

Not-for-profit Law  
Guide

# The laws of advertising and your community organisation

A guide for Australian community  
organisations on how to comply with the  
laws of advertising and marketing in  
Australia.

November 2016

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# Overview

# Overview

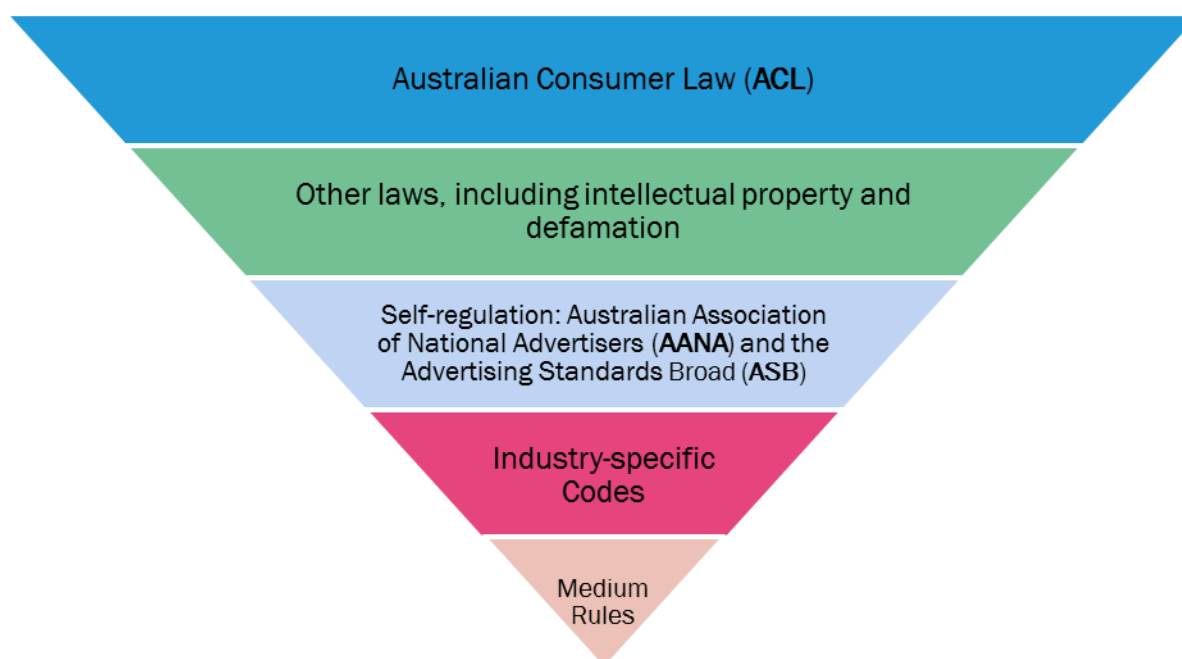
**This resource is a guide for Australian community organisations on how to comply with the laws of advertising and marketing in Australia.**

Advertising and marketing in Australia is governed by a co-regulatory system, with regulation in the Australian Consumer Law (ACL), as well as a self-regulatory system administered by representatives of the advertising industry. Community organisations are required to comply with all laws and regulations. There are some misperceptions in the not-for-profit sector that consumer laws do not apply to charities and not-for-profits. This is not true. Charities and not-for-profits should especially consider laws when they are providing goods and services, running campaigns or promotions, and in relation to fundraising activities.

Community organisations should also be aware that there are specific (extra) rules relating to communications made via some media such as television, subscription television, radio, print and online.

This guide does not cover specific fundraising laws or trade promotions laws. For more information go to our Information Hub page on Fundraising at [www.nfplaw.org.au/fundraising](http://www.nfplaw.org.au/fundraising). It does cover the way that the ACL applies to fundraising and promotions.

## The legal and regulatory framework



First, laws that regulate advertising campaigns and promotions are set out in the ACL which is in Schedule 2 of the Competition and Consumer Act 2010 (Cth) (CCA). The Australian Competition and Consumer Commission (ACCC) and state-based regulators such as Consumer Affairs Victoria and Fair and NSW Fair Trading, monitors and enforces these laws (see page 3).

Secondly, other laws such as intellectual property, privacy and defamation are often relevant to advertising and promotions. Intellectual property is discussed further below.

Thirdly, there is a self-regulatory system, administered by the Australian Association of National Advertisers (**AANA**), including a voluntary set of codes such as the AANA Code of Ethics. The codes are governed by the independent Advertising Standards Board (**ASB**), which acts on complaints made by consumers or companies. The ASB is administered by the Advertising Standards Bureau.

Fourthly, there are specific rules applying to:

- regulated industries, such as pharmaceuticals and therapeutic goods, which are subject to additional regulations, and
- different mediums of communications – for example, there are specific rules for television, subscription television, radio, print and online advertising.



# 1 - The Australian Consumer Law (ACL)

# The Australian Consumer Law

## This section covers:

- overview of the ACL
- 'trade and commerce'
- misleading and deceptive conduct
- false and misleading representations, and
- other ACL contraventions.

**The Australian Consumer Law (ACL) applies broadly and covers advertising, marketing as well as other areas.**

This Guide is focussed on the way the ACL regulates advertising and promotional conduct. There are specific provisions about quality of goods and services that are important for not-for-profits to understand. They are not covered in the guide, to find out more go to the Consumer Guarantees fact sheet on the Information Hub under Important Agreements ([www.nfplaw.org.au/agreements](http://www.nfplaw.org.au/agreements)).

The ACL has broad prohibitions against certain types of conduct, such in trade or commerce, such as conduct that is misleading or deceptive (or likely to mislead or deceive), making false or misleading representations, unconscionable conduct and harassment. The ACL therefore applies to advertising, promotions, campaigns, that are in print, multimedia, by telephone marketing and face to face.

If an organisation is suspected of being in breach of the ACL it may be investigated. If in breach a community organisation may be:

- prosecuted by the ACCC for that conduct, and a range of penalties can apply including fines
- taken to court by a person affected by the conduct, and that person can seek compensation, and/or
- required by a court order to cease or correct the conduct, including amending, removing or ceasing an advertisement.

## What activities of charities and not-for-profits are in trade and commerce?

Much of what charities and not-for-profits do is within trade and commerce, even though it may not seem like activities fit a classic understanding of trade and commerce.

"Trade and commerce" is defined widely, and includes activities that are not carried on for profit, and "professional activities".



The ACL may apply to some of your activities, and not others. You need to consider each activity of your organisation, rather than your organisation as a whole. It may be that much of what your organisation does is not covered by the ACL, but a particular bundle of activities are.

