



Submission to

**Consumer Affairs Australia and New Zealand:
Australian Consumer Law Review**

on behalf of

Australian Association of National Advertisers

May 2016

Background

The AANA represents Australia's national advertisers and welcomes this opportunity to respond to the Issues Paper for the Australian Consumer Law Review.

The AANA established the self-regulatory system for advertising and marketing communications in 1997. Since that time, new codes have been introduced and existing codes have been amended to keep pace with the ever evolving advertising, marketing and media industry. The AANA Code of Ethics is the cornerstone of the advertising self-regulatory system and is supplemented by a Code of Advertising and Marketing to Children, Food & Beverages Advertising & Marketing Communication Code, Environmental Claims in Advertising & Marketing Code and the Wagering Advertising & Marketing Communication Code.

The self-regulatory system is underpinned by an independent, transparent and robust complaints handling system which was established by the AANA. The complaints handling system is administered by the Advertising Standards Bureau (ASB) and complaints are adjudicated by the Advertising Standards Board (Standards Board), made up of individuals who are representative of the community and not connected to the advertising industry.

The AANA self-regulatory system provides appropriate community standards in relation to the regulation of advertising and marketing communication across all media. The system reflects the collective thinking of AANA members and has evolved following extensive public consultation. It is technology and platform neutral and provides a uniform set of self-regulatory restrictions to advertising and marketing communication. Brand owners who are found in breach of the restrictions, must remove or amend the relevant marketing material, irrespective of the platform.

In evolving and developing the AANA self-regulatory system, the AANA is the respected voice for brands, and reflects brand owners' intent to meet the community's expectation for standards in advertising and marketing communication. As such, the AANA is the custodian and champion of the over-arching system of self-regulation. The system is recognised and endorsed through inclusion in other self and co-regulatory systems, whose members support the decisions of the Standards Board.

The establishment of the self-regulatory system for advertising and marketing communication in Australia was in response to advertisers' recognition that they have a responsibility to deliver agreed and trusted standards. The AANA system of self-regulation sits alongside and complements systems of regulation, co-regulation and self-regulation. Self-regulation of the advertising and marketing communication industry provides a flexible mechanism to meet the challenges of the ever-evolving advertising, marketing and media industry, along with changing consumer expectations.

The AANA self-regulatory system

A role for advertising

An objective of the Intergovernmental Agreement is to ensure that consumers are sufficiently well informed to benefit from and stimulate effective competition.

Advertising is the driver of consumer awareness and, by promoting competition, helps people get better value for money. Also, advertising enables innovation to be brought to market and helps stimulate economic growth and jobs. As such, the advertising, marketing and media industry plays a

fundamental economic role in society and contributes approximately \$13 billion to the Australian economy annually¹. According to a report by McKinsey & Company in 2012, on a global level advertising has fuelled, on average, about 15 per cent of growth in GDP in the major G20 economies over the previous decade². It underpins the existence of many media outlets and a variety of media content.

And yet there is a lack of understanding about how advertising benefits the consumer and the society in which we live. Some pressure groups argue society would be better off without advertising while other critics of advertising say it appeals to and reinforces extrinsic values. Advertising is useful as a means of providing information, and it is vital to distinguish products in market.

The argument that advertising promotes values that are directly opposed to a fair society inevitably concludes that advertising ought to be considered a detrimental influence and regulated accordingly, however advertisers recognise that they have a responsibility to deliver agreed and trusted standards. This accountability led to the establishment of the self-regulatory system for advertising and marketing communication in Australia.

The benefits of self-regulation

Self-regulation is an essential part of the Australian business landscape and contemporary society. It flourishes through strong leadership, commitment and cooperation across business, government and the community at large. Self-regulation is not the exclusive domain of any one particular body but the collective concern of many players, large and small.

Self-regulation of the advertising and marketing communication industry provides a flexible mechanism to meet the challenges of the ever-evolving advertising, marketing and media industry, along with changing consumer expectations and community standards. In Australia this is done via the AANA Codes, various AANA Practice Notes, and a number of industry initiatives.

