

# The laws of advertising and your community organisation

A guide for Australian community organisations on complying with the laws of advertising and marketing in Australia

Aug 2022



# Contents

<b>Overview</b>	<b>4</b>
<b>Part 1</b>	<b>7</b>
<b>The Australian Consumer Law</b>	<b>8</b>
Overview of the Australian Consumer Law	8
What is conduct?	9
What activities are in trade or commerce?	9
Misleading or deceptive conduct	10
Examples of misleading or deceptive conduct	10
False or misleading representations	13
Types of false or misleading representations	14
Examples of false or misleading representations	15
Unconscionable conduct	19
Other types of ACL contraventions	20
Bait advertising	20
Offering rebates, gifts, prizes or other free items	20
Wrongly accepting payment	21
Unsolicited supply	21
Component pricing	21
Harassment and coercion	21
<b>Part 2</b>	<b>22</b>
<b>Advertising and Ad Standards</b>	<b>23</b>
AANA Code of Ethics	23
Other regulated industry codes	24
Complaints	24
Summary of relevant advertising codes	25
<b>Part 3</b>	<b>26</b>



<b>Advertising and specific media-based codes and rules .....</b>	<b>27</b>
Free to air television.....	27
Subscription television .....	27
Radio .....	28
<b>Part 4 .....</b>	<b>29</b>
<b>Advertising, intellectual property and displaying your Australian Business Number.....</b>	<b>30</b>
Displaying your business name and Australian Business Number in advertising.....	31
Community organisations incorporated association under state or territory legislation .....	31
Community organisations incorporated under Commonwealth legislation.....	31
<b>Part 5 .....</b>	<b>33</b>
<b>Online and email marketing.....</b>	<b>34</b>
Social media advertising .....	34
Checklist for online content: created by users .....	35
Email marketing .....	35
Keyword and search engine advertising.....	36



# Overview

The legal and regulatory framework

# Overview

---

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

In Australia, advertising and marketing is predominantly regulated by:

- the *Competition and Consumer Act 2010 (Cth) – schedule 2*, called the Australian Consumer Law (**ACL**), and
- a self-regulatory system administered by the advertising industry



## Note

This guide provides general information about the laws of advertising and marketing in Australia. This information is intended as a guide only and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before deciding what to do.

Please refer to [the full disclaimer](#) that applies to this guide.



## Note – consumer laws apply to charities and not-for-profits

Charities and not-for-profits should especially consider relevant consumer laws when they are providing goods and services and running campaigns or promotions.

There is also separate legislation specifically covering fundraising activities.

Community organisations should also be aware that there are specific rules relating to communications made on some forms of media such as television, subscription television, radio, print and online or in certain industries, such as for health services.

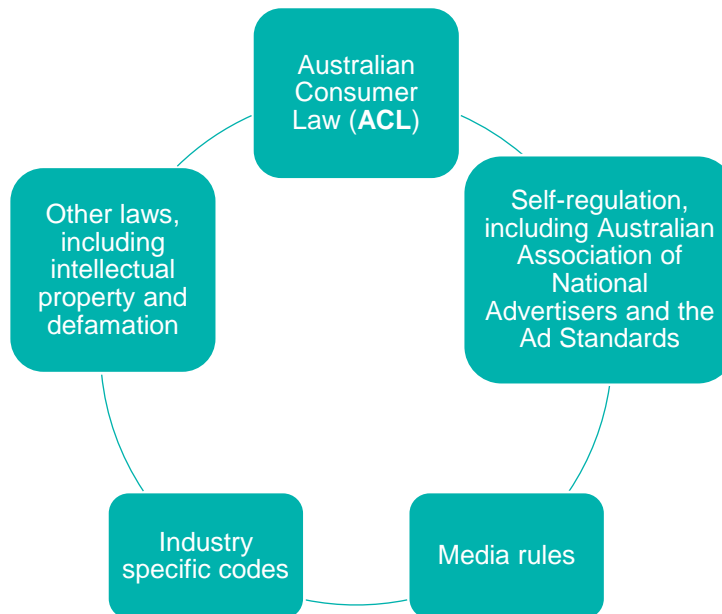
This guide does not cover specific fundraising laws or trade promotions laws.



## More information

For more information go to our [webpage on fundraising](#).

## The legal and regulatory framework



This guide focusses on the way the ACL regulates advertising and promotional conduct, which is just one part of the legal and regulatory framework.



### Note

There are specific ACL provisions about the quality of goods and services that are important for not-for-profits to understand. These are not covered in this guide – to find out more, read our [Consumer Guarantees fact sheet](#).