There are two main ways that activities of charities and not-for-profits are in trade and commerce:

- selling or supplying a good or a service (even on a not-for-profit basis) to a consumer, or
- through conduct that is “professional” – conduct that is sophisticated, organised in a professional way, or carried out by a professional or employee (eg a professional fundraiser, counsellor, lawyer, accountant).

For some activities, it can be difficult to assess whether or not the activity is in trade or commerce. Where this is the case, the safest approach is to assume that the ACL does apply, and conduct activities in line with ACL requirements.

Of particular note is that many fundraising activities are considered to be in trade and commerce, especially where they are carried out by employees, third party contractors, or by volunteers as part of a highly organised sophisticated fundraising campaign. You can read more about fundraising and the ACL at <http://www.justiceconnect.org.au/fundraisingfaq>.

### What is not considered to be conduct in trade or commerce?

Some examples of conduct found not to be in trade or commerce are below. However, conduct and representations must always be considered on a case by case basis, and these examples may not always be applicable in similar cases.

#### EXAMPLE

Examples of business or professional activities that have not been considered conduct in trade and commerce include:

- the provision of free public welfare services in a manner that is as an extension of government
- representations made by the Royal Society for the Prevention of Cruelty to Animals relating to dog collars manufactured by a person
- a report issued by a professor on Aboriginal cultural issues that would be affected by the construction of a bridge to Hindmarsh Island in South Australia
- an organisation gratuitously supplying blood to a patient (this finding is quite old and there is some doubt about whether this finding would be made again)
- information given by an employee of a company to another of the same company
- statements made in a public lecture by an academic who was not paid for the lecture, and
- claims made on a website that remained live after a business had ceased to trade.

### What is conduct that the ACL applies to?

Conduct is a very broad term, and can include:

- oral conversations
- written statements (eg in letters, advertisements or brochures or on social media),
- actions (eg body language, displaying or distributing brochures, selling goods or services)
- inferences

- failing to disclose information
- refusing to do something, or
- a combination of these.

The ACL prohibitions apply to any conduct in trade or commerce, whether that type of conduct is a usual part of your organisation's activities, or only occasional. If a particular communication or activity is in trade or commerce, you should consider whether it may contravene a provision of the ACL.

## EXAMPLES

Examples of business or professional activities that may be conduct in trade and commerce include:

- sale or exchange of goods or services
- publishing advertisements while fundraising for a cause
- making statements during public presentations such as exhibiting films
- displaying promotional brochures in the foyer of your organisation, and
- comments on social media and blogs such as Facebook, Twitter, Tumblr and others.

## When is conduct misleading or deceptive?

Section 18 of the ACL prohibits misleading and deceptive conduct. Conduct could be misleading or deceptive or likely to mislead or deceive if a reasonable person to whom the conduct is directed may interpret the conduct in a way that:

- leads that person to believe something that is false
- misleads the person about a fact, or
- leads a person into error.

The intention of the person or organisation making representations is generally not relevant – you can be liable for misleading or deceptive conduct, even if you did not intend to mislead or deceive.

Whether conduct is misleading or deceptive is a matter of an overall impression created (eg. by looking at an advertisement as a whole, not just a particular statement in the advertisement, or taking into account all statements said and not said in face-to-face interactions).

## REMEMBER

An advertisement may be misleading or deceptive where:

- the words or phrases used in the advertisement may have more than one meaning, and in the context, it is unclear which meaning is intended,
- there is wording included that alters the general thrust of an advertisement, e.g. "70% off all stock" sale appears in large font – but there is small print at the bottom of the advertisement stating "conditions apply", with an exclusion, or
- when a person skims over the advertisement, they may miss vital information about the product or service, and may therefore be lead to believe a particular quality about the product or service which is not true. This includes where misleading photographs and drawings correspond with the product or service being advertised.

It is important to consider the following:

- Who is the intended target audience?
- What are the characteristics of those in the target audience (eg what knowledge do they presumably have)?
- Will others outside of the intended audience will be able to view and potentially act on the information?
- What impression might the advertisement have on a “reasonable person” in that audience?

## EXAMPLE

A community organisation is looking to lease its property. A third party wishes to set up a community day care centre and are looking for a long term lease in an area away from major roads to ensure the safety of the children, and communicate this to the community organisation. The community organisation is aware that the local council is considering developing the road alongside the property into a busy highway within the next 18 months, but does not inform the third party, who then goes ahead with a 10-year lease. This is potentially a situation of misleading and deceptive conduct because the community organisation may have a legal obligation to disclose the relevant information.



### Steps to avoid misleading or deceptive conduct:

- ☐ Use clear and unambiguous language. All terms used should have clear meanings and be clearly stated.
- ☐ Only use factual information to promote a product or service, or fundraising campaign which allows consumers to make an informed decision about those products or services or making a donation to your campaign.

## Examples of types of misleading or deceptive conduct

### 1. Silence or failure to disclose information

Advertising and marketing may also be misleading or deceptive if:

- the advertiser knows information that will affect a particular decision, there is a reasonable expectation that the relevant fact would be disclosed if it existed, and the advertiser fails to disclose part or all of such information to the decision-maker, or
- the advertiser knows that information initially provided to the consumer is now incorrect but does not inform the consumer.

### 2. Predictions about the future, promises and statements of opinion

In some circumstances, statements (or suggestions by behaviour) about future acts or events that do not turn out to be true may be misleading or deceptive. Mere opinions (as opposed to statements of fact) will generally not be misleading, but predictions, promises or opinions may be misleading or deceptive if:

- there is an implied representation of present fact, and this fact is not true

- the person making the statement knew it was false (or did not care whether it was true or false) at the time it was made
- some qualification should have been added to the statement, but was not
- the person making the statement represented that they were capable of performing the promise or ensuring that the prediction came true, or
- the person making the statement had no reasonable grounds for making it (for example making predictions or giving advice where the person is not qualified to do so).

#### EXAMPLE

A community organisation that runs after-school art classes is told by the art supply company that the price of supplies is about to increase by 10%. The organisation consequently raises tuition fees, explaining to parents the reason for the increase is the higher cost of art supplies. The supply company later decides to keep supplies at the same price and parents have already paid the higher art classes fee. The art school had reasonable grounds to believe that the prices were going to increase because they had been told so by the art supply company and therefore is not likely to have engaged in misleading or deceptive conduct.



#### EXAMPLE

A charity runs a fundraising campaign and says all funds raised will go to a particular initiative. The charity intends to use the funds across whole organisation, and has no systems in place to ensure that funds raised will be directed to the program. This is misleading and deceptive.



