1 – MARKETING

1.1 – Overview of Australia's Advertising Legal and Regulatory Regime

In Australia today there is no express legal protection of freedom of speech. Generally speaking Australian Federal and State governments are able to pass laws that censor or restrict what can be said and communicated. Consequently, in the advertising and marketing context, Australian advertisers are restricted in what they are able to communicate to consumers about their products and services.

The restrictions are imposed upon the advertising and marketing communications industry by government, the courts and by the industry itself through a regime of pro-active self-regulation. There exists a broad coalition of laws, regulations, determinations, standards and industry codes that impact directly upon the nature and type of content that can be published and restricts the claims and messages of all commercial communications. Given the severe penalties advertisers and even their agencies can be subject to for infringing these laws and regulations, and the adverse publicity that can arise as a consequence, it is of real importance for all advertisers and agencies to have a basic understanding of these rules so that they can be considered and applied during campaign planning and prior to execution.

Technological advancements in recent years have seen the emergence of an array of digital, interactive and social media options and digital marketing channels, presenting advertisers and marketers with an unprecedented opportunity to reach and interact with their consumers. Instead of being simply passive receivers of marketing information, consumers of today are actively engaged as brand and campaign participants.

With this increased opportunity follows greater responsibility. Accordingly, Australian advertisers and agencies are faced with an increase in the legal compliance obligations and commercial risks associated with the deployment of campaigns as existing and new laws and regulations are brought to bear in an effort to protect consumers and other affected parties.

The coalition of laws, regulations and codes that may apply on a case by case basis to influence and restrict advertising and marketing communications in Australia are summarised below:

Consumer protection: The Australian Consumer Law (**ACL**) prohibits all those engaged in trade or commerce, therefore including advertisers, from communicating misleading or deceptive material to consumers.

Copyright: The *Copyright Act 1968* (Cth) (**Copyright Act**) prevents advertisers from using in advertising any unauthorised reproduction or adaptation of *original* creations such as books, computer programs, scripts, lyrics, paintings, sculptures, drawings, photographs, musical scores, films, videos, broadcasts, sound recordings or the choreography of a performance.

Moral Rights: Moral rights exist independently under the Copyright Act from the copyright that may exist in original material and may continue to be exercised by an author or performer even though the copyright ownership has transferred to another person. Moral rights prevent advertisers using works without attribution of the work, prevent false attribution and prevent derogatory treatment of a person's work in advertising.

Trade marks: The *Trade Marks Act 1995* (Cth) (**Trade Marks Act**) prevents advertisers from using as a badge of origin any letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent that has been registered as a trade mark by another person.

Defamation: The Acts governing defamation in the various States protect personal reputation and prevent advertisers from defaming individuals in their commercial communications.

Injurious Falsehood: Injurious falsehood is an old common law action that protects business interests. An injurious falsehood case may be brought against an advertiser where it is alleged that their advertising and marketing communications contains false statements concerning the property, goods or services of another person or entity.

Privacy laws: The *Privacy Act 1988* (Cth) (**Privacy Act**) (as amended) protects personal information (information about an identified person or from which a person is reasonably identifiable) and regulates the way a consumer's personal information can be collected, stored and used, including for direct marketing purposes.

Discrimination, indecency, hate speech and causing offence: Various Federal and State criminal laws apply that prohibit discrimination, racial vilification and causing offence.

Spam laws: The *Spam Act 2003* (Cth) (**Spam Act**) regulates the ability of an advertiser to send electronic commercial messages to consumers.

Trade Promotions Lottery laws: Various State and Territory lottery laws regulate the conduct of prize draws and competitions conducted by advertisers for the promotion of products and services.

Mandatory industry codes: Many mandatory codes of practice exist in Australia that must be complied with by force of law. Such codes are industry and product specific and must be determined and complied with by

advertisers depending upon the products and services offered to consumers.

Voluntary industry codes of practice: The Australian Association of National Advertisers (AANA) is the peak advertising industry body representing the rights and responsibilities of Australia's major advertisers and their industry partners. The AANA promotes consumer confidence in and respect for general standards of advertising through the Advertising Standards Bureau (ASB). The ASB's responsibility is to ensure that all advertising, wherever it appears, meets the high standards laid down in Industry Codes, particularly the Codes administered by the ASB.

