

A HITCHHIKERS GUIDE TO ADVERTISING LAW IN AUSTRALIA

By Leanne Montibeler, Solicitor and Tony Anisimoff, Principal

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INTRODUCTION

There is a joke that lawyers like to tell about advertising. A witness in the witness box is sworn in and swears "to tell the truth and nothing but the truth". The lawyer approaches the witness and asks his first question: "Please tell the court what business you are in", the witness replies "advertising". The lawyer dryly says "Then please step down". The moral of the story is not that people in advertising cannot be trusted, although most people take the joke that way, rather it is that lawyers are concerned that no one will take what a person in advertising says seriously, so there is no point in continuing to examine the witness. A subtle, but significant difference to the lawyer, but irrelevant to everyone else. The joke is on the lawyer as he is trapped in his own world of legal analysis and how things appear. Law and advertising don't mix well. Law, to advertising people, appears dry, rigid, unnecessarily complex and illogical. Advertising, to lawyers, appears fluffy and without substance where accuracy is seen as an inconvenience. The stubborn refusal by many to simultaneously understand the nuances of each of these man made sciences is a constant source of friction to both lawyers and advertisers.

The great brands of this world, such as Apple, McDonalds, Microsoft, Coca Cola, Ferrari and so on all successfully integrate their marketing with the law. Occasionally some, like Google or Facebook will move so fast that they will overlook (perhaps even intentionally) a local law, such as a privacy law or code and will, as a consequence, interact with the law rather than integrate with it. This is not a bad thing, as laws need to be challenged and risks sometimes need to be taken. Involving lawyers in the advertising process should not mean (although sadly it often does) automaton like adherence to "the Law", it should instead mean that the advertiser is better informed of the risks and the downside of a particular action, so they can make better informed decisions.

Advertisers do not need sympathetic advisors, they need empathetic ones, but that must start with an understanding of the basics. This article is not intended for lawyers, if it was, then it would focus on the methods of advertising and how they can trigger a legal problem. Let me give you an example: a recurring mistake by advertisers is to adopt a campaign theme, a byline or even a hero colour without doing a trade mark search. Advertising lines, e.g "Oh What a Feeling", and even colours such as the Cadbury Purple for chocolate, are protected trade marks. Another example is the desire by advertisers to copy some music but not pay the high licence fee for the use of the original. The brief to the musician is often "I want this but don't copy it". The musician assures the advertiser that the finished product is not a copyright infringement, and the advertiser is very happy with the music. Lawyers are not involved until the music rights owner makes a claim for \$250,000. The musician goes out to lunch and the advertiser is left to negotiate on their own. These examples can go on forever, but they can often be avoided in practice with a knowledge of the basics which will help you decide when you do need to consult a lawyer, so please keep an open mind and improve your knowledge of advertising law by reading on.

Australia has a federal government, and the Australian legal system is separated into Commonwealth of Australia (Cth) laws (which apply nationally and override any other laws) and the various independent laws of Australia's six states and two territories. Regulations relating to advertising can vary among the various states and territories, so the specific laws that apply in each state and territory should be consulted when conducting a national advertising campaign. Commonwealth laws are identified by (Cth) after the law's name.

For the purposes of this summary guide, we have not analyzed the position in each and every state and territory, but have provided examples (where relevant) of how laws may differ across the jurisdictions. This is intended to be a guide only and does not constitute legal advice. We recommend that you obtain specific legal advice in relation to the product or service advertised before proceeding to advertise in Australia.

The Australian Consumer Law

Advertising and marketing are regulated by Schedule 2 of the Competition and Consumer Act 2011 (Cth) (the Australian Consumer Law or ACL), which contains the general overriding obligation on advertisers to ensure that advertisements are not false, misleading, or deceptive. All products and services advertised in Australia must comply with the Australian Consumer Law. This law is enforced by the Australian Competition and Consumer Commission (ACCC), an Australian government body, but competitors and consumers are also able to take legal action against advertisers for breach of the law under the ACL.

Other Laws and Codes

There are also industry-specific laws and regulations that apply when advertising certain products or services, such as financial services, therapeutic goods, and food. Among these, the Australian and New Zealand Food Standards Code and the Therapeutic Goods Act 1989 (Cth) are among the most important. In addition, the advertising industry relies heavily on self-regulation and there are numerous industry enacted codes of practice which set forth various obligations on advertisers. Compliance with these codes is generally self-regulated, but there is commercial pressure within markets (particularly from competitors and consumer groups) to comply.

1. PRODUCTS AND SERVICES BANNED FROM ADVERTISING

1.1 Tobacco Products

Advertising tobacco products is banned in Australia so as to discourage smoking. See Tobacco below.

1.2 Prescription Medicines

Advertising prescription medicines to consumers is banned. See Pharmaceuticals below.

1.3 Interactive Gambling Services

Advertising interactive gambling services is banned. This applies to any material that promotes or gives publicity to an interactive gambling service, or trademarks or words closely associated with an interactive gambling service. See Gaming below.

1.4 Gaming Services

In some states (e.g., NSW and VIC) advertising gaming machines is banned. See Gaming below.

1.5 Adoption

Advertisements which indicate that a parent wishes to have a child adopted, or to adopt a child (or facilitate an adoption) are banned.

1.6 Surrogacy

Advertisements that relate to entering into a surrogacy arrangement or to seek a birth mother are generally banned.

1.7 Covert Listening Devices

In QLD, you must not advertise or publicly exhibit a covert listening device (a “bug” or “wire”) with the intention of promoting its sale or use.

2. REGULATIONS RELATED TO PRODUCT AND SERVICE ADVERTISING

2.1 Alcohol (Beer and Wine)

2.1.1 General Advertising—Television, Print, Radio

Advertisements for alcohol beverages must comply with the Alcohol Beverages Advertising Code (ABAC) and the Australian Association of National Advertisers’ Code of Ethics (AANA Code). These codes stipulate that advertisements for alcoholic beverages must not:

- Encourage excessive or irresponsible consumption of alcohol
- Encourage underage drinking or be designed to appeal to children or adolescents
- Promote offensive behaviour

- Suggest that alcohol can create a significant change in mood or environment—i.e. contribute to achievement of personal, business, social, sporting, sexual, or other success; be the cause for celebration; or have a therapeutic benefit such as relaxation
- Show alcohol being consumed while operating a vehicle, boat, or aircraft, or when engaging in sport (including water activity) or hazardous activity
- Challenge or dare people to drink or induce a preference for higher alcohol content

Adults appearing in advertisements must be over 25 years of age.