### 3. Acceptable exaggerations (also known as puffs or puffery)

Puffs are widely used in advertising and are obvious exaggerations or fanciful claims that no one could possibly treat seriously and are unlikely to mislead or deceive. If a person is likely to answer “yes” to any of the following questions about a specific claim, that claim may be mere puffery, and therefore not be considered as misleading or deceptive:

- was the claim very general and of a subjective nature?
- was the claim of an introductory nature designed to attract attention?

#### EXAMPLES

Courts have found that use of the words such as “best ever” or “all your dreams will come true” are puffery and not misleading or deceptive.

An example of a statement that was not puffery was a claim that a battery was the “world’s longest lasting battery in high powered devices”, which was found to be significant and an unambiguous statement of fact.



### 4. Confusion and uncertainty

#### ! CAUTION

Take care with labelling goods and services: confusing or uncertain packaging, markings and labelling may lead

Conduct that has caused confusion or uncertainty may in some circumstances be misleading or deceptive under the ACL. For this to be the case, there must be something in the conduct that is capable of leading someone into error.

consumers into error and be misleading or deceptive under the ACL.

If conduct that causes confusion or uncertainty is held to be misleading or deceptive, giving an appropriate explanation may prevent misleading or deceptive conduct in the future, but may not prevent liability for misleading or deceptive conduct that occurred before the explanation.

#### EXAMPLES

- promoting products similar to products that are available from other companies is not misleading or deceptive, even if the audience might wonder whether the two products came from the same source, but
- where a product is packaged in a form similar to another product, this may create a false impression, so that a person will deal with the seller where he or she may not have otherwise done so. This may constitute misleading or deceptive conduct.



## 5. Statements which are literally true

Statements which are literally true may nevertheless be misleading or deceptive because the statement conveys to the audience something different to the literal meaning.

#### EXAMPLES

- It would be misleading or deceptive to sell raffle tickets where the prize is 'a day at the tennis watching Pete Sampras', where the player is an unknown person bearing the name of the famous tennis player. The fact that a person could enquire about the identity of the tennis player is irrelevant.
- A document that contains a potentially misleading statement which is corrected somewhere else in the document may be misleading or deceptive if there is nothing which adequately draws the reader's attention to the correction.



## 6. Disclaimers

Disclaimers are often used by advertisers to qualify statements or provide additional explanation. Often, there will be an attention-grabbing statement made to the audience and the disclaimer will contain further information to counter any confusion and erase whatever is misleading in the conduct. To be effective, disclaimers must be clear, prominent, unambiguous and clearly brought to the attention of the audience. Disclaimers should be as visible and close to the claim it seeks to qualify or explain. Use of an asterisk to refer the reader to terms and conditions not part of the document may be permitted, provided the asterisk is also prominent and close to the statement it seeks to qualify or explain. Consumers cannot be expected to exhaustively search for exclusion. For example, a link to a website containing further information may not be enough.

Community organisations must be careful when running advertising campaigns with disclaimers across different media. For example, television and radio advertisements are transient and the audience's attention may be divided (i.e. a person may be cooking and watching television or driving and listening to the radio) unlike print, where the audience will have more time to examine a disclaimer.

## EXAMPLES WHERE DISCLAIMER ARE USED



- a community organisation advertises a charity dinner at which it will give diners a free entrée (but the free entrée is limited to only some options on the menu), and
- a community organisation that runs a pet enclosure for abandoned animals advertises that it will wash your pet for free on Saturday (but the free pet wash is limited to small dogs only).

## 7. Comparative advertising

Statements may be made comparing two similar products or services and promoting the superior quality or lower cost of one product or service. These types of comparisons are carefully examined by the ACCC and the courts. When using this method particular care must be taken to ensure that:

- the comparisons are factually accurate
- the comparisons remain valid for the life of the campaign (in particular when making price comparisons)
- where comparisons are based on price, the product or service must logically be capable of such comparison. A statement may be misleading if your product is cheaper but also has fewer benefits or features
- where comparisons are based on quality or capability, the product or service must be accurately compared, and
- products are clearly identified and accurately describe.

### EXAMPLE



An advertisement compared two tanning/moisturiser products and claimed that 7 out of 10 users preferred one product over the other product. The market research asked women to express a general preference: "Which product did you prefer?" The advertisement centred on the tanning attributes of the product (and not on other attributes such as moisturising capacity, fragrance, packaging or branding).

The Court found that the advertisement was misleading and deceptive for a number of reasons:

- results of the survey could not support a representation that 7 out of 10 users preferred one product over the other for its tanning attributes, as a general preference was requested
- the advertisement depicted women of all ages however the study only surveyed women between 25 and 45 years of age, and
- there were two variants of each product, a light tan and dark tan variant, however only one was used in the market research. This detail was not disclosed in the advertisement. The Court found this led the audience to believe that the 7 out of 10 preference applied to both products, which was not established by the study.

## 8. Passing Off

Advertising that uses another organisation's name, trademark or even colours in a way that misleads consumers into believing there is some link between the organisations or their products may be misleading or deceptive under the ACL, and may also constitute "passing off". This may include, for example, copying another organisation's packaging or product name. Such conduct may also breach intellectual property laws (see section 4 of this guide).

## 9. Misleading conduct as to the nature of goods and services

In addition to the general prohibition on misleading or deceptive conduct, there is a further prohibition under the ACL for conduct in trade or commerce that is liable to mislead the public as to the nature, manufacturing process, characteristics, suitability for purpose or quantity of any goods or services. Breach of this prohibition can result in very substantial fines.

### EXAMPLES

- advertisement placed in a newspaper detailing the features and price of a particular model of motor vehicle that were incorrect
- cordial labelled in a manner suggesting that it contained fruit extracts, when it did not
- facial tissues advertised as 100% cotton even after tests showing that this was not true (fine was imposed, even though there was no evidence of injury caused to anyone), and
- fruit juice sold and labelled as 35% fruit juice, when in fact they contained not more than 17% juice.



## 10. Fundraising

Advertising and representations as part of fundraising campaigns can amount to misleading and deceptive conduct. Particular issues to look out for include:

- making representations about where funds will be directed, or who will benefit from funds raised that are not true or are only partially true
- making representations about what percentage of funds raised will be spent on program delivery. For more information on fundraising laws, see [www.nfplaw.org.au/fundraising](http://www.nfplaw.org.au/fundraising).