Australia's regulation of advertising and marketing is a complex regime of laws, regulations and codes that may apply in varying degrees to a proposed campaign. As each advertising campaign is different and raises its own legal and compliance challenges, it is important to carefully consider each application on a case by case basis and for advertisers to seek advice and guidance when necessary.

1.2 Comparative Advertising

Comparative advertising is an advertising technique that compares the quality of a product or service to those of competitors, either by inference or by directly naming a competitor's product or service. Unlike some other countries, comparative advertising is legal in Australia but should be used with caution.

Trade Marks

The use of competitors' trade marks in comparative advertising material is permissible under the Trade Marks Act. Section 122(1)(d) of the Trade Marks Act provides that "a person does not infringe a registered trade mark when... the person uses the trade mark for the purposes of comparative advertising".

As demonstrated by *Easyway Australia Pty Ltd v Infinite Plus Pty Ltd* [2011] FCA 351, where a competitor's trade mark is not displayed in the advertisement, the court will look to the market to determine whether or not the impugned vendor is identifiable.

Copyright

There is no exception in the Copyright Act to allow the reproduction of a copyright work (such as a brand's logo) in comparative advertising. However, there is a provision that allows the inclusion of artwork 'incidentally' in a film or broadcast. Whether the inclusion of a third party's brand in an advertisement is 'incidental' or not will be determined on a case by case basis and there are currently no decided cases in Australia on this point.

Misleading and Deceptive Conduct

Section 18 of the ACL (at Schedule 2 of the *Australian Competition and Consumer Act 2010* (Cth)) prohibits a person from engaging in conduct in trade or commerce that is misleading or deceptive or is likely to mislead or deceive. The main risk advertiser's face in utilising comparative advertising is that comparisons that are misleading or deceptive may breach Sections 18 and 29 of the ACL.

The laws prohibiting misleading and deceptive conduct apply to all forms of advertising, however comparative advertisements are more likely to be subject to scrutiny, both by the competitor and a regulator such as the Australian Competition and Consumer Commission.

<u>Comparing "like with like"</u>

To avoid breaching the ACL, accuracy is essential. For this reason, advertisers do not necessarily have to compare "like with like". An advertisement may compare a "superior" product with an "inferior" product, as long as the comparison is truthful and accurate. This applies even if the competitor also produces a more comparable superior product.

For example, in *Gillette Australia Pty Ltd v Energizer Australia Pty Ltd* (2002) 56 IPR 1 a television commercial compared a Duracell alkaline battery against an Eveready carbon zinc battery, which had a shorter battery life but was less expensive. In *Telstra Corporation Ltd v SingTel Optus Pty Ltd* [2007] FCA 824, Optus advertisements compared Optus' $49 Cap Plan against Telstra's $40 Phone Plan.

In both cases, the advertisements were clear, accurate and truthful, and therefore held to be lawful even though the competitor also sold other products more comparable to the "superior" product.

Each case will be assessed on its merits. Where the products being compared are clearly identified and the statements made about the products are truthful, there will be no breach of the ACL.

<u>Price Comparisons</u>

Any price comparisons made in advertising must accurately state the price difference, and this accuracy must be maintained for the life of the campaign. Should a competitor change their prices in response to an advertisement, the comparative advertisement may be rendered misleading. Many advertisers elect to include disclaimers stating that a price or calculation was accurate as at a certain date to cover this issue. However, while such disclaimers mitigate risk, they do not eliminate risk. Whether or not the comparison will be seen as unlawful will depends on the overall impression created by the advertisement.

Additionally, as the focus of the ACL is consumer protection, price differences must not be overstated <u>or</u> understated.

In *Luxottica Retail Australia Pty Ltd v Specsavers Pty Ltd* [2010] NSWSC 37 a Specsavers advertisement attempted to compare its prices favourably against the prices charged by OPSM. It stated the average price paid by OPSM customers, along with the average saving if Specsavers' products were purchased instead. The saving at Specsavers was in fact much larger than the saving claimed in the advertisement. Even though Specsavers painted OPSM more favourable than it should have, Specsavers was still found to have engaged in misleading or deceptive conduct because the price comparison was inaccurate.

Remedies

The remedies often sought in pursuing claims for misleading or deceptive conduct regarding comparative

advertising include injunctions, damages and corrective advertising.

