Note: Dr Hassed applied to VCAT for a review of this matter. VCAT found that his unprofessional conduct had not been of a serious nature and reduced the penalty to a reprimand. The full text of the VCAT decision is available at http://www.austlii.edu.au/au/cases/vic/VCAT/2006/443.html.
The Board appealed against VCAT's finding that the unprofessional conduct was not of a serious nature.
The appeal was allowed.
The Honourable Justice Hargrave set aside VCAT's order and sent the matter back to VCAT for rehearing.
Costs of the appeal were awarded to the Board.
The full transcript of the supreme court decision can be found at http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/vic/VSC/2006/485.html

The matter was reheard in VCAT on 30 April 2007 before Deputy President Macnamara. On 9 May 2007 he handed down his decision affirming the Board's finding that Dr Hassed had engaged in unprofessional conduct of a serious nature. The Board's determinations were varied such that Dr Hassed was fined the sum of $4,000 to be paid within 30 days of 9 May 2007. Further, Dr Hassed was cautioned to ensure that in future his advertisements were not false, misleading or deceptive.

DENTAL PRACTICE BOARD OF VICTORIA

RE: Dr Mark Hassed

[2005] DPBV 4

PANEL:

Mr Victor Harcourt (Chair)
Dr Gerard Condon
Professor Michael Morgan
Dr Mandy Leveratt

DATES OF HEARING: 13 October 2003, 30 March 2004, 26 April 2004
DATE OF DECISION: 30 May 2005

FINDINGS

The Panel, having considered the evidence and submissions placed before it, and taking into account the admissions, finds the following allegations in the Notice of Formal Hearing under section 45 of the *Dental Practice Act* 1999 ("the Notice") to be established:

1 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) …; or
>
> (d) creates an unreasonable expectation of beneficial treatment."

2 During or about November 2002, Dr Hassed published various statements on Dr Hassed's website and in the Melbourne Weekly dated 17-23 November 2002 which advertised Dr Hassed's practice or services.

3 Included in those statements made on Dr Hassed's website and in the Melbourne Weekly were the following words ("**the offending words**"):

3.1 "Only 3% of dentists would have amalgam used on themselves if they needed a medium-sized filling in a back tooth";

3.2 "Amalgam may be toxic - Government warning";

3.3 "Amalgam breaks teeth by thermal expansion";

3.4 "There is decay under 80% of the fillings we remove";

3.5 "According to a recent survey, only 3% of American dentists would have amalgam (mercury) fillings in their own teeth and we suspect the figures would be the same here".

4 The advertisements read as a whole (and in particular the "offending words") are false, misleading or deceptive.

5 The advertisements (and in particular the "offending words") create an unreasonable expectation of beneficial treatment.

6 In the circumstances Dr Hassed has breached the provisions of Section 64(1)(a) and (d) of the *Dental Practice Act* 1999.

7 Dr Hassed has accordingly engaged in unprofessional conduct, as defined in Section 3 of the *Dental Practice Act* 1999, which is 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 *Dental Practice Act* 1999 to impose the following determinations.

1 A condition be imposed upon the registration of Dr Hassed that he undertake the corrective advertising specified in paragraph 2 of this Determination within 90 days of the date of the delivery of this Determination.

2 Dr Hassed must publish on his website on the home page the following notice for a period of six calendar months from 1 July 2005:

> "The Dental Practice Board of Victoria has found that I, Mark Hassed, published an advertisement which was false, misleading or deceptive and which created an unreasonable expectation of beneficial treatment and that accordingly I engaged in unprofessional conduct of a serious nature. The Dental Practice Board of Victoria's Findings, Determinations and Reasons can be found at its website at http://www.dentprac.vic.gov.au/publications.asp?doc=1."

3 Dr Hassed is fined the sum of $7,500.00 which is to be paid on or before 1 September 2005.

4 If Dr Hassed fails to comply with the condition or payment of the fine, his registration as a dental care provider is suspended from the date of non-compliance until the date of compliance.

5 The Panel cautions Dr Hassed that in the future his advertisements should be the subject of more scrutiny to ensure that his advertisements are not false, misleading or deceptive or create an unreasonable expectation of beneficial treatment.

