New South Wales
Supreme Court

CITATION :	**Commissioner for Fair Trading, Department of Commerce v Hunter [2008] NSWSC 277**
HEARING DATE(S) :	11-14/02/2008; 21-22/02/2008
JUDGMENT DATE :	2 April 2008
JURISDICTION :	Common Law
JUDGMENT OF :	McCallum J
DECISION :	1) pursuant to section 65(1) of the Fair Trading Act, that the defendant, by himself, his servants or his agents or otherwise be permanently restrained from carrying on a business of, or in any way providing in trade and commerce, any form of the following health care services: (a) naturopathy; (b) medical herbalism; (c) herbalism; (d) iridology; (e) hydrotherapy; (f) dietician or nutritionist (being the professional application of nutrition knowledge in the treatment and prevention of human illness); (g) sports medicine; (h) osteopathy; and (i) blood analysis; 2) pursuant to section 65(1) of the Fair Trading Act, that the defendant be permanently restrained from using in any way, in trade or commerce, the doctorate of philosophy conferred on him in August 1998 by the Faculty of Medical Studies, Medicina Alternativa Institute, affiliated to the Open International University for Complementary Medicines; 3) that the defendant pay the plaintiff's costs of the proceedings.
CATCHWORDS :	COMMON LAW - misleading and deceptive advertising in contravention of FTA - question whether avertisements conveyed misrepresentations alleged by the Commissioner - dispute by

	defendant as to his authorisation of publication of certain parts of advertisements - application for permanent injunction under s 65 FTA - power to grant injunction - exercise of Court's discretion under s 65
LEGISLATION CITED :	Business Names Act 1962 Fair Trading Act 1987 Health Care Complaints Act 1993
CATEGORY :	Principal judgment
CASES CITED :	Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd [2007] FCAFC 146 Australian Competition and Consumer Commission v Dell Computer Pty Ltd [2002] FCA 847 BMW Australia Limited v Australian Competition and Consumer Commission (2004) 207 ALR 452 Campomar Sociedad, Limitada v Nike International Ltd (2000) 202 CLR 45 Foster v Australian Competition and Consumer Commission (2006) 226 ALR 27 ICI Operations Pty Ltd v Trade Practices Commission (1992) 38 FCR 248 Puxu Pty Ltd v Parkdale Custom Built Furniture Pty Ltd (1980) 31 ALR 73 Taco Company of Australia v Taco Bell (1982) 42 ALR 177
PARTIES :	Commissioner for Fair Trading, Department of Commerce (Plaintiff) Jeremiah Jeffrey Hunter (Defendant)
FILE NUMBER(S) :	**SC** 12270/07
COUNSEL :	Ms R Francois (Plaintiff) In Person (Defendant)
SOLICITORS :	D Catt Solicitor Office of Fair Trading (Plaintiff)

IN THE SUPREME COURT
OF NEW SOUTH WALES
COMMON LAW DIVISION

McCallum J

2 April 2008

12270/07 Commissioner for Fair Trading, Department of Commerce v Jeremiah Jeffrey Hunter

JUDGMENT

1 **HER HONOUR**: These proceedings raise a difficult issue as to the appropriate reach of an injunction under s 65 of the *Fair Trading Act* 1987. The defendant has published advertisements that breach the Act. He has prior convictions for publishing similar material. The Commissioner for Fair Trading says that the appropriate order is a permanent injunction in terms that would prevent the defendant from practising in his professed field as a naturopath and medical herbalist.

2 The advertisements complained of by the Commissioner promote the defendant's services, with particular emphasis on a diagnostic test offered by him known as "live blood analysis". They promise instant test results from a drop of blood viewed under a high-powered microscope. The Commissioner contends that the advertisements are misleading in a number of respects. She says that live blood analysis has virtually no efficacy as a diagnostic tool. The Commissioner also contends that the advertisements misrepresent the defendant's qualifications, his ability to diagnose and treat serious health conditions and other matters. The defendant acknowledges that the advertisements are misleading in some respects.

3 The power to grant an injunction under s 65 arises upon the Court's being satisfied that a person "has engaged, or is proposing to engage" in conduct that constitutes a contravention of a provision of Part 5 of the Act, but the power is controlled by the requirement for the Court to determine that the injunction is in appropriate terms. The final orders sought in the present case would preclude the defendant from supplying the services of a naturopath or medical herbalist altogether. Section 65(2) expressly confers power to make such an order for a specified period or on terms. However, the appropriateness of an order of such broad reach must be assessed by reference to what is necessary to protect the public from conduct of the kind constituting the contravention. That is the primary issue in this case.

The defendant's advertisements

4 Five advertisements were published over five weeks, in a newspaper called the Northern Beaches Weekender, a free weekly newspaper published by Torch Publishing Company Pty Ltd and distributed in the area of Manly. The advertisements were broadly in the same terms except for two matters, the addition of a border to the last two advertisements and the addition of an advertisement about the defendant's treatment of the Pye family next to the last advertisement. The first advertisement, published on 22 February 2007 states:

Are you sick of being sick?
NEED A CURE?
LIVE BLOOD ANALYSIS
New Horizons in Natural Health Diagnosis
pinpoints nutritional imbalances and corrects
Metabolic weaknesses in body organ systems.
Dr Jeremiah Hunter N.D. PH.D. M.A.
DOCTOR OF NATURAL MEDICINE

WORKING WITH:

. Food Allergy
. Skin problems – Acne, Eczema, Psoriasis
. Weight Control/Obesity
. Digestive Problems, Constipation
. Bloating - Candida
. Chronic Fatigue Syndrome
. Menstrual/Menopausal Syndrome
. High blood Pressure, insomnia
. Child Health Care

HOW DO THE TESTS WORK?
One drop of blood is expressed from your finger-tip and analysed under a high-powered microscope. The contents of your blood are then projected onto a large screen monitor – various states of sub-par health can be displayed through blood pictures that deviate from normal. No waiting is required and test results are instant, the consultation allows for on the spot feedback and interactive discussion over your treatment program. Dr Jeremy Hunter combine (sic) state of art technological advances in Bionome Health Diagnosis with program advice on Dietary Modification, Nutritional and Herbal Medicine, and Eating Behaviour and Lifestyle Management.

Accredited Australian Charter of natural health Practitioners

MEDICAL FUND REBATES AVAILABLE

Family Bonus Analysis includes free blood
Discount cleansing program valued at
CHILDREN FREE $360. Runs for 3 weeks.

5 The significance of the border added to the last two advertisements is that it contained the following additional words which were relied on by the Commissioner as part of the material that conveyed the misrepresentations:

> "natural super foods - food allergy - child health care (ADHD) - constipation - boils - circulation - headache - colic - dermatitis - diabetes - eczema - epilepsy - menopause - weight control - obesity".

6 The advertisement about the Pye family described the defendant's diagnosis and treatment of two children using live blood analysis. It reported a successful outcome for both children and said that the family had nothing but praise for him.

7 As there were no pleadings, I asked Ms Francois, who appeared for the Commissioner, to identify the ways in which the advertisements were alleged to contravene the Act. The final version of the response to that request became MFI 10. It identified the following as the representations complained of by the Commissioner:

> "(a) the defendant is medically qualified and a medical doctor, by using the title "*Dr Jeremiah Hunter N.D. PH.D M.A. Doctor of natural medicine*";
> (b) the defendant is competent to diagnose and "cure" health problems;
> (c) the defendant is competent to treat serious health conditions, including

diabetes, epilepsy and circulation and high blood pressure problems;
(d) "live blood analysis" test is a diagnostic tool which:
i. can pinpoint "nutritional imbalances";
ii. can identify "various states of sub-par" health;
iii. can identify blood which "deviate(s) from normal";
iv. can correct "metabolic weaknesses " in body organ systems.
(e) the defendant was accredited with the Australian Charter of Natural Health Practitioners;
(f) the defendant treated the Pye family two years before the date of the advertisements [said to arise only from the last advertisement]; and
(g) the defendant had undertaken the highest level of academic study and been awarded a doctorate of philosophy."

8 The Commissioner alleges that the making of each of the identified representations amounts to conduct that is misleading or deceptive or likely to mislead or deceive in contravention of s 42 of the Act. It is further alleged that the representation as to the performance characteristics or benefits of live blood analysis amounts to a false representation in contravention of s 44(e) and s 50 of the Act. It is also alleged that the representation as to the defendant's accreditation with the Australian Charter of Natural Health Practitioners amounts to a false representation contrary to s 44(f) of the Act.