# Part 1

## The Australian Consumer Law



# The Australian Consumer Law

---

## This part covers:

- ▶ overview of the Australian Consumer Law
  - ▶ the concept of 'conduct'
  - ▶ the concept of 'trade or commerce'
  - ▶ when conduct may be misleading or deceptive
  - ▶ false or misleading representations
  - ▶ unconscionable conduct, and
  - ▶ other relevant ACL contraventions
- 

## Overview of the Australian Consumer Law

The Australian Consumer Law (**ACL**), set out in Schedule 2 to the *Competition and Consumer Act 2010 (Cth)* (**Act**) is the national law for consumer protections and fair trading.

The provisions in the ACL are designed to protect consumers against certain behaviours which may be considered harmful to them.

Examples include:

- misleading or deceptive conduct
- false or misleading representations, and
- unconscionable conduct

The ACL is administered by the Australian Competition and Consumer Commission (**ACCC**).

The ACCC is an independent statutory authority that enforces the Act. The ACCC has a number of powers under the Act to investigate breaches of the ACL and, where relevant, penalise those who engaged in breaches of the ACL.

If a person is found to be in breach of the ACL, the breach may attract fines or other pecuniary penalties. For a corporation, the maximum penalty will be the greater of:

- \$10 million
- three times the value of the benefit received, or
- 10% of the annual turnover in the preceding 12 months if a court cannot determine the benefit obtained from the relevant breach of the ACL





For individuals, the maximum penalty is \$500,000.

In addition, the ACCC has the power to issue an infringement notice if it has reasonable grounds to believe that a person has engaged in, for example, unconscionable conduct or false or misleading conduct.

Although the penalty amount in an infringement notice may vary, depending on the severity of the alleged contravention, in most cases, the penalty amount is fixed at:

- \$13,320 for a corporation or \$133,200 for a listed corporation for each alleged contravention, and
- \$2,664 for an individual

## What is conduct?



### Conduct

Conduct is a broad term and generally refers to the doing of, or the refusal, failure or omission to do, an act.

Conduct may include positive actions such as oral conversations, written statements or can also include inaction such as the failure to disclose information or the refusal to do something (or a combination of any of these).

## What activities are in trade or commerce?

It's important to remember that much of what charities and not-for-profits do is in trade or commerce.



### Trade or commerce

Trade or commerce means:

- trade or commerce within Australia, or
- trade or commerce between Australia and places outside Australia, and
- includes any business or professional activity whether carried out for profit or not

Examples of business or professional activities that may amount to conduct in trade or commerce (which is set out in further detail below) may include:

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

For some activities, it can be difficult to assess whether the activity is in trade or commerce.

Where this is the case, the safest approach is to assume that the ACL does apply, and act in compliance with the ACL (and not engage in activities that are prohibited by the ACL).

It's important to always consider conduct and representations on a case by case basis.

**Note**

Many not-for-profit 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 campaign.

**Misleading or deceptive conduct**

Section 18 of the ACL requires that your community organisation doesn't engage in misleading or deceptive conduct or conduct that is likely to mislead or deceive.

The ACL doesn't define 'misleading' or 'deceptive'. Australian Courts apply an objective test in determining whether the relevant conduct in question is or is likely to mislead or deceive.

In assessing whether your behaviour is or is likely to be misleading or deceptive it's important to consider:

- the conduct in context (for example, looking at an advertisement as a whole, and not just a particular statement in an advertisement), and
- the overall impression conveyed to a reasonable class of consumers (for example, could the advertisement lead a person to believe something that is false, mislead a person about a fact, or lead a person into error?)

**Note**

You can be liable for misleading or deceptive conduct, even if you didn't intend to mislead or deceive.

It's therefore important to make sure any advertisement your community organisation publishes:

- is accurate
- is clear and unambiguous
- creates an overall impression that is accurate, and
- clearly includes all conditions (for example, an advertisement that says '70% of all stock' in large font but doesn't include reference to terms and conditions which apply may be misleading or deceptive, or likely to mislead or deceive).

When you review your advertisement, other document or publication, it's also important to consider:

- the intended target audience
- the characteristics of those in the target audience – for example, considering what knowledge they presumably have
- whether others outside the intended audience will be able to view and potentially act on the information, and
- what impression the advertisement might have on a 'reasonable person' in that audience

**Examples of misleading or deceptive conduct****Silence or the failure to disclose information**

Whether silence is misleading or deceptive will depend on the relevant circumstances.