1.3 Online Behavioural Advertising

Online behavioural, or interest based, advertising (**OBA**) is a form of targeted advertising based on someone's past browsing activity. The purpose of this type of advertising is to increase the effectiveness of website publishers and advertisers' campaigns by capturing data generated by website and landing page visitors.
Advertising and data collection companies do this in a number of ways including by placing cookies on consumers' computers. A 'profile' is then created for an individual, based on the pages visited, the amount of time they view each page, the links they click on, the searches they make and the things that they interact with, items that they purchase, and other factors.

Interest categories based on a user profile can allow advertisers to build up a picture of the user's browsing habits and interests. These interest categories can then be used to deliver advertisements.

The most common form of OBA is Third Party, used by advertising and data collection companies. However, First Party OBA also occurs (where no information is shared with third parties).

OBA is also known as Behavioural Targeting, Audience Targeting, Interest-Based Advertising and Targeted Online Advertising.

Regulations

On 8 April 2011, the Australian Senate Environment and Communications References Committee released their report '*The adequacy of protections for the privacy of Australians online'*.

As a result of the recommendations in this report, the Australian Guide for Third Party Interest Based Advertising was developed by the Australian Digital Advertising Alliance (**ADAA**) and released in March 2011. This is the first self-regulatory guideline for Third Party OBA in Australia. The Guideline is designed to complement existing Australian privacy laws and provides an additional layer of protection for consumers.

The aims of the Guideline are as follows:

- **To promote transparency and choice** by giving consumers clear notice as to which data is collected, how it is collected, what it is used for and the ability to exercise choice over online ads;
- **To promote internal good practices** in the area of privacy, data security and the handling of sensitive data, to promote consumer awareness with the launch of www.youronlinechoices.com.au; and
- **To promote accountability** with the introduction of an easily accessible complaints procedure and on-going monitoring and review of the Guideline. The Guideline consists of seven self-regulatory principles for best practice. These principles do not seek to regulate the content of online advertisements, other forms of online advertising or First Party OBA and are set out below:
- **Personal Information and Third Party OBA**
  Third Parties who want to combine OBA Data with Personal Information must treat the OBA Data as if it is Personal Information and in accordance with the Privacy Act.
- **Providing Clear Information to Users**
  Requirement to provide a clear notice to consumers about which data is collected, how it is collected and what it is used for.
- **User choice over OBA**
  Consumers to be able to make a choice as to whether or not they consent to the collection of data for OBA and given clear user-friendly options to manage their advertisement choices.
- **Keeping Data Secure**
  Companies must ensure data is stored securely and is only kept as long as it fulfills a legitimate business need or as required by law.
- **Careful Handling of Sensitive Segmentation**
  OBA categories uniquely designed to target children under 13 will not be created. Companies seeking to use OBA in relation to Sensitive Market Segments must obtain explicit consent.
- **Educating Users**
  Companies to provide easily accessible, user-friendly information about OBA. A consumer education website providing consumer friendly and non-technical information on OBA has been developed by the industry.
- **Being Accountable**
  All businesses are accountable to uphold the principles in the Guideline, develop easily accessible mechanisms for consumers to lodge complaints directly to companies and commit to an ongoing review of the Guideline and its implementation.
- To date, the companies signatory to the Guideline are: Adconian, Adobe, Carsales Network, Eyeota, Fairfax Digital, Google, Microsoft, News Digital Media, News Corp Australia, NineMSN, realestate.com.au, Network Ten, Sensis Digital Media, Telstra, Rhythm One, Digital 19, XAXIS, and Yahoo!7.

The Privacy Act

The *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (**Privacy Amendment Act**) was introduced to Parliament on 23 May 2012 and was passed with amendments on 29 November 2012. The Privacy Amendment Act introduces many significant changes to the Privacy Act which will commence in March 2014.

Most importantly, the Privacy Amendment Act introduces the Australian Privacy Principles (APPs), a set of mandatory privacy principles which replace the National Privacy Principles and the Information Privacy Principles contained in the old Act. The APPs apply to all organisations that collect 'personal information' and have a minimum annual turnover of $3 million.

This raises an important question for organisations using OBA as to when does the collection and pooling of information to create a user profile of an individual for marketing purposes amounts to the collection of 'personal information' as defined in the Act, thereby requiring full compliance with all of the APPs.

Under the old Act, personal information is defined as "information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an

individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion".