REASONS

1 On 13 October 2003, 30 March and 26 April 2004 the Dental Practice Board of Victoria ("the Board") in a Panel of four members ("the Panel") convened to conduct a formal hearing pursuant to the *Dental Practice Act* 1999 ("the Act") into the conduct of the dentist, Dr Mark Hassed. Dr Hassed was at all material times a registered dentist.

2 The formal hearing concerned allegations placed before Dr Hassed in a Notice of Formal Hearing which the Panel found upheld.

3 The *Dental Practice Act* 1999 states that its main purposes, inter alia, are :

> *"(a) to provide for the registration of dental care providers and investigations into the professional conduct and fitness to practise of registered dental care providers; and*
>
> *(b) to regulate the provision of dental care services; and …"* (section 1).

4 The functions of the Dental Practice Board of Victoria established pursuant to the Act are broad and give effect to the main purposes of the Act (section 69). It is well accepted that the Board and indeed any Panel appointed under section 43 of the Act for a formal hearing, must have regard to the objective of the Act which is the protection of the public. This is particularly pertinent to a formal hearing into the professional conduct of a registered dental care provider which inquires into whether the dental care provider has or has not engaged in unprofessional conduct either of a serious nature or not of a serious nature. Unprofessional conduct is defined in the Act to mean all or any of the following -

> *"(a) Professional conduct which is of a lesser standard than that which the public might reasonably expect of a registered dental care provider;*
>
> *(b) Professional conduct which is of a lesser standard than that which might reasonably be expected of a registered dental care provider by his or her peers;*
>
> *(c) Professional misconduct;*
>
> *(d) Infamous conduct in a professional respect;*
>
> *(e) Providing a person with dental services of a kind that is excessive, unnecessary or not reasonably required for that person's wellbeing;*
>
> *(f) Influencing or attempting to influence the conduct of a dental care provider's practice in such a way that patient care may be compromised;*
>
> *(g) The failure to act as a dental care provider when required under an Act or Regulations to do so;*
>
> *(h) Providing dental care that the provider is not registered to provide;*
>
> *(i) The contravention of or failure to comply with a condition, limitation or restriction on the registration of the dental care provider imposed by or under this Act;*
>
> *(j) The contravention of a provision of this Act or the regulations; or*
>
> *(k) A finding of guilt of -*
>
> > *(i) an indictable offence in Victoria, or an equivalent offence in another jurisdiction; or*

(ii) an offence if the dental care provider's ability to continue to practise is likely to be affected because of the finding of guilt or if it is not in the public interest to allow the dental care provider to continue to practise because of the finding of guilt; or

(iii) an offence as a dental care provider under any other Act or regulations." (section 3).

5 A finding by a Panel that a dental care provider has engaged in unprofessional conduct of a serious nature or not of a serious nature may result in certain determinations being made which may be seen to be disciplinary in their nature. Again, however, the determinations are made for the protection of the public:

> *"The Tribunal referred to the effect of the criminal and disciplinary proceedings on the doctor and their costs 'in money and emotional stress'. These matters would be highly relevant if the purpose of these proceedings was punitive, but their purpose is entirely protective. In* Clyne v New South Wales Bar Association *(1960) 104186 at 201-202, the court said:*
>
> > *" … Although it is sometimes referred to as 'the penalty of disbarment' it must be emphasised that a disbarring order is in no sense punitive in character. When such an order is made, it is made, from the public point of view, for the protection of those who require protection, and from the professional point of view, in order that abuse of privilege may not lead to loss of privilege."*
>
> *"Later, in* New South Wales Bar Association v Evatt *(at 183-184), the court said:*
>
> > *"… The power of the court to discipline a barrister is … entirely protective and notwithstanding that its exercise may involve a great deprivation to the person disciplined, there is no element of punishment involved."*[1]

6 Consistent with the objective of protecting the public, the Act has made specific provision regarding the advertising of a dental care provider's practice or services. Section 64 relevantly states:

"(1) 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) offers a discount, gift or other inducement to attract patients to a dental care provider or dental care provider's practice unless the advertisement also sets out the terms and conditions of that offer; or

(c) refers to, uses or quotes from testimonials or purported testimonials; or

(d) creates an unreasonable expectation of beneficial treatment.

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[1] *Health Care Complaints Commission v Litchfield* (1997) 41 NSWLR 630, 637 to 638. See also *Reyes v Dental Board of South Australia* [2002] SASC 239, paragraph 32.