## False or misleading representations

Section 29 of the ACL requires that if your community organisation is supplying or offering to supply or promoting goods or services, it must ensure that representations it makes in relation to those goods or services are not “false” or “misleading”. “Representations” may be verbal or written statements, suggestions by behaviour, or a combination of both. A representation may be false or misleading even if you did not know it was false or intend it to mislead.

Very substantial fines and other penalties can be imposed for breaches of this law. If your organisation provides goods or services as part of a fundraising campaign, these provisions may apply.

The terms “false” and “misleading” have a similar meaning to “misleading or deceptive” (see discussion above). However, the prohibition against false or misleading representations relates only to the supply, possible supply or promotion of goods or services.

A false or misleading representation is made where it is communicated to another person (or organisation) and is intended to lead the recipient to believe a particular matter. It does not matter whether the representation is made to an individual (for example, in a meeting or face-to-face sales or fundraising), or to a mass audience (for example, through general advertising).

### ! CAUTION

Even if you do not know that a statement is false, you may still make a false or misleading representation. This is because “false or misleading” is judged by objective standards, not by what the person making the representation knew or intended at the time.

A representation can be made by both the person who created it and later the person who publishes it. Someone who merely publishes someone else's content (for example, publishing an advertisement in a magazine) will not be found to have made the representation unless they have "adopted" it in some way.

## Types of false or misleading representations

Section 29 of the ACL sets out that a person must not, in connection with the supply (or possible supply or promotion) of goods or services, make a false or misleading representation:

- that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use
- that services are of a particular standard, quality, value or grade
- that goods are new
- that a particular person (such as a famous athlete) has agreed to acquire goods or services
- that purports to be a testimonial
- that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits
- that the person making the representation has a sponsorship, approval or affiliation
- about the price of goods or services
- about the availability of facilities for the repair of goods or of spare parts for goods
- about the place or origin of the goods (meaning where they were produced, made or grown)
- about a consumer's need for particular goods or services
- about the existence, exclusion or effect of any condition, guarantee, warranty, right or remedy, or
- about the requirements to pay for a right that is already provided by law.

## Examples of false or misleading representations

**Style or model** is the manufacturer's or seller's generally known description of the good or service. For example, if you advertise that the winner of a raffle will win a car of a particular make and model (e.g. Volkswagen Touareg) and the winner is actually to be provided with a different make and model (e.g. Subaru Forester), then the advertisement is false and misleading.

**Standard** relates to a level of excellence or a standard in a particular industry. These standards may also be provided in codes or rules. For example, if you are running a community co-operative and you advertise that the chicken products sold at the co-operative are free range, when they are not – this would be a false representation as to the standard of the goods.

**Quality** refers to the virtues, attributes, properties or special features when compared to goods or services of a similar kind. For example, if you run a clinic and advertise that you can teach parents and carers of children to successfully cure a child's allergy, when in fact none of your treatments can achieve this result, the advertising will be a false representation.



**Composition** refers to the elements that make up a particular good. For example, if you import fair trade woollen products from South America and advertise that the products contain 70% llama wool and 30% alpaca wool when in fact the ratio is 90:10, the composition of the wool is falsely represented.

**Particular history or particular previous use** refers to the past record or relates to past incidents which the item was subjected to. For example, if you advertise that a product has been used by a prominent sports person or team when it was not, this will be a false and misleading representation.

**Services of a particular standard, quality, value or grade.** For example, if you purported to provide a free “medical clinic” and did not provide doctors but medical students who were not qualified to provide the requisite medical advice and prescriptions, this may be a false representation in relation to the standard and grade of the service.

**Goods are new** means that the relevant goods should not have been previously used.

**Testimonials** are statements from people who have previously used the particular goods or services and are commenting on their experience with such goods or services. Testimonials are often given by celebrities to promote a particular product or service, but may also be comments from ordinary consumers. If your community organisation uses testimonials, then it should ensure that they are given from persons who have actually used the particular goods or services and are commenting on their personal experience with such goods or services.

**Price of goods or services** refers to the total amount payable for the goods or services. Some examples of false or misleading representations regarding price are:

- the sale of items without including the GST price or other compulsory fee (for example, a delivery fee), or
- advertising a “was” price and “now” price in a catalogue where the product was never offered for sale at the “was” price.

**Sponsorship, approval or affiliation** requires that there is an impression of a positive link between two parties by way of sponsorship, approval or affiliation. Examples where false representations may be made include:

- making a product very similar to a competitor’s product, thus giving the impression that the second product is affiliated with the first product
- a community organisation making a representation that a particular organisation (i.e. Cancer Council Victoria) endorses its products by including their trademark symbol along with his/her charity, when it does not
- a community organisation selling another community organisation’s charity products without gaining authorisation or a licence to do so and therefore giving the impression that there has been approval from the community organisation to sell the relevant products
- representing that an organisation has government approval to sell a particular product when it does not, or
- representing that a celebrity is a patron of your charity where this is not the case.

**Place or origin** concerns a false claim that a particular good was made in a particular place (for example, in Kenya) when it had, in fact, been made elsewhere (for example, in China). If a product had different origins in terms of its design and manufacture, then the labelling should reflect this (i.e. designed in Kenya and manufactured in China). Such representation can include words, pictures or

both. The place of origin can also be falsely implied (for example, advertising “Italian Suits” that were not actually made in Italy but were of that design).

**Warranties and guarantees** refer to any written warranty or guarantee that is given by a party or may refer to warranties or guarantees that are provided under law including legislation. For example, a party may falsely represent a warranty or guarantee for a good or service if the party provides a set term warranty and then does not honour the particular warranty or guarantee as initially represented.

**Need for particular goods or services.** For example, a motor mechanic advises a motorist that their car needs the brake pads changed immediately. If it is found that the brakes pads still have plenty of mileage left, then the mechanic will have falsely represented that the vehicle needed the brake pads changed when there was no need for the service to occur.

### EXAMPLES

- a false representation that a treatment could cure cancer
- a representation that a biscuit could cause weight loss but did not do so
- a false representation about the constitution of a brand of fruit juice
- chickens or eggs represented as being free range that were not, and
- a representation that an iPad was “4G compatible” that was not.



## Unconscionable conduct

Advertising and promotional activities in trade or commerce can amount to unconscionable conduct under section 20 of the ACL where they are exploitative, unfair or unreasonable. Examples include where conduct takes advantage of bargaining power or positions, or exploits vulnerability. Face-to-face and telephone fundraisers should be especially careful to avoid unconscionable conduct as they are often engaging with people in an unsolicited environment, where they may be especially vulnerable (like in their own homes).