9 The only conduct complained of by the Commissioner as being in breach of the Act is the publication of the advertisements. There was other evidence in the proceedings going to the defendant's prior convictions and his dealings with a particular client but that evidence was put by Ms Francois as going only to the issue of the exercise of the Court's discretion under s 65 to grant an injunction on such terms as the Court determines to be appropriate.

Concessions made by the defendant

10 As noted above, the matter did not proceed on pleadings. Further, although there was a direction for the service of affidavits, the defendant did not serve any affidavits. He gave his evidence orally. Accordingly there was no formal identification, prior to the commencement of the hearing, of the issues in dispute. At the commencement of the hearing, it appeared that all issues were contested by the defendant. However, on the fourth day of evidence and apparently after consulting a lawyer, the defendant made concessions, with some equivocation, as to the case against him. He also indicated his consent to some of the orders sought, but he remained opposed to an order in terms that would prevent him from providing health services.

11 The defendant acknowledged the following matters:

(a) he acknowledged that insofar as he used the title "Dr" before his name, that was misleading or deceptive in contravention of the Act [T245.25];

(b) he acknowledged that the use of the description of himself as "Doctor of natural medicine" is misleading [T245.40];

(c) he acknowledged, in respect of his use of the word "cure" and the word "diagnose", that his advertisements were misleading or deceptive or likely to mislead or deceive insofar as they represented that he is competent to diagnose and cure health problems [T255.46];

(d) he acknowledged, ultimately, that it was misleading or deceptive or likely to mislead or deceive for him to represent that he is competent to diagnose and treat high blood pressure problems [T255.29]. However, there was some equivocation in the exchange leading up to that acknowledgement;

(e) he acknowledged that he was not in fact accredited with the Australian Charter of Natural Health Practitioners at the time of publication of the advertisements but said that he was unaware of that fact at the time [T247.35].

12 The Commissioner submitted that, by those concessions, the defendant has conceded that the advertisements conveyed certain misleading and deceptive representations. That entails two propositions, namely, that the representations were conveyed and that they were misleading. However, the defendant did not, in terms, make concessions as to whether the representations were conveyed. Rather, his concessions were directed to whether, assuming they were conveyed, the representations were misleading or deceptive. Accordingly, I have proceeded on the basis that it is necessary for me independently to consider whether the representations were conveyed by the advertisements.

Publication of the advertisements

13 Subject to two matters, there was no real dispute as to whether the defendant published the advertisements. The Commissioner led evidence from Torch Publishing which established that the defendant placed the order for publication of the advertisements and participated in their composition. The defendant did not dispute that evidence. However, he raised two discrete issues.

14 First, he contended that he did not authorise the inclusion in the last two advertisements of the border containing the list of ailments set out in paragraph 5 above. The Commissioner relies on the contents of the border as the foundation for representation (c), that the defendant is competent to treat serious health conditions, including diabetes, epilepsy and circulation and high blood pressure problems. The words "diabetes, epilepsy and circulation" appear only in the border. The reference to high blood pressure appears in the body of the advertisement.

15 The second issue was that the defendant said that he did not authorise the publication of the advertisement about the Pye family in the form in which it appeared. That advertisement represented that the defendant had first seen the Pye family "two years ago" and that they had nothing but praise for him. It was true that he had seen them, and that they were happy with the outcome, but those events occurred nearly ten years ago when the defendant practiced in a different place and under a different name. The advertisement used an old photo with new text.

16 The defendant's evidence in relation to the advertisement about the Pye family was that he had asked Janet Gibson, the sales representative from Torch Publishing with whom he placed the order for the advertisements, to "strike" the statement that he had first treated the Pye family two years ago but that she had failed to make that correction. In later evidence, he said that he had provided an old advertisement from another newspaper, the Northern Star, to Torch Publishing and had asked them to develop an advertisement that would insert the original piece as an excerpt, but that was not done.

The two letters of 16 February 2007

17 In support of his contention that he did not authorise the addition of the border, the defendant tendered a letter dated 16 February 2007 which he says was sent to Janet Gibson at Torch Publishing. Ms Gibson, who was called by the Commissioner in her case in reply, denied receiving the letter. The

Commissioner disputed the authenticity of the letter and submitted that I should find that it was fabricated by the defendant for the purpose of these proceedings.

18 There was a second letter by the defendant also dated 16 February, addressed to Mrs Pye. It recorded the defendant's thanks to her for letting him run the "testimonial" again. However, that letter was not tendered by the defendant but by the Commissioner, who submitted that it must also be a fabrication. The Commissioner obtained a copy of the letter when it was included in material served on her by the defendant. The defendant said that it was included by mistake. He said that he had not in fact sent the letter to Mrs Pye. He strenuously opposed its tender.

19 The letter to Janet Gibson states:

> "An advertisement for Salus Per Aquum Spa and Beauty has been run No.5442 within the Weekender (Nth Beaches). The set date runs for 8 March onwards and due to the borders of the advertisement we require you cease production until Janet Gibson changes the necessary details. Please confer with either Dana or myself to make arrangements to make these necessary improvements".

20 The submission that the letter was fabricated for the purpose of these proceedings was based on some anomalies in the information contained in the letterhead, the fact that the letter was not received by Janet Gibson, the fact that the letter states that the advertisement "has been run" at a time when no advertisement had yet been published, the fact that the proofs for the first advertisement would not have included the border (and indeed the defendant complained that he had received no proofs) and the fact that the letter states "the set date runs for 8 March onwards". Ms Francois invited me to infer that the defendant had taken that date, which was wrong, from a photocopy of a document annexed to an affidavit served in these proceedings which obscures the true commencement date for the run, 22 February 2007.

21 Perhaps the most curious feature of the letter to Janet Gibson is that it is dated 16 February 2007. That is the date on which the defendant placed the order for the advertisements. It makes no sense that he would write a letter on the same day complaining about the form of the advertisement and asking the publisher to cease production.

22 On the issue of fabrication, Ms Francois also relied on the similarity between the letter to Janet Gibson and the letter to Mrs Pye, which the Commissioner submitted was clearly false, and clearly fabricated for the purpose of these proceedings. The letter to Mrs Pye states "I want to thank you for letting me run your testimony again". Mrs Pye's evidence was that she had not spoken to the defendant for a number of years and had not given permission for him to use the testimonial again. Ms Francois suggested that, when the defendant learned that Mrs Pye would be called to give evidence, he changed his mind about relying on the false letter. The defendant's explanation for the letter was, in effect, that his ex-wife was in contact with Mrs Pye and he was under the impression that she had spoken to Mrs Pye about his using their testimony in a new advertisement.

23 The Commissioner tendered the files of the publisher in relation to the advertisements as part of her case in reply. Material contained in those files discloses that, after the publication of the first several advertisements, the defendant requested the addition of the border and even provided a form of advertisement previously published in the Manly Daily by way of precedent.

24 The form of the advertisements in fact published is consistent with that course of events. The first three advertisements, published on 22 February, 1 March and 8 March 2007 do not include a border. The last two, published on 15 March and 22 March 2007 do.

25 In respect of the Pye advertisement, the evidence of the sales manager, Janet Gibson, was that at no stage had she been told by the defendant that he did not want it published in that form. She denied that the defendant instructed her to make it very clear that it was an extract from the Northern Star dated back to the time when it was originally published. I prefer the evidence of Ms Gibson to the evidence of the defendant on that issue. There is nothing in the file that confirms the defendant's evidence that he attempted to make corrections to the form of the Pye advertisement. It is inherently unlikely that the defendant would have instructed Ms Gibson to republish the original testimonial from 9 years earlier, which was prepared at a time when the defendant practiced under a different name. The defendant took great exception to being referred to by that name during the proceedings. I do not accept his evidence that his instructions were to have the original advertisement republished without amendment.

26 I am satisfied that the defendant authorised the publication of all of the advertisements in the form in which they appeared.

27 It is not necessary for me to make a finding as to whether the two letters dated 16 February 2007 were fabricated by the defendant for the purpose of these proceedings. The letters are certainly very strange, and are inconsistent with the objective evidence, but they do not assist the defendant's case at all and for that reason alone I have some doubt as to whether they were deliberately fabricated by him for the purpose of these proceedings.