Penalty: 50 penalty units for a natural person or 100 penalty units for a body corporate.

(2) If a body corporate contravenes sub-section (1), any person who is concerned in or takes part in the management of that body corporate who was, in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the commission of the offence also commits an offence under sub-section (1) and is liable for the penalty applicable to a natural person for that offence."

7 The Act further provides for the protection of a person who, in good faith, publishes or prints an advertisement in contravention of section 64(1) on behalf of another person is not guilty of an offence under that section. Proceedings for an offence against section 64 may be commenced within three years after the commission of the alleged offence.

8 In seeking to apply the law in relation to the allegations against Dr Hassed, regard may be had to a document published by the Health Care Complaints Commission and the Australian Competition and Consumer Commission entitled "Fair Treatment? Guide to the Trade Practices Act for the Advertising or Promotion of Medical and Health Services" (July 2000). The object of the Guide is stated to be to help the health and medical sector associations, individual practitioners and others assisting in the provision of medical and health services develop strategies that will improve compliance with the *Trade Practices Act* 1974 (Cth). The Guide does however canvass relevant state legislation and the health profession specific legislation. To the extent that the Guide deals with misleading or deceptive conduct by health professionals contrary to the *Trade Practices Act*, it is helpful in considering the offending words in the context of section 64 of the *Dental Practice Act*.

9 The following passages from the Guide are pertinent:

- After referring to an information inequality between consumers and suppliers, it then states the consequences of this may include "the temptation to create unrealistic expectations through promotional activities" and "the potential for consumers to make incorrect choices which risks their financial, psychological and physical welfare" (p7);

- "Advertising medical and health services and products can help consumers to make informed choices. However, it is imperative that the information provided be honest, accurate and complete (ie no omissions likely to mislead or deceive). False, misleading or deceptive advertising may lead to badly informed decisions and cause harm." (p9);

- "Generally professionals must not, in their promotional activities, act in a way that is misleading or deceptive, or is **likely** to mislead or deceive. …all statements, taking account of both their content and context, must be honest and truthful." (p10);

- "Each claim or statement in a promotional statement must be correct. This includes not only what is actually **said** or **written** but also what is **implied**." (p10);

- "…the Court will consider what ordinary members of the target audience would understand by the statement. …the fact that the target audience may be vulnerable, or potentially vulnerable, as a result of a medical condition, will also be relevant in assessing whether a statement is misleading. The Court will look at the **overall impression** created by an advertisement in deciding whether it is misleading or deceptive." (p10);

- "Both content and context of all promotional statements must be honest and accurate"; "Self evident exaggeration and "puffery" are generally okay. However,

such statements should be avoided or used with extreme caution in conflict subjects like health care."; "carefully consider how your promotion will be received by ordinary members of the target audience."; "Be aware that some target audiences may have particular vulnerability." (p11);

- "It is simply good risk management to ensure that you can substantiate representations made in your promotions before you run them. This will put you in a better position to defend any allegations that they are false or misleading. Any difficulty in substantiating a claim will alert you to the risk in making it. Substantiating claims beforehand is particularly important if they predict outcomes, including the likely success of treatment, Such future claims are taken to be misleading unless the person making them has a reasonable basis for doing so." (p11);

- "Many complaints about medical and health services advertising arise from the use of exaggerated claims that cannot be substantiated." (p15).

10 The Guide emphasises the information imbalance which exists between consumers and in the case before us dental care providers. That information imbalance can be detrimental to consumers and reducing this information imbalance is fundamental to protecting the public. This is analogous to the scope and purpose of section 64 of the Act. The Guide goes on to state and the Panel agrees that:

> *"It is therefore imperative that information provided to consumers be honest, accurate and complete."*[2]

11 The Guide positively asserts that the courts have interpreted the prohibition against engaging in misleading or deceptive conduct as meaning that all statements, taking account of both their content and context, must be honest and truthful.[3]

12 This is not to suggest that the offending words should be scrutinised in minute detail and without regard to reading the advertisement as a whole.[4] However, if claims made in an advertisement cannot be substantiated this will have a significant influence upon whether the advertisement when read as a whole is misleading or deceptive or creates an unreasonable expectation of beneficial treatment.