The law says that in many situations, charities and not-for-profits (and anyone else with activities in trade and commerce) must not take advantage of people who they know, or they ought to know, are in a vulnerable position. This type of behaviour can sometimes be called “unconscionable conduct”. In many situations, taking advantage of vulnerability is unlawful for fundraisers, groups selling goods and services. This type of conduct is also, of course, unethical.

### Taking advantage of vulnerability: the case of *Amadio*

In a famous court case (*Commercial Bank of Australia Ltd v Amadio* (1983) [151 CLR 447](#)), a guarantee (an agreement to repay a loan in certain circumstances) that was provided to the Commercial Bank of Australia by Mr and Mrs Amadio was unenforceable because the circumstances in which the guarantee was taken were ‘unconscionable’. The Amadios had limited understanding of English, did not receive independent advice about the guarantee, and did not have a proper understanding of the guarantee. It was evident to the bank that the Amadios were vulnerable, and therefore it should not have accepted the guarantee without taking extra steps to make sure the Amadios properly understood the obligation and were able to consent freely to providing the guarantee.

### Unconscionable conduct: the case of *ACCC v Lux* [2013] FCAFC 90

In another case (*ACCC v Lux*), door-to-door sales of vacuum cleaners were made using strategies aimed at gaining access to elderly people's homes by offering to undertake a 'maintenance check' of their vacuum cleaners. Tactics were then used to sell these elderly people new vacuum cleaners, including by spending significant time in their homes and running comparisons of old vacuum cleaners to new.

The use of an offer to undertake a maintenance check was viewed poorly by the court, as the real purpose of the visit was to sell vacuum cleaners. The salespeople were taking advantage of the 'subtle vulnerability' of elderly people in their homes.

### ***Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (AIPE)***

The ACCC took legal action against AIPE in March 2016 alleging that its selling techniques for vocational education training courses (TAFE courses) in face-to-face contexts were unconscionable. ACCC Chairman Rod Sims said: "We allege AIPE marketed its courses to some of the most vulnerable and disadvantaged groups in the Australian community, including consumers from low socio-economic backgrounds and consumers with intellectual disabilities."

Promoters, door-to-door sales people and fundraisers should avoid targeting people who are likely to be vulnerable – for example, face-to-face fundraising outside a drug and alcohol, mental health treatment, or aged care centre. It would not be good for a charity's reputation if it is revealed that donations are being sought from the same types of people that the charity is trying to help!

## Other types of ACL contraventions

### Bait advertising

'Bait advertising' refers to advertising goods or services for a particular price during a specified time frame, without a reasonable supply of those goods or services to meet the demand that is reasonably expected. This is prohibited under the ACL.

#### EXAMPLE

A community organisation advertises that they are having a sale on fundraising merchandise and regular greeting cards will be 90% off for one week only. Normally, the organisation sells 100 regular greeting cards per week at full price. The week of the sale, however, they have a supply of only 5 regular greeting cards. Customers are therefore told that regular greeting cards are out of stock but that they can purchase the more expensive premium greeting cards, which are readily available. This is potentially bait advertising and prohibited under the ACL.



### Offering rebates, gifts, prizes or other free items

A person must not advertise or offer a rebate, prize, gift or other free item in connection with the supply or promotion of any good or services with the intention of not actually providing one or not providing one as offered.

Any rebate, prize, gift or other free item must be supplied within the time set out in the offer, or within a reasonable time.

## Wrongly accepting payment

The ACL prohibits any organisation from accepting payment for goods or services that:

- it does not intend to supply
- are materially different to that which the organisation intends to supply, or
- will not be provided within a specified or reasonable time.

### EXAMPLE

If you accept money to publish advertisements in your next monthly newsletter, but intend not to actually publish the advertisement until a later edition.



## Unsolicited supply

It is a breach of the ACL to send consumers, in trade or commerce, unsolicited goods or provide unsolicited services and demand payment. It is also a breach to send an invoice for unsolicited goods or services without the following statement: “This is not a bill. You are not required to pay any money.” For example, your community organisation cannot send out a calendar not requested by the consumer and demand payment, or include an invoice without the required statement.

## Component pricing

Prices displayed in advertising must include the full price, including all relevant fees and charges. For example, you must not advertise prices that are exclusive of GST, or exclude any fee or charge that cannot be avoided (for example a payment processing fee). Components of a price can be advertised if the total price is also displayed as prominently as the components.

## Harassment and coercion

Section 50 of the ACL prohibits conduct that involves harassment or coercion in relation to the supply of goods or services.

## 2 - Advertising and the ASB



# Advertising and the ASB

## This section covers:

- overview of the self-regulation scheme
- AANA Code of Ethics
- other regulated industry codes, and
- complaints under codes.

In addition to complying with the ACL, the advertising industry operates a system of self-regulation. This is made up of a number of codes and initiatives that set out additional rules for advertising in Australia.

Each code is specific to the category of claims and intended audience of the advertisement. The relevant codes and initiatives are outlined in a table in the [Schedule of Advertising Codes](#).

The full text of the codes and initiatives are available from the ASB website at [adstandards.com.au/codes-and-cases/codes-and-initiatives](http://adstandards.com.au/codes-and-cases/codes-and-initiatives).

## AANA Code of Ethics

The AANA Code of Ethics (**the Code**) applies to 'Advertising or Marketing Communication', which is defined very broadly, and includes many types of advertising, such as radio and television commercials, billboards, and online content (both advertising and user generated content).

More specifically, the Code applies to all content 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, including:

- all advertising and marketing communications under the reasonable control of the advertiser (regardless of whether or not payment has been made or other valuable consideration has been involved), regardless of the mode of delivering content (including social media, and user generated content on social media)
- all advertising or marketing communications directed to consumers of the product/service who are physically present in Australia
- sponsorship announcements and community service announcements
- advertorials and infomercials, and
- user generate content communicated via a site/digital platform over which the marketer has a reasonable degree of control.

The Code does not apply to labels and packaging, or to corporate reports including press releases.

## Other regulated industry codes

Some regulated industries have their own codes which apply in addition to the AANA Codes. These include:

- Therapeutic Goods Advertising Code 2015
- ABAC Responsible Alcohol Marketing Code
- Weight Management Industry Code of Practice 2015, and
- Australia Food and Grocery Council Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry.

The Therapeutic Goods Advertising Code 2015 is administered under the *Therapeutic Goods Act 1989* (Cth). The main object of the Code is to ensure that the marketing and advertising of therapeutic goods to consumers is conducted in a manner:

- that promotes the quality use of the therapeutic goods
- is socially responsible, and
- does not mislead or deceive the consumer.

