



Submission to

Department of Health, Therapeutic Goods Administration

**Consultation: Draft Therapeutic Goods Advertising Code 2018
and associated Guidelines**

on behalf of

Australian Association of National Advertisers

April 2018

Introduction

The AANA welcomes the review and appreciates the opportunity to provide this submission to the Therapeutic Goods Advertising Code (“TGA Code”).

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 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.

AANA self-regulatory system

Background

Self-regulation is an essential part of the Australian business landscape and contemporary society. The current self-regulatory system for advertising and marketing communication in Australia was established by the AANA in 1997. Its establishment was due to advertisers’ recognition that they have a responsibility to deliver marketing that is aligned to community standards and expectations.

The AANA system of self-regulation sits alongside and complements systems of regulation, co-regulation and 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.

Codes

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 a Wagering Advertising Code.

The system is recognised and endorsed through inclusion in other self and co-regulatory systems, and all major media owners have agreed to support the decisions of the Ad Standards Community Panel.

Complaints

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, or location, in which the relevant advertisement appeared.

¹ <https://adstandards.com.au/about>

Therapeutic Goods Advertising Code

Application of AANA Code of Ethics

The object of the AANA Code of Ethics (“AANA Code”) is to ensure that advertisements and other forms of marketing communications are legal, decent, honest and truthful and that they have been prepared with a sense of obligation to the consumer and society and a sense of fairness and responsibility to competitors. The AANA Code stipulates ethical standards, underpinned by prevailing community standards, in relation to discrimination, language, violence, sexual appeal, sexuality, nudity, health and safety, and also addresses distinguishable advertising.

The AANA Code applies to most forms of advertising and marketing communication in any medium. As such it applies to therapeutic goods advertising in addition to the TGA Code. We recommend reference is made to the AANA Code within the TGA Code so that advertisers are aware that the requirements of both codes must be met. This is done by other industry specific codes such as the Commercial Television Industry Code of Practice and the ABAC Responsible Marketing Code.

Application of the TGA Code

Section 6(5) of the TGA Code states it will apply to:

any person who:

- (a) advertises, by any means, therapeutic goods; or*
- (b) causes the advertising, by any means, of therapeutic goods.*

The AANA believes this provision is too broad and that responsibility for advertising material should rest with the advertiser. Under the AANA Codes, advertising is defined as:

- *any material which is published or broadcast using any medium or any activity which is undertaken by, or on behalf of an advertiser or marketer, over which the advertiser or marketer has a reasonable degree of control; and*
- *that 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.*

This definition uses the concept of ‘reasonable degree of control’ over the advertising material – it is in this category that responsibility for advertising should lie, rather than other people or organisations who may participate in the chain of advertising distribution (such as the pharmacy owner example given in the guidance material).

We note this provision was to be introduced to provide greater clarity, however, in seeking to apply the TGA Code beyond advertisers, we believe clarity of responsibility may be reduced.

Advertising to children

Section 19 of the TGA Code addresses advertising directed to children. We note that no guidance is given as to how it will be determined whether advertising is “directed” to a certain age group.

The AANA recommends that the term “directed primarily” is used. This term 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 19 should not apply to advertising which is directed at adults, or advertising that may be seen by children, but is not directed primarily to them.

In order to align the terminology used, to assist in a greater degree of understanding of the requirements within the advertising industry, the AANA recommends reference be made to the guidance it provides with

respect to the term “directed primarily”. The AANA Practice Note² in relation to this term provides that “primarily” means “in the first instance”. Advertising which is directed to parents, adults or grocery buyers is not subject to the restrictions in the AANA Code.

The guidance goes on to consider the following factors in determining to whom the advertising is directed:

- **Theme of the marketing communication**
Advertising is directed primarily to children if it uses children’s themes and characters. Advertising which appeals to an adult using imagery reminiscent of childhood may be directed to adults and not to children.
- **Child’s perspective**
Stories told through children’s eyes and which may include reactions and expressions of the child characters are usually directed primarily to children. Advertising which tell stories from an adult perspective and include images of an adult’s reaction or expressions is unlikely to be directed primarily at children, even if children feature in the advertisement or storyline for example, featuring family settings or adults more prominently than the children.
- **The “storyline”**
Advertising which uses storylines that have a simple uncomplicated plot structure, such as “good against evil”, may be directed primarily to children. If the advertisement contains complex plot structures, it is unlikely to be directed primarily to children.
- **Visuals**
Visuals which appeal to a child’s imagination and sense of play and wonderment may be primarily directed to children.
- **Language**
Advertising which uses language which is appropriate and able to be comprehended by children is likely to be directed primarily to children whereas advertising using adult concepts and vernacular is unlikely to capture a child’s attention or engage a child.
- **Age of actors and characters**
Advertising which uses child actors or characters may be directed primarily to children, however, advertising which features children but does not otherwise use themes, visuals or language which is targeted at children may not be directed primarily to children.
- **Call to action**
Advertising which speaks to children and directs a call to action to children using language and visual techniques which are understood by children are most likely directed primarily to children. If there is a clear call to action to adults, the advertisement may not be directed primarily to children.

More detail is set out in the Practice Note document.

The AANA believes it would be useful to provide guidance as to what constitutes advertising directed to children, given the absolute prohibition on advertising to those aged under 12.

Support for other submissions

The AANA supports the submission made by Free TV Australia with respect to liability for breaches, testimonials and advertising to children.

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