



CODE OF ETHICS: PRACTICE NOTE

FROM 1 MARCH 2018

This Practice Note is provided as a guide to interpretation to assist advertisers, their agencies and the community. The interpretations in this Practice Note are based on the AANA's intent in relation to the Code and relevant determinations of the Advertising Standards Board.

This Practice Note must be applied by the Advertising Standards Board in making its determinations. In the event of any ambiguity the provisions of the Code prevail. The Practice Note may be amended by the AANA from time to time.

WHAT DOES THE CODE APPLY TO?

The Code applies to 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 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 on line and social media (the Code is technology neutral)

The Code does not apply to:

- 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 and the like
- promotions for a broadcaster's programs aired on that network (television or radio).

For the avoidance of doubt, placing advertising and marketing communication online or publishing it in a digital format does not by itself mean that the communication is directed to a particular audience – for example, advertising or marketing communication contained on an international website will not be considered to be directed to Australians unless the

material is clearly addressed to Australian consumers. Where advertising or marketing communication are directed to consumers physically present in Australia, the Code applies to the advertiser or marketer who has reasonable control over the communications – for example, in the case of an international campaign this may be a brand owner based overseas and not the local entity for the brand, where the local entity does not have reasonable control over the communications.

TWO SECTIONS OF THE CODE

The Code is divided into two sections. The purpose of the two sections is to differentiate between the provisions which apply to complaints by competitors (Section 1) and complaints which are brought by consumers (Section 2).

Section 1 – Competitor Complaints is intended to provide a mechanism for complainants to resolve disputes between competitors in an efficient and low cost way without the need for recourse to the courts.

Section 2 – Consumer Complaints is the section for complaints under the Code by consumers.

SECTION 1: COMPETITOR COMPLAINTS

Section 1 reflects the consumer protection principles in the Australian Consumer Law (part of the Competition and Consumer Act) (ACL).

Complaints are made to the Advertising Claims Board:
<http://www.adstandards.com.au/process/claimsboardprocess>

Section 1.2 reflects concepts in the ACL in relation to misleading and deceptive conduct.

To establish that advertising or marketing communication is not misleading or deceptive an advertiser may be required to provide substantiation of any claims made. This means that an advertiser must have a reasonable basis for their claims. Substantiation may be in the form of tests, studies or expert reports depending on the type of claim made.

The Advertising Claims Board will consider whether the information most likely to be taken from the advertisement

or marketing communication by an average consumer in the target market would be reasonably regarded as truthful and honest. In testing the requirement that advertising or marketing communication should not be designed to be misleading or deceptive, the Board will consider the advertiser's stated intention, but may also consider, regardless of stated intent, that an advertisement is by design misleading or deceptive.

SECTION 2: CONSUMER COMPLAINTS

APPLICATION OF SECTION 2

Section 2 of the Code provides the self-regulatory rules around portrayal of people, violence, treatment of sex, sexuality and nudity, appropriate language and Prevailing Community Standards in advertising or marketing communication.

The AANA Codes apply to advertising and marketing communication where two key criteria are met:

- 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 the product or service?

Material may originate to provide information to stakeholder groups such as media, investors or government and not be covered by the Codes. However once it is targeted directly at consumers or the public in a way that is calculated to promote a service or product and in circumstances where the brand owner retains reasonable control over the material, then the Codes would apply.

Contextually targeted branded content, integrated content, native advertising – that is, material which seeks to provide content generated by brands which does not look out of place in the habitat within which it is being viewed, heard or experienced – is included within the definition of advertising and marketing communication.

