

The Executive Director
Australian Law Reform Commission
GPO Box 3708, SYDNEY NSW 2001

Dear Madam, Sir,

Submission to the ALRC regarding the Australian classification scheme

On behalf of The Communications Council, the peak body for Australia's agencies in the marketing communications sector, please find enclosed our submission regarding the Australian classification scheme.

The Council thanks the Commission for the opportunity to comment and we look forward to discussing this submission with the Commission in further detail.

Yours sincerely,



Daniel Leesong
Chief Executive Officer
The Communications Council

About The Communications Council

The Communications Council was formed on 1 January 2010, merging the former Advertising Federation of Australia (AFA) with the Account Planning Group (APG) and Australasian Writers and Art Directors Association (AWARD) and more recently the Australasian Promotional Marketing Association (APMA). The Communications Council is the peak body representing agencies in the marketing communications industry to government, media and the public.

We help grow member businesses and develop individual careers through the provision of professional development services, advocacy and support.

The Communications Council represents businesses in marketing communications sector which contribute in excess of \$30 billion towards Australia's GDP.

The Communications Council and this enquiry

The Communications Council has previously been involved in the Senate Legal and Constitutional Affairs Committee's enquiry into the Australian literature and film classification scheme and the House of Representatives Committee on Social Policy and Legal Affairs' enquiry into the regulation of billboard and outdoor advertising.

The submissions made at the former enquiry is here

http://www.aph.gov.au/senate/committee/legcon_ctte/classification_board/submissions.htm

and the latter here:

<http://202.14.81.34/house/committee/spla/outdoor%20advertising/subs.htm>

Given these recent enquiries, The Communications Council will submit the following commentary alongside the Terms of Reference of this enquiry, while directing the committee to the previous two submissions for additional information on the topics of outdoor advertising regulation and how it pertains to classification specifically.

1. In this inquiry, should the ALRC focus on developing a new framework for classification, or improving key elements of the existing framework.

The current marketing communications regulations and self-regulatory codes are not covered by the classification system.

Marketing communications are covered by the following Codes and regulations:

- The AANA Code of Ethics stipulating that advertisements are legal, decent, honest and truthful. Administered by the Australian Association of National Advertisers (AANA) and adjudicated by the Advertising Standards Bureau (ASB).
- The AANA Code on Advertising and Marketing to Children, aimed at ensuring that advertisers and marketers develop and maintain a high sense of social responsibility in advertising and marketing to children in Australia.
- The AANA Food and Beverages Code, aimed at ensuring social responsibility in advertising and marketing food and beverage products in Australia, as well as the Environmental Claims

in Advertising Code, dealing with misleading and deceptive claims in areas of 'green marketing'.

- The Alcohol Beverages Advertising Code (ABAC) regulating Alcohol advertising, administered by a Management Committee which includes industry, advertising and government representatives, including our CEO, Daniel Leesong. Complaints are handled by the Advertising Standards Bureau (ASB). Alcohol advertising is prevetted by the Alcohol Advertising Pre-Vetting System (AAPS).
- The Motor Vehicle Code, the Voluntary Code of Practice for Motor Vehicle Advertising instituted by the Federal Chamber of Automotive Industries (FCAI) regulating motor vehicle advertising in Australia in regards to appropriate standards for the portrayal of images, themes and messages relating to road safety.
- The Therapeutic Goods Advertising Code regulating advertising of non-prescription drugs, regulated by the Therapeutic Goods Advertising Code Council (TGACC).
- Additional Weight Management and Financial Advertising Codes.

In addition:

- The Competition and Consumer Act 2010 (formerly the Trade Practices Act 1974) prohibiting misleading or deceiving advertising, packaging, logos, endorsements or sales pitches applies to agencies.

The exceptions are television commercials and infomercials, which must be classified before they can be broadcast on free to Air TV. Commercial Advice (CAD) provides classification and information services to advertisers, agencies and production houses in relation to television commercials and infomercials.

The AANA Code of Ethics

The AANA Code of Ethics provides the overarching set of principles to which all advertising and marketing communications, across all media channels, should comply.

The complaints based system is designed to adjudicate on what it perceives are prevailing community attitudes. In this way, the Standards Board aims to draw community expectations into its consideration of the rules set out in the Codes and reflect community standards as they evolve.

The Communications Council submits that the existing self-regulation system is an effective means of providing appropriate protections and safeguards for the community.