All alcohol advertisements must be pre-vetted by the Alcohol Advertising Pre-Vetting System for compliance with the ABAC.

Alcohol advertisements must comply with the Commercial Television Code of Practice, the Codes for Commercial Radio and the Outdoor Advertising Code of Ethics. These contain requirements in relation to scheduling and broadcast of alcohol advertisements.

2.1.2 “On Premise” (Point-of-Sale) Advertising

There are separate Liquor Promotion Guidelines which apply in each state and territory for the responsible promotion of alcohol in licensed venues (known as “on premise” advertising). Requirements vary among the various states and territories but can include prohibitions on promotions that encourage irresponsible alcohol consumption or intoxication (e.g., drinking games, shooters, “all you can drink” offers). Advertising should not use images that are sexual, degrading, sexist, or offensive, and promotions cannot target a particular group of people, for example by advertising a cocktail for sale only to women.

2.1.3 Packaging

The Australia New Zealand Food Standards Code (Food Standards Code) sets out requirements for representations made on packaging or in connection with alcohol products.

2.2 Alcohol (Spirits)

The regulations discussed in Alcohol (Beer and Wine) above also apply to spirits. Standard 2.7.5 of the Food Standards Code defines the words “brandy,” “liqueur,” and “spirit” and provides certain compositional permissions for such products. The standard also restricts geographical indications in relation to spirits (e.g., “Jamaican Rum”), allowing such indications only when the spirit has been produced in the country, locality, or region indicated.

2.3 Cinema Films / DVDs / Games

Advertisements for films released in cinemas or on DVD and advertisements for classified computer games must comply with the Classifications (Publications, Films and Computer) Act 1995 (Cth). One requirement of this act is that such advertisements include the relevant classification markings (e.g., “G,” “PG,” “M”), indicating the audiences for which the film or game is approved. Advertisers may advertise an unclassified film or computer game and obtain an assessment of the likely classification pending formal classification. If they do so, they are required to include a “Check the Classification” statement/symbol.

2.4 Cosmetics

The National Industrial Chemicals Notification and Assessment Scheme (NICNAS) Guidelines 2007 provides a list of products that are regulated as cosmetics and sets out how claims for certain cosmetic products should be presented in advertisements.

2.5 Financial Products and Services

Advertising of financial products (e.g., insurance products and financial planning services) is regulated by the Corporations Act 2001 (Cth), which is enforced by the Australian Securities and Investment Commission (ASIC), a government body. Requirements depend on the product or service offered. The National Credit Protection Act 2009 (Cth) regulates credit offered to consumers (e.g., home loan, credit cards). If an advertisement states the amount of a repayment, it must also state the applicable annual percentage rate(s). Credit fees and charges payable must be either disclosed or stated. Advertisements for a fixed-term consumer credit that state an annual percentage rate (e.g., borrowing interest rate) are also required to prominently disclose the “comparison rate” per annum (calculated based on the amount and term in a legislated standard list) and a legislatively prescribed warning.

2.6 Firearms, Weapons, and Ammunition

2.6.1 Firearms

Advertisements for the sale of firearms are subject to specific regulation in each state and territory. In some cases, only licensed firearm dealers may advertise and sell firearms and must state or display the firearm license number in the advertisement. In other situations, it may be acceptable for persons without a firearm dealer's license to advertise a firearm, provided they include the serial number of the firearm in the advertisement and/or a statement that the actual sale must take place in the presence of a licensed firearm dealer (or other specified person).

2.6.2 Weapons

Advertisements for the sale of restricted weapons (weapons that may be sold under a permit) are subject to specific regulation in each state and territory. In most cases, advertisements for the sale of weapons must state that a permit is required for the possession or use of the weapon.

2.6.3 Ammunition

In some states and territories (e.g., NSW), it is an offence to advertise explosives or display them for sale in a place that is visible to the public.

2.7 Food

The Food Standards Code contains technical requirements on all aspects of food and beverages including ingredients, vitamin and mineral claims, and information required on packaging. It sets out restrictions for making health and nutrition claims in advertising and prohibits the following:

- Claims that a food is a slimming food or has intrinsic weight-reducing properties
- Claims that a food has a therapeutic or prophylactic action
- Use of the word "health" (or similar words) in conjunction with the name of the food, (e.g., "Healthy Muffins")
- Statements that could be interpreted as medical advice
- References to any disease or physiological condition (e.g., "Apples can cure cancer")

There is also a voluntary self-regulated Code of Practice on Nutrient Claims in Food Labels and in Advertisements, which sets out requirements for making nutrient claims such as "low in fat" and "high in fibre."

Food advertisements are also regulated by the Australian Consumer Law, and claims must not be misleading or deceptive. Advertisers need to be careful with quality descriptors such as "fresh," "homemade," "natural," "pure," "100%," among others; such claims must be true and capable of substantiation.

Social responsibility is also an industry aim, and there are voluntary self-regulated codes such as the AANA Food & Beverages Advertising & Marketing Communications Code and Australian Quick Service Restaurant Initiative for Responsible Advertising and Marketing to Children that set out various ethical guidelines for food advertisements. For example, food advertisements must not encourage excessive consumption. Breach of these codes may be determined by the Advertising Standards Bureau, an industry panel, who can rule that the advertisement be withdrawn.

2.8 Gaming

2.8.1 Gambling

The legal requirements in relation to gambling advertising vary depending on the state or territory and the type of gaming activity. Some advertising prohibitions include:

- Showing a child gambling
- Suggesting every bet placed will be successful or that winning is a definite outcome
- Suggesting that participating is likely to improve a person's financial prospects
- Offering a benefit or reward in return for gambling
- Promoting the consumption of alcohol while engaged in gambling

Gambling advertisements must also include a prescribed message containing the telephone number and website of the national problem-gambling helpline.