Advertising and marketing may be misleading or deceptive if, for example:



- the advertiser knows important information about a product and fails to disclose some or all of such information in circumstances where it knows that such information may affect a particular decision (and there is a reasonable expectation that the relevant information would be disclosed if it existed), or
- the advertiser is aware that information initially provided to the consumer is now incorrect but doesn't inform the consumer



### Case example

A good example of this is the case of *Australian Competition and Consumer Commission v Woolworths Limited* [2016] FCA 44. In this case, Woolworths' delay to remove a product (which it knew to be unsafe to consumers) from its shelves was found to be misleading or deceptive conduct on the basis that it led the public to believe the product was suitable for its purpose (when in fact it was unsafe and not suitable).

### Predictions about the future promises and statements of opinion

A representation about a future matter will be taken to be misleading in circumstances where there are no reasonable grounds to make the representation.

Mere opinions (as opposed to statements of fact) will generally not be misleading, but predictions, promises or projections 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 didn't 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)



### Case example

In *Bennett v Elysium Noosa Pty Ltd (in liq)* (2012) FCA 211, the Court found that real estate agents had made a misleading representation about a future matter.

The representation was that a community centre would be completed in the first stage of a development. There were no reasonable grounds for making the representations in circumstances where, at the time the representations were made, there was no development approval, no final plans or design drawings, no reliable costings and no genuine commitment by joint venture partners.

### 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.

These types of statements are, for the most part, not considered misleading or deceptive. For example, a claim like 'we make the best lamingtons in Australia' is not considered misleading.

In determining whether a statement in an advertisement is misleading or deceptive, or mere puffery, the overall impression created or 'dominant message' of the advertisement should be considered.



### Case example

In the High Court decision of *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54 186 the Court discussed the importance of considering the 'dominant message' of an advertisement rather than considering words in isolation. This is important as a general matter, and not just in relation to puffs.

### Disclaimers

Disclaimers are often used by advertisers to qualify statements or provide additional explanation.

Disclaimers must be clear, prominent, unambiguous and clearly brought to the attention of the audience.

Disclaimers should be as visible and close to the claims they seek to qualify or explain.

A disclaimer can't be used to correct an otherwise misleading message. For example, stating something is 'free' and adding the disclaimer 'with minimum purchase of \$5' would be misleading – the item is not free as it requires the payment of \$5 (even though the payment is towards another purchase).

Use of an asterisk to refer the reader to terms and conditions is common – the asterisk should be prominent and close to the statement it seeks to qualify or explain.



### Case example

In *ACCC v Target Australia Pty Ltd* [2001] FCA 1326, a large department store engaged in misleading conduct when it advertised '25% off all clothing' but in small print excluded certain items of clothing and had a different discount rate for homewares.

The Court found this was misleading conduct, and the use of a disclaimer or information in small print for potential customers is not generally an effective way of avoiding the prohibition against misleading or deceptive conduct.

### Comparative advertising

Statements comparing two similar products or services and promoting the superior quality or lower cost of one product or service are carefully examined by the ACCC and Australian Courts.

When using this method, take particular care to make sure:

- 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 described



### Example

The [ACCC has acted against telecommunications providers for misleading conduct](#).

This includes action against Optus Internet Pty Limited for representing to consumers that Optus' broadband services and plans provided speeds comparable to those available on NBN plans. Optus claimed that its cable broadband service and plans had 'NBN-like speeds'. The reality was that Optus' speeds were not comparable at all.

Optus was fined \$51,000 for this conduct.

### Passing Off

Advertising that uses another organisation's name, trade mark or even colours can be problematic for a number of reasons, including because it may mislead consumers into believing there is some link between the organisations or their products.

This 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.



### Case example

In [In-N-Out Burgers, Inc v Hashtag Burgers Pty Ltd \[2020\] FCA 193](#), the Court found Down N' Out had passed itself off as In-N-Out. The judge found that Down N' Out had knowingly used logos, branding and signage similar to In-N-Out's, and as such had engaged in passing off and misleading and deceptive conduct.

### 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 and suitability for purpose or quantity of goods or services. Breach of this prohibition can result in very substantial fines.

### Fundraising



### More information

Fundraising activities are likely to be governed by the ACL as well as more specific legislation.

For more information on specific fundraising laws, see our [fundraising webpage](#).

## False or misleading representations

Under section 29 of the ACL, if your community organisation is supplying (or offering to supply) or promoting goods or services, it must make sure representations it makes about those goods or services are not false or misleading.

'Representations' may be statements (verbal or written), behaviour, or a combination of both.

A representation may be false or misleading even if you didn't know it was false or didn't intend your behaviour to be false or misleading.

Significant fines and other penalties can be imposed for a breach or breaches of section 29 of the ACL.

A representation is made where it is communicated to another person (which includes an organisation) and leads the recipient to believe a particular matter, whether or not that is the intention. It doesn't 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).

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 necessarily be found to have made the representation unless they have 'adopted' the representation in some way.