Issues as to the representations

28 The next issues to be considered are whether the advertisements conveyed the representations identified in MFI 10 and whether those representations were misleading or deceptive or likely to mislead or deceive, or otherwise contravened the Act.

29 The question whether the advertisements made the representations is an objective question of fact. In the case of a representation made to a section of the public generally (as opposed to identified individuals), it is necessary to isolate the "ordinary" or "reasonable" members of that class: *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 at [102].

30 The defendant's advertisements were directed to the readers of the Northern Beaches Weekender. There was no evidence in the proceedings as to the characteristics to be attributed to that section of the public. It should be presumed to include the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated and men and women of various ages pursuing a variety of vocations: *Puxu Pty Ltd v Parkdale Custom Built Furniture Pty Ltd* (1980) 31 ALR 73, per Lockhart J at 93. However, the decision of the High Court in *Nike* at [103] suggests that the task is to isolate a representative member of the class, rather than to consider the conduct by reference to all who fall within it: *cf Taco Company of Australia v Taco Bell* (1982) 42 ALR 177, per Deane and Fitzgerald JJ at 202.

Representation that the defendant is medically qualified

31 The first representation to be considered is representation (a) in MFI 10, that the defendant is medically qualified and a medical doctor. In my view, the advertisements do convey that representation. First, there is the use of the title "Dr". The ordinary reader would understand that title generally denotes a medical doctor. Some readers may know that it could also denote a person who has a doctorate of philosophy, which is usually indicated by the initials "PhD". The defendant's initials stated in the advertisement include "PHD" but he also adds the description "Doctor of Natural Medicine".

Interestingly, although the defendant described himself in evidence as a naturopath, that term is not used in the advertisements.

32 Other features of the advertisement point the reader to the conclusion that the defendant is a medical doctor. The most prominent words in the advertisement are "Are you sick of being sick?" and then, in large letters, "Need a cure?" In my view, those words invite the reader to infer that the defendant does the sort of things that medical doctors do.

33 Although the particular conditions listed in the advertisement do not represent a complete catalogue of the conditions for which one might see a medical doctor, they do include a number of serious ailments, such as high blood pressure and psoriasis.

34 The explanation of live blood analysis in the advertisements refers to the ability to see various states of "sub-par health" through "blood pictures that deviate from normal". The reader is offered instant test results and the opportunity to discuss their "treatment program". Those are words calculated to create the impression that what underlies the process is medical science, rather than naturopathy.

35 As to the issue whether that misrepresentation was misleading or deceptive, the defendant acknowledged that the use of the title "doctor" before his name was misleading or deceptive in contravention of the Act [T245-25]. He also acknowledged that the use of the description of himself as "Doctor of Natural Medicine" is misleading [T245-40]. I am of the view that his concessions in that respect were appropriate. He is not medically trained and is not a medical doctor. I am satisfied that the advertisements conveyed the misleading and deceptive representation that the defendant is medically trained and is a medical doctor.

Representations as to the defendant's competence

36 Representations (b) and (c) in MFI 10 are that the defendant is competent to diagnose and cure health problems and that the defendant is competent to treat serious health conditions including diabetes, epilepsy and circulation and high blood pressure problems.

37 As noted above, the reference to diabetes, epilepsy and circulation comes from the words included in the border. The defendant contended that he did not authorise the inclusion of the border in the advertisements but, as indicated above, I have found against him on that issue.

38 In my opinion, the advertisements convey representation (b), that the defendant is competent to diagnose and cure health problems. I have already referred to the predominant feature of the advertisements being the headline "Are you sick of being sick? Need a cure?" Most of the wording in the advertisements then deals with the live blood analysis test and an explanation of how the tests work. It includes the statement "no waiting is required and test results are instant, the consultation allows for on-the-spot feedback and interactive discussion over your treatment program."

39 Those words are apt to convey to the ordinary, reasonable reader of the advertisement that the services offered by the defendant include diagnosis and treatment or "a cure" for a variety of health problems.

40 As to representation (c), the advertisements include the words "working with" followed by a list of health complaints, including high blood pressure. The reference to "your treatment program" follows that list. In my view, all of the advertisements represent that the defendant is competent to treat health conditions such as high blood pressure, which the ordinary reader would know is a serious health condition.

41 However, the remaining conditions listed in representation (c), that is, diabetes, epilepsy and circulation, are not expressly listed in the body of the advertisement. Those conditions, and other conditions, are listed in the border, which appears only in the last two advertisements. The words in the border are not the most prominent feature of the advertisement but they contribute to the impression that the defendant treats a broad range of ailments. I am satisfied that the ordinary reader would take the words in the border to indicate the breadth of the defendant's expertise. Accordingly, I am satisfied that the advertisements which contained the borders do represent that the defendant is competent to treat diabetes, epilepsy and circulation problems as well as high blood pressure.

42 As to whether those misrepresentations were misleading or deceptive, the defendant made an express concession in respect of representation (b) and that was plainly appropriate. His position in respect of representation (c) was perhaps less clear, and there was some inconsistency within his case. On the third day of the hearing he said [T216.24]:

> "Your Honour, my master diploma of herbal medicine is a credential that is registered through - registered by the Federal government, the government of health - sorry, the government of Aged Care and Health, which is a Federal body which masterminds the overall administration of these diplomas. It is my contention, it is my argument, that myself having this credential entitles me and qualifies me to be able to deal with such an illness as high blood pressure."

43 His concessions on the fourth day of the hearing included a concession that he is not competent to treat high blood pressure problems, but that was after some equivocation. Later in the evidence, the defendant was at pains to emphasise that he makes it very clear to his clients what he is "limited to in regards to practicing as a naturopath" [T211.5]. He said "I make it very clear to them that the modalities that I profess are in no way to the liking of that of a medical doctor, that I am a naturopath that is trained to use the naturopathic means of healing".

44 The defendant placed some reliance on a disclaimer which he stated must be signed by every client. The contents of the disclaimer are completely inconsistent with the tenor of the advertisements. The disclaimer states that the information provided by "biologic terrain assessments" (apparently a reference to live blood analysis) is an information service, should only be viewed as opinion, and should not be used for diagnosing or treating a health condition, symptoms or a disease. The disclaimer also states "I am fully aware that Jeremiah Hunter has explained to me in full detail that he is "not a medical practitioner" and his doctorate expresses nutritional, herbal and dietary education only".

45 The proposition appeared to be that any misrepresentation conveyed by the advertisement was corrected by the disclaimer when a client attended the defendant's practice. I reject that contention. It is no defence to an allegation of misleading advertising to say that customers are disabused of any misrepresentation when they contact the promoter: *Australian Competition and Consumer Commission v Dell Computer Pty Ltd [2002] FCA 847* per Jacobson J at [33] (reversed in part on appeal but not on that issue).

46 The defendant relied on the disclaimer as indicating that he has "strongly opposed [himself] to being called a doctor" and he said that he will not see a client unless that form is signed. I asked the defendant why, then, he advertises himself as "Dr Hunter". He responded by reference to the disclaimer, stating "it says that my academic qualifications do not cover pharmaceutical drug medication or an education that entitles a medical doctor to be called a medical doctor but rather an academic qualification that relates to education, dietetic education, nutritional education".

47 The defendant indicated that the word "cure" in the advertisements was used in the "preventive

medicine" context and he believed that was what his disclaimer points out. I do not accept that explanation but in any event the question is whether he is in fact competent to treat serious medical conditions. By his reliance on the disclaimer, he has in effect acknowledged that he is not.

48 I am satisfied that the defendant's concession as to his not being competent to diagnose and treat high blood pressure problems was an appropriate concession and, further, that he is not competent to treat any serious health condition. I am satisfied that representations (b) and (c) were misleading and deceptive.

Representation as to the diagnostic capacity of the live blood analysis test

49 The representation relied upon by the Commissioner in respect of the diagnostic capacity of the live blood analysis test is drawn in terms from the words of the advertisements. There is no doubt that the advertisements conveyed that representation to the ordinary, reasonable reader.

50 As to whether that representation was misleading or deceptive, the defendant stated that there is a huge controversy and confusion in regards to live blood analysis and that he was confused as to whether or not it is a valid tool. However, in the proceedings, all the evidence went one way.