2.8.2 Interactive Gambling

The Interactive Gambling Act 2001 (Cth) makes it an offence across Australia to advertise an interactive gambling service, in other words a gambling service accessed using the Internet or TV, which has not received a licence under Australian law. A person residing overseas must also not intentionally provide an interactive gambling service to customers physically residing in Australia.

The act applies to any material that promotes or gives publicity to:

- An interactive gambling service
- Interactive gambling services in general
- The whole or part of a trademark in respect of an interactive gambling service
- Any words closely associated with an interactive gambling service

2.9 Legal Services

It is an offence to represent or advertise that a person is entitled to engage in legal practice if the person is not an Australian legal practitioner holding a current practising certificate.

Lawyers may not advertise themselves as a “specialist” in a particular area of practice unless they hold appropriate qualifications.

Advertising services that refer to or depict personal injury or work injury (including circumstances in which an injury might occur) or services to recover compensation for personal injury or work injury are prohibited or restricted in some states and territories. See individual state legal practitioners acts, regulations, and professional and conduct guidelines.

2.10 Medical Devices

Medical devices are therapeutic goods and must comply with the Therapeutic Goods Act 1989 (Cth), Part 2 of the Therapeutic Goods Regulation 1990, and the Therapeutic Goods Advertising Code (TGAC).

Medical devices may be advertised directly to consumers. Pursuant to the TGAC, advertisements for therapeutic goods must contain correct and balanced statements only and claims which have been verified. Advertisements for therapeutic goods must not, amongst other things:

- Arouse unwarranted or unrealistic expectations of product effectiveness or suggest the product is miraculous or a guaranteed or sure cure
- Lead to consumers self-diagnosing or inappropriately treating serious diseases
- Mislead directly or by implication
- Abuse the trust or exploit consumers' lack of knowledge
- Contain language which could cause fear or distress
- Suggest that goods are safe or that their use cannot cause harm

Therapeutic claims made in relation to medical devices are also regulated generally by the Australian Consumer Law and may not be false, misleading, or deceptive. This means that advertisers should have substantiation in place to support claims made.

2.11 Medical Services

There is a national scheme for health practitioners including restrictions on advertising, implemented by legislation in various participating states and territories. For example, in NSW, the Health Practitioner Regulation National Law prohibits advertising a health service in a way that:

- Is false, misleading, or deceptive
- Offers a gift, discount or other inducement to attract a person to use the services (unless also stating the terms and conditions)
- Uses testimonials or purported testimonials
- Creates an unreasonable expectation of beneficial treatment

- Encourages the indiscriminate or unnecessary use of the health service

In addition, specific requirements relate to different health service providers, such as chiropractors, dentists, optometrists, osteopaths, physiotherapists, and podiatrists; individual legislation should be consulted.

2.12 Motor Vehicles

Motor dealer legislation applies in various states and territories. In some states and territories (e.g., VIC, WA, NT and ACT) motor dealers must specify their dealer license number in dealer advertisements.

If the purchase price is stated, advertisers must also prominently state the minimum total “single price” (or “drive away” price) quantifiable at the time of the advertisement, i.e. the total dollar amount the consumer must pay to take ownership of the vehicle including purchase price, stamp duty, compulsory third-party insurance (CTP), registration, dealer delivery charges, and Goods and Services Tax (GST). If a price is stated, it must relate to the model of car shown with the same features and options. Any material qualifications must be prominently disclosed.

The Voluntary Code of Practice for Motor Vehicle Advertising instituted by the Federal Chamber of Automotive Industries (the FCAI Code) regulates advertising content for motor vehicle advertisements. The code prohibits advertisements from depicting unsafe, reckless, and menacing driving, speeding, unlawful driving practices, driving while fatigued or under the influence of drugs or alcohol, or driving causing environmental damage. There are also provisions on the use of motor sport in advertising and the depiction of off-road vehicles.

2.13 National Flags and Symbols

The Australian national flag may be used for advertising purposes without the need for formal permission, subject to the following guidelines:

- The flag should be used in a dignified manner and be reproduced completely and accurately
- The flag should not be defaced by overprinting with words or illustration
- The flag should not be covered by other objects in displays
- All symbolic parts of the flag should be identifiable.

The Aboriginal flag must not be used without express permission of the copyright owner, Mr Harold Thomas, a resident of Northern Territory. The Commonwealth Coat of Arms is a symbol of the Commonwealth of Australia and is for Commonwealth use only.

2.14 Nonprofit Fundraising

Fundraising activities can include doorknock appeals, donation bins, telemarketing, selling products commercially and donating a portion of the sale to charity, public appeals, and collections. In some cases, donations tied to sales of products (e.g., “5 cents from the sale of this product will go to the Cancer Council”) may be seen as fundraising.

Each state and territory places specific restrictions on nonprofit fundraising. A common requirement across Australia is that the fundraising organisation must be either registered as a charity (or exempt from the requirement to be registered) or authorised by a registered charity to raise funds on its behalf. It is an offence to advertise a fundraising appeal knowing it is being conducted unlawfully (i.e. knowing the fundraiser is not legally registered).

The requirements in relation to fundraising are extensive. Advertisers should consult the legislation in each relevant state and territory before proceeding.

2.15 Nutritional Supplements

In Australia, nutritional supplements (pills, potions, and powders) that have a therapeutic benefit fall within the control of the Therapeutic Goods Administration (TGA). Most nutritional supplements are “listed” on the Australian Register of Therapeutic Goods (ARTG), meaning they are recognised as “therapeutic goods.”

Therapeutic goods advertising is regulated by the Therapeutic Goods Advertising Code (TGAC). See requirements in Medical Devices above.

Advertisements for nutritional supplements that are listed therapeutic goods require pre-vetting and approval of the Complementary Healthcare Council, which will assess claims for compliance with the TGAC and issue an approval number. This number must be published in the advertisement.

Therapeutic claims made in relation to nutritional supplements are also regulated generally by the Australian Consumer Law and cannot be false, misleading, or deceptive. This means that advertisers must have substantiation in place to support claims made.

If the nutritional supplement is a food product, it will be regulated by the Food Standards Code. The health claims provisions of this code (see Food above) prohibit making therapeutic claims about food.