13 The Panel was careful at the outset of the hearing and in a consideration of the evidence and the submissions to ensure that this matter not be either considered or treated as a debate about the relative merits of the use of amalgam as against composite material. Recognising that there are differing views the Panel found that Dr Hassed's advertising insofar as it contained the offending words was, when viewed as a whole, false, misleading or deceptive and created an unreasonable expectation of beneficial treatment.

14 The statement "A 1995 Survey found that only 3 percent of dentists would have amalgam used on themselves if they needed a medium sized filling in a back tooth here's why …" is followed by four reasons. These are stated to be: "Amalgam is ugly"; "Amalgam may be toxic. Government warning"; "Amalgam breaks teeth by thermal expansion"; "Amalgam leaks. There is decay under 80 percent of the fillings we remove". There is an inference that the reasons are a justification as to why the 3 percent of dentists would not have amalgam, and that these reasons form part of the survey, when in actual fact they did not. In the Panel's view, the inclusion of these reasons as a non sequitur is misleading. The Panel

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[2] "Fair treatment? Guide to the Trade Practices Act for the advertising or promotion of medical and health services" (July 2000) at p7. See also p9.
[3] Ibid, p10.
[4] Ibid, p10; *Global Sportsmen Pty Ltd v Mirror Newspapers Limited* (1984) 55 ALR 25, at p32-33; *Kimberley Clark Aust Pty Ltd v Carter Holt Harvey Tissue Aust Ltd* (1997) ATPR (Digest) 46-171, 54, 372 at 54, 374.

noted that when the website was modified in March 2003, the words "Here's why" were deleted.

15 The words "Amalgam may be toxic. Government warning" together with a skull and crossbones, in the Panel's view give a strong implication of amalgam's toxicity. The Panel noted that in the website revision in March 2003 the skull and crossbones were removed, and the words "Government warning" were replaced with "NHMRC warning".

16 There are two issues the Panel need to consider. Firstly, whether there was a government warning and, secondly, whether amalgam may be toxic. In considering the government warning aspect, there were a further two issues. Firstly, was there a "warning" and secondly, did it come from the "government"?

17 The Panel was taken to the documents "Dental Amalgam and Mercury in Dentistry, A Report of a NHMRC Working Party" (March 1999) and a media release from the NHMRC. Neither document warns against the use of, or the toxicity of amalgam.

18 On page 11 of the report the following advice appears:

> "General public and environmental health principles dictate that where possible exposure to mercury from dental amalgams be reduced where a safe and practical alternative exists."

19 Even Dr Hassed's own expert witness, Professor Mount, conceded under cross examination that there was no government warning that amalgam may be toxic. Indeed, he was prepared to characterise the statement as advice rather than a warning. It should be noted that Professor Mount is a leading authority on dental materials, particularly glass ionomers. The Panel agrees with Professor Mount in this respect.

20 The Panel also received evidence from Professor Tyas, a world authority in dental materials. In correspondence to the Board Professor Tyas states:

> "The dentist is implying very strongly that "the government" (i.e. the National Health and Medical Research Council (NHMRC), on his current website) has warned that amalgam is toxic. He has failed to substantiate this claim, and will be unable to do so, as the NHMRC has not given any such warning."

21 Much was made as to whether the government was, in fact, the NHMRC. Counsel for Dr Hassed pointed out that the copyrights for NHMRC material lies with the federal government and so it is reasonable to use the terms equivalently. Counsel assisting the Panel however then directed the Panel's attention to the opening pages of the NHMRC report in which it is stated that:

> "The NHMRC is a statutory authority within the portfolio of the Commonwealth Minister for Health and Aged Care, established by the National Health and Medical Research Council Act 1992."

22 It is further stated in this section of the report that NHMRC reports are prepared by panels of experts drawn from appropriate Australian academic, professional community and government organisations. While it may be a moot point given that the Panel found there was no "warning" as claimed by Dr Hassed, the Panel considered it was false, misleading or deceptive of Dr Hassed to characterise the NHMRC as "the government" in his advertising. The NHMRC functions under its Act as an advisory body to the federal government, and the government can either accept or reject any of the reports or advice it receives from the NHMRC. To consider the government and the NHMRC as synonymous in the terms in which Dr Hassed did and portrayed in his website is neither reasonable or appropriate as it is false, misleading or deceptive.