When the Privacy Amendment Act took effect in March 2014, the old definition of personal information was replaced with the following definition:

"information or an opinion about an identified individual, or an individual who is reasonably identifiable:

(a) whether the information or opinion is true or not; and
(b) whether the information or opinion is recorded in a material form or not."

Significantly, this new definition contemplates information about an individual which, when linked to other information (which may be held by the same entity or another entity), identifies an individual or renders the individual reasonably identifiable. The central issue is to determine whether, when data is compiled from various sources to create user profiles, the threshold of 'reasonably identifiable' has been reached.

The Privacy Amendment Act applies to information about an individual who is 'identified' or 'reasonably identifiable'. The Explanatory Memorandum provides some guidance regarding when information about an individual may be seen as 'reasonably identifiable':

> Whether an individual can be identified or is reasonably identifiable depends on context and circumstances. While it may be technically possible for an agency or organisation to identify individuals from information it holds, for example, by linking the information with other information held by it, or another entity, it may be that it is not practically possible. For example, logistics or legislation may prevent such linkage. In these circumstances, individuals are not 'reasonably identifiable'.

The Explanatory Memorandum goes on to note that whether an individual is reasonably identifiable from certain information requires a consideration of a number of factors, including the cost, difficulty, practicality and likelihood that the information will be linked in such a way as to identify an individual.

This approach is consistent with the recommendations contained in the *For Your Information: Australian Privacy Law and Practice* (ALRC Report 108), which suggested that an individual is 'reasonably identifiable' when the individual can be identified from information in the possession of an agency or organisation or from that information and other information the agency or organisation may access without unreasonable cost or difficulty.'

Relevantly, the United Kingdom Information Commissioner has issued detailed legal guidelines on the *Data Protection Act 1998* (UK), including in relation to the meaning of 'personal data':

> An individual is 'identified' if you have distinguished that individual from other members of a group ... Simply because you do not know the name of an individual does not mean you cannot identify that individual.

The ALRC Report specifically notes that the examples used by the United Kingdom Information Commission regarding the collection of information about internet users with the intention of linking that information to names and addresses and targeting individuals with advertising without linking the information to names and addresses or making any effort to identify individuals in the physical world, would fall within the new definition of 'personal information' and should be protected by the Act.

The government has encouraged the development and publication of appropriate guidance about the meaning of 'identified' and 'reasonably identifiable' in the definition of 'personal information' by the Office of the Australian Information Commissioner (OAIC). Guidance issued by the OAIC will likely play an important role in assisting organisations, agencies and individuals to understand the application of the new definition, especially given the contextual nature of the definition.

Until such further guidance is issued, it is difficult to reach a definitive conclusion regarding when user profiles such as those created for OBA will fall within the definition of personal information.

The decision as to whether information is about 'an identified or reasonably identifiable individual' will always be contextual and will have to be considered on a case-by-case basis.

While the approach to whether an individual is reasonably identifiable may only be confirmed once final guidance is issued by the OAIC (and this may be deliberately vague), it seems likely that the data collected as part of OBA would be classified as personal information under the Act. As such, it is likely that OBA advertisers will need to treat all user profiles as personal information, unless the underlying data set contains only anonymous, de-identified information that cannot be linked or combined with any other data to become personally identifiable information. Therefore, it is likely that OBA advertisers will have to comply with the new provisions of the Privacy Amendment Act in collecting and handling personal information, including the new APPs.

1.4 Ambush Marketing

Ambush marketing is a marketing activity used by a brand to capitalise on or leverage off the goodwill of an event without permission. The most common instances of ambush marketing are in relation to major sporting events, such as the Olympics, FIFA World Cup, Rugby World Cup, Commonwealth Games and Grand Prix. An example of ambush marketing is the Qantas television advertisement of choirs on the Sydney Opera House steps, which caused many people to believe that Qantas, and not Ansett, was the official airline sponsor of the 2000 Sydney Olympics.

There are numerous laws in Australia that directly and indirectly regulate ambush marketing, including consumer protection laws, intellectual property laws and event specific legislation. These laws seek to protect against ambush marketing weakening the commercial investment of official sponsors or suppliers to an event by diluting or depriving them of public recognition and association to the event.

