



Submission to

**ACMA: Draft online content service provider rules -
Gambling promotional content provided in
conjunction with live coverage of a sporting event**

on behalf of

Australian Association of National Advertisers

May 2018

Executive summary

The AANA welcomes the opportunity to provide this submission to the ACMA consultation paper *Draft online content service provider rules – gambling promotional content provided in conjunction with live coverage of a sporting event* (“Draft Rules”).

The AANA is the peak body for advertisers and has represented national advertising for 90 years. It represents the common interests and obligations of companies across all business sectors involved in the advertising, marketing and media industry.

The AANA understands that the Draft Rules operate in certain circumstances in relation to gambling promotional content, online content services and the provision of live sport. Our comments relate solely to section 18 of the Draft Rules because this provision addresses the content of the advertising, rather than its placement.

Given that the AANA Codes, including the Wagering Advertising Code (“WAC”), apply to all advertising irrespective of the medium or platform, our overarching concern is that the Draft Rules address content issues in a different way to the system that already exists. We acknowledge that there are also state-based regulatory regimes that cover wagering advertising so that many advertisers currently operate under a range of requirements. In addition, we note that the Australian Consumer Law also applies to the advertising covered by the Draft Rules.

However, the intent of the WAC was to create a national, platform neutral set of standards that gave consumers easy access to a single complaint resolution body. In introducing content requirements for advertising in section 18, in our view the Draft Rules create further unnecessary complexity for advertisers and consumers alike.

We recommend that section 18 as written is removed and replaced by a provision that requires advertising to comply with the requirements of the AANA Codes. This is the approach that has been adopted in a range of other regulatory instruments dealing with advertising, and is a simple and effective way to ensure advertisers can more readily meet their obligations, and consequently provides protection for consumers.

AANA self-regulatory system

Introduction

The AANA has a strong ongoing commitment to self-regulation. The AANA designed and delivered the self-regulatory component of regulation controlling advertising and marketing communication in Australia.

The AANA’s self-regulatory system applies to all media and virtually all forms of advertising and marketing communication. The AANA protects the rights of consumers by helping to ensure advertising and marketing communication is conducted responsibly, including through its development and administration of industry codes and the overall self-regulatory system.

The AANA system of self-regulation sits alongside and complements systems of regulation, co-regulation and sector-specific self-regulation. It provides a flexible mechanism to meet the challenges of the ever-evolving advertising, marketing and media industry, along with changing community expectations.

The self-regulatory system, including complaints handling, operates at no cost to the consumer or to government. The AANA is funded by membership fees. Funding of Ad Standards and its secretariat

support of the Ad Standards Community Panel and Ad Standards Industry Jury is provided through a voluntary levy on advertising spend.

Codes and complaints

The AANA self-regulatory system provides Codes that reflect community standards in relation to advertising. They are developed and have evolved with public and industry consultation. The Codes are technology and platform neutral, providing a uniform set of self-regulatory standards that apply to all advertisers, regardless of AANA membership.

The Code of Ethics is the cornerstone of the advertising self-regulatory system and is supplemented by a Children's Advertising Code, a Food & Beverages Advertising Code, an Environmental Claims Code and the WAC.

In maintaining the AANA self-regulatory system, and continuing to evolve the codes, the AANA reflects brand owners' intent to continue to meet the community's expectations for ethical standards in advertising and marketing communication.

Complaints about advertising are directed to Ad Standards, which administers the operation of the independent adjudicators who comprise the Ad Standards Community Panel¹. The platform neutral self-regulatory model provides for Ad Standards to receive all complaints without the consumer having to consider the medium/platform, or location, in which the relevant advertisement appeared.

Brand owners who are found in breach of the standards are required to remove or amend the relevant marketing material, irrespective of the medium/platform. The resulting commercial consequences of breaching the Codes include the direct and indirect costs of withdrawing an advertisement and the reputational cost when a non-compliance decision is made public, including possible adverse media coverage.

The compliance rate with Ad Standards Community Panel determinations is currently 98 per cent as an overall average during its history.

Wagering Advertising

Code of Ethics

The Code of Ethics applies to all advertising regardless of the product or service being promoted. Under the Code of Ethics, wagering advertising is assessed against requirements in relation to:

- discrimination and vilification;
- exploitative or degrading content;
- depictions of violence;
- use of offensive language;
- treatment of sex and nudity; and
- behaviour relating to health and safety.