51 The Commissioner called evidence from Professor Eva Raik, a haematologist with extensive qualifications and experience. Professor Raik's evidence was that the only cellular elements of blood that can be examined microscopically are red cells, white cells and platelets. She stated that, in order to visualise variations in these cells it is necessary to stain a dried drop of blood. Professor Raik stated that it may be possible, in a few restricted, extreme circumstances, to establish that there is a "deviation from normal" on a wet, unstained drop of blood as described in the defendant's advertisements. She stated, however, that it would be impossible to identify the cause of the "deviation" and that it would be exceedingly dangerous to reach a diagnosis or to advise about a "treatment program" without knowledge of the absolute counts of the cells present in a measured volume of blood and without a properly stained blood film examined by a qualified scientist or pathologist. She also stated that it requires a properly qualified scientist or pathologist to interpret the findings and that, even then, those findings have to be correlated with the clinical condition of the patient as assessed by a medical doctor.

52 Professor Raik did not resile from any part of her opinion when cross-examined by the defendant. Further, the defendant's cross-examination of Professor Raik disclosed the superficiality of his own understanding of haematology, and some misconceptions. Some of his questions were formulated by reading from the technical support manual for the live blood analysis microscope. It appeared to me that he did not understand the questions he was putting. On a number of occasions, he was unable to pronounce the words he was reading. At times, he abandoned points, apparently because he was unable to formulate a question.

53 The defendant called no expert evidence in response to the evidence of Professor Raik. In the course of the hearing, the defendant indicated that he wished to adduce such evidence from Mr Curley, who appears to be a promoter and distributor of the live blood analysis microscope and technology. Mr Curley did not appear in response to a subpoena. I refused the defendant's application for the issue of a bench warrant for his arrest because no expert report had been served. The defendant also sought to prove the efficacy of live blood analysis as a diagnostic tool by tendering the training materials he received when he was trained in the use of that process. I refused to admit that material on the issue of the efficacy of live blood analysis as a diagnostic tool. I admitted some of the material for the purpose of demonstrating the reasonableness or otherwise of the defendant's representations made in the advertisements based on the education he received, which I accepted was relevant to the exercise of my discretion under s 65.

54 Professor Raik presented as an intelligent and careful expert who confidently maintained that live blood analysis has virtually no efficacy as a diagnostic tool. She is eminently qualified in the field of blood analysis, which is the relevant field of expertise, and there was no challenge to her expertise. I accept her evidence. I find that the representations made in the defendant's advertisements as to live blood analysis are misleading or deceptive or likely to mislead or deceive.

Representation that the defendant was accredited with the Australian Charter of Natural Health Practitioners

55 Each of the advertisements states "Accredited Australian Charter of Natural Health Practitioners". Those words plainly represent to the reader that the defendant was so accredited at the time of publication. The defendant accepted that he was not accredited with the Australian Charter of Natural Health Practitioners when he published the advertisements but maintained that he was unaware of that fact at the relevant time. He stated that he was prepared to accede to an order that he not represent himself as being accredited with that organisation until such time as that is the fact. The basis for the defendant's belief that he was accredited at the time of publication of the advertisements is dealt with below in relation to the question of the breadth of the injunction sought by the Commissioner.

Representation that the defendant treated the Pye family two years before the date of the advertisements

56 The last of the five advertisements included a piece of the kind commonly described as an "advertorial" featuring the Pye family. It states that the Pye family first saw Dr Jeremiah Hunter two years ago. It reports that he was able, with the live blood test, to identify health problems in each of Mrs Pye's children. The true position is that the defendant first saw Mrs Pye and her children many years earlier. They did not know him as Dr Jeremiah Hunter but by his former name, Jeffrey Dummett. The Commissioner called evidence from Mrs Pye. She maintained that she remains happy with the assistance that her family received from the defendant but she confirmed that it is not correct to say that she first saw the defendant two years before the publication of the advertisement.

57 The defendant did not take issue with those matters. In respect of the advertorial, his position was that he attempted to correct mistakes in a proof of evidence that was provided to him and that the failure to correct those mistakes meant that that particular advertisement was published without his authority. I have already indicated that I do not accept his evidence on that issue.

58 I am satisfied that the last advertisement conveyed the representation that the defendant treated the Pye family two years earlier and that the representation was misleading and deceptive.

Representation as to the Doctorate of Philosophy

59 The Commissioner's case in respect of the PhD was that, by appending the letters PhD after his name, the defendant conveyed the representation that he had undertaken the highest level of academic study and had been awarded a doctorate of philosophy, because that is what those letters denote. That contention was not expanded upon in the submissions. It raises an issue as to the extent to which there is, in the ordinary, reasonable reader of an advertisement in the Northern Beaches Weekender, an

understanding of what is conveyed by the letters PhD. An academic, or a person with experience of post-graduate education, would know that the letters PhD stand for doctor of philosophy and would probably consider that to be the degree that entails the highest level of academic study, although even that may be a matter for debate.

60 The difficulty is that it is impossible to know the extent to which that is a matter within the knowledge of the hypothetical representative of the class of persons to whom the advertisement was directed. It seems very likely that some of the potential readers of the advertisement would have that knowledge but I do not know whether the "ordinary" or "reasonable" reader would. Accordingly, I am not satisfied that the advertisements conveyed the representation that the defendant had undertaken the highest level of academic study and had been awarded a doctorate of philosophy.

61 If I had found that the representation as to the PhD was conveyed by the advertisements, I would also have found that it was misleading or deceptive in contravention of s 42. The defendant's conduct in respect of the PhD is relevant to the exercise of my discretion under s 65 of the Act and is considered further below. The reasons for which I would have found that the representation was misleading or deceptive are set out in that section of the judgment.

Other defences raised by Mr Hunter

62 The defendant made reference during his cross-examination of various witnesses to two other lines of defence to the plaintiff's claim. One was the proposition that, when he was in practice at the Salus Per Aquum Spa and Beauty Salon at Manly, which was the practice advertised in the advertisements, he was working for Dr Baumann Australia, which is a German based company. The evidence did not go so far as to establish the truth of that proposition but, even if it had, it would not have sustained a defence to the claims made against the defendant by the Commissioner. If he has breached the *Fair Trading Act*, he is liable for the consequences of his breach, whether or not those breaches were committed in the course of employment or at the direction of another. In any event, nothing in the evidence disclosed that the advertisements were placed, or their contents composed, at the direction of anyone other than the defendant. Any representations conveyed by the advertisements were made by the defendant and the defendant alone.

63 A further line of defence disclosed by the defendant's cross-examination of some witnesses was that some of the representations made in his advertisements were not misleading or deceptive. In particular, he cross-examined Mr Khoury, the Policy Advisor for the Australian Traditional Medicine Society, generally to the effect that some of the services and advice advertised by him, such as blood cleansing programs and dietary modification, are accepted by naturopaths. On the whole, Mr Khoury agreed with those propositions. However, the fact that the advertisements were not wholly misleading or deceptive does not mean that they were not misleading or deceptive in the particular respects identified by the plaintiff.

Conclusion

64 I find that the advertisements conveyed representations (a), (b), (c), (d), (e) and (f) in MFI 10. I find that, by reason of the making of those representations, the publication of the advertisements was conduct that was misleading or deceptive or likely to mislead or deceive contrary to s 42 of the *Fair Trading Act*.

65 I also find that, in respect of representation (d) as to the diagnostic capacity of the live blood analysis

test, the publication of the advertisements falsely represented that a service (the live blood analysis test) had performance characteristics or benefits that it does not have, contrary to s 44(e) and s 50 of the *Fair Trading Act*.

66 I also find that representation (e) that the defendant was accredited by the Australian Charter of Natural Health Practitioners was a representation as to an affiliation that the defendant does not have, contrary to s 44(f) of the *Fair Trading Act*.

Orders sought by the Commissioner

67 The Commissioner initially sought a permanent injunction restraining the defendant from providing any form of "health service" as defined in the *Health Care Complaints Act* 1993.

68 During the course of the hearing, I raised with Ms Francois the issue of the breadth of an injunction in those terms. In particular, I noted that there did not appear to be any suggestion of any past or proposed contravention of the Act by the defendant in respect of his competence or qualifications as a massage therapist. The order originally sought would have prevented him from providing such services. I also expressed my concern as to an order that was not self-contained but required the defendant to go to the *Health Care Complaints Act* for the definition of "health service". The Commissioner then filed a Further Amended Summons. The relief sought in the Further Amended Summons is set out below.