## Types of false or misleading representations

Section 29 of the ACL, further, sets out that a person must not, in trade or commerce and 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 has agreed to acquire goods or services
- that purports to be a testimonial by any person relating to goods or services
- concerning a testimonial by any person, or concerning a representation that purports to be such a testimonial, relating to goods or services
- 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 of origin of the goods (meaning where they were produced, made or grown)
- about the need for any 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 contractual right that is already provided by law



### Note – green marketing and greenwashing

The terms 'green marketing' and 'greenwashing' are used to refer to claims made by an organisation about its environmental credentials, or the extent to which its goods or services are sustainable, to seek an advantage in the market.

Organisations need to take care to ensure these representations are not misleading.

The [ACCC's 2022/23 compliance and enforcement priorities](#) include environmental claims and sustainability. See [the ACCC's publication Green marketing and the Australian Consumer Law](#) for more information.



## Examples of false or misleading representations

### Model

Model is the manufacturer's or seller's commonly 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 (a Volkswagen Touareg) and the winner is given a different make and model (a Subaru Forester), or the same make and a different model (Volkswagen Golf), then the advertisement will be false and misleading.



### Case example

In *ACCC v Nissan Motor Company (Australia) Pty Ltd & Anor (1998) ATPR*, Nissan had run an advertising campaign that represented that a vehicle described as a Patrol RX Turbo Diesel was for sale at a price of \$39,990.

The model of the vehicle displayed in the advertisement was a Nissan Patrol RX 4.2 litre, styled with over fender flares and wider wheels than the Patrol RX Turbo Diesel. It was held that both Nissan and the relevant advertising company were guilty of contraventions of the ACL.

### Standard

Standard relates to the level of excellence or a standard in a particular industry which is commonly set out in industry 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 will be a false representation as to the standard of the goods.



### Case example

In *ACCC v Cotton On Kids Pty Ltd [2012] FCA 1428*, Cotton On Kids retailed children's nightwear labelled 'low fire danger'. The nightwear did not, however, comply with the relevant Australia/New Zealand product safety standard.

Cotton On Kids admitted liability for:

- false representations that the goods were of a particular standard and had performance characteristics or benefits, and
- conduct that was liable to mislead the public as to characteristics of the goods

### Quality

Quality has a wide meaning but this generally 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 advertisement will be a false representation.



### Case example

In *Allergan Australia Pty Ltd v Self Care IP Holdings Pty Ltd* [2021] FCAFC 163, the Full Court held that the words 'instant Botox® alternative' used to promote an anti-wrinkle skin cream misrepresented the standard or quality of the product, as well as its performance characteristics, uses or benefits.

Allergen was held to be in breach of the ACL for misleading or deceptive conduct.

### Composition

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 9:1, the composition of the wool will be a false representation.



### Case example

In *Trade Practices Commission v the Vales Wine Company Pty Limited* (1996) FCA 1463, Vales Wine Company made various representations about the composition of its wine — namely that particular wine was 100% Cabernet Sauvignon from the 1991 vintage. The wine was in fact a blend of vintages and varieties.

The company was found to have made four ACL breaches for misrepresentation and two of the company's directors were found to be guilty of aiding and abetting. Fines totalling \$165,000 were imposed on the company and each director was fined \$10,000.

### Particular history or particular previous use

This 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 sportsperson or team when it wasn't, this will be a false or misleading representation.



### Case example

In *ACCC v Snowdale Holdings Pty Ltd* [2016] FCA 541, the Court held that Snowdale's free range representation was a false or misleading representation that the eggs had a particular history in breach of section 29 of the ACL.

The majority of the hens didn't move around freely on an open range on most days and their ability to do so was significantly inhibited by the number of 'pop holes' (openings in the side of sheds), the number of birds per metre of pop hole, as well as the flock and shed size.

Snowdale was penalised \$750,000 and ordered to pay the ACCC's costs of \$300,000





### Goods are new

This means that, if goods are represented as being new, the relevant goods should not have been previously used.

### Testimonials

Testimonials are statements from people who have previously used the particular goods or services commenting on their experience with the 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, make sure they are given by people who have used the particular goods or services and are commenting on their personal experience with the goods or services.



### Case example

In *ACCC v Service Seeking Pty Ltd [2020] FCA 1040*, Service Seeking, an online tasking platform, was found to have engaged in false and misleading representations in relation to business reviews.

The 'Fast Feedback' feature allowed businesses to write reviews of the services they had provided to customers. The reviews were sent to customers for approval or amendment. Where customers didn't respond, the reviews were nevertheless published as the customers' reviews.

