made the admissions, contesting only those matters where there was a genuine and serious matter to be considered. They expressed contrition and the Panel found that it was highly unlikely that Drs AA and BB would engage in a repetition of the conduct.

- 11 In those circumstances, the protection of the public would not be served by the imposition of any harsher determinations.

DATED: 28 November 2006

Victor Harcourt
Chair