Consumer protection laws
Pursuant to the Australian Consumer Law in Schedule 2 of the *Competition and Consumer Act 2010* (Cth), any marketing activity that falsely or deceptively suggests or implies an association, sponsorship or affiliation between a brand and an event may constitute misleading or deceptive conduct (section 18) and/or contain false or misleading representations (section 29).

The distinction must however be made between a marketing activity that indirectly implies an affiliation with an event, which may only lead to confusion and may not give rise to a cause of action under the Australian Consumer Law, and a marketing activity that makes direct and misleading claims of association with an event, which may result in deception or a misrepresentation under the Australian Consumer Law.

Additionally, ambush marketing may be actionable under the common law action of passing off if it causes damage to the reputation or goodwill of an official sponsor or supplier to an event or wrongful appropriation in the sense of causing potential customers to associate the product or business of an official sponsor or supplier with that of the marketed brand, where no such connection exists.

Intellectual property laws
Ambush marketing may infringe the intellectual property rights of an official sponsor or supplier to an event through the unauthorised use of logos, names, symbols or imagery as part of the overall marketing campaign. For instance, copyright infringement may arise if the marketing activity substantially reproduces original components of the branding of an official sponsor or supplier or of the event itself, for instance its logo, tagline or theme song.

Trade mark infringement may also arise where a marketing activity contains a sign that is substantially identical or deceptively similar to the registered mark of an official sponsor or supplier or of the event itself, if the sign is used as a trade mark to indicate the origin of goods or services that fall within or are similar to the classes of goods or services in which the trade mark of the official sponsor or supplier or of the event itself is registered.

Event specific legislation
In addition to the above laws that generally regulate ambush marketing, there are various Australian Federal and State legislation that restrict certain marketing practices for specific events, including but not limited to the:

- *Olympic Insignia Protection Act 1987* (Cth), which protects Olympic insignia and prohibits the commercial use of certain Olympic expressions without licence from the Australian Olympic Committee;
- *Melbourne 2006 Commonwealth Games (Indicia and Images) Protection Act 2005* (Cth), which protects against the use of fraudulent or obvious imitations of designs or symbols associated with the Commonwealth Games;
- *Australian Grands Prix Act 1994* (Vic), which prevents ambush marketing in connection with the Australian Grand Prix in Melbourne;
- *Major Sporting Events Act 2009* (Vic), which restricts ambush marketing relating to major sporting events and to venues for events in Victoria, including aerial advertising;
- *Major Sports Facilities Act 2001* (Qld), which regulates the advertising and promotion of national and international events staged in Queensland, including advertising in air space or on a building or other structure visible from these events; and
- *Commonwealth Games Arrangements (Brand Protection) Amendment Bill 2013* (Qld), which aims to ban the unauthorised use of certain references and images where the use is for commercial or promotional purposes or would suggest a sponsorship-like arrangement with the 2018 Gold Coast Commonwealth Games, as well as conduct suggesting a sponsorship or affiliation with the Games that does not exist.

How to protect official sponsorship rights
The exclusivity of official sponsorship rights to an event in Australia can be protected in a variety of ways, including:

1. securing first tier advertising rights (for instance, in broadcasts) for official sponsors of the event;
2. registering any trade marks in respect of the event (including any titles, logos or images that only official sponsors can use to distinguish themselves from other parties) as well as in respect of the advertising of the event by official sponsors. If a trade mark is unregistered, the trade mark owner can only seek to enforce its rights on the basis of consumer protection laws, which often requires evidence of reputation in the trade mark, unlike an action for the infringement of a registered trade mark under the Trade Marks Act;
3. entering into an official sponsorship agreement between official sponsors and the governing body of the event, which contemplates ambush marketing and the circumstances in which the governing body will intervene to assist the sponsor, for instance the confiscation of competing marketing material from the venue;
4. formally thanking the official sponsors for their support of the event;
5. imposing conditions on tickets into the event and controlling what patrons can bring into the event (such as promotional material of competitors);
6. managing the numerous layers of sponsorship opportunities between events, venues, promotions, teams and athletes; and
7. preparing template letters of demand, which can be quickly served upon competitors to enforce the rights of official sponsors in respect of the event in reliance upon the above laws.

1.5 Direct Marketing
'Direct marketing' involves the promotion and sale of goods and services directly to consumers. Direct marketing can include both unsolicited direct marketing and direct marketing to existing customers. For unsolicited direct marketing, direct marketers usually compile lists of individuals' names and contact details from many sources, including publicly available sources.