There are also a range of voluntary codes for fundraisers, which are covered in Not-for-profit Law's fundraising resources at [www.nfplaw.org.au/fundraising](http://www.nfplaw.org.au/fundraising).

## Complaints

Anyone may make a complaint about an advertiser's failure to comply with the code applicable to their advertising. Complaints are made to the ASB and must be submitted in writing. This may be done through the ASB website.

Community organisations may seek to use provocative and confronting advertising in order to draw attention to a cause. Community organisations have been the subject of complaints to the ASB regarding the justifiable use of violence, sexuality, language and community standards on health and safety.

### EXAMPLES

- A complaint was made that an advertisement where one side of a woman's face was covered in burns and sores and was accompanied with the text "This won't hurt a bit... Stop animal testing" was disturbing and unsuitable for viewing by children. The ASB upheld the complaint and the community organisation was required to remove billboards depicting the advertisement.
- A complaint was that a TV advertisement showing real footage of pigs, chickens and hens in factory farms depicted violence and cruelty to animals and may cause alarm and distress. The ASB rejected the complaint as there was no more than a suggestion of cruelty and violence.

Upon receiving a complaint, the ASB will contact the advertiser, providing details of the complaint received and identify the initial assessment. The ASB's assessment includes a consideration of the original reasons for the complaint, the advertiser's response and the codes and initiatives that apply.

The ASB will not raise a complaint with the advertiser if the complaint is a 'consistently dismissed complaint' that the ASB has determined is not a breach. A list of examples is available on the ASB website [here](#).

#### TIP

The key factor for whether a complaint is upheld or not is community perceptions of the messages in the advertisement. As community standards change over time, messages that were once considered acceptable are now viewed as inappropriate and vice versa. Be aware of this when creating or modifying an advertisement.



If a complaint about an advertisement is upheld by the ASB, the advertiser will be asked to remove or amend the advertisement as soon as possible after receiving a copy of the draft case report. Once a determination is made, the original complainant or advertiser/marketer can also ask for a review of the determination. If a complaint is upheld, the advertiser must tell the ASB, within 5 days of being notified of the ASB's decision, the steps they are taking to remove or amend the advertisement. Advertisements can be modified and re-released, provided the inappropriate aspect has been removed.

#### NOTE

The ASB cannot issue fines or take other enforcement measures under a statute. This is because the ASB and the Codes of Ethics are part of a self-regulated scheme, not created or enforced by a law of parliament. However, if an advertiser breaches a provision of a code or initiative and does not modify or discontinue the advertisement, the Board will include the advertiser/marketer's failure to respond in the case report, forward the report to the media and post it on the ASB's website, and, if appropriate, refer the case report to the appropriate government agency.







## 3 - Advertising and specific media-based Codes and rules

Special Codes and rules apply to some particular media

# Advertising and specific Codes and rules

## This section covers:

- free to air television
- subscription television, and
- radio.

**There are specific rules relating to different mediums of communications for the purposes of compliance, such as television, subscription television, radio, print and online.**

Below is a list of codes and rules that relate to the most common mediums of advertising. Your community organisation should refer to these codes and rules for guidance when advertising in these mediums.

There are also a range of voluntary codes for fundraisers, which are covered in Not-for-profit Law's fundraising resources at [www.nfplaw.org.au/fundraising](http://www.nfplaw.org.au/fundraising).

## Free to air television

A new Commercial Television Industry Code of Practice came into effect on 1 December 2015. It covers matters such as:

- program classifications
- accuracy, fairness and respect for privacy in news and current affairs
- disclosure of commercial arrangements (for example, if a factual program endorses certain products)
- advertising time on television
- scheduling and placement of commercials and programs promotions, and
- complaints.

## Subscription television

The ASTRA Codes of Practice are Codes developed under the direction of the Broadcasting Services Act 1992 and are registered with the Australian Communications Media Authority. The Codes relate to areas of subscription television such as:

- program content

- advertising
- privacy
- subscriber service obligations, and
- complaints.

## Radio

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The Commercial Radio Codes of Practice and Guidelines cover the following areas:

- programs unsuitable for broadcast
- news and current affairs programs
- advertising
- Australian music
- complaints
- interviews and talkback programs
- compliance with codes
- broadcast of emergency information
- live hosted entertainment programs
- promotion of gambling and betting odds in live sport coverage
- portrayal of indigenous Australians, and
- portrayal of mental illness.

As a condition of their broadcasters' licences, broadcasters must also comply with the Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2012. This encourages broadcasters to provide a fair and accurate coverage of matters of public interest by requiring the disclosure of commercial agreements or other arrangements that have the potential to affect the content of current affairs programs.



## 4 – Advertising, intellectual property and numbers



# Advertising, intellectual property and display of ABN and permit numbers

## This section covers:

- advertising and intellectual property
- getting releases to use photographs
- IP checklist, and
- requirements to display ABN and permit numbers.

**Community organisations should ensure that their advertisements and marketing communications do not infringe any other person or organisation's intellectual property rights.**

An intellectual property right is a right to use a particular image, audio or text, and prevent others from doing so. For example, where a person holds intellectual property rights over a photograph, they may use it themselves and prevent others from using it without their permission. The holders of intellectual property rights may allow others to use them on an exclusive or non-exclusive basis by granting permission (a licence, release or consent). Some material may be licensed for use by the public without restriction. Not all images, audio or text are subject to intellectual property rights – some are in the public domain and able to be used without any permission or restriction.

### TIP

This is only a brief introduction to intellectual property rights in advertising. For more detail, refer to the Not-for-profit Law Guide to Intellectual Property, available to download at [www.nfplaw.org.au/ip](http://www.nfplaw.org.au/ip).

Your community organisation's advertising must not contain material over which someone else holds intellectual property rights, unless you have obtained their permission to use that material. If you want to use material that someone else owns, you should obtain permission from that owner of the intellectual property, in writing.

Some examples of things that intellectual property rights may attach to include songs, song lyrics, photographs, videos, films, poems, books, or logos.

## How to obtain a release to use a photograph

A release must be in writing and is slightly different from a licence. The following are examples of the types of issues which you may wish to include in any release:

- a description of the photo
- a grant from the owner of the photo for the community organisation to use the photo,
- the publication in which the photo will be featured

- the amount to be paid for the photo (the consideration), and
- a release from the owner of the photo to the community organisation from all liability if the community organisation uses the photo in the publication.

#### INTELLECTUAL PROPERTY CHECKLIST

- ☐ Is my community organisation advertisement using material created by someone else that may be their intellectual property?
- ☐ Has someone else taken the photograph being displayed?
- ☐ Is music playing that we did not compose?
- ☐ Did someone else make the video, film or recording used?
- ☐ Are we using text from a poem or book that we did not write?