69 Order 1 sought by the Commissioner is an injunction permanently restraining the defendant from carrying on a business of or in any other way providing in trade and commerce any form of the following health care services;

> "(a) naturopathy
> (b) medical herbalism
> (c) herbalism
> (d) iridology
> (e) hydrotherapy
> (f) dietician or nutritionist (being the professional application of nutrition knowledge in the treatment and prevention of human illness)
> (g) sports medicine
> (h) osteopathy
> (i) blood analysis"

70 I note that an order in those terms would not preclude the defendant from practising as a massage therapist.

71 The Commissioner also seeks an order permanently restraining the defendant from using, in trade or commerce, the doctorate of philosophy (order 2).

72 In the alternative, the Commissioner seeks an order restraining the defendant from providing health care services except under the direct supervision of an appropriately qualified medical practitioner who has been approved in writing by the Commissioner to act in that capacity (order 3). Such a regime would require the defendant to have not only the willingness but also the capacity to submit to the supervision of a discipline that is very different from those he has learned. In my assessment, it is unlikely that such an arrangement would work satisfactorily.

73 The Commissioner also seeks, further or in the alternative, orders restraining the defendant from making the particular representations identified in MFI 10 (order 4) or from making false representations

as to the diagnostic and treatment benefits of the live blood analysis test (order 5) or from promoting or supplying that test (order 6).

74 The power of the Court to grant an injunction under s 65 is controlled by the words "in such terms as the Court determines to be appropriate". Subsection (2) of s 65 removes any doubt as to whether the power is broad enough to restrain a person from engaging in a particular field of business: cf. *Foster v Australian Competition and Consumer Commission* (2006) 226 ALR 27 at [35].

75 *Foster* was concerned with the breadth of the power under s 80 of the *Trade Practices Act* 1974, which does not include a provision in the terms of s 65(2). The Full Court of the Federal Court per Ryan, Finn and Allsop JJ held that, if the Court considers that a complete prohibition, whether permanently or for a specified period, on the respondent's engaging in a particular field of commercial activity is necessary to protect the public from conduct of the kind that constituted the contravention, s 80 is wide enough to support such a prohibition as a matter of power. The position might be said *a fortiori* to be the same under s 65, having regard to the terms of subs 65(2).

76 However, the power must be exercised judicially and sensibly so as to ensure that the order made is appropriate: *ICI Operations Pty Ltd v Trade Practices Commission* (1992) 38 FCR 248, per Lockhart J at 256.5; *Foster* at [35]. An aspect of the task is to consider the nexus between the contravention of the Act found by the Court and the terms of the restraint sought to be imposed. The injunction should not prohibit conduct falling outside the boundaries drawn by the section: *ICI Operations* at 267.5 per Gummow J; cf. *Foster* at [30] and [35].

77 Section 65(6) of the *Fair Trading Act* removes the normal rule that an injunction is only to be granted to restrain threatened or impending conduct. In respect of the equivalent provision of the *Trade Practices Act*, the Full Court of the Federal Court per Gray, Goldberg and Weinberg JJ said in *BMW Australia Limited v Australian Competition and Consumer Commission* (2004) 207 ALR 452 at [36]:

> "In such cases, it is clear that the terms of any injunction based only on past conduct should be limited to restraining a repetition of precisely that conduct. The case of an injunction based on an intention to commit further conduct is different. There, the terms can be cast more widely, in order to catch conduct of any kind threatened or intended."

78 The distinction drawn in that passage as to the permissible width of an injunction based only on past conduct as opposed to that of an injunction based on an intention to commit further conduct was doubted in a later decision of the Full Federal Court per Moore, Dowsett and Greenwood JJ: see *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* [2007] FCAFC 146 at [108]. Their Honours stated that, in each case, the purpose of the injunction will be to prevent, or at least to reduce the likelihood of, future infringement. Past conduct will be relevant to the likelihood of future conduct to the extent that it demonstrates a "propensity" or "inclination" to infringe the relevant legislation.

79 It is possible that the distinction drawn in *BMW* between injunctions based only on past conduct and injunctions based on an intention to commit further conduct was made in recognition of the language of s 80(1) which identifies as the source of the power to grant an injunction, the satisfaction of the Court that a person either "has engaged" or "is proposing to engage" in conduct in breach of the Act. Nonetheless, in my view, the Court's power under s 65 of the *Fair Trading Act* does not, on its proper construction, confine the Court to making an injunction based only on past conduct in terms that restrain only a repetition of precisely the conduct in which the person is found to have engaged. The question of the appropriate terms of an injunction, once the Court is satisfied that a person has engaged in conduct in breach of the Act, is a matter going to discretion, not power.

Evidence going to the exercise of the discretion

80 On the question of the exercise of the Court's discretion, both the Commissioner and the defendant relied on a broader range of evidence than was relied on in respect of the alleged breaches of the Act. The Commissioner called evidence from a former client of the defendant, Mrs Atkinson, and also relied on the defendant's prior convictions for similar conduct.

81 The defendant tendered material he obtained when he was trained in the use of live blood analysis to demonstrate that he had a reasonable basis for making the representations. He also gave evidence as to the basis on which he believed that he was still accredited with the Australian Charter of Natural Health Practitioners at the time of the advertisements. That evidence is addressed in the discussion of the defendant's submissions below.

82 The evidence as to the defendant's prior convictions demonstrated that, in May 2002, he was prosecuted by the Department of Fair Trading and convicted of twenty-five offences arising out of the conduct of his business as a naturopath. Three were offences against s 5(1) of the *Business Names Act* 1962. The remaining twenty-two were convictions under ss 44 and 50 of the *Fair Trading Act*.

83 The defendant also admitted that he had previously been convicted in proceedings brought by the Medical Board in 2001. He said that the Medical Board prosecution related to whether he gave "medical advice". However, that prosecution also appears to have involved advertisements in very similar terms to those complained of in these proceedings.

84 The defendant has also been expelled from the Australian Traditional Medical Society for practising outside his discipline, claiming to be able to "cure" and giving the impression of qualifications he did not hold. The defendant's only response to that evidence was that he disassociated himself from that Society before the date on which they claim to have expelled him.

85 The *Fair Trading Act* convictions involved the placement of advertisements in the Northern Star in Lismore in almost identical terms to the advertisements complained of in these proceedings. The common theme of many of the advertisements was to describe a number of conditions as "biochemical imbalances and metabolic weaknesses in body organ systems"; to suggest that live blood analysis enables a diagnosis of those conditions and to offer a "cure".

86 As in these proceedings, the Department of Fair Trading called evidence in the earlier proceedings from Professor Raik. Her report in the earlier proceedings specifically addressed a test described in the advertisements as "crypto-stain blood urine and saliva analysis". Professor Raik stated that the claims made in those advertisements had no scientific basis. She said that one of the statements made in one of the advertisements was "nonsense". The statement was that the cell is the smallest molecular unit of life. Professor Raik explained that a cell is not a molecule.

87 Professor Raik also stated in the earlier proceedings that claims in those advertisements as to the diagnostic capacity of live blood and clot retraction were not only misleading but may endanger patients' health and ultimately life as patients may be incorrectly diagnosed or lulled into a false sense of security if no "abnormalities" were detected. She stated there (as she did in these proceedings) that it is not possible to use "live blood analysis" to reach a diagnosis.

88 In the proceedings before me, the defendant was at pains to point out that the present advertisements do not deal with the "crypto-stain" analysis. He appeared to suggest that is a different test, but there was no evidence as to any relevant difference. Each test appears to be based on the premise disputed by Professor Raik, that examination of wet, unstained blood is a reliable basis for diagnosis and treatment of

health problems.

89 The material relating to the prior convictions demonstrates that the defendant has been on notice for several years that representations of the kind complained of in these proceedings as to the diagnostic capacity of live blood analysis are false and contravene the *Fair Trading Act*. His conduct of these proceedings demonstrated a complete disregard for the gravity of having repeated conduct of that kind. It is difficult to judge whether that disregard is due to stubborn self-interest, or a want of comprehension, or some other cause. The cause does not matter. What is indicated by the defendant's conduct is a risk that he will continue to misrepresent what he can achieve by way of diagnosis and treatment of serious health problems.