The 'Fast Feedback' feature was used to create about 21,000 reviews between 12 July 2016 and 29 November 2018. Service Seeking admitted that it had falsely represented that reviews published on its platform were by customers, when in fact the reviews had been created by the businesses themselves using Service Seeking's 'Fast Feedback' feature.

The court imposed a pecuniary penalty of \$600,000 and made a range of other orders.

### Value

Representations about value may include the total amount paid or payable for goods or services. Some examples of false or misleading representations regarding value are:

- the advertisement of items without including the GST price or other compulsory fee (for example, a delivery fee), or
- advertising a previous price with the current price in a catalogue where the product was never offered for that previously displayed price



### Case example

In *ACCC v Titan Marketing Pty Ltd [2014] FCA 913*, Titan Marketing sold first aid kits door to door, targeting Indigenous communities (mainly in Queensland).

Titan represented to consumers that the contents of the first aid kits it sold were valued at \$1,000 and that purchasing a first aid kit for \$300 or \$400 was good value. The court found that these representations were false and misleading because the contents of the first aid kits were worth substantially less than \$1,000. Titan had purchased the kits for between US\$9.39 and US\$36.20 plus shipping. Titan made false or misleading representations that the first aid kits were of a particular value.

### Sponsorship, approval or affiliation

This requires that there is an impression of a positive link between two parties by way of sponsorship, approval or affiliation.



Examples of making such false representations include:

- making a product very similar to a competitor's product and giving the impression that the second product is affiliated with the first product
- making a representation that another organisation endorses an organisation's products by including that other organisation's trade mark or logo in advertising in circumstances where there has been no endorsement
- selling another organisation's charity products without authorisation or a licence to do so, giving the impression that there has been approval from the other organisation to sell the relevant products
- representing that an organisation has government approval to sell a particular product when it doesn't, or
- representing that a celebrity is a patron of your charity where this is not the case



### Case example

In *Twentieth Century Fox Film Corp v The South Australian Brewing Co Ltd* [1996] FCA 480, an Australian corporation marketed 'Duff Beer', a beer with labelling bearing similarities (including the name) to the beer drunk by cartoon character Homer Simpson in the television series 'The Simpsons'. This was found to be a false or misleading representation.

### Place of origin

This refers to 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 has different origins in terms of its design and manufacture, the labelling should reflect this (for example, 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).



### Note

For country of origin claims for food products offered for sale in Australia, there are specific guidelines mandated under the *Country of Origin Food Labelling Information Standard 2016* of the *Food Standards Code Australia New Zealand*.

### Need for particular goods or services

For example, if a motor mechanic advises a motorist that the brake pads on their car must be changed immediately, but it's found that the brake pads still have plenty of mileage left. The mechanic will have falsely represented that the vehicle need new brake pads when there was no need for the service to occur.



### Case example

In *Peter James Dawson v Motor Tyre Service Pty Limited* [1981] FCA 100, Motor Tyre Service told a customer certain repairs to his car were necessary and provided an itemised quote of \$300. The customer sought a second opinion which said the work was unnecessary. Motor Tyre Service was charged with a contravention for false or misleading representation.

The charge was ultimately dismissed as the judge was not satisfied beyond reasonable doubt that:

- the work was not necessary, or
- the Motor Tyre Service mechanic assessment was unreasonable

### Warranties and guarantees

These refer to:

- any written warranty or guarantee that is given by a party, or
- warranties or guarantees that are provided under law

For example, a party may falsely represent that a consumer must pay more money to secure an 'additional warranty' for a product, in circumstances where the additional warranty does not grant any rights over and above the consumer's entitlements under the ACL.

### Unconscionable conduct



#### Unconscionable conduct

Unconscionable conduct generally refers to conduct which is exploitative, unfair or unreasonable and which goes against good conscience.

Section 21 of the ACL provide that a person must not, in trade or commerce, in connection with the supply or acquisition of goods or services (or possible supply or acquisition of goods or services) engage in conduct that is, in all the circumstances, unconscionable.



#### Note

When your community organisation engages in trade or commerce with the supply or acquisition (or possible supply or acquisition) of goods or services, take care to make sure your conduct doesn't amount to unconscionable conduct.