**If yes to any of the above,** is the material in the public domain – that is, able to be used by the public without restriction?

**If not able to be used without restriction,** has my community organisation obtained a licence, release or consent from the owner of the intellectual property? If no, do not use the material in your advertisement.

If your community organisation is unsure of any of the following you should refer to the Copyright, Ownership of IP, Selling and licensing IP and Moral Rights Consents sections in the Not-for-profit Law Intellectual Property Guide available at [www.nfplaw.org.au/ip](http://www.nfplaw.org.au/ip).

- ☐ Do we know if our organisation owns the intellectual property to certain materials (such as photos taken by its employees or logos created by its contractors)?
- ☐ Do we know whether our organisation has properly obtained a licence to use any third party intellectual property?
- ☐ Do we know how to acquire a licence to use third party intellectual property in its advertisements or marketing communications?
- ☐ Do we know how to acquire a moral rights consent from the author of a work?

# Displaying your Business Name and Australian Business Number in advertising

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Community organisations may be created under the state legislation or under the Commonwealth legislation (*Corporations Act 2001* (Cth) and subject to the *Charities and Not-for Profit Commission Act 2012* (Cth)).

## If your community organisation is an incorporated association under state legislation:

In general, the last word of the name of your community organisation must be “Incorporated”, as follows:

- Community Organisation Incorporated
- Community Organisation (Incorporated)
- Community Organisation Inc., or
- Community Organisation (Inc.).

Your community organisation’s name should appear in legible characters in:

- notices
- advertisements
- other official publications, and
- business documents.

Your community organisation will also have a Registration Number, and in most states and territories this should be included on:

- notices
- advertisements
- other publications, and
- business documents.

## If your community organisation is incorporated under Commonwealth legislation:

As a limited company, your community organisation’s name must include the word “Limited” unless it has been granted an exemption from the requirement.

Your community organisation’s name must be displayed:

- prominently at your registered office
- at every place where your community organisation carries on business, that is open to the public, and

- on all public documents.

Your community organisation will also have an Australian Company Number. This must be displayed, labelled as “ACN” or “Australian Company Number” on all public documents.

- If your community organisation holds an Australian Business Number, and the last 9 digits of the ABN are the same as the last 9 digits of your ACN, you only need to include your ABN in the document.

#### NOTE

There may be other requirements to display permit numbers such as lottery permit numbers in advertising. For more information go to the Not-for-profit Law page on fundraising at [www.nfplaw.org.au/fundraising](http://www.nfplaw.org.au/fundraising)







## 5 - Online and email advertising

Advertising online and through email raises particular legal issues

# Online and email advertising

## This section covers:

- advertising on social media
- checklist for online content
- email marketing
- keyword and search engine advertising

**Advertising online raises some particular legal issues. It is also important to remember that the rules of advertising apply online just like any other media.**

Australian law does not generally distinguish between different methods of advertising or communications. However, issues specific to email or online advertising sometimes arise and are considered below.

## Social media advertising

Community organisations will be legally responsible for content generated by or on behalf of the organisation on social media, such as Facebook and Twitter, and may also be responsible for content generated by users of those sites. Community organisations will be responsible for content posted on their social media pages because they have control over these pages. This requires community organisations who have Facebook or similar social media sites to regularly monitor user comments and remove posts which may breach provisions of the ACL or any of the AANA voluntary codes as discussed above.

Social media platforms may also have their own rules for advertising on or using those platforms that must be complied with.

### EXAMPLES OF RECENT CASES

- In 2011 the Federal Court found that a company was responsible for testimonials that a customer posted on its Facebook and Twitter pages. A customer had published statements regarding that company's products and services (which were found by the Court to be misleading and deceptive). The Court found that although the company was not responsible for the initial publication of the testimonial, the company accepted responsibility for the publications when it knew of the publications and decided not to remove them. Hence it became the publisher of the testimonials.
- In 2012 the ASB found that a company was responsible for user generated comments on that company's Facebook page that Facebook users had posted. Facebook users had posted user comments to questions such as "Besides VB, what's the next essential needed for a great Australia Day BBQ?".

## Checklist for online content: created by users

Community organisations should immediately remove content generated by users of the organisation's site and seek legal advice, if you are likely to answer "yes" to any of the following questions:

### CHECK LIST FOR USER GENERATED CONTENT

- ☐ **Misleading and deceptive claims:** Does the post contain misleading and deceptive claims, or false or misleading representations about the community organisation? Does it communicate that the services provided by the community organisation are of a particular standard, quality, value or grade, or have benefits, sponsorship, affiliation or approval, which they do not have?
- ☐ **Content in breach of the voluntary codes:** Does the post contain material which may be in breach of any of the AANA voluntary codes?
- ☐ **Defamation and injurious falsehood:** Does the post have the effect of lowering/harming the reputation of a person, brand or corporation, holding them up to ridicule or leading others to shun and avoid them?
- ☐ **Discrimination:** Does the post show or incite hatred towards, serious contempt for, or severe ridicule of a person or group of people based on race, religious belief, sexuality, gender, medical condition or something similar?
- ☐ **Intellectual property:** Does the post contain words, images or audio material (other than material that has been made available by the community organisation itself) that is or could be intellectual property of any other party?
- ☐ **Classifiable content:** Does the post contain words, images or audio unsuitable for children eg does it contain references to, or images of, pornography, violence or drug use?
- ☐ **Privacy:** Does the post contain personal information about a person e.g. name, phone number, address, place of work or school that may allow other users to know the identity of that individual?
- ☐ **User targeted attacks:** Does the post (or a series of postings) appear likely to torment, threaten, harass, humiliate, embarrass or otherwise target a user. Does a post (or series of posts) contain content that indicates predatory behaviour by an adult user towards a child user e.g. is an adult user requesting to 'meet up' with a child user?

# Email marketing

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The *Spam Act 2003* (Cth) (**Spam Act**) applies to marketing emails and electronic communications including by instant messaging, SMS and MMS.

The Spam Act prohibits “marketing emails” being sent without the consent of the recipient. Consent may be explicit or implied. Marketing emails include emails advertising or promoting:

- goods
- services
- land, and
- business or investment opportunities.

Marketing emails can only be sent where there is consent, and must have information about the sender of the communication, and must contain an ‘unsubscribe’ function, which must be honoured within 5 working days.

Your community organisation will only be exempt from the Spam Act if it is a registered charity under the ACNC Act or an educational institution. For more information on registering as a charity see Not-for-profit Law’s Charities Guide, at [www.nfplaw.org.au/charity](http://www.nfplaw.org.au/charity).