90 It is also a matter of concern that since being convicted under his former name in the earlier proceedings, the defendant has changed his name and proceeded to publish very similar advertisements. Ms Francois submitted that the defendant changed his name to avoid being associated with his earlier convictions but the defendant denied that. He said that he changed his name in response to adverse media attention from Channel 7 and Channel 9. He did not identify the subject of any programme published about him. There have been other proceedings involving allegations against the defendant under his former name but Ms Francois pointed out to me in submissions that the change of name pre-dated the commencement of those proceedings. Ultimately, I have concluded that there is not a sufficient basis for me to draw any adverse inference in respect of the name change. Of course, if the defendant were to change his name again following these proceedings, there may well then be a basis for inferring that the reason for the name change was to avoid the consequences of the orders made in these proceedings.

Evidence of Mrs Atkinson

91 Mrs Atkinson went to see the defendant in response to an advertisement in the terms of the advertisements complained of in these proceedings. She had been suffering from eczema for a period of time and had a young daughter who was also suffering from eczema. The advertisement led her to believe that the blood analysis would show what she was allergic to. She thought it might pick up something that no-one else had picked up before. She spoke to the defendant by telephone and said that he recommended that she go to see him because he could analyse her blood and cure her in three weeks.

92 Mrs Atkinson saw the defendant twice. On the first occasion, he took a drop of blood from Mrs Atkinson's daughter, Xanthe, which he placed on a slide. He turned on a monitor which magnified the size of the slide. She recalled him saying that he could see pesticides in Xanthe's blood and also saying that Xanthe had "leaky gut syndrome", that is, that the gut was allowing particles to go through the gut wall into the blood which the body then reacts to. He told her "this is what leads to trouble in the skin".

93 At the second consultation, the defendant took blood from Mrs Atkinson and again placed the slide under a microscope which projected to a television monitor. He told Mrs Atkinson that her blood had pesticides in it and also a fungal infection.

94 In relation to his examination of Xanthe, the defendant cross-examined Mrs Atkinson to the effect that he disassociated the blood analysis with the information that he gave her in relation to pesticides and leaky gut syndrome. Mrs Atkinson maintained that she thought she had gone there for him to look at Xanthe's blood and that he told her what he could see in Xanthe's blood. In relation to her own examination, the defendant pursued a similar line. The following exchange occurred [T130.1]:

"DEFENDANT

Q. I suggest to you that I told you that the blood analysis that was on the screen was totally disassociated with pesticides and fungal infection but rather that these pesticides which flood the environment, destroying - do you remember me talking to you about the environment and the seriousness of chemicals in the environment?
A. Yes.

Q. Do you remember me telling you how these environmental chemicals affected not only human physiology but also the world, the earth?
A. Probably, yes, it's something I am aware of.

Q. Did you not understand that when I said that, when I spoke about the world and when I spoke about the earth that these comments about pesticides was related to the earth and to humanity rather than to your blood on the screen?
A. I thought you pointed them out to me on the screen.

Q. I suggest to you that you know full well that I did disassociate any viewing of your blood with that which was spoken in regards to the environment and humanity and pesticides and fungus?
A. That is not the perception I got at all.

Q. In paragraph 18, the second line, you said, "I recall the general tenor of his comments were quite negative." What are you relating to there? "Negative" in what sense?
A. That there was a lot wrong with my blood. You were doing a big tutt-tutting, it was like (indicating)."

95 Mrs Atkinson came away from the consultation with the understanding that the defendant had advised her to undertake a nine-day detoxification diet which "pretty much had no food in it at all". She has four young children, one of whom was then still breast-feeding. She was thin at the time of the hearing and said she was even thinner when she saw the defendant. The defendant put a proposition to Mrs Atkinson in cross-examination which I am satisfied was deliberately false. He suggested to her that he would have informed her that to do a detox program whilst breast-feeding her son was "contra-indicated" for both herself "and Xanthe". In putting that proposition, the defendant's pronunciation of the word "contra-indicated" was barely comprehensible. In any event, she denied it. It makes no sense that the defendant would have said that to Mrs Atkinson. It is completely inconsistent with other parts of his cross-examination, in which he was critical of her for not having adhered to the regime he advised. In my view, it was something he made up in response to a concern expressed by me about his advising a woman in Mrs Atkinson's circumstances to virtually fast for nine days.

96 As to Xanthe, Mrs Atkinson understood that the defendant had said her blood revealed "leaky gut syndrome". The defendant, apparently in an effort to distance himself from that evidence, said "I made it clear to Mrs Atkinson that her daughter did not have leaky gut syndrome. I made it very clear to Mrs Atkinson that her gut was working properly". I asked the defendant how he was able to ascertain that. He then said, "Hang-on, I did not say that. Can I tell your Honour what I did say?" However, he was unable to complete that answer and simply said " I will just move on, your Honour".

97 Mrs Atkinson impressed me as a careful and reliable witness. She was a quiet, intelligent woman who took care to qualify her answers where appropriate but she remained firm under vigorous and sometimes aggressive cross-examination by the defendant. I accept that the defendant purported to diagnose pesticides and a "fungal infection" in her blood, and "leaky gut syndrome" from Xanthe's blood, by

reference to the live blood analysis test, and used that diagnosis as the basis for prescribing herbal formulas costing hundreds of dollars.

98 The evidence of Mrs Atkinson confirmed, as one would expect, that the claims made by the defendant are not confined to his advertisements, but are indicative of the way in which he conducts his practice.

The defendant's PhD

99 As indicated above, although I am not satisfied that the advertisements conveyed the representation relied on by the Commissioner in respect of the defendant's PhD, the evidence surrounding that qualification is relevant to the exercise of my discretion under s 65. In my view, that evidence, and other evidence surrounding the defendant's qualifications and affiliations, demonstrated that the defendant has little regard for the need for accuracy in self-promotion and is prone to making wild misrepresentations as to his qualifications.

100 The defendant obtained secondary eduction to the equivalent of year 10. He uses the title "Dr Jeremiah Hunter N.D. PH.D. M.A. Doctor of Natural Medicine". The letters "N.D." stand for "naturopathic diploma". The defendant says that is a "credentialed abbreviation that has come through statutory law through the Society of Natural Therapists and Researchers". He does not hold a qualification by that name. It is apparently a reference to his diploma of medical herbalism awarded in January 1998. He obtained the degree of doctor of philosophy in August of the same year from the Medicina Alternativa Institute. That is not a university, but purports to be affiliated to a university recognised in Sri Lanka. The letters "M.A." do not refer to a separate degree. The defendant said that they refer to the "university that [he] received the degree from, which is the Medicina Alternativa". As already noted, there is no university of that name. The Medicina Alternativa Institute is described on the PhD as being affiliated with the Open International University of Natural Medicine.

101 Mrs Pye gave evidence that the defendant told her in late 1997 that he had been invited to receive a doctorate from an overseas university and that it arrived 6 to 8 weeks later.

102 The defendant gave evidence that he attained his PhD by four years approved residency in a post-graduate institution. He also tendered material which he had downloaded from the internet about the Open International University for Alternative Medicine, which is the university to which the Medicina Alternativa Institute is said to be affiliated. That material states that, for conferral of the degree of doctor of philosophy, the "training requirement" is "forty-eight months (four years) of approved residency in department (sic) of any recognised post-graduate institution/teaching hospital of your concerned country".

103 When the defendant was cross-examined by Ms Francois, he disclosed that the putative "post-graduate institution" in which he undertook that four years of approved residency was the Research Institute of Diet, Disease and Prevention Incorporated. That is an association that was incorporated in New South Wales on 23 January 1997 and its public officer is the defendant (under his former name, Jeffrey Dummett).

104 The defendant described the Institute as a "panel" of which he was a member. He denied that the Institute can only operate when he is available to run it but, almost in the same breath, stated that it is "in limbo" because he (the defendant) is in limbo because of these proceedings. The clear inference is that the defendant obtained his PhD by representing that he had undertaken four years residency in a post-graduate institution when the true position was that it was an institution effectively run by himself that

had been established by himself less than two years before the conferral of the degree. The defendant is not a post-graduate in the traditional sense, not having graduated with a bachelor degree from any university. His only qualification from a university is a certificate in thermotherapy that he obtained following a 48-hour continuing education course at the Loma Linda University in California.