- **Prevailing Community Standards** apply to all parts of Section 2. This means that the Board will have regard to community standards at the time the advertising or marketing communication was published. Prevailing Community Standards are determined primarily by the Board, whose members are representative of the community, on a case by case basis, as part of the complaints process. To assist advertisers and complainants, this Practice Note provides some guidance into Prevailing Community Standards. It is influenced in part by previous decisions of the Board, the AANA's intent in developing this Code and any relevant research (of the AANA or Advertising Standards Bureau as relevant). There is no one test of Prevailing Community Standards. The Prevailing Community Standard will differ in relation to the different restrictions in relation to health and safety, nudity, language, violence and portrayal of people.
- **Relevant audience** is applicable to the restrictions on treatment of sex, sexuality and nudity, language and clearly distinguishable advertising. Relevant audience is informed by the content of the advertising or marketing

communication as well as other material that may be provided by the advertiser including classification material, audience measurement data and the media placement plan, to determine the audience that the advertiser intends to see the advertising or marketing communication. The Board will have regard to the audience or readership composition data for the relevant media where this is provided. For example, OzTAM data can be used to inform the Board that the relevant audience for commercial free to air and subscription television is grocery buyers between the ages of 20 and 35. In the case of social media, the Board should have regard to the opt-in nature of the medium and the age gating which may apply to some social media sites in determining the relevant audience. The Board will consider reasonable members of the relevant audience in making its determinations.

- **Broad view of “audience” taken by the Board.** For the purposes of advertisements in public places, the Board will not only take account of the relevant audience, but it can also take a broad view of the “audience”. This recognises the broad nature of the audience for advertisements in public places, which may include Minors. The Board will not just have regard to whom the advertisement is targeted (the relevant audience) but the Board also looks at who can see it and the Board will take that into consideration in determining their view of whether the advertisement treats sex, sexuality and nudity with sensitivity to that audience or in regards to whether the language used is appropriate for that audience.
- **Portrayal of people (Section 2.1).**
 - This section describes types of behaviour and restricts depictions of those types of behaviour against people within certain groups.
 - The types of behaviour are:
 - Discrimination – unfair or less favourable treatment
 - Vilification – humiliates, intimidates, incites hatred, contempt or ridicule
 - The groups are:
 - Race – viewed broadly this term includes colour, descent or ancestry, ethnicity, nationality, and includes for example ideas of ethnicity covering people of Jewish or Muslim origin
 - Ethnicity – those with a common social identity as a result of customs, traditions and belief about historical origins
 - Nationality – people belonging to a particular nation either by birth, origin or naturalisation. This can change over time so a person born in the United States who becomes a citizen of Australia by marriage may describe their nationality as both Australian and American
 - Gender – male or female characteristics
 - Age – based on a person's chronological age (ie the date they were born) and not a person's biological age (ie physical age a person may exhibit)
 - Sexual preference – includes homosexuality,