Although the ACL doesn't provide a definition of 'unconscionable conduct', it does provide a number of factors which a Court would consider to determine whether particular behaviour is unconscionable under the ACL. These include:

- the bargaining positions of the supplier and the customer
- whether the customer was required to comply with unnecessary conditions imposed by the supplier that were not reasonably necessary for the protection of the supplier's legitimate interests
- whether the customer was able to understand any relevant documents relating to the supply or possible supply of the goods or services



- whether any undue influence or pressure was exerted on, or any unfair tactics were used against the customer
- the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a different supplier
- whether the supplier's conduct towards the customer is consistent with how it generally conducts itself
- the requirements of applicable industry codes
- if there is a contract between the supplier and a customer, considering, the extent to which the supplier is willing to negotiate the terms and conditions of the contract, the actual terms and conditions of the contract and the conduct of both parties in complying with the contract, and
- whether the supplier has the right to vary a term of a contract (should one exist) without the consent of the customer



### Case example – taking advantage of vulnerability

In *Commercial Bank of Australia Ltd v Amadio* [1983] HCA 14; (1983) 151 CLR 447 a guarantee (an agreement to repay a loan in certain circumstances) 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, didn't receive independent advice about the guarantee, and didn't have a proper understanding of the guarantee. It was evident to the bank that the Amadios were vulnerable, so the bank shouldn't 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.

## Other types of ACL contraventions

### Bait advertising



#### Bait advertising

'Bait advertising' generally refers to advertising goods or services for a specific price (for example, a sale price) that are either not available or only available in limited supply.

If your community organisation advertises goods or services at a particular price, make sure you have reasonable quantities of the goods or services for a reasonable period of time.

To determine what is a reasonable quantity or reasonable period of time for the purpose of bait advertising, have regard to:

- the nature of the market in which you are carrying on your business, and
- the nature of your advertisement

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

Your community organisation must not advertise or offer a rebate, prize, gift or other free item in connection with the supply or promotion of any goods or services if you don't intend to actually provide a rebate, prize, gift or other free item or don't intend to provide the rebate, prize, gift or other free item as offered.

Any rebate, prize, gift or other free item must be supplied within the time set out in the offer, or (if no time is specified) within a reasonable time.



## Wrongly accepting payment

The ACL prohibits any organisation from accepting any form of payment for goods or services if at the time of acceptance:

- your community organisation doesn't intend to supply the goods or services
- the advertised goods or services are materially different to the goods or services the organisation intends to supply
- your community organisation is aware (or should reasonably be aware) that it will not be able to supply the goods or services, and
- your community organisation is aware (or should be reasonably aware) that it will not be able to supply the goods or services within a specified or reasonable time

## Unsolicited supply

It's a breach of the ACL to send consumers, in trade or commerce, unsolicited goods or provide unsolicited services and demand payment.

It's also a breach to send an invoice for unsolicited goods or services without the following statement set out in prominent text:

'This is not a bill. You are not required to pay any money'.

For example, your community organisation can't send out a calendar not requested by the consumer and demand payment, or include an invoice without the required statement.

If your community organisation sends unsolicited goods to another person, your organisation will have three months from the day after the customer receives the unsolicited goods to reclaim possession. After this period, the goods become the property of the customer and your community organisation will not be able to reclaim them.

## Component pricing

When your community organisation displays or advertises prices, it must make sure it includes 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, tax, duty or levy).

## Harassment and coercion

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



# Part 2

## Advertising and Ad Standards

# Advertising and Ad Standards

## This part 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 system of self-regulation is made up of codes and initiatives that set out additional rules for advertising in Australia.



## Ad Standards

In Australia, Ad Standards (previously known as the Advertising Standards Bureau) works with the advertising industry and community and manages the complaint resolution process of the advertising self-regulation system.

Ad Standards administers certain advertising codes which are specific to the category of claims and intended audience of the advertisement.

The full text of the codes and initiatives are available from the [Ad Standards website](#).

## AANA Code of Ethics

The Australian Association of National Advertisers (**AANA**) Code of Ethics (**Code**) applies to advertising or marketing communication 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 or marketing communication under the reasonable control of the advertiser, regardless whether payment has been made or other valuable consideration has been involved



- all advertising or marketing communication where any of the potential customers of the goods or services are physically present in Australia and the advertising or marketing communication is directed to those customers
- sponsorship announcements
- community service announcements
- advertorials and infomercials
- user generated content communicated through a site or digital platform over which the marketer has a reasonable degree of control, and
- any media, including online and social media

The Code doesn't apply to labels and packaging, or to corporate reports including corporate public affairs messages in 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 \(Therapeutic Goods Advertising Code\) Instrument 2021](#)
- [ABAC Responsible Alcohol Marketing Code](#), and
- [Australia Food and Grocery Council Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry](#)

## Complaints

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

When Ad Standards receives a complaint, Ad Standards will notify the advertiser or marketer with the details of the complaint and provide the advertiser or marketer the opportunity to provide a written response. The Ad Standards Community Panel will then consider the complaint, taking into account the following:

- all relevant advertising and marketing communications submitted by the advertiser or marketer (if any)
- the advertiser or marketer's response (if any)
- all relevant provisions of the Ad Standards codes and initiatives, and
- any other relevant supporting materials or other representations or submissions

Ad Standards will not raise a complaint with the advertiser if the complaint is a 'consistently dismissed complaint' that the Ad Standards Community Panel has consistently determined is not a breach.

