LEGISLATION AND REGULATION

ADVERTISING REGULATORY GUIDE

Federal or State legislation and regulation is wide-reaching. Avoiding misleading advertising is just the beginning. Here's an overview of the key laws that impact your advertising material.

WHAT IS THE GENERAL LAW REGARDING MISLEADING OR DECEPTIVE ADVERTISING?

The Australian Competition and Consumer Commission (ACCC) is an independent Commonwealth statutory authority whose role is to enforce the Competition and Consumer Act 2010 (CCA) and a range of additional legislation. The Australian Consumer Law (ACL), which forms part of the CCA, is a national law that aims to protect consumers and ensure fair trading in Australia.

The ACL contains two fundamental rules of advertising and selling, namely:

- You must not engage in conduct that is likely to mislead or deceive
- You must not make false or misleading claims or statements

WHAT HAPPENS IF I DON'T COMPLY WITH THE ACL?

Contraventions of the ACL may attract fines and pecuniary penalties - monetary fines imposed and collected by civil courts. Penalties may apply for the following:

- Unconscionable conduct
- False or misleading conduct
- Pyramid selling
- Failure to respond to, or provide false or misleading information in response to, a substantiation notice
- Various product safety provisions

The ACCC can also issue substantiation or infringement notices, including in relation to misleading advertising, imposing a penalty without the need for going to court. The penalty for an infringement notice is usually $10,200 per infringement for a corporation. You can read more about substantiation and infringement notices here.

The maximum penalty for false or misleading and unconscionable conduct, pyramid selling and breaches of relevant product safety provisions is $1.1m for corporations and $220,000 for individuals.

PRODUCT?

The Australian Securities and Investments Commission (ASIC) an independent Commonwealth Government body, is Australia's corporate, markets and financial services regulator and has the power to protect consumers against misleading or deceptive and unconscionable conduct affecting all financial products and services, including credit. ASIC carries out most of its work under the Corporations Act 2001.

In the *Regulatory Guide 234: Advertising financial products and services (including credit),* ASIC provides good practice guidance for advertisers, promoters and publishers of financial products in all mediums to help them comply with their legal obligations to not engage in misleading or deceptive conduct. The Guidance draws attention to accuracy and transparency in the following areas when advertising:

- Returns, features, benefits and risks
- Warnings, disclaimers, qualifications and fine print
- Fees and costs
- Comparisons
- Past performance and forecasts
- Use of certain terms and phrases
- Target audience
- Consistency with disclosure documents
- Photographs, diagrams, images and examples
- Nature and scope of financial advice and credit assistance

You can access the Guideline here.

WHAT HAPPENS IF I DON'T COMPLY WITH ASIC'S REGULATIONS?

ASIC has a range of powers, including: (a) information gathering powers, such as issuing a substantiation notice; (b) issuing a stop order or seeking an injunction to stop continued advertising or to stop an associated disclosure document; (c) issuing a public warning notice; and (d) cancelling a promoter's AFS licence or credit licence, or varying its conditions. ASIC can also issue an infringement notice where it has reasonable grounds to believe a person has contravened certain consumer protection laws.

AM I ADVERTISING A FINANCIAL

AM I ADVERTISING A THERAPEUTIC GOOD?

The Therapeutic Goods Administration (TGA) is part of the Australian Government Department of Health, and is responsible for regulating therapeutic goods (via the Therapeutic Goods Act 1989) including prescription medicines, vaccines, sunscreens, vitamins and minerals, medical devices, blood and blood products. Almost any product for which therapeutic claims are made must be entered in the Australian Register of Therapeutic Goods (ARTG) before it can be supplied in Australia.

Manufacturers and importers of products need to know whether the products are regulated as therapeutic goods or as food because different regulatory requirements apply.

Products that are classed as therapeutic goods (this includes medicines) are regulated by the TGA at a federal level while foods (including many that make health claims) are predominantly regulated by state and territory food regulatory bodies.

There is an integrated three-tier system of controls for the advertising of therapeutic goods in Australia. The Therapeutic Goods Advertising Code (TGAC) provides the standard for all advertising that is directed to consumers. In addition, there are industry codes of practice. The TGA has overall responsibility for the successful operation of the co and self-regulatory systems and for achieving compliance with outcomes of determinations.

WHAT HAPPENS IF I DON'T COMPLY WITH TGAC?

In a co-regulatory approach, the Complaints Resolution Panel (CRP) receives, considers and determines complaints about advertisements directed to consumers in TV, radio, the internet, newspapers, magazines, displays (except inside individual shops) and cinematographic film. Industry complaints panels in each sector (Medicines Australia - prescription medicines; Australian Self-Medication Industry (ASMI) OTC/complementary medicines; Complementary Healthcare Council (CHC) complementary medicines; Medical Industry Association of Australia (MIAA) medical devices) address complaints about advertisements directed to consumers in all other media (e.g. leaflets, brochures, catalogues, shelf talkers) and complaints about advertisements directed to healthcare professionals.