There are many benefits of self-regulation which have been recognised by governments and consumer advocates alike. These include:

- Costs of the system are borne by advertisers – there is no cost to government.
- A self-regulatory system is flexible and can adapt easily to changes in community attitudes. By contrast, legislation is more costly, time consuming and difficult to amend.
- Resolution time for complaints-handling is faster than for regulatory schemes.
- Commitment to the self-regulatory system can be seen through almost universal compliance with the Standards Board's decisions.

The self-regulatory system in Australia is rooted in the model of best practice and aligns with the International Chamber of Commerce Code for Advertising & Marketing Communication Practice³. The self-regulatory model ensures consultation with community groups and others in the development and evolution of codes and both complaints and decisions are dealt with transparently⁴.

¹ <http://users.tpg.com.au/ceasa/index.html>

² *Advertising as an economic growth engine*, March 2012 http://www.iab-austria.at/wp-content/uploads/2013/03/2012_McKinsey_advertising-role-in-growth.pdf

³ <http://www.codescentre.com/>

⁴ <http://www.easa-alliance.org/>

Platform neutrality

The definition of “Advertising or Marketing Communication” in the AANA Codes ensures virtually all commercial communication is captured (including third party comments such as user-generated comments on brand-owned social media sites). The standards specified in the AANA Codes apply equally across all media. The platform neutral self-regulatory model provides for the ASB to receive all complaints without the consumer having to consider the medium in which the relevant advertisement appeared.

In an industry that operates across platforms, and particularly where consumers can access the same or similar material across a range of platforms, the AANA supports platform neutrality in advertising regulation and self-regulatory codes. Self-regulatory codes can continue to evolve as new technology and means of communication evolve so that they remain relevant and universal.

Last year the AANA welcomed FreeTV Australia’s recognition of the role of the AANA Codes and role of self-regulation as the preferred model for managing marketing communication in Australia as part of the review of the Australian Commercial Television Industry Code of Practice. Many advertising associations also refer to, or incorporate by reference, the AANA Codes including the Australian Subscription Television and Radio Association; Commercial Radio Australia; Outdoor Media Association and Alcohol Beverages Advertising Code.

When determining what combination of regulatory interventions might be needed in the future, it is important to recognise the evidence that shows brand owners already, in the vast majority of instances, recognise their responsibility to meet community expectations in terms of advertising and marketing communication standards, across all media.

Misleading & deceptive conduct

AANA’s self-regulatory system is comprised of a number of different codes and industry initiatives. The AANA Code of Ethics is AANA’s core self-regulatory code and provides the overarching set of principles with which all advertising and marketing communication, across all media should comply. It comprises two parts.

Section 1 of the Code deals with advertising or marketing communication which is misleading or deceptive, or likely to mislead or deceive, as well as misrepresentations which may cause damage to goodwill or which relate to the origin or content of products. It permits competitors to make complaints to the ASB in relation to advertising or marketing communication which may breach these provisions.

Section 2 of the Code deals with maintaining community standards in advertising and marketing. Section 2 contains provisions dealing with the portrayal of people (including discrimination and vilification), portrayal of violence, treatment of sex, sexuality and nudity, use of language and prevailing community standards on health and safety.

In addition to its Code of Ethics, AANA has developed three other specialised codes to address the specific circumstances of advertising to children, the advertising of food and beverages and environmental claims, all which allow for consumer complaints in relation to misleading advertising. The AANA has also recently published a specific code which covers wagering advertising by Australian licensed operators and comes into effect on 1 July 2016.

The AANA believes the ACL's general protections are working effectively and address the risk of consumer and business harm without imposing disproportionate or unnecessary costs on business. While the AANA Codes provide a particular avenue for consumers to make complaints regarding potentially misleading advertising in certain circumstances, the AANA considers the ACL as the most appropriate instrument to provide a remedy for consumers in terms of misleading advertising generally.

Omissions

An objective of the Intergovernmental Agreement is to prevent practices that are unfair and in the context of advertising, the Issues Paper raises the question of whether it is appropriate to maintain the current approach to silences or omissions in the ACL, where it is not misleading unless there is a reasonable expectation that a consumer would be informed of the material. Reference is made to the European Union's *Unfair Commercial Practices Directive 2005* ("Directive").

