



FACT SHEET

# An overview of Advertising's Legislative and Self-Regulatory Landscape



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We work with von Muenster Legal as our industry partner in providing up-to-date, relevant guidance for marketing communications specialists. Backed by the collective experience of von Muenster Legal and Advertising Council Australia, this guidance is an important tool in ensuring campaigns meet regulatory standards.

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# Advertising's Legislative and Self-Regulatory Landscape

## Introduction

The ecosystem within which advertisers, marketers and media operate is a very complex one involving both self-regulation and a legislative landscape. Numerous laws and codes influence and restrict the advertising and marketing of goods and services.

There are some constants such as the Australian Consumer Law under the Competition and Consumer Act 2010 which is enforced by the Australian Competition and Consumer Commission (ACCC). It is not uncommon for the ACCC to issue hefty fines to companies who have been found guilty of breaching the law.

For example, in April 2022 the travel and hotel aggregator website Trivago was fined \$44.7 million for misleading conduct as its website did not sufficiently disclose to users that the website used an algorithm that gave prominence to accommodation providers paying Trivago a higher payment fee (cost per click) and thus the most prominent offers were often not the cheapest offers for consumers even though this is what consumers were made to believe.

against prevailing community standards. AdStandards has a community panel that performs this function.

However, there are numerous laws that can apply to advertising over and above Australian Consumer Law. And there are numerous elements of the self-regulatory system over and above the AANA's Code of Ethics. Advertising fast food is different from advertising cars or alcohol. Similarly, advertising on televisions has different implications than advertising on out-of-home or social media.

The self-regulatory system was introduced in the mid-1990s as a tri-partite agreement between marketers, agencies and media platforms. All parties agree to abide by the codes and remove or amend any advertisement should it be found to be in breach of the codes. At the heart of the self-regulatory system is the AANA, whose role is to draft the codes including the AANA Code of Ethics which applies to all advertising. The AANA also oversees AdStandards whose role is to adjudicate any public complaint

It is important, therefore, for people working in advertising to have a holistic view of Australia's Legislative and Self Regulatory Landscape. It is complex but this factsheet aims to give an overview of all elements that can affect marketing and advertising.



## Legislation and Regulation

The Australian Consumer Law has a particular focus on regulating the accuracy and fairness of marketing, advertising, and selling to consumers. An understanding of the Australian Consumer Law and other applicable laws is therefore extremely important for advertising professionals.

Compliance and enforcement of the Australian Consumer Law is on a ‘one law, multiple regulators’ model, with existing consumer regulators enforcing the uniform national law. The regulators include the Australian Competition and Consumer Commission (ACCC) and State/Territory consumer protection & fair trading agencies.

Australian Consumer Law regulators can exercise a range of civil, administrative, and criminal enforcement remedies to ensure compliance with the law and supporting legislation, including:

- A criminal conviction, fines;
- Disqualification orders, civil pecuniary penalties;
- Non-party redress orders, adverse publicity orders, non-punitive orders, public warning notices;
- Declarations, injunctions, damages, compensation orders;
- Infringement notices, court-enforceable undertakings; or
- Education, advice and persuasion, voluntary industry self-regulation codes, and formal written warnings.

Other laws, legislations, and regulations that come into play include:

Copyright, Trade Marks & Brand Protection, Passing off, Defamation, Privacy and Data, Celebrity Law, Comparative Advertising, Parodies, Influencers, and Sales and Trade Promotions.

It is important for advertising professionals to understand that each product and supporting campaign will need to be assessed on a case-by-case basis to determine what laws, codes and regulations may apply. The laws, regulations, and codes apply in most cases to the agency and the brand, and others in the supply chain; these businesses must manage risk and demonstrate legal compliance. Further, the media channel used can often have different legal implications, and again, must be considered.

## Self Regulation

### – Why do we self-regulate?

The rationale for self-regulation is that it is a more efficient and effective system within which advertisers, marketers and media can operate, without government intervention, when it comes to regulating advertising, setting standards, and handling consumer complaints. The underpinning premise is that all parties need to abide by the code, or else it may force the government to step in, resulting in bureaucracy and the imposing of fines etc.