Direct marketing can include:

- postal advertising;

- email advertising;
- SMS advertising; and
- telemarketing.

Privacy
The Privacy Amendment Act makes significant amendments to the Privacy Act. Amongst other things, the reforms include a new set of Australian Privacy Principles (**APPs**).

APP 7 deals with direct marketing. However, it will not apply to the extent that the Spam Act or the *Do Not Call Register Act 2006* (Cth) (**Do Not Call Register Act**) apply. APP 7 restricts the use and disclosure of personal information by organisations for the purpose of direct marketing. Organisations will only be permitted to use or disclose personal information for direct marketing if:

- they collected the information from the individual;
- the individual would reasonably expect the organisation to use or disclose the information for the purpose of direct marketing;
- the organisation provides a simple means for the individual to easily request not to receive direct marketing communication from the business; and
- the individual has not already made a request to opt out.
- Where the direct marketing involves a use or disclosure of sensitive information, consent will be required. There is an exception provided for contracted service providers to Federal government agencies.
- In all cases individuals will have the right to:
- request the source of their personal information;
- opt out of receiving direct marketing communications from the organisation; and
- opt out of disclosure of their personal information for third party marketing.

Spam
All commercial electronic messages sent in Australia must comply with the Spam Act.

The Spam Act is supplemented by the Australian eMarketing Code of Practice that was registered with the Australian Media and Communications Authority (ACMA) in March 2005. The Code has the force of law and establishes industry-wide rules and guidelines for the sending of commercial electronic messages in accordance with the Spam Act. The Code rules and guidelines provide practical and specific guidance in relation to the sending of messages in the context of current eMarketing practices. The Code automatically applies to all persons, including individuals and organisations, undertaking an eMarketing activity.

Under the Spam Act, commercial electronic messages include messages sent by way of email, IM (Instant Messaging) and Mobile Wireless Technology (MWT) including SMS (Short Message Service), MMS (Multimedia Message Service), Wireless Access Protocol (WAP) and 3rd Generation technology (3G) by entities to individuals, for the purposes of selling, advertising or promoting certain goods and services. Commercial electronic messages do not include fax or voice to voice telemarketing, even where the voice call is a pre-recorded human voice (although the Do Not Call Register will apply).

The *Spam Act* prohibits the sending of commercial electronic messages to an individual unless that individual has consented to receiving such communications. Both the Spam Act and Code clearly set out that consent can come in the form of "express consent" or "inferred consent". Express consent arises where an individual takes an active step to indicate that they consent to receiving future marketing materials, after first being made clearly aware that they are consenting to receiving commercial messages in the future. This means that the consumer is advised that they may receive promotional or advertising material from the relevant advertiser in the future by way of email, IM and MWT.

Establishing inferred consent is more difficult. The Spam Act and Code state that it can come about in two ways:

- where the advertiser sending the commercial electronic messages and the relevant individual has an existing business or other relationship and there is a reasonable expectation of receiving commercial electronic messages from that advertiser; and
- where a person conspicuously publishes a work related email address and a company wants to send them a commercial electronic message that relates to that person's line of work (it is important to note however, that this second option does not apply if a person indicates that they do not want to receive commercial electronic messages at that address).

In addition to the consent of the recipient, the Spam Act requires all "commercial electronic messages" contain clear and accurate sender identification and a functional 'unsubscribe' facility to opt out of receiving such messages.

Do Not Call Register
The Do Not Call Register was established under two pieces of Commonwealth legislation, namely the Do Not Call Register Act and the *Do Not Call Register (Consequential Amendments) Act 2006* (Cth).

The Do Not Call Register commenced in 2007 with the general prohibition on making, or causing telemarketing calls to be made to numbers on the register beginning on 31 May 2007. Under the Do Not Call Register Act, it is illegal to make telemarketing calls to numbers on the Do Not Call Register. There are exceptions for charities, educational and religious organisations and political parties.

Advertisers who make telemarketing calls can avoid possible penalties by checking or 'washing' their lists against the Do Not Call Register.

It is legal for advertisers to call customers with whom they have a relationship and who have consented to receive the call, even if the customers number is listed on the Do Not Call Register. It is important for advertisers to be able to establish that express consent has been given, for example if the customer willingly opted-in via Internet or mobile in response to a particular campaign.