If the email consists of only factual information, and provides specific information and contact details of the author of the message, that message is also exempt from the Spam Act.

## Penalties

If an organisation is found to have contravened the Spam Act:

- ACMA may search its premises and seize relevant equipment used for the contravention, and
- ACMA can also impose financial penalties by requiring the organisation:
  - to pay up to \$1.1 million to ACMA for each day of contravention
  - to forfeit any profits, or
  - to pay compensation to spam victims.

## Keyword and search engine advertising

Keyword advertising is achieved through the sale or auctioning of search words via a search engine company. The advertiser selects keywords it wishes to use when a search is made which results in the search engine directing users to websites that match those keywords entered.

If reserving keywords for your organisation, or purchasing search engine advertising, be aware that some terms may be a trade mark and therefore the use of such terms may contravene trade mark laws. In addition, it may be misleading or deceptive or may even be falsely representing a sponsorship, approval or affiliation (as discussed above) if your organisation was to use a keyword relating to the name of a competitor organisation.

Most major search engines have their own policies that your organisation should be familiar with before entering into such arrangements.

### Case Study

A not-for-profit animal cruelty association called “Furry Friends United” released a TV advertising campaign that showed a kangaroo with an arrow stuck in its side. In the background REM’s song “everybody hurts” is playing. A voice-over states that over 1,000 kangaroos were the subject of bow and arrow attacks in Victoria last year alone. “Furry Friends United” is against hunting with bows and every dollar donated went directly to outlawing bow hunting in Victoria and no donation money was wasted on fundraising parties like other top animal cruelty associations in Victoria such as “Animals United”. The advertisement concludes with a testimonial by a famous AFL player stating that he knew for a fact that every dollar that was donated to “Furry Friends United” went to stopping bow hunting.

### Legal Issues:

**Misleading deceptive conduct:** do claims that all donations go directly to stopping animal cruelty mislead the audience? “Furry Friends United” must be able to show that donations are directly attributable to saving animals.

**Intellectual Property:** is “Furry Friends United” allowed to use “everybody hurts” as a backing track? “Furry Friends United” will only be allowed to use the REM track if it has licensed that use.

**False or misleading representations:** is the famous AFL player’s testimonial false or misleading representation? It may be if it’s a statement as to the quality of the service provided by “Furry Friends United”, it would need to be factually accurate.

**Advertising standards:** what are the relevant TV advertising standards? Showing a kangaroo with an arrow in its side may give rise to complaints to the ASB.

**Media releases:** have all persons filmed or photographed signed releases for promotional purposes?

**Comparative Advertising:** is “Furry Friends United” allowed to compare its services with “Animals United”? The statements need to be factually accurate. As the comparison is based on quality, the product or service must be accurately compared. Comparative advertising is not advisable.

## Schedule of advertising codes

If you are advertising...	...with this target audience...	...consult the following:
All advertisements	Anyone	AANA Code of Ethics (and corresponding Practice Note)
	Children (14 years old or younger)	AANA Code for Advertising & Marketing Communications to Children Practice Guide: Advertising Communications to Children
All advertisements involving images of children and young people <sup>1</sup>	Anyone	Practice Guide: Managing Images of Children and Young People
In digital format	Anyone	AANA Best Practice Guideline on Responsible Marketing Communications in the Digital Space
Food and beverages	Anyone	AANA Food & Beverages Code (and corresponding Practice Note)
	Children (14 years old or younger)	Australia Food and Grocery Council Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry
Food and beverages (quick service)	Children (14 years old and younger)	AANA Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children Australia Food and Grocery Council Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry
Providing guidance to parents and guardians on making product choices for children	Adults	AANA Australian Quick Service Restaurant Industry Initiative for Responsible Advertising and Marketing to Children
Environmental claims	Anyone	AANA Environmental Claims in Advertising and Marketing Code (and corresponding Practice Note)
Alcohol	Adults	ABAC Responsible Alcohol Marketing Code, Alcohol Beverages Advertising (and Packaging) Code
Weight management products and services	Anyone	Weight Management Industry Code of Practice

<sup>1</sup> Please note: There is no definition explaining the age of a 'young person'.

# Resources

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## Related Not-for-profit Law Resources

The Not-for-profit Law Information Hub ([www.nfplaw.org.au](http://www.nfplaw.org.au)) has further resources on the following topics:

- ✔ [Intellectual Property](#)
- ✔ [Social media](#)
- ✔ [Fundraising and events](#)
- ✔ [Important agreements](#)

Has resources on Consumer Guarantees under the ACL

## Legislation

- ✔ [Australian Consumer Law](#)
- ✔ Guide to the Australian Consumer Law – [www.consumerlaw.gov.au](http://www.consumerlaw.gov.au)
- ✔ [Competition and Consumer Act 2010 \(Cth\)](#)

## Australian Communications and Media Authority (ACMA)

- ✔ General guidance regarding advertising – [www.acma.gov.au/Industry/](http://www.acma.gov.au/Industry/)
- ✔ Anti-Spam – [www.acma.gov.au/Industry/Marketers/Anti-Spam/Ensuring-you-dont-spam/](http://www.acma.gov.au/Industry/Marketers/Anti-Spam/Ensuring-you-dont-spam/)

The ACMA website features information on how the *Spam Act 2003* (Cth) applies to marketing emails and electronic communications.

## Other Related Resources

- ✔ Australian Competition and Consumer Commission (ACCC) – [www.accc.gov.au/business/advertising-promoting-your-business/false-or-misleading-claims/](http://www.accc.gov.au/business/advertising-promoting-your-business/false-or-misleading-claims/)

The ACCC website features information on false or misleading statements.

- ✔ The Alcohol Beverages Advertising Code (ABAC) Scheme – [www.abac.org.au](http://www.abac.org.au)

Visit the ABAC website for more information on the Code.

- ✔ Not-for-Profit Compliance Support Centre: [www.nfpcompliance.vic.gov.au](http://www.nfpcompliance.vic.gov.au)

This website is an online information resource for Victorian not-for-profit community organisations.

- ✔ Australian Charities and Not-for-profits Commission (ACNC) – [www.acnc.gov.au](http://www.acnc.gov.au)

Visit the ACNC website to look up registered charities, access publications and submit your Annual Information Statement.

- ✔ Arts Law – [www.artslaw.com.au/legal-topics/archive/cat/copyright-moral-rights/](http://www.artslaw.com.au/legal-topics/archive/cat/copyright-moral-rights/)

Arts Law has sample agreements relating to copyright and moral rights.



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