2.16 Occult (“Psychic”) Services

No current legislative restrictions.

The Australian Psychics Association has a self regulated Code of Ethics including a requirement that its members must not promise to be 100% accurate. Applicants for membership in the association are required to submit a statutory declaration stating that they are psychic and as well as statutory declarations from three clients who are satisfied with their services. See Premium Charge Telephone Services below for advertising psychic telephone services.

2.17 Pharmaceuticals

2.17.1 Prescription Medicines

Prescription medicines must be listed on the Australian Register of Therapeutic Goods (ARTG) in order to be advertised in Australia. In addition, the Competition and Consumer Act contains a requirement that claims made in relation to the prescription medicine must match the indications stated for the medicine in the ARTG.

Advertising prescription medicines directly to consumers is not permitted under the Therapeutic Goods Act 1989, but you can advertise prescription medicine to health professionals. The Medicines Australia Code of Conduct sets the standards for ethical marketing and promotion of prescription pharmaceutical products to health professionals.

2.17.2 Over-the-Counter Medicines

Generally, advertisements for non-prescription (“over-the-counter”) medicines may be directed both to consumers and health professionals, but certain pharmacy-only medicines are exempt from being advertised to consumers.

Advertisements for non prescription medicines are regulated by the Therapeutic Goods Act and must comply with the Therapeutic Goods Advertising Code (TGAC). See the discussion in Medical Devices above.

There are pre-vetting procedures for certain types of advertisements for over-the-counter medicines. These advertisements have to be submitted for prior approval either to the Australian Self-Medication Industry (ASMI) or to the Complementary Healthcare Committee (CHC). Both ASMI and the CHC have their own codes of practice, but these largely complement the TGAC.

The TGAC also requires that advertisements be accompanied by mandatory disclaimers (e.g., “Always read the label. Use only as directed”) and the approval number given by the ASMI or CHC if relevant.

2.18 Political Advertising

A television advertisement that contains any political matter must comply with the provisions of the Broadcasting Services Act 1992 (Cth). If the political advertisement is broadcast during an election, additional requirements of the Commonwealth, state, and local government Electoral Acts may apply. Advertisements broadcast outside an election period or that are not on behalf of a political party may still be deemed political matter if they attempt to influence a person on a matter which is part of the current political debate, such as global warming.

A television advertisement will require an “authorisation tag,” which must appear immediately after the commercial and be separate from the content of the commercial. The person authorising the advertisement is expected to ensure that the advertisement complies with all relevant laws, including the applicable Electoral Act and the laws of defamation. Similar provisions apply for political advertising

in the print media and online.

2.19 Premium Charge Telephone Services

If, during a program, an advertiser invites viewers to call a premium charge telephone service, the advertiser must provide clearly readable information about the cost of the call, as per the Commercial Television Industry Code of Practice.

Advertisements for mobile premium services (e.g., those with 191- prefixes) must comply with the Mobile Premium Services Industry Code. This requires disclosing information including the following:

- Premium fees
- Unsubscribe information
- Helpline
- Restrictions on the term "free"

2.20 Products Related to Sexuality

Condoms and erectile dysfunction drugs are therapeutic goods. All advertising therefore needs to comply with the Therapeutic Goods Act and the Therapeutic Goods Advertising Code (see discussion in Medical Devices and Pharmaceuticals above). Representations to the effect that condoms may help reduce the risk of transmission of sexually transmitted disease (STDs) or may help reduce the possibility of pregnancy are acceptable. The Commercial Television Code of Practice requires television commercials for condoms to be broadcast outside the designated hours for children's television programs.

2.21 Religion

There is no current prohibition on advertising a religion in Australia. The advertisement must not discriminate against or vilify a person or a section of community on the basis of religion under the self-regulatory Australian Association of National Advertisers (AANA) Code of Ethics.

2.22 Sex (Adult) Services

Legislation in the various states and territories (e.g., NSW, QLD, NT, VIC, ACT) prohibits advertising prostitution services. The Commercial Television Industry Code of Practice contains broadcast scheduling restrictions for adult products and services. These must meet the Mature Audience (MA) classification criteria, meaning that they may include a visual depiction of intimate sexual behaviour (discreetly implied or simulated) or of nudity only where relevant to the story line or program context. Gratuitous, exploitative, or demeaning portrayals of sexual behavior or nudity are not acceptable. Adult telephone services advertisements may be scheduled only between 11pm and 5am and not within or alongside any religious or sports program.

Material that is "X" rated (i.e., pornographic in nature) cannot be broadcast on Australian television.

Advertisers of adult content via a mobile premium phone service should have regard to the rules set out in the Mobile Premium Services Industry Code (see below) and Schedule 7 of the Broadcasting Services Act 1992.

Advertisers of adult content via a website should likewise have regard to the rules set out in the Broadcasting Services Act 1992. Websites with "R" rated content (i.e. material considered unsuitable for exhibition by persons under 18 years old) must have restricted-access systems in place.

2.23 Tobacco Products

Advertising of tobacco products and sponsorship of sporting or cultural events by tobacco brands is prohibited in Australia pursuant to the Tobacco Advertising Prohibition Act 1992.

Tobacco product packaging is also required to include graphic warning labels designed to educate consumers on the detrimental health effects of smoking and to discourage tobacco use. The Australian government has announced plans to implement new legislation (known as the "plain packaging" legislation) which would prohibit tobacco companies from using any industry logos, colours, brand imagery, or promotional text on packaging, and would require instead that product names be stated in a standard colour, typeface, and position.

2.24 Toys

The Australian law specifies various safety requirements in relation to manufacturing and safety standards of toys sold in Australia, including a mandatory Consumer Product Safety Standard for toys for children up to and including three years of age. Advertising of products which are targeted toward children and have principal appeal to children aged 14 years or younger is regulated by the AANA Code for Advertising and Marketing Communications to Children.

Generally, advertisements must be factual and clear, identify the need for any accessory parts (e.g., “batteries not included”) and must not include sexual imagery, depict unsafe use of products, or demean any person or group. Advertisements must be clearly identified as such and must not be disguised as editorial/programming content. The Children’s Television Standard is also applicable to advertising of toys on television during children’s programming.