23 Turning next to the second issue, the Panel considered whether the statement "Amalgam may be toxic" could be supported. The Panel was taken to the document entitled "WHO Consensus Statement on Dental Amalgam" (1997) in which it was noted that dental amalgam and other dental materials may, in rare instances, cause local side effects or allergic reactions. Counsel for Dr Hassed provided the Panel with material from Professor Maths Berlin, the Dental Board of California Materials Fact Sheet and various other articles. Professor Berlin's material was prepared on behalf of the Dental Materials Commission of Sweden and was based on an overview of the scientific literature published in 1997 to 2002 and current knowledge. A potential for toxicity primarily based on cell studies and occupational health and safety concerns was demonstrated. The Dental Board of California's fact sheet noted amalgam to be "generally safe, occasional allergic reactions …".

24 The issue, however, was not whether amalgam is or is not toxic. The advertisement stated that amalgam "may be toxic" and that is certainly true of all materials and this is at the heart of the finding that the offending words, as a whole, were false, misleading or deceptive and created an unreasonable expectation of beneficial treatment.

25 The NHMRC report discusses the toxicology of alternative resin-based restorative materials in section 4.6 in the following terms:

> "There is a dearth of information known about … the components … six lacked genotoxicity data … several were positive in genotoxicity tests."

- The report also makes some conclusions in section 4.7:

> "For the numerous compounds used in alternative restorative materials, it is evident that for the most there has been little or no toxicological testing …"

- and the report also notes that some considerations at section 4.8:

> "Alternative direct restorative materials … have been infrequently studied in terms of their toxicology. Therefore, such toxicological research is a high priority."

26 In cross examination it was put to Professor Mount the following:

> "Would you agree with the proposition that … caution should be used, would you apply to all dental materials? - - - Sure. - - - Including composite resin? - - - Yes."[5]

27 The clear implication from Dr Hassed's statements is that while amalgam may be toxic, other materials are not toxic. In the light of the available evidence, this is not correct. The Panel was also of the view that the hyperlink from Dr Hassed's website to the NHMRC's media release did not do anything to cure the misleading nature of the offending words. It was an insufficient approach to clarifying the obvious message Dr Hassed conveyed and conveniently avoided referring the reader to the full report.

28 It was also illuminating to consider that Professor Mount himself was of the view that Dr Hassed's advertisement did not provide to the reader appropriate information on the risks and benefits of all dental materials to assist them in making an informed choice. This is clearly correct as the offending words clearly chose to portray one side of the argument in a manner which mis-stated the issues. Interestingly, Dr Hassed, in his evidence, stated that he relied upon the reasoning in a survey authored by Christensen published in a peer review journal. However, the Christensen survey canvassed issues of material preference, likes and dislikes and did not directly cover issues of toxicity.

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[5] T174.

29 Turning now to the statement "*Amalgam breaks teeth by thermal expansion*", the Panel heard from Professor Mount that he agreed that amalgam was in his clinical judgment, a contributor to tooth fractures. However he also stated that amalgam was one of many such contributing factors.[6] Professor Mount added that while it was difficult to extrapolate laboratory findings to the clinical situation, amalgam was in his view, not the major contributor to fractures in teeth. Mr Monahan posed the question:

> "Are you not saying teeth with amalgam fillings do break in circumstances of thermal expansion, but you cannot say that amalgam breaks those teeth by thermal expansion?"

Professor Mount replied he could not say that and agreed that the statement in the advertisement as it stood was incorrect. He gave evidence that in his view, fractures of teeth also occur under composite although not to the same extent as under amalgam.

30 Professor Tyas was of the view that despite laboratory evidence linking stresses within amalgam restorations, the claim that amalgam breaks teeth by thermal expansion had not been demonstrated in any clinical research to date.[7] In supporting this view, the Panel was impressed with Professor Tyas's reliance on a comprehensive literature review conducted by Michael J Wahl entitled "Amalgam - Resurrection and redemption. Part 1: The clinical and legal mythology of anti-amalgam" [Quintessence International; 32:(7)525-535] which concluded that there was very little evidence in the scientific dental literature to implicate dental amalgam per se in the direct cause of tooth fracture. The review also indicated that cuspal fractures were as likely to be associated with composite resin restorations as amalgam restorations.