heterosexuality, bisexuality and trans sexuality

- Religion – a person’s belief or non belief about god or the existence or non existence of god or gods
 - Disability – a current, past or potential physical, intellectual, psychiatric, or sensory illness, disease, disorder, malfunction, malformation, disfigurement or impairment, including mental illness
 - Political belief – support for or opposition of a particular political party or ideology.
- A negative depiction of a group of people in society may be found to breach section 2.1 even if humour is used. The depiction will be regarded as negative if a negative impression is created by the imagery and language used in the advertisement.
- A realistic depiction of people with a disability can be acceptable, even if the advertisement is upsetting to some members of the community, where there is an important message being delivered.
- Advertisements can suggest stereotypical aspects of an ethnic group or gender with humour provided the overall impression of the advertisements is not a negative impression of people of that ethnicity or gender.
- Portraying a woman as attractive does not of itself constitute discrimination or vilification of women.
 - Images of men or women in traditional roles are not prohibited provided the major focus of the advertisement is on the product, not the role portrayed. However care should be taken if depictions suggest that such activities are “women’s work” or “work of little value”.
 - Particular care must be exercised when portraying people, particularly Minors, in advertising or marketing communication. Advertisers should have regard to Section 2.2 below and the AANA Best Practice Guide: Managing the Portrayal of People in Advertising & Marketing Communication.
- **Exploitative or degrading material (Section 2.2)** This provision will be amended on 1 March 2018.
 - Section 2.2 prohibits the use of advertising or marketing communication which employs sexual appeal which is exploitative of or degrading to any individual or group of people. It applies to all genders, with distinct criteria when it comes to the portrayal of minors.
 - In advertisements where minors, or people who appear to be minors, are used, sexual appeal is not acceptable and will always be regarded as exploitative or degrading. Advertisements must not include sexual imagery, state or imply that minors, or people who appear to be minors, are sexual beings or that ownership or enjoyment of the advertised product will enhance their sexuality. Minors, or people who appear to be minors, must not be portrayed in a manner which treats them as objects of sexual appeal.
 - For material to breach this section of the Code, it must contain sexual appeal, however not all images or other material depicting people who are scantily clad or naked will be unacceptable under this section. This section restricts the use of material only if it employs sexual appeal in a manner which is exploitative of or degrading to any individual or group of people. The Board may have regard to the context or medium in which the material appears.
 - **Exploitative** means (a) taking advantage of the sexual appeal of a person, or group of people, by depicting them as objects or commodities; or (b) focussing on their body parts where this bears no direct relevance to the product or service being advertised.
 - **Degrading** means lowering in character or quality a person or group of persons.
 - **Violence (Section 2.3)**
 - Consequences of violence may also be prohibited however graphic depictions of traffic accidents or the consequences of domestic violence may be justified by the community safety message involved.
 - Sexual violence is not acceptable.
 - The Board has also found that a strong suggestion of menace presents violence in an unacceptable manner and breaches this section of the Code.
 - Audio representations of violence may be prohibited. For example, a radio advertisement for a vehicle which included the sound of a man being slapped and his consequent expression of pain, was found in breach.
 - Violence against animals is caught by this section.
 - Depiction of violence to promote a violent game may be acceptable provided it is relevant to the product advertised.
 - Realistic depictions of the consequences of violence are not acceptable.
 - More leeway is permitted where the depiction is stylised rather than realistic. However, advertisers should exercise caution when using cartoon violence as a cartoon style may be attractive to children.
 - **Sex, sexuality or nudity (Section 2.4)**
 - This section applies equally to images of men as well as images of women and children.
 - Images which are not permitted are those which are highly sexually suggestive and inappropriate for the relevant audience. Explicit sexual depictions in marcomms, particularly where the depiction is not relevant to the product or service being advertised, are generally objectionable to the community and will offend Prevailing Community Standards.
 - Full frontal nudity and explicit pornographic language is not permitted. Images of genitalia are not acceptable. Images of nipples may be acceptable in advertisements for plastic surgery or art exhibits for example.
 - Discreet portrayal of nudity and sexuality in an appropriate context (eg advertisements for toiletries and fashion) is generally permitted but note the applications of the relevant audience. More care should be taken in outdoor

media than magazines, for example.

- Advertisements which depict women or men scantily clad, are generally acceptable, if relevant to the product.
- Images of women in bikinis are permitted, however, unacceptable images could include those where a woman (or man) is in a suggestively sexual pose, where underwear is being pulled up or down (by the model or another person), or where there is clear sexual innuendo from the ad (e.g. depicting women as sexual objects).
- Advertisements with appeal to young people (under 14 years) which contain sexualised images or poses are to be used with caution. Models who appear to be minors should not be used in sexualised poses. An advertisement in which the female looks very young and is lying in bed with a man, with no direct reference to the product being advertised, was found in breach by the Board as it used a highly sexualised image regardless of the audience to which the advertisement was directed.
- The use of the word “sex” does not, of itself, make an advertisement unacceptable. However, such advertisements must not contain images that are highly sexualised.

• Language (Section 2.5)

- Words and phrases which are innocuous and in widespread and common use in the Australian vernacular are permitted (provided they are used in a manner consistent with their colloquial usage, for example with gentle humour, and not used in a demeaning or aggressive manner). Examples are “bugger”, “shit”, “pissed-off”, “crap”, “bloody”, “cheap bastard”, “bum”, “honk if you did it last night” and “balls”. The “f” and “c” words are generally not permitted. Non verbal representations of the “f” word are also not permitted.
- Words and acronyms that play on the ‘f’ word, eg WTF and LMFAO, but do not use the actual word are normally considered acceptable if used in a light hearted and humorous way, are in subtitle rather than spoken word and are appropriate to the situation.
- When considering the application of this section to UGC within the control of the advertiser, the Board will have regard to the contextual and conversational nature of social media. In some cases the use of the vernacular in UGC may not offend Prevailing Community Standards of the relevant audience.