### – Definition of advertising

Advertising is defined as any material which **draws the attention** of the public in a manner calculated to promote or oppose directly or indirectly a product, service, person, organisation, or line of conduct, and includes:

- all advertising or marketing communication under the reasonable control of the advertiser, whether or not a payment or other valuable consideration has been involved;
- all advertising or marketing communication where any of the potential customers of the product, service etc. are physically present in Australia and the advertising or marketing communication is directed to those customers;
- sponsorship announcements such as “this program brought to you by . . .”;
- advertorials and infomercials;
- community service announcements;



- user-generated content which is communicated via a site or digital platform over which the marketer has a reasonable degree of control; and any media, including online and social media (the Code is technology-neutral)

Advertising is not considered to be:

- labels and packaging
- corporate reports including corporate public affairs messages in press releases and other media statements, annual reports, statements on matters of public policy
- promotions for a broadcaster's programs aired on that network (television or radio).

#### – AANA Code of Ethics:

Section 2 is the Consumer section of the AANA Code of Ethics and provides the self-regulatory rules around the portrayal of people, violence, treatment of sex, sexuality and nudity, appropriate language, health, safety, and distinguishability in advertising.

There are 7 codes under which advertisements can be in breach:

#### **1. DISCRIMINATION/ VILIFICATION**

Advertisements shall not portray people or depict material in a way that discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, gender, age, sexual preference, religion, disability, mental illness or political belief.

#### **2. EXPLOITATIVE/DEGRADING**

Advertising or marketing communications should not employ sexual appeal in a manner that is exploitative or degrading to any individual or group of people.

#### **3. VIOLENCE**

Advertisements shall not present or portray violence unless it is justifiable in the context of the product or service advertised

#### **4. SEX, SEXUALITY AND NUDITY**

Advertising or marketing communications shall treat sex, sexuality, and nudity with sensitivity to the relevant audience

#### **5. LANGUAGE**

Advertising or marketing communications shall only use language which is appropriate in the circumstances (including appropriate for the relevant audience and medium). Strong or obscene language shall be avoided.

#### **6. HEALTH AND SAFETY**

Advertising or marketing communications shall not depict content that would **encourage or condone** unhealthy or unsafe behaviour having regard to Prevailing Community Standards.

#### **7. CLEARLY DISTINGUISHABLE**

This section requires advertising to be clearly distinguishable as advertising and for it not to be disguised as news, independent market research, user-generated content, private blogs or independent reviews

#### **Other AANA Codes**

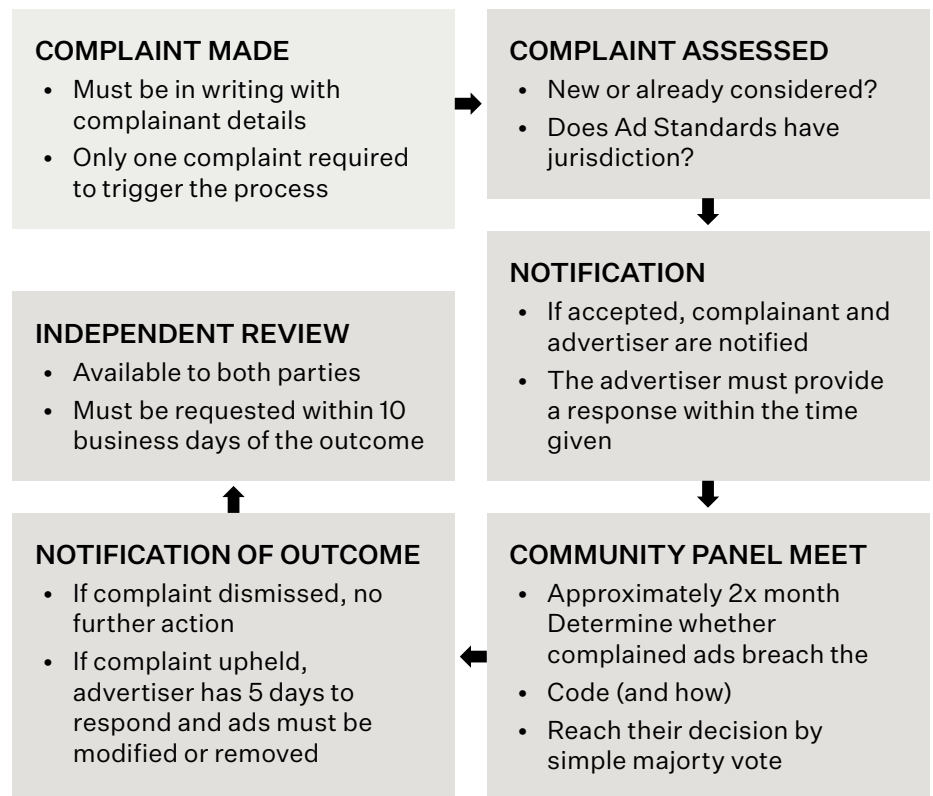
In addition to the overarching Code of Ethics, the AANA also has established Codes for advertisements that have a higher social responsibility:

- Marketing and Advertising to Children Code
- Environment Claims Code
- Wagering Code
- Food & Beverage Code

#### **How complaints are made**

Consumers may lodge complaints about advertisements that are in breach of any of the AANA Codes online, on the AdStandards website: <https://adstandards.com.au/lodge-complaint>

## The complaints process is as follows:



## Product and Medium-specific Codes:

Depending on the product being advertising and the medium being used, there may be additional codes or regulations that need to be complied with:

### Product:

- Motor Vehicles/Transport - [Federal Chamber of Automotive Industries \(FCAI Code\)](#)
- Alcohol - [Alcoholic Beverage Advertising Code \(ABAC\)](#)
- Food & Beverage - [AANA Food and Beverages Marketing and Communications Code](#)
- Wagering & Gambling - [AANA Wagering Advertising and Marketing Communications Code](#); [Interactive Gambling Act 2001](#)
- Therapeutic Goods - [Therapeutic Goods Advertising Code](#)
- Infant Formula - [Infant Formula Marketing Code](#)

### Medium:

- Outdoor - [Outdoor Media Association \(OMA\)](#)
- Direct - [Association for Data-Driven Marketing \(ADMA\)](#)
- Native/Testimonial - [Interactive Advertising Bureau \(IAB\)](#)
- Social Media (Influencer) - [Australian Influencer Marketing Council \(AIMCO\)](#)
- Television - [ClearAds](#); [Australian Communications Media Authority \(ACMA\)](#); [ASTRA Subscription Media Australia](#)
- Radio - [Commercial Radio Authority](#)

## To summarise:

The AANA Code of Ethics is the over-arching code of conduct, but your product and the medium within which you are advertising will likely have their own codes to be complied with.

## 2. Codes & Compliance

Australian Association of National Advertisers (AANA) - Code of Ethics

General Codes	Product-Specific Codes	Media-Specific Codes
<b>AANA</b> <u>Marketing &amp; Advertising to Children</u>	<b>Federal Chamber of Automotive Industries (FCAI)</b> <u>Motor Vehicles/Transport</u>	<b>Outdoor Media Association (OMA)</b> <u>Outdoor</u>
<b>AANA</b> <u>Environmental Claims</u>	<b>Alcoholic Beverages Advertising Code (ABAC)</b> <u>Alcohol</u>	<b>Association for Data-Driven Marketing (ADMA)</b> <u>Direct</u>
<b>AANA</b> <u>Wagering</u>	<b>AANA Food and Beverages Marketing and Communications Code</b> <u>Food &amp; Beverage</u>	<b>Interactive Advertising Bureau (IAB)</b> <u>Native or Testimonial</u>
<b>AANA</b> <u>Food &amp; Beverage Code</u>	<b>AANA Wagering Advertising and Marketing Communications Code</b> <u>Wagering &amp; Gambling</u>	<b>Australian Influencer Marketing Council (AIMCO)</b> <u>Social Media (Influencer)</u>
	<b>Interactive Gambling Act 2001</b> <u>Wagering &amp; Gambling</u>	<b>ClearAds</b> <u>Television</u>
	<b>Therapeutic Goods Advertising Code</b> <u>Therapeutic Goods</u>	<b>Australian Communications Media Authority (ACMA)</b> <u>Television</u>
	<b>Infant Formula Marketing Code</b> <u>Infant Formula</u>	<b>ASTRA Subscription Media Australia</b> <u>Television</u>
		<b>Commercial Radio Authority</b> <u>Radio</u>