Wagering advertising continues to be subject to the Code of Ethics, however in addition, the new WAC now applies.

¹ <https://adstandards.com.au/about>

Wagering Advertising Code

The WAC came into effect on 1 July 2016. It was developed following a consultation process and drawing on input from the wagering sector, governmental organisations and regulators, submissions and comment by consumer advocacy groups and academics. The aim is to help ensure that advertisers and marketers continue to develop and maintain a high standard of social responsibility in the advertising and marketing of wagering products in Australia and contribute to existing harm-minimisation measures.

The WAC provides a range of protections for the community, including requirements that wagering advertising must not:

- be directed primarily to minors;
- portray people under the age of 25, unless in an incidental role;
- portray or encourage the consumption of alcohol in combination with wagering;
- state or imply a promise of winning;
- state or imply a link between wagering and sexual success or enhanced attractiveness;
- portray or encourage wagering as a means of relieving financial difficulties;
- portray or encourage excessive participation;
- portray or encourage peer pressure to wager or disparage abstention.

It applies to advertising in relation to wagering products and services by licensed Australian operators and complements existing Federal, state and territory legislation.

The WAC provides a robust self-regulatory framework for advertising and marketing communication of wagering services using any medium. It applies to betting on thoroughbred, harness and greyhound racing, sporting and other events. The key benefits of the WAC are that:

1. it applies to advertising by licensed operators, regardless of membership of the AANA;
2. it applies to all media in the same way, including out-of-home advertising as well as online and social media advertising;
3. consumers who wish to make a complaint can do so via Ad Standards, regardless of the media in which the advertising appeared or the jurisdiction in which the operator is registered;
4. a single complaint is sufficient to initiate the complaints handling process and determinations by the Ad Standards' Community Panel are made in a timely manner;
5. a code breach requires the advertiser to remove the advertisement from display or broadcast, which can cause considerable financial loss beyond the value of current regulatory fines;
6. all Community Panel determinations are made publicly available and advertisers in breach may be the subject of adverse publicity.

Section 18 of the Draft Rules

The AANA believes that in introducing content requirements for advertising in section 18, the Draft Rules create further complexity for advertisers and consumers alike. We recommend that section 18 as written is removed and replaced by a provision that requires advertising to comply with the requirements of the AANA Codes. This is the approach that has been adopted in a range of other instruments dealing with advertising, for example, the Commercial Television Industry Code of Practice, and is a simple and effective way to ensure advertisers can more readily meet their obligations, and consequently provide protection for consumers.

If section 18 is to be retained in its current form, we make the following observations in relation to each provision.

Interaction with the Wagering Advertising Code

Section 18 provides that, in the applicable circumstances, gambling promotional content must not:

- (a) *be directed to children;*
- (b) *portray children as participating in betting or gambling;*
- (c) *portray betting or gambling as a family activity;*
- (d) *make exaggerated claims;*
- (e) *promote betting or gambling as a way to success or achievement;*
- (f) *associate betting or gambling with alcohol; or*
- (g) *mislead the audience.*

Section 18 (1)(a) is discussed further below, but at the outset the AANA questions why a similar, yet different, list of prohibitions has been adopted, compared to the WAC. The AANA understands that the Draft Rules may apply more broadly than to licensed wagering operators, to whom the WAC applies. However, those operators will need to comply with both the code and the Draft Rules, and different standards will make compliance more difficult. In contrast, the WAC applies in a platform neutral manner, on the basis that members of the community expect the same standards in advertising, regardless of the media used.

To ensure that advertisers can more readily meet their obligations, it would make sense to mirror the obligations of the WAC, rather than to express them slightly differently in the Draft Rules. Different wording will create uncertainty in interpreting the Draft Rules and consequently will make it more difficult for the development of promotional material that can be used across multiple platforms. It may also lead to confusion among consumers regarding the basis on which they can make a complaint.

Section 18(1)(a)

Section 18 of the Draft Rules uses the term “directed to children”. The AANA has two concerns in relation to this term.

Firstly, there is concern regarding the use of the word “children”. In contrast, the WAC uses the word “minor”. The term “child” is defined in the Draft Rules as “an individual who has not reached 18 years of age”. The WAC defines “minor” as “a person under 18 years of age”. Whilst the outcome is the same, the AANA recommends using the term ‘minor’ for consistency, and to ensure there is no confusion with other industry and regulatory standards, such as the Children’s Television Standards, which defines a child as someone under 14 years of age.