105 I can only conclude that the defendant's reliance on the PhD either is disingenuous or demonstrates a complete want of appreciation of the importance of integrity in the academic process.

Submissions as to the exercise of the discretion under s 65

106 Ms Francois submitted that the Court should make orders 1 and 2 sought in the Further Amended Summons for the following reasons:

> "a) earlier prosecutions and sanctions for similar conduct have not been sufficient to deter the defendant from engaging in unlawful conduct;
>
> (b) the defendant's willingness to fabricate documentary evidence for these proceedings demonstrates his inability to respect legal boundaries to his practice;
>
> (c) the defendant has no understanding of the law nor any insight that he doesn't understand his legal obligations;
>
> (d) the defendant appears to be entirely incapable of distinguishing between truth and falsehood;
>
> (e) there are real questions about the defendant's general competency;
>
> (f) the defendant poses a serious risk to the public"

107 For the reasons outlined above, I accept that there is sufficient similarity between the matters the subject of the earlier prosecutions and the present complaints to indicate that the defendant understood, or should have understood, that the representations made in the recent advertisements in relation to live blood analysis are false and amount to a breach of the *Fair Trading Act*. His persistence in repeating those representations reveals that the sanction of the earlier convictions was not effective to enforce obedience to the law.

108 In respect of the submission as to the defendant's willingness to fabricate documentary evidence, I have not made any finding that the defendant has fabricated documentary evidence in the proceedings and accordingly I do not place any reliance on that submission.

109 As to the question of the defendant's general competency, I have some doubt as to whether that is a proper consideration in the exercise of my discretion. The purpose of the power I am exercising is to protect the public from unlawful conduct, not from incompetence. Accordingly, I have not taken that matter into account in the exercise of my discretion. The remaining matters are addressed below.

Defendant's submissions

110 As noted at the outset of these reasons, the defendant has been effectively prohibited by an interim injunction granted last year from practising as a naturopath at all. He opposes the making of a permanent

injunction in the same terms. The defendant submitted that if I were to make an order in those terms on a final basis, it would effectively mean that $70,000 worth of education would be wasted. He submitted that there should be no order restraining him from describing himself (and presumably practising) as a naturopath, medical herbalist, nutritionist, massage therapist, hydro-therapist and iridologist [T243]. He also made a submission that suggested that rather than be stopped from practising due to misleading advertisements, he could submit his advertisements in advance to the Commissioner [T505].

111 The defendant submitted that I should reject the proposition that there has been a pattern of non-compliance, since there has been a seven-year gap between the last charge and this current action. The principal matter of concern, however, is the defendant's preparedness to breach the Act again, notwithstanding the sanction of earlier convictions.

112 The defendant also submitted that the reason for the earlier convictions and the present complaints was his use of live blood analysis as a diagnostic tool. The defendant indicated that he proposes to donate the microscope to a school and that, on removal of the microscope, there will be no recurrence of any breach. I accept that the risk of the defendant's making misrepresentations in the future in respect of the diagnostic capacity of the live blood analysis test will be smaller if he divests himself of the microscope. However, his persistence in the use of that tool, notwithstanding the earlier convictions, gives me little confidence that he will do what he says. Further, the misrepresentations are not confined to the use of the live blood analysis test. The misleading statements as to the defendant's competence and accreditations are equally troubling.

113 The defendant also submitted that naturopaths are inundated with continual marketing strategies and schemes from companies such as Metagenics, the distributor of the live blood analysis technology. Even if that is so, it would not relieve the defendant of the obligation to comply with the *Fair Trading Act*.

114 The defendant tendered a video of one of the training seminars conducted by Metagenics. That material was tendered to establish the reasonableness of his conduct in persisting to promote live blood analysis. I have watched the whole video. On the strength of that material, I have a level of sympathy for practitioners in the position of the defendant who have invested time and money learning the use of a diagnostic tool that is virtually useless, except for marketing expensive nutritional supplements. The training seminar, conducted by Mr Mike Curley, is calculated to persuade the students that they will emerge with a profound understanding of haematology, although in my opinion, the more astute members of his audience would have been concerned as to the integrity of the scientific process they were being taught and the depth of knowledge they had acquired.

115 The difficulty for the defendant is that his previous prosecutions should have demonstrated to him the shortcomings of that instruction. They did not. Rather than heed the warning of earlier prosecutions, the defendant resumed practice on almost identical terms under a different name in a different place. In addition, as noted above, the extent of the misrepresentations in this case goes beyond the statements made in respect of live blood analysis.

116 The defendant also submitted that other practitioners are using the same tool and advertising it, and that the blame should focus on the organisation that teaches the live blood analysis technique. There was no evidence before me as to the use of live blood analysis by any person other than the defendant. I am not concerned in these proceedings with the conduct of any person other than him.

117 The defendant also submitted that he has spent a significant amount of money, which he assessed at $70,000, in gaining his qualifications. Whilst there was no evidence in the proceedings as to the amount that the defendant has in fact spent gaining his qualifications, I accept from the sheer number of them that he is likely to have expended a considerable amount of time and money on those undertakings. That

is a matter which highlights the care with which the Court should exercise its discretion in these proceedings. Nonetheless, in my view, if the protection of the public interest requires an order to be made, then the personal interests of the defendant must give way to the public interest.

118 The defendant also made a submission based on the Commissioner's application, in the alternative, for an order that the defendant be restrained from providing health care services except under the supervision of an appropriately qualified medical practitioner. He submitted that the Commissioner's willingness to allow him to practise on those terms shows that she believes he is qualified to provide health care services in the community. I do not accept that submission. The order sought by the Commissioner reflects the terms of s 65(2)(b) of the *Fair Trading Act*, which confers power to grant an injunction restraining a person from carrying on business except on specified terms. The Commissioner's primary contention was that the Court should grant an injunction permanently restraining the defendant from providing any health care services. The application for an order restraining him from providing such services except under supervision was sought in the alternative.

119 As to the representation that the defendant was accredited with the Australian Charter of Natural Health Practitioners, the Commissioner relied on admissions made in an earlier affidavit sworn by the defendant which stated that, after a period overseas, he omitted to renew his accreditation. The defendant said that affidavit was prepared by a solicitor who is no longer acting for him and that its contents were not true. I do not accept that evidence. The affidavit was sworn by the defendant. His evidence in these proceedings was that he believed he was accredited because he did not receive any notice of the need to renew his accreditation. However, during his submissions, he indicated that he thought he was entitled to state that he was accredited because he has the qualifications which would entitle him to accreditation with that organisation. I reject both his evidence and his submission on that issue. The defendant has failed to establish any reasonable explanation for making a misrepresentation as to his accreditation.

Conclusion as to discretion

120 I have come to the view that complete prohibition on the defendant's engaging in practice as a naturopath and medical herbalist, and using the related "modalities" he practices, is required in order to protect the public from conduct of the kind that has been engaged in by the defendant. In my view, the defendant's conduct in publishing the advertisements, and other evidence in the proceedings, demonstrates that, unless restrained from practice altogether, he is very likely to repeat the misrepresentations admitted by him and proved against him in these proceedings.

121 Although the Commissioner's case on breach was confined to advertisements, in my assessment the risk of repetition of misleading statements is not so confined. For that reason, I do not think that the defendant's proposal that he submit his advertisements to the Commissioner would adequately protect the interests of the public.

122 The defendant has no apparent comprehension as to why it was wrong to publish the misleading advertisements the subject of his earlier convictions. His reaction to those convictions appears to have been one of irritation at being stopped from doing something he believes he is entitled to do, rather than one of understanding or acceptance.

123 My assessment of the defendant is that his perceptions are dominated by excessive confidence in his own abilities and a lack of appreciation of the shortcomings of his education. Further, in my assessment, the defendant is a person who habitually misstates the true position when it serves his interests to do so. Whether that is due to dishonesty, delusion or a simple lack of comprehension is not clear. In some instances, it may simply be his curious choices of words.

124 For example, on the question whether the words in the advertisement "Need a cure?" might convey to someone reading it that, using live blood analysis, he is able to cure food allergies, he wanted to place emphasis on the fact that there was a question mark beside the word cure. He said:

> "the word "cure" with the question mark and the words "working with" in itself does not quantitate the word or rather the ability to be able to cure all the illnesses listed in the advertisement. How do you measure a question mark? There is no measure".