• Health and Safety (Section 2.6)

- Images of bike riding without helmets or not wearing a seatbelt will be contrary to prevailing community standards relating to health and safety. Similarly, advertisements depicting unsafe practices or images, such as riding down a hill in a wheelie bin, using a mobile phone while driving or apparently hiding in a chest freezer etc are unacceptable. Advertisers should take care not to depict behaviour that children may imitate.
- Motor vehicle advertisements are subject to the health and safety section. This means that a motor vehicle

advertisement cannot depict images contrary to public health and safety notwithstanding the images being unrelated to the motor vehicle advertised.

- Bullying – the age of the people depicted in an advertisement, their relationship to each other and the nature of the communication are relevant in determining whether an advertisement constitutes bullying and is contrary to Prevailing Community Standards.
 - More care must be taken when the people depicted in an advertisement are Minors or if there is an unequal relationship between the people in the advertisement, eg student and teacher, manager and worker.
- ## • Clearly distinguishable advertising (Section 2.7)
- This provision came into effect on 1 March 2017.
 - Context driven advertising and marketing approach is permitted, but marketers should be cognizant that, in seeking to make their advertising and marketing communication more engaging, they do not camouflage the fact that it is advertising. Advertising or marketing communication should not be disguised as, for example independent market research, user-generated content, private blogs or independent reviews.
 - There is no absolute requirement that advertising or marketing communication must have a label. If it is clear to the relevant audience that the content is commercial in nature (for example by the nature of the content, where the content is placed, how consumers are directed to the content, the theme, visuals and language used, or the use of brand names or logos), then no further disclosure or distinguishing element is needed.
 - For example, where advertisers have made commercial arrangements for the branded products to feature as a product placement, and no other claim is made about the products, no label or disclosure may be required. Even though consumers may not realise the advertisers have made a commercial arrangement for their products to appear, the use of the branded products may be sufficient to distinguish the material as an advertisement or marketing communication. Further disclosure of product placement may not be necessary because there is a prevailing community view that audiences do not need to be notified of this sort of product placement.¹
 - Advertisers have flexibility as to how to ensure that material is distinguishable as advertising or marketing communication. Advertisers may use logos or brand names combined with other visual or audio cues where appropriate, such as background shading, outlines, borders, graphics, video or audio messages depending on the medium. When advertisements are targeted to a specific audience, the relevant perspective is that of a typical member of the targeted group.
 - Where a third party recommends a product due to an arrangement with the brand owner, it should be clear that the view expressed is not the independent view of the third party. Again, the advertiser has flexibility as to how this distinction may be achieved. Similarly where a brand has an arrangement for contextually targeted content that

¹ Australian Communications and Media Authority, “Contemporary Community Safeguards Inquiry”, 2014.

is designed to fit in with surrounding editorial content, and the brand has reasonable control over the content, the content should be clearly distinguishable to the relevant audience as advertising.

- Responsibility for developing content that is aligned to the AANA Codes falls to the advertiser – the brand owner who has control over the relevant material and whose products or services are being promoted. The AANA Codes do not apply to the broadcaster or publisher unless they are acting as advertiser for their own products or services. Be aware that other industry codes, such as the Commercial Television Industry Code of Practice; Commercial Radio Code of Practice; ASTRA Codes of Practice; ADMA Code of Practice may also apply.

For more information see the AANA Best Practice Guideline: Clearly Distinguishable Advertising and also the AANA IAB Native Advertising Principles.

OTHER GUIDANCE

USER GENERATED CONTENT

User Generated Content (UGC) is material which has not been created by the brand owner but by a person interacting on the brand owner's digital marketing platform.

Reasonable Control – a brand owner has reasonable control of user generated content when it becomes aware of the material.

An advertiser/marketer becomes aware of material when:

- it has posted or published material;
- it becomes aware of UGC through reasonable review;
- a user notifies the advertiser/marketer of the UGC; or
- a complaint is lodged with the ASB about the UGC.