2.25 Weight-Loss Products or Services

Advertising of weight-loss products and services is self-regulated by the Weight Management Code of Practice. Weight-loss products that are also therapeutic goods are regulated by the Therapeutic Goods Act and Therapeutic Goods Advertising Code. See discussion of requirements in Medical Devices and Pharmaceuticals above.

3. REGULATIONS RELATED TO ADVERTISING METHODOLOGY

3.1 Advertising to Children (advertising during and immediately before and after children’s programs)

The Children’s Television Standards 2009 (CTS 2009) sets out a range of obligations regarding the broadcasting of content during specified periods (known as “C” and “P” broadcast periods). For example, during children’s program times, it is unsuitable to present frightening or distressing images or depict unsafe uses of a product or unsafe situations which children may imitate. Claims made in advertisements to children must not be ambiguous. If accessories would be required to operate the product (e.g., batteries), then this should be clearly understood by children. Presentation of a product and its price must also be accurate and clearly understood, and the performance of products such as toys and games must be fairly represented (see Toys above).

Disclaimers must be easily seen by children and readily attract their attention. Generally speaking, a printed disclaimer in a television commercial may not be appropriate for children not of reading age and should be avoided.

Advertisements referring to competitions for children must state a summary of the basic rules, and statements made about the chance of winning must be clear, fair, and accurate. The CTS 2009 prohibits advertisers offering prizes during P programs. An advertisement for a trade-promotion lottery in NSW may not depict a child participating in a lottery activity or winning or collecting a prize.

Popular characters and personalities (either filmed or as a voiceover) may not be used to endorse, recommend, or promote commercial products or services during C or P periods. This covers any Australian or international well-known character or personality regarded with favour or approval by the child audience, e.g., cartoon characters or the host of a children’s television show.

There are voluntary self-regulated codes for advertising to children, including the AANA Code of Advertising to Children. Requirements stipulated by this code include the following:

- Advertising to children must not portray images or events which depict unsafe uses of a product or unsafe situations which may encourage children to engage in dangerous activities
- Restrictions are placed on advertising premiums (i.e. gifts given for free or at a reduced price with purchase of a children’s food or beverage)
- Advertising to children must be clearly represented as a commercial communication rather than editorial or program content

3.2 Celebrity Endorsements

Celebrities have the right to control the commercial use of their image under various laws in Australia.

Celebrities may take action under the law of passing off for unauthorised use of their image, name, or likeness in advertising in a manner that suggests that they endorse the product or are commercially

associated with the campaign. Passing off is a tort which applies where a trader "passes off" the trader's goods and services as those of another. There must be a misrepresentation, for example that there is a commercial or endorsement relationship between the product and the celebrity. In a leading 1988 case, a TV ad for shoes was removed from air when Paul Hogan, the actor/writer/producer of the Crocodile Dundee films, successfully argued that the use of a character dressed to look like "Mick Dundee" was passing off. It is also an offence under the Australian Consumer Law to represent that goods, services, or companies have sponsorship, approval, or affiliation that they do not have.

Caution should also be exercised in a commercial in which a celebrity is portrayed by means of impersonation, caricature, or look-alike characters.

3.3 Comparative Advertising

Comparative commercials (ads that compare the advertiser's product to that of a competitor) are permitted, but they are generally higher in risk and carry a heavy burden of proof, given the prospect of challenge by competitors. They must compare like with like and must not be misleading or deceptive.

3.4 Contests

Contests to promote services and/or products are generally permitted. Each state/territory in Australia has its own set of rules regarding game-of-chance promotions, that is, promotions where the winner is determined by random means (e.g., a draw or multiple-choice question). Various states/territories require that a formal permit be obtained before a game of chance is conducted in that state/territory.

Permits as well as other listed information must be featured on all advertising material for a game-of-chance promotion. The promotion cannot be advertised until permits are obtained (where necessary).

There is no specific legislation governing game-of-skill promotions, that is, where the winner is determined by skill, such as creative merit, alone, with no element of chance. However these are subject to the Australian Consumer Law and must not be misleading and deceptive.

3.5 Copyright

Most contemporary literary, artistic, dramatic and musical works are protected by copyright under the Copyright Act 1968(Cth). Once they become very old (the rules for this vary considerably) they come into the public domain. If you substantially copy a work which is protected by copyright, even unintentionally, you have probably breached copyright unless you can show that your work is either not a substantial reproduction (which is both a qualitative and quantitative test) or that you created your work independently and through pure chance it happened to be a substantial copy of an existing work. There are certain fair dealing defences (such as news reporting) but the rules are complex. Logos can be artistic works and advertising copy can be literary works. The advent of the internet and online and social media has caused copyright infringements everywhere. This proliferation of potential copyright infringements gives a false sense of safety in numbers ("they are doing it and there is no action, so I can too"); but copyright owners can and do pick their targets and take action, and when they do the penalties and consequences can be severe. Don't copy anything, anytime or anywhere without advice.

3.6 Deceptive or Misleading Advertising

Misleading or deceptive advertising is prohibited by the Australian Consumer Law. The law is strict liability, meaning that it is irrelevant whether or not an advertiser intended to mislead or deceive consumers; the fact that the advertisement was likely to mislead or deceive is sufficient to establish breach of the act. Penalties can be serious, and the Australian Competition and Consumer Commission (ACCC) is aggressive in enforcing breaches of the act.

3.7 Disguised Ads and Advertorials

Advertisements must not be misleading or deceptive and must not be presented in a false light (for example, an advertisement for a product may not be disguised as a factual news story). Advertisements disguised as editorial copy are subject to the Australian Press Council's Statement of Principles, which requires that publications disclose any commercial or other interest which might be seen as influencing the publication's presentation of news or opinion. Also, as noted above, advertising to children must be clearly represented as a commercial communication rather than editorial or program content. Under the Commercial Television Industry Code of Practice, free to air commercial television stations must not broadcast subliminal messages during programs, program promotions, station identifications, and community service announcements.

3.8 False Advertising

False advertising (which goes even further than misleading and deceptive advertising) is prohibited by the Australian Consumer Law. The penalties are very severe.