31 The Panel therefore concluded that the claim that "*Amalgam breaks teeth by thermal expansion*" was again a selective use of information. Placing such a statement in the advertisement with no further explanation presents a distorted picture about the failings of amalgam as a restorative material, which in the view of the Panel was not designed to inform prospective patients seeking information.

32 The Panel accepted the uncontroverted evidence that in three separate samples, there was decay under at least 80 percent of the (amalgam) fillings Dr Hassed removed.[8]

33 The Panel, however, agreed with Mr Monahan's submission that this was irrelevant. Dr Hassed collected clinical evidence to prove his claim in February 2003, after he was aware of the Board's Inquiry. The allegations concerning the advertising breaches relate to November 2002 or before. At the time the advertisements were placed, there was no reliable evidence available to prove Dr Hassed's claims.

34 Finally, the Panel considered the following statements:

"*A 1995 survey found that only 3% of dentists would have amalgam used on themselves if they needed a medium-sized filling in a back tooth*"

"*According to a recent survey, only 3% of American dentists would have amalgam (mercury) fillings in their own teeth and we suspect the figures would be the same here*"

35 The Panel heard that the basis for the statements made in both the Web advertisement and the Melbourne Weekly was an article published by G Christensen in the Journal of Aesthetic Dentistry (Vol 1, No 3; 11-17:1995). This article reported on a questionnaire put to 66 members and guests attending the 1992 meeting of the American Academy of Esthetic Dentistry. Dr Hassed's statement relied entirely on the responses to a single question of that

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[6] T189-190.
[7] T105.
[8] T239.

survey (Question No. 23, page 16) which asked for respondents' preferences for restorative material if they had a moderate-sized lesion in their own mouth. Seven options were provided of which the respondent was asked to select one only. The exact wording of this closed ended question and the percentage of responses for each option was as follows:

> "If I had a moderate-sized MOD lesion (½ isthmus of the cusp-tip to cusp-tip distance) in my own mouth I would prefer (one answer only)

A.	direct placement class 2 resin (Herculite, Heliomolar, P50, etc.)	5%
B.	a tooth-colored inlay or onlay	24%
C.	a gold alloy inlay	24%
D.	a gold alloy onlay	39%
E.	a gold allow crown	2%
F.	a porcelain fused-to-metal crown	3%
G.	a silver amalgam restoration	3%"

36 The Panel heard evidence from Professor Tyas that the article reported on a survey of a small group of non-representative dentists attending an aesthetic dentistry conference held in the United States. He suggested that the quoted survey should not be relied upon due mainly to bias particularly in relation to:

- inappropriate sample selection - attendees and guests who could be presumed to have an interest in aesthetic restorative materials; and

- inadequate numbers - 66 dentists out of the many thousands of dentists in America.

37 A critical appraisal of the article presented by Professor Tyas impressed the Panel that it did not progress the discussion about the merits or otherwise about dental composite material or the relative superiority of one restorative material over another. From Professor Tyas's evidence, the article may well be useful as an indicator of what a small number of American dentists might prefer about the use of amalgam for medium-sized restorations on themselves. The Panel heard that Professor Mount, while generally supportive of the claims made in the advertisement, agreed with Professor Tyas that given the situation under which the survey was undertaken, it could not be considered of great scientific import.

38 For the reasons presented by Professor Tyas, the Panel was not convinced that the data provided by this article would be used by a reasonable dental practitioner to support the argument that dentists generally (and in Australia in particular) would not have amalgam used on themselves. The Panel agreed that extrapolating the results from this survey to the local situation was inappropriate. Mr Monahan reminded the Panel that Professor Mount had agreed that Dr Hassed had "merely developed his own interpretation of facts as presented by an acknowledged expert in the field" and that "this interpretation could be criticised as being rather superficial".

39 The Panel did not feel that the recording of a radio interview with Michael Wahl presented by Dr Hassed was of significance to the case at hand. It was felt that the material captured within the recording was related to practice management and was not relevant to his attitudes to the use of amalgam as a restorative material.

40 In his submissions, Mr Monahan reminded the Panel that the article by Christensen made the point, agreed to by Professor Mount, that amalgam has a number of advantages that are not referred to in the advertisement (page 303). For example, the opening paragraph of the Christensen article states: "Although no type of restoration has the economy, simplicity, and near universal acceptance of silver amalgam, there is significant growth in the use of other restorations, most of which are tooth coloured."