ACMA has also implemented the *Telecommunications (Do Not Call Register) (Telemarketing and Research Calls) Industry Standard 2007* which commenced on 31 May 2007. The standard establishes a minimum set of requirements for making telemarketing and research calls and aims to provide greater certainty for consumers on the minimum level of conduct they can expect from those making unsolicited telemarketing and research calls.

The standard applies to:

- all telemarketing calls made to an Australian number to offer, advertise or promote goods, services, interests in land, business opportunities or investments, or to solicit donations;
- all research calls to conduct opinion polling and to carry out standard questionnaire-based research; and
- calls made for the above purposes by public interest entities (such as charities, registered political parties, and religious organisations) who are exempt from the general prohibition on calling numbers listed on the Do Not Call Register when making specific types of telemarketing calls.

ACMA has released the *Do Not Call Register Act 2006 Compliance Guide* to provide telemarketers with advice about measures they can take to comply with the Do Not Call Register legislation.

ADMA Direct Marketing Code of Practice
The Australian Direct Marketing Association (ADMA) operates a Direct Marketing Code of Practice which is a self regulatory code. Compliance with this Code is a pre-requisite of ADMA membership.

1.6 Product Placement

Product placement is wide-spread in Australian television programs and continues to be a growing source of revenue for broadcasters. This growth stems from the rise of digital product placement, where new digital technology allows advertisements and products to be embedded into a program in post-production. This may be in the form of an outdoor billboard or banner, product label or an advertisement on a laptop or television screen.

While there are laws prohibiting the display of specific products (such as tobacco), product placement remains largely unregulated in Australia.

Industry Codes
While a number of industries in Australia have their own voluntary advertising codes of practice (as discussed further below) it is arguable that these codes do not extend to coverage of product placement. Instead, they are primarily concerned with more traditional forms of advertising.

However, product placement is considered by the Commercial Television Industry Code of Practice. Under section 1.20, which applies to factual programs (documentaries, current affairs and infotainment programs), if a licensee enters into a commercial arrangement, and the third party's products or services are endorsed or featured in the program, the licensee must disclose the existence of that commercial arrangement. This disclosure must be made during the program or in the credits of the program. It should adequately bring the existence of any such commercial arrangement to the attention of viewers in a way that is readily understandable to a reasonable person. These rules also apply where the presenter of a factual program is paid to endorse a third party's product.

The Commercial Television Industry Code of Practice also notes that where a licensee receives payment for material that is presented in a program or segment of a program, that material must be distinguishable from other program material, either because it is clearly promoting a product or service, or because of labeling or some other form of differentiation.

The Code of Practice is silent in regards to commercial arrangements for non-factual programs. This lack of regulation means that a television network may accept payment from an advertiser for promoting a brand in a non-factual television program without disclosure either during the program or in the credits.

Consumer Protection Laws
All advertisers must comply with the Australian consumer protection laws, including when engaging in product placement.

Most relevantly, product placement must not be seen as misleading or deceptive, or there may be an infringement of the ACL (Schedule 2 of the *Competition and Consumer Act 2010* (Cth)). Section 18 of the ACL provides that a person in trade or commerce must not engage in conduct that is misleading or deceptive or likely to mislead or deceive. Section 29 of the ACL prohibits a person from falsely representing that goods or services of the corporation promoting the goods or services have sponsorship, approval or affiliation that they do not have. The legal test is whether a reasonable, casual and attentive, but not over analytical viewer or reader of the advertising material would be likely to be misled or deceived.

The risk of breaching these laws when engaging in product placement is relatively low, as by its nature, product placement does not generally make representations as to the standard, quality, value, grade, composition, style or model of a particular product. Further, given that products are often placed in fictional settings, it is doubtful that the 'reasonable viewer' would be likely to be misled or deceived by any representations made.

Social Media
The rise of social media has seen a rise in online 'cash for comment', with celebrities and social influences increasingly being paid to positively promote goods and services online. The Australian Competition and Consumer Commission considers that celebrities should disclose that they are being paid to endorse a product. However, to be compliant with the consumer protection laws contained in the ACL, it is important that in all instances celebrities' tweets, Instagram and/or Facebook posts are genuine and reflect the true opinions and beliefs of the celebrity.