3.9 Free Gifts/Samples

There is no specific legislation that prohibits the giveaway of free gifts/samples. In the event that a free gift sample offer is limited to the first “x” number of claims received, permits to conduct the offer may be required from some states/territories in Australia because chance may be seen to be determining the receipt of the gift.

Restrictions are placed on advertising premiums (i.e. gifts given for free or at a reduced price with purchase of a children's food or beverage).

All offers are subject to the general provisions of the Australian Consumer Law. Material terms and conditions must be disclosed. A claim that a good or service is “free” may be made only where it is genuinely at no cost and the cost of the good or service is not recouped from the buyer in another way. If the good or service is free but there are conditions concerning this (e.g., “buy one get one free”), these conditions must be clearly stated in the advertisement. Restrictions on giveaways of certain types of products (e.g., alcohol) are applicable.

3.10 Limits to Free Speech

Australia does not have a broad right to freedom of speech expressly entrenched in its constitution. The International Covenant on Civil and Political Rights includes a right to freedom of expression (articles 14, 17, 19). Australia has signed and ratified this covenant but not implemented it. The High Court of Australia has recognized an implied constitutional right to freedom of speech, but this is confined to communication on “political or government matters,” that is, matters which may be relevant to making informed decisions about voting in elections and in referenda; see *Lange v ABC* (1997). This includes the conduct of houses of parliament and their members, and also the conduct of government ministers and departments, public servants, public utilities, and statutory authorities. It is the nature of the subject matter that is protected, not the person (this contrasts with the approach taken in US law).

The High Court's ruling does not create a personal right of free speech per se; rather, it can be used to overcome the operation of a law that would infringe on the freedom, for example defamation. Advertisers still need to prove it was reasonable to publish this type of information. For areas outside of this implied right, defamation law would apply to defamatory material.

3.11 Nutrition Claims

See discussion at Food above. The Food Standards Code applies to certain nutritional claims (e.g., vitamin and mineral claims, gluten free claims).

The voluntary Code of Practice on Nutrient Claims which contains a range of requirements in relation to nutrient claims, including criteria and requirements for fat, fibre, sugar, salt, cholesterol, and energy claims. For example, for a “low-fat” claim there must be a reduction of at least 3 grams of fat per 100 grams of food.

3.12 Length of Commercial, Volume, and Similar Restrictions

It is standard industry practice in Australia for television advertisements to be either 15 seconds or 30 seconds in duration. This is based on the blocks of time in which television networks sell advertising space, rather than any rule or regulation.

Television advertisements should not be excessively noisy or strident. There are industry standards which set out limits on the use of compression, limiting and equalization in the production of television commercials, so that the commercials do not sound louder than adjacent programming; Free TV Australia, for example, has formulated its standards as Operational Practice 48: Audio Levels and Loudness, which may be reviewed on its website. Producers must certify that the advertisement complies with these standards upon submitting the advertisement for broadcast.

3.13 Rights of Privacy

Australia has in place laws regulating the collection, use, and disclosure of personal information. The main privacy requirements are outlined in the Privacy Act 1988 (and in particular in the National/Australian Privacy Principles which form part of that act). These include the requirement to

have a privacy policy and to inform consumers of certain matters when personal information is collected from them, and requirements on managing personal information.

Additional regulation and codes are applicable to advertising via electronic media. See Email Advertising (Spam) below.

3.14 Product Demonstrations

Demonstration of products which may be advertised is allowed in Australia, subject to the requirements of the Australian Consumer Law. This means the demonstration must accurately present the features/functions of the product and must not be misleading or deceptive as to the capabilities (or limitations) of the product or otherwise.

3.15 Regional Public and/or Community Standards

The AANA Code of Ethics specifies guidelines in relation to ethical issues in advertising including health and safety, discrimination, violence, sex, sexuality and nudity, sexual appeal, and strong language. Specific codes apply in relation to advertising to children as well as to advertising of some products. Restrictions and conditions on use of images of certain cultural sites such as Uluru and the Sydney Opera House are applicable.

3.16 Rebates

Advertising rebates is generally not prohibited; however, advertisements must be accurate and not misleading or deceptive, so terms and conditions may be required and material must be prepared with care.

3.17 Sex in Advertising

Sex in advertising is self-regulated by industry in accordance with the principles set out in the AANA Advertiser Code of Ethics, which says that advertising and marketing communications shall treat sex, sexuality and nudity with sensitivity to the relevant audience. Sexual content in television commercials is also subject to the Commercial Television Code of Practice, and broadcasting restrictions may apply.

3.18 Sponsorships

It is an offence under the Australian Consumer Law to make representations that goods, services, or companies have a sponsorship, approval, or affiliation that they do not have. Except for tobacco (see below) there are no prohibitions on product sponsorships.

Advertising of tobacco products and sponsorship of sporting or cultural events by tobacco brands is prohibited in Australia pursuant to the Tobacco Advertising Prohibition Act 1992.

3.19 Subliminal Advertising

The Commercial Television Code of Practice prohibits subliminal advertising i.e. using any technique which attempts to convey information to the viewer by transmitting messages below or near the threshold of normal awareness.

3.20 Sweepstakes Offers

Refer to Contests above.

3.21 Testimonials

The Australian Consumer Law includes an express prohibition on false testimonials, and false testimonials will also likely be misleading and deceptive. Generally, if testimonials are used, they should be genuine and reflect real experiences, and for television advertisements you will generally be required to have a signed testimonial release.

3.22 Tie-In Offers

There is no specific legislation that prohibits the conduct of offers involving the purchase of a product to receive a free gift/sample. In the event that a tie-in offer is limited to the first "x" number of claims received, permits to conduct the offer may be required from some states/territories in Australia. All offers are subject to the general provisions of the Australian Consumer Law. Restrictions may apply to certain types of products that may be purchased for a tie-in offer and the gift/sample itself.

3.23 Trade Marks

The Trade Marks Act 1995(Cth) sets out a system of ownership of branding devices and marks by registration. A registered trade mark is a very powerful thing and difficult to defend against if you are accused of deceptively reproducing a registered trade mark. A logo, a colour, a name, an advertising slogan, even a smell can be trade marked. Do not assume your novel branding idea is indeed novel. You need to do a trade mark search and you should register your branding idea as a trade mark if you think it has longevity. If you fail to use your trade mark you can lose it and you can attack by legal action other unused trade marks if you want to use them yourself. There are very complex rules surrounding what can and can't attain registration, but the basic principle is you need to push your application otherwise you will never know, or someone else could register it instead.