Secondly, the use of term “directed” is at odds with the WAC which states that advertising of wagering products must not be “directed primarily” to minors. The AANA recommends that the term ‘directed primarily’ is used to ensure consistency.

The term ‘directed primarily’ recognises that particular types of advertising engage and resonate with children in such a way as to bring about a response, reaction and action. It is only these advertisements which should be the subject to the additional restrictions - section 18 should not apply to advertising which is directed at adults, or advertising that may be seen by minors, but is not directed primarily to them. Similar concepts exist in the Commercial Television Industry Code of Practice and the ABAC Responsible Marketing Code.

The AANA Practice Note² in relation to this term provides:

Whether an advertisement or marketing communication is “directed primarily to minors” is an objective test based on a range of factors. It is a combination of visual techniques and age of characters and actors which will mean the marketing communication is directed primarily to minors.

It goes on to incorporate by reference the factors used in the AANA Children’s Advertising Code to determine whether advertising is directed primarily to a particular age group. These include:

- the theme of the marketing communication
- whether it is told through a minor’s perspective
- the storyline of the ad
- the visuals used
- the complexity of the language used
- age of actors and characters
- whether the call to action is directed to minors.

The term ‘directed primarily’ and the associated methodology for making a determination has been in use for a great number of years and, with respect to wagering advertising specifically, almost two years. The AANA believes that greater consistency will lead to a greater understanding of the requirements of the Draft Rules, and consequently compliance by advertisers.

We recommend section 18(1)(a) reads “be directed primarily to minors”.

Sections 18(1)(b) and (c)

In addition to our comments in relation to the use of the term “children”, we note the inconsistency between these provisions and sections 2.2 and 2.3 of the WAC which state:

2.2 Advertising or Marketing Communication for a Wagering Product or Service must not depict a person who is a Minor unless the person is shown in an incidental role in a natural situation and where there is no implication they will engage in wagering activities.

2.3 Advertising or Marketing Communication for a Wagering Product or Service must not depict a person aged 18-24 years old engaged in wagering activities.

Under the WAC, as a general rule, advertising should not depict a person who is a minor. However the depiction of minors is permissible provided they are shown in an incidental role in a natural situation (for example, in a group of spectators or accompanied by an adult and socialising responsibly in areas which are not restricted to adults). Another example could be where a licensed operator sponsors a sporting team which includes a minor, or other event or sport in which minors are engaged, the licensed operator may depict the team, event or sport in advertising where the minor is shown in an incidental role and there is no implication the minor will engage in wagering activities.

Section 18(1)(b) operates to essentially permit minors in wagering advertising, provided they are not participating in betting or gambling. This is in contrast to section 2.2 of the WAC which prohibits minors appearing in wagering advertising unless they are shown in an incidental role. The impact is that the Draft Rules are not as strict in their application to online content services, creating an imbalance in the restrictions that apply to different media.

² <http://aana.com.au/content/uploads/2018/03/180316-Code-of-Advertising-Marketing-Communications-to-Children-Practice-Note.pdf>

Conversely, section 18(1)(c) creates an additional requirement for online content services in that advertising cannot portray betting or gambling as a “family activity”. No guidance is given as to what the term “family activity” encompasses – presumably it is directed to showing a family that includes children, as there could be no objection to depicting family members who are all over the age of 18 engaging in wagering together as an activity, for example while attending a day at the races. However, this is not clear, as no reference is made to children/minors. Aside from the section being ambiguous, it again creates an imbalance in the restrictions that apply to different media.

For consistency, the AANA recommends that instead of sections 18(1)(b) and (c), the wording of section 2.2 of the WAC be adopted. The guidance the AANA provides could also be used in an explanatory note so that it is clear that “families” can be depicted, provided that any minors are shown in an incidental role, accompanied by an adult and socialising responsibly in areas which are not restricted to adults.

We note that section 18(1)(b) is also at odds with section 2.3 of the WAC. The impact of section 2.3 is that, while wagering is legally restricted to persons 18 years and over, individuals aged 18-24 appearing in advertising cannot be depicted engaging in wagering activities. The higher age restriction is to avoid the possibility that an individual in advertising material may appear to be under 18 years of age, even though they are aged over 18 years. This leads to another situation where the Draft Rules are not as strict in their application to online content services, creating an imbalance in the restrictions that apply to different media.