If a complaint about an advertisement is upheld by Ad Standards, the advertiser will be asked to remove or amend the advertisement as soon as possible after receiving a copy of the draft case report. The advertiser has five business days to respond to the Community Panel's decision and confirm that the advertisement has been, or will be, removed.

If the Community Panel dismisses a complaint, the complainants and advertisers are usually advised within about 10 business days. There is also an independent review process available to the advertiser and original complainant, provided that certain grounds for review are met.





## Summary of relevant advertising codes

If you are advertising...	...with this target audience...	...consult the following:
All advertisements	Anyone	<a href="#">AANA Code of Ethics</a> (and corresponding <a href="#">Practice Note</a> )
	Children (14 years old or younger)	<a href="#">AANA Code for Advertising &amp; Marketing Communications to Children</a> (and corresponding <a href="#">Practice Note</a> )
All advertisements involving images of children and young people	Anyone	<a href="#">AANA Practice Guideline: Managing Images of Children and Young People</a>
In digital format	Anyone	<a href="#">AANA Best Practice Guideline on Responsible Marketing Communications in the Digital Space</a> <a href="#">AANA Industry Practice Notes – Marketing in the Digital Space</a>
Food and beverages	Anyone	<a href="#">AANA Food &amp; Beverages Advertising &amp; Marketing Communications Code</a> (and corresponding <a href="#">Practice Note</a> )
	Children (12 years old or younger)	<a href="#">AANA Australian Food and Grocery Council Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry</a>
Food and beverages (quick service)	Children (14 years old and younger)	<a href="#">AANA Australian Food and Grocery Council Quick Service Restaurant Initiative for Responsible Advertising and Marketing to Children</a> <a href="#">AANA Australian Food and Grocery Council Responsible Children's Marketing Initiative of the Australian Food and Beverage Industry</a>
Guidance to parents and guardians on making product choices for children	Adults	<a href="#">AANA Australian Food and Grocery Council Quick Service Restaurant Initiative for Responsible Advertising and Marketing to Children</a>
Environmental claims	Anyone	<a href="#">AANA Environmental Claims Code</a> (and corresponding <a href="#">Practice Note</a> )
Alcohol	Adults	<a href="#">ABAC Responsible Alcohol Marketing Code, Alcohol Beverages Advertising (and Packaging) Code</a>
Motor vehicles	Anyone	<a href="#">FCAI Voluntary Code of Practice for Motor Vehicle Advertising</a>
Wagering products and services	Anyone	<a href="#">AANA Wagering Advertising &amp; Marketing Communications Code</a> (and corresponding <a href="#">Practice Note</a> )



# Part 3

**Advertising and specific media-based codes and rules**

# Advertising and specific media-based codes and rules

---

## This part covers:

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

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

A list of codes and rules that relate to the most common advertising media is below.

Your community organisation should refer to these codes and rules for guidance when advertising in these media.

## Free to air television

The [Commercial Television Industry Code of Practice](#) covers matters such as:

- program, commercial and program promotion classifications
- advertising time on television
- accuracy, fairness and privacy in news and current affairs
- disclosure of commercial arrangements in factual programming
- loudness of advertisements
- complaints handling, and
- dislike, contempt or ridicule on grounds of age, colour, gender, national or ethnic origin, disability, race, religion or sexual preference

## Subscription television

The [ASTRA Codes of Practice](#) are codes developed under the direction of the [Broadcasting Services Act 1992 \(Cth\)](#) 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



### Note

ASTRA is reviewing the Codes of Practice which govern content on subscription television. A public consultation period was held (between November 2018 and February 2019). ASTRA is working with the Australian Communications and Media Authority (**ACMA**) to finalise a new Code of Practice.

## Radio

The Commercial Radio Code of Practice cover the following areas:

- programs unsuitable for broadcast
- news and current affairs programs
- advertising
- Australian music
- interviews and talkback programs
- broadcast of emergency information
- live hosted entertainment programs
- promotion of gambling and betting odds in live sports coverage, and
- complaints

As a condition of their broadcasters' licences, broadcasters must also comply with the Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2022. 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.



# Part 4

**Advertising, intellectual property and  
displaying your Australian Business  
Number**

# Advertising, intellectual property and displaying your Australian Business Number

---

## This part covers:

- ▶ advertising and intellectual property, and
  - ▶ requirements to display Australian Business Number and permit numbers
- 

### **Community organisations should make sure their advertisements and marketing communications don't infringe any other person or organisation's intellectual property rights.**

An intellectual property right in the context of advertising generally refers to the right to use a particular image, audio or text, and prevent others from doing so.