AM I SENDING COMMERCIAL ELECTRONIC MESSAGES?

The Spam Act, administrated by the ACMA, regulates electronic message which are commercial in nature, for instance, selling or advertising goods or services, or directing the recipient to a location where goods and services are sold or advertised. Electronic messages are messages sent by:

- Email
- Short message service (SMS or text messages)
- Multimedia message service (MMS)
- Instant messaging (IM)

Electronic messages do not cover facsimile or normal voice-to-voice communication by telephone.

To avoid creating a Spam message when sending commercial electronic messages, follow the three key steps:

- **Consent** - Only send commercial electronic messages with the addressee's consent – either express or inferred consent.
- **Identify** - Include clear and accurate information about the person or business that is responsible for sending the commercial electronic message.
- **Unsubscribe** - Ensure that a functional unsubscribe facility is included in all your commercial electronic messages. Deal with unsubscribe requests promptly.

Messages from the following organisations can be sent without consent: government bodies, registered charities, registered political parties and educational institutions (for messages sent to current and former students).

ADMA is the industry body for the data-driven marketing and advertising industry and can provide guidance for direct marketers. You can find the ADMA principles here.

WHAT HAPPENS IF I DON'T COMPLY WITH THE SPAM ACT?

The ACMA accepts complaints, reports and enquiries about spam from the Australian public. This process is managed by the Anti-spam Team (AST) and includes taking enforcement action, such as formal warnings, infringement notices, enforceable undertakings and Federal Court action. Civil penalities may also apply.

AM I CALLING OR FAXING PEOPLE TO ADVERTISE MY PRODUCT OR SERVICE?

The Do Not Call Register is managed by the ACMA. The Do Not Call Register Act 2006 makes it illegal for any non-exempt Australian or overseas telemarketer or fax marketer to contact a number listed on the register. Certain public interest organisations are still allowed to contact numbers listed on the register. Exemptions exist so these organisations and individuals can continue to provide valuable services to the community.

There are two industry standards that set the rules about when and how telemarketers, researchers, and fax marketers can contact consumers: the Telemarketing and Research Calls Industry Standard 2007 and the Fax Marketing Industry Standard 2011. The standards apply to any person or business intending to make telemarketing or research calls or send marketing faxes, including those that may be exempt from the Act (such as registered charities).

The Telemarketing and Research Calls Industry Standard establishes minimum standards in four main areas:

- The hours during which telemarketing and research calls may be made
- Information that telemarketers and researchers must provide to the people they call
- Circumstances in which telemarketers or researchers must terminate calls
- The enabling of calling line identification

WHAT HAPPENS IF I DON'T COMPLY WITH THE DO NOT CALL REGISTER ACT?

Any business or person that makes a telemarketing call or sends a marketing fax to be sent to a number on the Do Not Call Register may be in breach of the Act and could face penalties and enforceable undertakings.

AM I USING, DISCLOSING OR STORING CUSTOMER INFORMATION?

Consider the Privacy Act 1988 (Privacy Act) which regulates how personal information is handled. The Privacy Act defines personal information as: *"...information or an opinion, whether true or not, and whether recorded in a material form or not, about an identified individual, or an individual who is reasonably identifiable."*

Common examples are an individual's name, signature, address, telephone number, date of birth, medical records, bank account details and commentary or opinion about a person.

The Privacy Act includes thirteen Australian Privacy Principles, which apply to private sector organisations. The principles cover:

- The open and transparent management of personal information including having a privacy policy
- An individual having the option of transacting anonymously or using a pseudonym where practicable
- The collection of solicited personal information and receipt of unsolicited personal information including giving notice about collection
- How personal information can be used and disclosed (including overseas)
- Maintaining the quality of personal information
- Keeping personal information secure
- Right for individuals to access and correct their personal information

There are more stringent obligations on organisations/entities in relation to handling sensitive personal information such as health or criminal records.

WHAT HAPPENS IF I DON'T COMPLY WITH THE PRIVACY ACT?

Depending on the particular complaint, some possible resolutions could include:

- taking steps to address the matter, for example providing access to personal information, or amending records
- an apology
- a change to the respondent's practices or procedures
- staff training
- compensation for financial or non-financial loss
- other non-financial options, for example a complimentary subscription to a service.

In some circumstances the Privacy Commissioner may also accept an undertaking from the respondent to do, or stop doing, a specific thing so that they do not breach the Privacy Act. If the respondent fails to meet the undertaking, the Commissioner can ask for it to be enforced by a court. Where a breach of privacy is very serious, the Commissioner may seek a civil penalty.