The Code does not apply to:

- UGC on pages and sites which are not within an advertiser's or marketer's reasonable control even if brands or products are featured. Examples include:
 - A user posting a brand's TVC on YouTube with additional footage/comments;
 - A user posting footage on YouTube using a brand or product but with no involvement from the advertiser/marketer;
- UGC featuring hashtags that may relate to a brand or brand campaign from platforms such as Twitter and Instagram;
- A tweet from a brand re-tweeted with added content by a user, over which the advertiser/marketer has no control;
- UGCs that are reposted by a person other than the brand

PUBLIC RELATIONS COMMUNICATIONS

The definition of Advertising and Marketing Communication was amended on 1 January 2016, and now includes consumer public relations communications.

Material produced for use in the media or by the media can be presented in a variety of formats, including video, infographics, question and answer articles, photos, audio or

online.

The following are excluded from the definition of advertising and marketing communication:

- corporate reports including corporate public affairs messages in press releases and other media statements, annual reports, statements on matters of public policy and the like
- any form of editorial content such as independent review content, editorial blog content or claims made in the context of editorial content
- corporate social responsibility (CSR) programmes

What are "corporate reports"?

Corporate reports are not covered by the Codes. This includes:

- Corporate public affairs messages in press releases and other media statements;
- Annual reports; and
- Statements on matters of public policy and the like, such as:
 - corporate or public affairs messages;
 - corporate/stakeholder websites containing corporate material including corporate social media or career sites;
 - internal company communication, sustainability reports, investor documents;
 - submissions, position statements, comments on policy issues; and
 - direct communications to audiences in their capacity as commercial stakeholders of the company.

Consumer public relations material, as distinct from corporate reports, that is reproduced as public facing content (e.g. a press release posted on a brand's consumer facing website) would be covered by the Codes because the brand owner has retained a reasonable degree of control over the material and it was used in a manner intended to directly promote a product or service. Note this inclusion does not apply to material published for other purposes, such as investor relations or regulatory affairs.

Where brand owners have provided material for their employees to promote a product or service via social media or similar, the material would be covered by the Codes if that material is reproduced substantially unaltered.

Do the Codes apply to editorial content?

Editorial content such as independent review content, editorial blog content or claims made in the context of editorial content is excluded from the Codes. For example:

- Material that is produced by a brand owner for the purpose of direct reproduction as content and which is not subject to editorial discretion/control would be covered by the Codes.
- Consumer public relations material that is provided directly by a brand owner (or their agent) to journalists for editorial consideration and interpretation would not be covered by the Codes as the brand owner does not have a reasonable

degree of control over the final content. Further, the interaction between the parties is already well-governed by the respective professions' codes of conduct and ethics. Complaints about any resulting editorial content or news reports should be directed to the Australian Press Council or relevant regulatory authority e.g. Australian Communications and Media Authority.

- Where a brand owner has a relationship with a reviewer, blogger, tweeter or similar and that relationship enables the brand owner to provide content for reproduction without editorial input as review, blog, tweet or similar material in order to promote a product or service, it is likely that the brand owner will have reasonable control over the content produced by that person/media outlet and it will therefore be covered by the Codes.
- Where spoken word/video or MP3 voice recordings created by or on behalf of the brand owner are used to support the promotion of a product, these materials would be covered by the Codes – the brand owner has a reasonable degree of control over the material and it was produced in a manner intended to promote a product or service.

CSR event or program would not of itself be considered a marketing communication merely because the brand name is used.

Do the Codes apply to CSR programmes?

Corporate social responsibility (CSR) programmes as such are not covered by the Codes; however, when a CSR statement appears as a claim in a commercial communication the Codes are applicable. For example:

- Where a brand owner operates a corporate CSR strategy or charitable foundation which publishes a sustainability report – this would not fall within the definition of advertising or marketing communication. However where the brand owner advertises the charitable foundation as a means of promoting the consumer brand itself, such as cause-related marketing campaign, then that material may be considered advertising or marketing communication, if the elements of the definition of advertising or marketing communication are met.
- The use of a consumer brand name in conjunction with a