For example, where a person holds intellectual property rights in 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.



### **Note**

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.

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



### More information

This is only a brief introduction to intellectual property rights in advertising. For more detail, refer to our [guide to intellectual property](#).

## Displaying your business name and Australian Business Number in advertising

Community organisations may be created under state, territory or Commonwealth legislation and be subject to the [Australian Charities and Not-for Profit Commission Act 2012 \(Cth\)](#).

### Community organisations incorporated association under state or territory legislation



#### Note

The following requirements vary slightly from state to state and this information is provided as a high-level summary only.

Check the requirements based on the specific legislation under which your community organisation was established.

In general, the last word of the name of your community organisation must note that it is 'Incorporated', as follows:

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

Ensure your community organisation's name is always in legible characters in:

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

Your community organisation may also have an Australian Business Number (**ABN**), and in most states and territories this should be included on:

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

### Community organisations 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 (**ACN**). This must be displayed, labelled as 'ACN' or 'Australian Company Number' on all public documents.

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



### Note

There may be other requirements to display numbers such as lottery permit numbers in advertising. For more information go to our [webpage on fundraising](#).





# Part 5

## Online and email marketing

# Online and email marketing

---

## This part covers:

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

---

## Advertising online raises some particular legal issues.



### Remember

The rules of advertising apply online just like to any other medium.

While Australian law doesn't generally distinguish between different methods of advertising or communications, issues specific to email or online advertising sometimes arise and are considered below.

## Social media advertising

Your community organisation is responsible for content generated by or on behalf of your organisation on social media, such as Facebook and Twitter, and may also be responsible for content generated by users of those sites.

If your community organisation has a Facebook page or a presence on other social media sites, you may wish to consider limiting comments on posts, or otherwise make sure you regularly monitor user comments and remove posts which may breach provisions of the ACL or any of the AANA voluntary codes.

In addition, always make sure the content on your social media pages is accurate (regardless of who posted it). Social media platforms may also have their own rules for advertising on or using those platforms which must be complied with.

Also make sure your community organisation doesn't make any false or misleading claims as part of its marketing and promotional activities on its social media sites. The same consumer protection laws discussed in part 1 of this guide will apply to content on social media channels.



## Checklist for online content: created by users

If you answer yes to any of the following questions, your community organisation should consider immediately removing the relevant content created by users of the organisation's site and seek legal advice.

### Check list for user generated content

- Misleading or deceptive claims:** Does the post contain misleading or 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 or 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? For example, does it contain references to, or images of, pornography, violence or drug use?
- Privacy:** Does the post contain personal information about a person (for example, name, phone number, address, place of work or school) that may allow other users to know the identity of that person?
- User targeted attacks:** Does the post (or a series of posts) 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 (for example, is an adult user requesting to 'meet up' with a child user)?



### More information

For more information, see [our guide to social media and community organisations](#).

## Email marketing

The *Spam Act 2003 (Cth)* (**Spam Act**) and the *Spam Regulations 2021 (Cth)* (**Spam Regulations**) apply to marketing emails and electronic communications.

The Spam Act and Spam Regulations set out when commercial electronic messages can be sent and what must be included in the message. The Spam Act applies to messages sent by email, SMS, MMS and instant message.

Make sure your community organisation complies with the following:

- messages can only be sent with the permission of the individual who owns the account for the address
- messages must contain the name and contact details of the person or business that authorised the message, and



- messages must contain an easy way for the recipient to opt out or unsubscribe (that does not require payment of a fee or does not cost more than the usual amount – such as a standard text charge)



### Note

Your community organisation will only be exempt from the Spam Act if it's a registered charity under the ACNC Act or an educational institution.

If an electronic communication 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.



### More information

For more information:

- on privacy law, see [our privacy webpage](#), and
- on registering as a charity, see [our webpage on registering as a charity](#)

### Penalties

If an organisation is found to have contravened the Spam Act, significant penalties may be imposed by the Federal Court, such as requiring the organisation to:

- pay up to \$2.2 million (if the organisation has a prior record and provided certain other criteria are established)
- forfeit any profits, or
- pay compensation to spam victims

Alternatively, if ACMA has reasonable grounds to believe a person has contravened the Spam Act, ACMA may issue an infringement notice imposing financial penalties by requiring the organisation to pay up to \$222,000 to ACMA.

### Keyword and search engine advertising

Keyword advertising is the sale of search words through a search engine company. The advertiser selects keywords that, when entered into a search engine, result in the search engine directing users to websites that match the keywords entered.

If reserving keywords for your organisation, or purchasing search engine advertising, be aware that some terms may be a trade mark, so 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 arrangements with them.