The Directive addresses misleading practices by omission and establishes a positive obligation on traders to provide information which the average consumer needs to make an informed choice. The Directive states that such information will not have to be disclosed in all advertisements, only where the trader makes an 'invitation to purchase', which, the Directive states, is a clearly defined concept. Where there is an 'invitation to purchase' the Directive lists the material information that must be provided to the consumer, if not already apparent from the context, including the main characteristics of the product, the address and identity of the trader, the price and arrangements for payment and delivery.

The definition of 'invitation to purchase' incorporates the requirement that the commercial communication 'thereby enables the consumer to make a purchase'. This suggests that for the communication to be considered an invitation to purchase, it must include a mechanism that enables the consumer to actually make the purchase. However the current guidance to the Directive broadens the scope of the requirement stating that the information given in the product marketing must be sufficient to enable the consumer to take a purchasing decision. It states that where the price and the characteristics of the product are given, an advertisement in a newspaper or on TV, for example, would normally be considered invitations to purchase.

The proposed new guidance to the Directive, which is still in draft form, provides some refinement in interpretation in that it indicates that an invitation to purchase is a narrower concept than advertising, and that not all commercial communications will qualify as an invitation to purchase. However, the guidance then provides examples of advertising which would be considered an invitation to purchase in any event.

On either interpretation, were a positive requirement to provide information be incorporated into the ACL, there would be a substantial impact on commercial communication in all media. An objective of the ACL should be to ensure that consumers are not enticed to make a purchase on the basis of faulty, incomplete or misleading information. However, the introduction of unnecessary or disproportionate information requirements in advertising should be avoided. Each commercial communication should be assessed on its individual merits as to whether it is misleading or deceptive by representation or by omission and the ACL already provides the appropriate mechanism to do this.

Vulnerable consumers

An objective of the Intergovernmental Agreement is to meet the needs of those consumers who are most vulnerable, or at a greatest disadvantage. While the Issues Paper does not directly raise the issue of children as part of this category, it is important to address the key protections that the AANA Codes provide for this section of the community.

Advertisers acknowledge that their licence to advertise goes hand in hand with a responsibility to ensure they are not contributing unduly to the challenge that parents face to raise their children happy and well. For this reason the AANA Code for Advertising & Marketing Communications to Children (Children's Code) was developed to provide additional standards for advertisers when marketing to children.

In the Children's Code, **Advertising or Marketing Communications to Children** means *Advertising or Marketing Communications which, having regard to the theme, visuals and language used, are directed primarily to Children...and are for goods, services and/or facilities which are targeted towards and have principal appeal to Children. Children means persons 14 years old or younger.*

The Children's Code requires that advertising to children must not:

- mislead or deceive children;
- employ ambiguity or deceptive sense of urgency to buy the product;
- feature practices such as price minimisation (using "only" or "just") which are inappropriate to the age of the intended audience;
- state or imply that a product makes children who own or enjoy it superior to their peers;
- undermine the authority, responsibility or judgment of parents or carers;
- contain an appeal to children to urge their parents, carers or another person to buy a product for them; or
- use popular personalities or celebrities to endorse, recommend or promote products in a manner that obscures the distinction between commercial promotions and program content.

These requirements align with those of the International Chamber of Commerce Code of Advertising Practice as well as the equivalent international codes, such as in New Zealand and the United Kingdom.

Under the AANA Codes, whether an advertisement or marketing communication is "directed primarily to children" is an objective test based on a range of factors. The application of the definition of "directed primarily to children" recognises that particular types of advertising and marketing communication engage and resonate with children in such a way as to bring about a response, reaction and action. The AANA believes there is an important and valid distinction to be made between advertising directed primarily to children and advertising or marketing communication that may be seen by children, but is not directed primarily to them. Marketing communication which is directed to adults should not be subject to the same limitations.

The AANA considers that the provisions in the Children's Code provide comprehensive and robust standards for advertising to children, including addressing the use of "pester power". There are clear prohibitions against undermining the authority of parents and appealing to children to urge their parents to make a purchase. The AANA does not believe that any additional protections are required on these issues in the ACL.