41 Again, although in general agreement with the stance Dr Hassed had taken, Professor Mount admitted that it could be interpreted that the advertisement selectively used results from the survey regarding dentists' preferences both about the general acceptance by the profession of amalgam and about the aesthetics of restorative materials especially in relation to gold restorations.[9] Under cross-examination by Ms Hartley, Professor Tyas agreed that from Question 23 of the Christensen article, 65 percent (sum of responses for C, D and E) indicated that they would choose Gold as their restoration of choice for a large MOD lesion.[10]

42 It is also clear from Question 23 that 29 percent of respondents chose A or B (indicating a preference for the white coloured restorative materials being recommended by Dr Hassed). This does not indicate strong support by the respondents for composite restorations when faced with the restoration of large lesions. It was Question 23 that Hassed based his claim that only 3 percent of dentists would choose amalgam for restorations in their own mouth. While 3 percent did indicate this position, they also did not necessarily opt for white coloured composite restorative material as the alternative - rather they opted for gold as the preferred restorative material or a full crown in the form of porcelain fused-to-metal.

43 The Panel was of the strong opinion that the advertisement placed by Dr Hassed used selective reporting of the results from the study at best and misrepresented results at worst. The Panel found that the advertisement does not present a balanced view of the results published in the article by Christensen and accordingly is false, misleading and deceptive.

44 Having found that the offending words were false, misleading or deceptive and created an unreasonable expectation of beneficial treatment, and that in making the advertisement, Dr Hassed had breached the provision of section 64(1)(a) and (d) of the Act, the Panel found that Dr Hassed had engaged in unprofessional conduct of a serious nature. The departure from the expected standards was considered by the Panel to be significant and should have been plainly understood by Dr Hassed when he placed the advertisement. Dr Hassed understood the importance of maintaining appropriate standards in the advertising and the controversial nature of the statements in his website. His approach to the Board indicates this but unfortunately, Dr Hassed did not seek, it would seem, appropriate independent professional advice. It is to be hoped that if he had, the error which he has fallen to would not have occurred. That is however mere speculation because the evidence indicated that Dr Hassed did not go further even though he had an obvious concern about the nature of the statements which were being made.

45 The Panel was referred to a previous finding which had been made against Dr Hassed by a Panel of the Board's predecessor that Dr Hassed had contravened section 33 of the (old) *Dentists Act* 1972. The previous case concerned significantly different facts and issues and was dealt with in July 1996. The relevance of the earlier matter is that Dr Hassed has been found, in effect, to have engaged in unprofessional conduct and suffered a six week suspension of his registration reflecting upon the seriousness of his breach. While the nature of his departure from expected standards is different in this case, it is a concern to the Panel that Dr Hassed has again been found to have engaged in unprofessional conduct.

46 It is a matter which the Panel has taken into account in making its determinations. The weight to be given to it however is not great in the case of Dr Hassed given the passage of time, and the differing nature of the breaches. Future Panels may well place greater weight on Dr Hassed's history before the Board should he again find himself the subject of a finding of unprofessional conduct of a serious nature, leading to a more significant determination than would otherwise be the case.

47 In making the determinations, the Panel was concerned about the nature and extent of the departure from expected standards, in seeking to further Dr Hassed's commercial enterprise. The Panel did not doubt Dr Hassed's genuinely held belief in the benefits of the use of

[9] T182.
[10] T67.

composite resin rather than amalgam. However, in seeking to convince the public, Dr Hassed has fallen into error.

48 It would seem that Dr Hassed's genuinely held beliefs stood in the way of objectively considering the advertisement to ensure that it complied with section 64(1). The Panel considered that Dr Hassed was again at risk of falling into error unless the determinations reflected the seriousness with which the Panel viewed his breaches.

49 The Panel also consider that the determinations should act as a general deterrent to other practitioners who should take careful note when seeking to promote arguments which favour their own views about dental care practice. To be clear, the Panel is not suggesting that views cannot be stated on controversial issues. The dental care provider must however consider the impact upon the consumer and whether the advertisement is false, misleading or deceptive or creates an unreasonable expectation of beneficial treatment by virtue of the manner in which the beliefs are stated.

Victor Harcourt
Chair