He appeared to be incapable of understanding that the words "Are you sick of being sick? Need a Cure?" are apt to be understood as offering a cure.

125 Another example is his description of his Diploma of Herbal Medicine. That is a diploma he obtained from the Southern Cross Herbal School. However, he has listed it on his curriculum vitae as a Bachelor of Health Science from "Southern Cross Herbal University". He stated that the reason he described it in those terms was that he was under the impression, from conversations with a gentleman from the Southern Cross Herbal School, that "the research arm of the Newcastle University had in fact now abbreviated the Diploma that I had completed in 1998 as a Bachelor of Health Science".

126 I indicated that, even if it were the case that a degree he had previously obtained as a Diploma was now a Bachelor degree, it would remain the position that he obtained a Diploma, not a Bachelor degree. He said that he understood the distinction. However, later in evidence on the same day, he came back to saying that he believed he had the equivalent of a Bachelor of Health Science from the "Southern Cross Herbal University (Newcastle University)".

127 Another example came in relation to the defendant's evidence about blood tests offered by him. He tendered a document that represents that clients can have a "three blood profile analysis" for $162. However, in evidence, he denied that he would necessarily undertake such tests. He said that a patient may present him or herself with a medical test that may have come from their doctor and he may "incorporate the naturopathic consultation with the interpretation accompanying the medical doctor's diagnosis with the current therapeutic application to the patient". I asked him whether he was saying that he requires clients to bring the results of blood tests from general practitioners to him. He said "absolutely". I asked whether he analyses them. He said "Well, I look at the comments from the doctor. As naturopaths, we are taught and licensed to view and to interpret those results that the doctor gives". The statement that he is "licenced" to practice as a naturopath was made and persisted in many times by the defendant.

128 The defendant had a sign on the door of his apartment describing himself as an osteopath. It remained on his door after the interim injunction was granted in these proceedings. In respect of that statement, there was the following exchange in cross-examination [at T339.37]:

> "FRANCOIS
>
> Q. Now, Mr Hunter, you have no qualifications as an osteopath, do you?
> A. I have trained under an osteopath.
>
> Q. Have you obtained any qualifications as an osteopath?
> A. I am currently being reviewed as being able to attain an osteopathic qualification.
>
> Q. But you do not have an osteopathic qualification?
> A. Well, do I have an osteopath skill or do I have an osteopathic qualification?

HER HONOUR

Q. Do you hold any qualification, Mr Hunter? It is a very straightforward question.
A. Yeah, well, a qualification could be - could be - could be interpreted from either a piece of paper, do I have an actual certificate or diploma that says I am an osteopath, no, I don't.

Q. Do you think that you can be qualified to give a form of treatment regardless of whether you have a piece of paper based on your assessed competence to do that thing?
A. Well, I have - I have had training in osteopathic medicine. I have been--

Q. Do you think that that means that you are qualified to practise as an osteopath?
A. No, I wouldn't practise as an osteopath but I believe that the education, the - the 21 years of education, yeah, possibly.

Q. You haven't had 21 years of education as an osteopath?
A. 21 years of - of studying medicine."

129 The defendant describes the Research Institute of Diet, Disease and Prevention Incorporated as a government-certified institution. That was one of the matters in respect of which he was convicted in 2002 but he persists in that description. He says the Institute has a tax exemption from the Australian Taxation Office. On the strength of that exemption, he describes the Institute as being "certified" as a scientific institute or a medical research institute.

130 As a final example, there was evidence in relation to the defendant's Diploma of Herbal Medicine, which he persists in referring to as a "Master Diploma". Initially, he conceded that he does not have a degree called a "Master Diploma". However, he later referred to the "Master Diploma" as the diploma that entitles him to be registered as a medical herbalist. When questioned by Ms Francois as to why he was again referring to it as a "Master Diploma" he said "I refer to it as a "Master Diploma" and I'm entitled – I'm entitled to call it what I may*"*. When I challenged that proposition, he said, "It's a definition. When I call it a "Master", it's a definition. It's not – you know, I mean, I'm not a technical person and this court case is all about technicalities …". The defendant then asked rhetorically "Is there anybody in this courtroom who doesn't break the law every day?" He said, "The thing is that I love Jesus, and I am a sinner and I'm not righteous and I do sin and I do fall. We all fall."

131 Those are only examples. There were other parts of the defendant's evidence, and his submissions, that contributed to my conclusion that he habitually misrepresents the facts. There is a particular bias in his inaccuracy in that he tends to overstate his competence and his qualifications and affiliations. In my view, there is a substantial risk that he will continue to do so unless restrained from providing the services identified in the order sought by the Commissioner. I am satisfied that it is appropriate to make that order.

Injunction in respect of the PhD.

132 The defendant indicated that he would consent to order 2. Although I have not made the finding sought by the Commissioner in relation to the representation as to the PhD, I am satisfied that the degree of doctor of philosophy held by the defendant did not entail the level of academic study that a person familiar with post-graduate degrees would expect to have been required for the conferral of a doctorate

of philosophy by a reputable academic institution. In those circumstances, and having regard to subs 65(6) of the *Fair Trading Act*, I am satisfied that it is appropriate to make order 2.

The appropriate period of restraint

133 It remains to consider whether the injunction should be for a specified period. The Commissioner sought a permanent injunction. The primary basis for my being prepared to make an order restraining the defendant from providing nominated services is the fact that he appears to be unwilling or unable, in the provision of those services, to conform to the norm of conduct imposed by the *Fair Trading Act*. There is nothing in the evidence to suggest that the attributes of the defendant in that respect will change.

134 I note that subs 65(5) of the *Fair Trading Act* provides that the Court may rescind or vary an injunction granted under subs 65(1). In *ICI Operations*, Gummow J said at 267.6 that it is no support for the grant of an injunction which, from the outset, has an operation outside the boundaries of the section to say that it is open for the party enjoined to vary the injunction so as to bring its operation wholly within proper limits. His Honour stated that the party in question should not be placed under such obligation in the first place.

135 Gummow J was there concerned with the breadth of the order, rather than its duration. Different considerations arise in considering the appropriate temporal reach of an injunction because circumstances may change. An injunction that is appropriate when it is made may cease to be so. In my view, the existence of the power to rescind or vary an injunction at a future date is some support for the grant of an injunction with no temporal limit.

136 As already indicated, I am satisfied that, at present, although it is broad, the injunction sought by the Commissioner is required in order to prevent a repeat of conduct of the kind established in these proceedings. There being no indication that the position is likely to change, I am satisfied that it is also appropriate to grant the injunction on a permanent basis. There is no basis in the evidence for me to be satisfied that the conduct of the defendant would be any different at the conclusion of, say, a five-year period.

137 However, it is possible that the defendant's circumstances will change. In that respect, although the Court is not concerned in these proceedings with the defendant's competence to practice in his chosen fields, there is some analogy with disciplinary proceedings in which a practitioner is struck from the relevant role of professionals. If such a person wishes to be readmitted to practice in his chosen field, he bears the onus of establishing that is appropriate. Such applications are generally not entertained unless a substantial period of time has elapsed and the person is able to demonstrate that the risk to the public that was present at the time of the original decision is no longer present. Section 65(5) confers power on the Court to entertain an application by the defendant on an analogous basis.

138 Accordingly, I make the following orders:

1. pursuant to section 65(1) of the *Fair Trading Act*, that the defendant, by himself, his servants or his agents or otherwise be permanently restrained from carrying on a business of, or in any way providing in trade and commerce, any form of the following health care services:
    (a) naturopathy;
    (b) medical herbalism;
    (c) herbalism;

(d) iridology;
(e) hydrotherapy;
(f) dietician or nutritionist (being the professional application of nutrition knowledge in the treatment and prevention of human illness);
(g) sports medicine;
(h) osteopathy; and
(i) blood analysis;

2. pursuant to section 65(1) of the *Fair Trading Act*, that the defendant be permanently restrained from using in any way, in trade or commerce, the doctorate of philosophy conferred on him in August 1998 by the Faculty of Medical Studies, Medicina Alternativa Institute, affiliated to the Open International University for Complementary Medicines;

3. that the defendant pay the plaintiff's costs of the proceedings.

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