Emerging consumer policy issues

Increasingly marketing is taking different forms, particularly in the digital environment, including product integration, native advertising, twitter and other social media forums, blogs and product reviews. As technology advances and advertising extends across the full spectrum of paid, owned and earned, the approach of the AANA Codes is to assess potential marketing material against two key criteria: does the marketer have a reasonable degree of control over the material and does the material draw the attention of the public in a manner calculated to promote a product or service? If these two criteria are met the material is a marketing communication and the Code applies.

Generally consumers know when they are interacting with an advertisement that the brand is trying to sell them a product or service. Consumers may treat advertisements with caution or scepticism. When a consumer reads material about a product written by a third party, views a piece on television or hears material on the radio, then they may respond to it differently than they do paid advertising. The perception of third party endorsement by independent media can create greater credibility for a brand.

Public relations professionals may produce content that is posted on media sites but not subject to journalistic interpretation - this is material over which the brand owner may maintain control. For example where a brand owner retains approval of the final copy for 'advertorials', 'native advertising', 'special features', social media promotions or blogging and tweeting on behalf of a brand in third party media, it makes sense that the content is considered a marketing communication. The AANA Codes were updated in January 2016 to provide greater clarity and make it explicit that consumer facing public relations material falls under the Codes.

However brand owners should not be responsible for editorial content in traditional or social media which they did not produce and/or over which they cannot exercise control. In cases where independent third parties (such as journalists or bloggers) exercise editorial discretion and it cannot be said that the brand owner retains a reasonable degree of control, the resulting content is editorial and consequently is not subject to the AANA Code of Ethics.

Marketers in the digital space are increasingly using story telling techniques in digital communication. The AANA, together with IAB Australia, launched the Native Advertising Principles in November 2015. The principles are a consumer protection tool for advertisers to reference, aimed at ensuring readers can readily distinguish between what is paid-for advertising versus editorial content in the online environment. It stipulates that marketers and publishers should provide consumers with prominently visible cues to enable them to immediately understand that they are engaging with paid for marketing content that is not editorially independent.

The AANA Best Practice Guideline: Responsible Marketing Communications in the Digital Space is a best practice guide for marketers, their agencies and the community to help them to understand the application of the AANA self-regulatory codes in the digital space, and aims to ensure best practice in relation to transparency and privacy in the online environment. The Guideline deals with:

- User-generated content
- Advergames & Apps
- Blogs, Vlogs, Tweets and Reviews
- Transparency in Digital Communication
- Data Protection & Privacy
- Commercial Electronic Messages
- Employees & Social Media

While the AANA considers that the existing ACL provisions adequately address issues regarding the transparency of comparator websites and online reviews, given the commitment by industry to evolve and adopt transparent practices in both traditional and online media, the AANA considers that regulatory intervention is unwarranted and industry should retain the ability to effectively self-regulate regarding transparency in advertising.

With the increase in innovative means of advertising, brand owners recognise that there is a commensurate onus to make it clear when content is a commercial placement. It is in all stakeholders' interests that there is transparency and that the nature of the relationship between the brand owner and the media outlet is adequately disclosed. The AANA recognises its responsibility to proactively evolve its Codes to align with developments in marketing communication techniques to meet with community expectations and will continue to do with transparency in advertising as a key concern.

Remedies

An advertiser found to be in breach of an AANA Code must cease to use the advertisement or modify it so that it is no longer in breach. The media supports these breach findings and will act to remove the advertisement in the highly unlikely scenario that the advertiser does not. The consequences of breaching the Code constitute a substantial commercial deterrent, including the direct and indirect costs of withdrawing an advertisement and the reputational cost when a non-compliant decision is made public, including possible adverse media coverage. There can be significant public backlash for campaigns which breach community standards.

The AANA believes there is a role for a range of penalties and remedies under the ACL to effectively deter future breaches. In terms of self-regulation, the AANA believes that commercial deterrents are sufficient to promote compliance with the AANA Codes, as demonstrated by the 99.5% overall average compliance rate with Standards Board determinations during its 16 year history.