3.24 Use of a Public Person's Image or Name

See Celebrity Endorsements. Public figures, such as religious leaders, royal figures, politicians or the deceased are in the public domain and do not have the right to sue for passing off so generally may be used in advertising. However, care must still be taken with regard to misleading, defamatory (except for the deceased), or controversial content.

3.25 Use of Children in Advertising

Children cannot be used in gambling or gaming advertisements or in alcohol advertisements. See Alcohol and Gaming above.

3.26 Use of Foreign Content in Advertising

Television commercials consisting of wholly foreign sound and vision may be broadcast in Australia. However the Australian Content in Advertising Standard (ACMA Television Program Standard 23) requires at least 80 percent of broadcast advertising time to be "Australian."

3.27 Use of Models as Doctors, Nurses, Lawyers, or other Professionals

It may be misleading and deceptive to show models as professionals. There are no express laws prohibiting this conduct generally; however, care must be taken and will depend on individual executions. Note that the Therapeutic Goods Advertising Code places restrictions on the use of healthcare professionals or healthcare organisations in advertising for therapeutic goods.

3.28 Violence in Advertising

Violence in advertising is self-regulated by industry in accordance with the principles set out in the AANA Advertiser Code of Ethics. The code states that advertising or marketing communications shall not present or portray violence unless it is justifiable in the context of the product or service advertised. The Commercial Television Code states that the following depictions of violence are not suitable for broadcast:

- Sustained, relished, or excessively detailed acts of violence
- Unduly bloody or horrific depictions
- Strong violence that has a high impact or which is gratuitous or exploitative
- Depiction of exploitative or non-consensual sexual relations as desirable

3.29 Other Regulations Particular to Australia

3.29.1 Component Pricing

Advertisers that advertise a price which is made up of components must include the "single price" (i.e. minimum total cost) as prominently as any other price communication. The "single price" is calculated by adding up each of the price components that are quantifiable at the time of the advertisement, including all mandatory charges (see e.g., Motor Vehicle advertising above)

There is an exception where the price representation is made exclusively to corporations in business.

3.29.2 Country of Origin

The Australian Consumer Law prohibits false and misleading claims about the place of origin of goods.

The "test" for country of origin claim (e.g., "Made in Australia") is that the goods must be substantially transformed in the country of origin being claimed; and 50 percent or more of the costs to produce or manufacture the goods must have occurred in that country. "Substantially transformed" means there must be a fundamental change in the form, appearance, or nature of the goods.

If a good is touted as a “product of” a country, the test is stricter, and in addition to the above requirements, each significant ingredient or component of the good must originate from the country and all, or virtually all, of the production processes must take place there.

3.29.3 Disclaimers & Other On-Screen Text

Disclaimers must be legible, easy to comprehend, and held on screen long enough for all text on screen to be noticed, read, and understood. Disclaimers must not be used to correct a misleading impression given by the advertisement as a whole or to conceal important information.

Commercials Advice of Free TV Australia (CAD), the body that pre-vets and classifies advertising for commercial television, issues certain size and time requirement policies for on-screen disclaimers.

3.29.4 Environmental Claims

Claims or representations regarding environmentally sound products must not overstate or misrepresent the environmental friendliness of the goods. All such claims must be fully substantiated.

The ACCC has published a guide, “Green Marketing and the Australian Consumer Law,” regarding environmental claims. The ACCC has taken a notoriously aggressive approach in pursuing advertisers over misleading green claims. High-risk areas include broad, unqualified claims such as “green” and “environmentally friendly,” or benefits that are now irrelevant such as “CFC free.”

The AANA Environmental Claims in Advertising and Marketing Code recommends that environmental claims in relation to a product or service should be truthful and factual and relevant to the product or service. In addition, the actual environmental impacts of the product or service as claimed must be substantiated and verifiable. The advertisement must not exploit community concerns in relation to protecting the environment by presenting or portraying distinctions in products or services advertised in a misleading way or in a way which implies a benefit to the environment which the product or service does not have.

3.29.5 Price and Discounts

Representations about price must not be misleading or deceptive. The Australian Consumer Law prohibits false claims regarding the price of goods or services. All discounts must be genuine. If an advertiser compares a “sale” price with a regular price, the latter must be the price at which that advertiser has genuinely offered those goods for a reasonable period beforehand. If an advertiser compares a price to a “recommended retail price,” the advertiser (or those in the marketplace) must have regularly charged the recommended retail price for that product. Prices stated in advertisements must be stated inclusive of Goods & Services Tax (GST).

4. REGULATIONS RELATED TO MEDIA CHANNELS

4.1 Billboard Advertising

Billboard advertising is self-regulated by industry in accordance with the principles set out in the AANA Advertiser Code of Ethics and the Outdoor Media Association of Australia Code of Ethics. Typically, public concerns about taste and decency in advertising relate to material carrying sexual connotations or seen as demeaning to women. The location of such material to inappropriate audiences (such as children) causes concern, as outdoor advertising is open to general exhibition. Careful consideration should be given to choice of content for outdoor advertisements.

4.2 Digital Media Advertising (websites, online advertising)

There are no specific restrictions on advertisements in digital media in Australia, but advertising laws will generally apply equally to digital content. However, there are certain codes and regulations that apply to the advertising of certain types of products/services. Contacting of individuals with commercial electronic messages is regulated in Australia, and restrictions and conditions apply. See Email Advertising (Spam) below.

4.3 Direct Mail Advertising

Direct mail advertising is regulated by the Privacy Act 1988 (Cth), and advertisers must comply with the National/Australian Privacy Principles.

The Privacy Act applies to organisations based in Australia that have an annual turnover of AUD\$3 million (3 million Australian dollars) or more OR that are private-sector health-service providers (e.g., GP, hospital) or other businesses that trade in personal information.

4.4 Email Advertising (Spam)

The Privacy Act 1988 (Cth) and the SPAM Act 2003 (Cth) (Spam Act) regulate the sending of spam, but do this in different ways.