For consistency, the AANA recommends that wording equivalent to section 2.3 also be adopted.

Sections 18(1)(d) and (g)

Sections 18(1)(d) and (g) state gambling promotional content must not make exaggerated claims or mislead the audience. The AANA notes that the *Australian Consumer Law* (“ACL”) would apply to the advertising covered by the Draft Rules so that advertising that is misleading or deceptive, or likely to mislead or deceive, is already prohibited. In addition, there exists a regulatory body to which consumers should complain about advertising that may fall within this category. The WAC does not address misleading advertising for this reason.

Also, the Draft Rules seek to introduce vague and overlapping provisions to apply to gambling promotional content provided by online content services. This further delineates the regulation that applies to particular media in lieu of adopting, where possible, a platform neutral approach.

We note that no guidance is given as to what may constitute an “exaggerated claim” under section 18(1)(d), or whether a claim would need to be shown to be misleading or likely to mislead.

Similarly, there is no guidance as to whether gambling promotional content that is likely to mislead would also be included under section 18(1)(g), as under the ACL, or whether in fact someone must be misled for the provision to be enlivened.

The AANA recommends that sections 18(1)(d) and (g) be removed, as they are unnecessary given the operation of the ACL. If they are retained, the AANA recommends that only one, clearer, provision is used, so that advertisers can have a better understanding of their obligations.

Section 18(1)(e)

Section 18(1)(e) states gambling promotional content must not promote betting or gambling ‘as a way to success or achievement’.

The AANA believes this provision is vague as it is not clear in what context the success or achievement cannot be linked to betting or gambling; whether the provision goes so far as to prohibit the depiction of success or achievement in betting, for example, on the winner of the Melbourne Cup, as part of the advertising.

In contrast, sections 2.5, 2.6 and 2.7 of the WAC clearly stipulate that wagering advertising must not:

- state or imply a promise of winning;
- portray, condone or encourage participation in wagering activities as a means of relieving a person’s financial or personal difficulties; or
- state or imply a link between wagering and sexual success or enhanced attractiveness.

These provisions combined, adequately address the issues associated with linking advertising with “success or achievement”. In particular, the guidance to section 2.7 provides:

Licensed operators should also take care when characters in advertising are treated with admiration as a result of their wagering to avoid creating a link between wagering and enhanced attractiveness. Similarly, references to fame, being special or being a VIP should be treated carefully. For example, portraying the transformation of characters’ appearance after wagering can create an implication that wagering could result in enhanced attractiveness and an improvement in self-image, which may breach the Code.

The AANA recommends that section 18(1)(e) be removed, given the issue is already covered by the WAC. If necessary, the Draft Rules could include wording equivalent to sections 2.5, 2.6 and 2.7.

Section 18(1)(f)

Section 18(1)(f) states gambling promotional content must not associate betting or gambling with alcohol. In contrast, the section 2.4 of the WAC provides that wagering advertising must not portray, condone or encourage wagering in combination with the consumption of alcohol.

The wording of section 2.4 was developed following consultation in relation to the proposed WAC and much of the feedback related to the wording in relation to betting and alcohol. In essence the concern was that the term ‘associate’ is broad in meaning and a prohibition on ‘associating’ betting with alcohol could in effect ban advertising by wagering operators of betting available on particular races. For example, Melbourne Cup Day 2017 featured Race 8, the *James Boag’s Premium Stakes* – section 18(1)(f) could operate to prohibit a wagering operator from promoting odds or betting on this race as it could be considered associating betting with alcohol.

For this reason, the wording of section 2.4 was particularly chosen to avoid the harm that promoting wagering *in combination* with the consumption of alcohol may cause, without preventing advertising that legitimately featured both betting and references to alcohol. The guidance for section 2.4 is clear the provision refers to the combination of the consumption of alcohol and wagering, for example, by depicting a person drinking alcohol while placing a bet. The following examples would not, in and of themselves, be in breach:

- advertising a joint promotion between a licensed operator and an alcoholic beverage brand;
- advertising an event or a race on which wagers could be made, where there is sponsorship by an alcoholic beverage brand; or
- advertising depicting the consumption of alcohol at a venue where wagering may take place.

If not removed entirely, for consistency, the AANA recommends that wording equivalent to section 2.4 of the WAC be adopted.