4.4.1 Privacy Act

The Privacy Act has rules about how organisations handle personal information. The act only applies to some commercial electronic messages, depending on whether the sender is covered by the Privacy Act or whether personal information was used to send the message. Personal information will be used to send the message in circumstances where the email address can be linked to the person (for example, if it was provided with the person's name or other details, or if it is made up of the person's full name). A nickname email account (e.g., `babycakes@gmail.com`) is not personal information if it cannot be identified with the owner of the account.

4.4.2 Spam Act

The Spam Act regulates the sending of unsolicited commercial electronic messages by email or SMS. This act applies to all organisations, even those not covered by the Privacy Act. Businesses are allowed to send commercial electronic messages under the following conditions:

- The message is sent with the consent of the consumer (for example, if the company had previously disclosed that it was collecting the consumer's email for the purpose of direct marketing)
- The message identifies the business as the sender
- The message includes a functional "unsubscribe" mechanism so that the consumer can opt out of receiving any more messages

Messages that do not meet the above conditions are generally "spam" and unlawful under the Spam Act.

There is also an eMarketing Code of Practice, which sets out procedures that must be followed by e-marketers when sending marketing or promotional messages by email or SMS.

4.5 Newspaper and Periodical Advertising

There are no specific prohibitions on advertising in Australian newspapers and periodicals. However, the Press Council of Australia has issued guidelines, standards, and principles that apply to all content in newspapers and periodicals, including advertisements. Advertising of some types of products/services may also be regulated.

4.6 Radio Advertising

Radio advertising is regulated by the Commercial Radio Codes of Practice as well as license conditions used to regulate commercial radio programs found in the Broadcasting Services Act 1992. The codes are binding on all commercial radio licensees. The codes deal with, amongst other things, taste and decency in advertising. Unlike television advertisements, radio advertisements are not subject to pre-vetting procedures.

4.7 Social Media Advertising

There are no specific restrictions on advertisements in social media (such as Facebook, YouTube, Twitter) in Australia. However, certain codes and regulations apply to the advertising of certain types of products/services. Most social-networking platforms have their own terms and conditions and privacy policies. Activities that may be viewed as spam are often prohibited by these self-regulating terms and conditions.

Companies with a Facebook page should be careful regarding what is posted on their "wall." Recent Australian case law has suggested that companies may be liable for misleading or deceptive claims made about their products by consumers on their Facebook "wall" if the companies fail to remove or clarify those comments.

4.8 Telemarketing

Telemarketing is covered by the Privacy Act 1988 (Cth), and advertisers must comply with the National/Australian Privacy Principles.

The Australian government has set up a “Do Not Call Register” where individuals can list their name and number and request not to receive telemarketing calls. Telemarketers must not make calls to phone numbers listed in the register. There are some exemptions, for example if the person is an existing customer of the organisation or for public-interest organisations such as charities.

4.9 Television Advertising

All television advertisement must conform with the Commercial Television Industry Code of Practice (CTVI Code). Television commercials for free-to-air or commercial TV are required to be submitted and approved by Commercials Advice (CAD) before broadcast.

5. REGULATORY AGENCIES

5.1 Australian Competition and Consumer Commission (ACCC)

Web: www.accc.gov.au

Enforces the Australian Consumer Law, which is applicable to all products advertised in Australia

5.2 Australian Securities and Investment Commission (ASIC)

Web: www.asic.gov.au

Enforces the Corporations Act in relation to financial products and services advertising

5.3 Therapeutic Goods Administration

Email: info@tga.gov.au

Web: www.tga.gov.au

Administers the Therapeutic Goods Act and regulates therapeutic goods

6. KEY LAWS AND REGULATIONS

6.1 Australian Consumer Law

Schedule 2 of the Competition and Consumer Act 2011 (Cth): Overarching legislation which regulates misleading, deceptive, and false advertising claims for all goods and services in Australia.

6.2 Food Standards Code

The Australian and New Zealand Food Standards Code: regulates compositional requirements and certain advertising, marketing and labelling claims that can be made in respect of food and beverages

6.3 Therapeutic Goods Act 1989 (Cth)

Regulates advertising and marketing of therapeutic goods (prescription medicines, non-prescription medicines, medical devices, therapeutic claims)

7. MANDATORY ADVERTISING PRE-CLEARANCE AGENCIES

7.1 Australian Self-Medication Industry Inc

Web: www.asmi.com.au

Email: info@asmi.com.au

Pre-clearance of certain therapeutic goods advertisements e.g. Paracetamol; Multivitamins

7.2 Complementary Healthcare Council of Australia

Web: www.chc.org.au

Email: reception@chc.org.au

Pre-clearance of certain therapeutic goods advertisements e.g. Natural remedies such as herbs which make therapeutic claims, such as reduce arthritic pain.

7.3 Commercials Advice (CAD)

Web: www.freetv.com.au

Email: cad@freetv.com.au

Pre-clearance of commercial television commercials

8. TRENDS

The recent introduction of the Australian Consumer Law has provided a range of stronger enforcement powers to the Australian Competition and Consumer Commission (ACCC) for regulating misleading and deceptive advertising.

The ACCC has recently obtained substantial fines against several Internet and telecommunications companies in relation to misleading and deceptive advertising. In some cases, the ACCC has issued multiple infringement notices for each breach (totalling millions of dollars). In another case, the federal court, in an action brought by the ACCC, determined that Optus had breached the Australian Consumer Law and issued a penalty of AUD\$5.26 million dollars. In June 2012, the ACCC fined Apple AUD\$2.25 million plus court costs for misleading claims in relation to its iPad being “wifi + 4G” when the device did not work on any existing Australian 4G networks.

The ACCC is also currently spotlighting green-marketing claims, with a string of successful enforcement actions against advertisers for false or misleading environmental claims.

Contact us

If you would like further information on any of the topics covered above, or on how to obtain a copy of the book *Media Law for Non-Lawyers* compiled by Lyndon Sayer-Jones, please contact one of this article's authors as per the below.

Leanne Montibeler
+61 2 8935 8805
leanne.montibeler@anisimoff.com.au

Tony Anisimoff
+61 2 9460 6611
tony@anisimoff.com.au



www.anisimoff.com.au



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