The Communications Council recognises that the advertising sector carries an above-average expectation on it for social responsibility, and must be aware of existing community concerns and standards when creating marketing communications campaigns.

The Communications Council's members share a commitment to provide consumers with appropriate advertisements that are in line with community standards, with a view to promoting consumer confidence and trust in the self-regulatory system more broadly. They operate from the understanding that a failure to meet community expectation will result in ineffective marketing messages, and may result in reputational damage to the brand.

The current system is an effective and transparent mechanism for consumers to raise concerns about the content of particular advertisements and provides a robust, independent and fair system for assessing whether or not an advertisement meets the broader community's standards.

We therefore consider that including advertising within the National Classification Scheme is neither appropriate, nor necessary.

Critical to our position are these additional facts:

- The Advertising Standards Bureau (ASB) reports that the vast majority of marketing communications do not attract complaints
- The ASB reports that the majority of complaints are rigorously assessed, and are dismissed
- A determination that an advertisement breaches community standards means the immediate removal of the advertisement and prohibits use of the advertisement in the future.
- The ASB system has resulted in upheld complaints being actioned and addressed in an effective and timely manner, achieving a compliance of nearly 100%¹
- In the 0.07 per cent of cases of non-compliance, over 12 years of operation of the system, the ASB already works with government bodies to address the gaps.

We also note that Research conducted for the Bureau and Standards Board in 2007, 2009 and 2010 indicates that Standards Board decisions generally reflect community standards on the key provisions of the AANA Code of Ethics.

Research conducted in 2007 related broadly to the Code of Ethics, while research conducted in 2009 and 2001 related to –respectively- community perceptions of violence in advertising and community perceptions of sex, sexuality and nudity in advertising.

Advertising Standards Board members take the research into account in their consideration of complaints under the Codes.

Current enquiries

The Communications Council notes that the recent enquiry into the regulation of outdoor advertising has dismissed calls to include outdoor advertising into the classification scheme. The Committee noted in its final report 'Reclaiming Public Space' that:

“The committee failed to be convinced that a government regulatory or classification model would improve compliance or provide a more effective means of regulating the industry in line with community expectations.²”

¹ Advertising Standards Board Statistics as cited in the ASB submission to the Senate Committee Legal and Constitutional affairs' Inquiry into the Australian film and literature classification scheme, p 25.

² Reclaiming Public Space, Inquiry into the regulation of billboard and outdoor advertising report by the House of Representatives standing Committee on Social Policy and Legal Affairs, July 2011, section 3.58, page 36

We submit that including any form of advertising under the classification scheme won't be more effective than regulation through the current system.

The Report has recommended a number of improvements to the system. As The Communications Council is committed to keeping the system relevant and reflective of community standards, we have welcomed the findings and committed to working with other industry bodies to consider the recommendations. In addition, we'll look at addressing gaps in the system through education and research.

We note that the Australian Association of National Advertisers (AANA) is currently reviewing its Code of Ethics to take into account the recommendations of the enquiry. The Communications Council will follow that development closely with a view to providing members with adequate training reflective of the changes.

Question 2: What should be the primary objectives of a national classification scheme?

While the objectives of the classification scheme are outside the purview of The Communications Council, we do note that the principles that underpin the classification system, ie of non censorship for adults, protection of minors and taking into account community concerns around offensive material, violence and the portrayal of persons, also inform the self-regulatory system.

The AANA Code of Ethics provisions are designed to ensure legality, truth, accuracy, a sense of taste and decency and to ensure they have been prepared with a sense of obligation to the consumer and society and a fair sense of responsibility to competitors.

Specific provisions of the code ensure communications do not vilify or discriminate against a person on account of race, ethnicity, nationality, sex, age, sexual preference, religion, disability or political belief; do not portray violence unless it is justifiable in the context of the product or service being advertised; treat sex, sexuality and nudity with sensitivity to the relevant audience, including specifying that advertisers should not imply that children are sexual beings and that ownership or enjoyment of a product will enhance their sexuality; ensure there is no contravention of community standards of advertising to children.

Question 3. Should the technology or platform used to access content determinate whether content should be classified, and, if so, why?

The Communications Council submits that technology neutrality in self –regulation and regulation more broadly, is the best way to ensure the principles remain relevant and current in the context of rapidly changing technologies.

We note that the present AANA Code of Ethics touches all media- regardless on which device is used to access the content.

Question 9: Should the potential size and composition of the audience affect whether content should be classified.

Question 10: Should the fact that content is accessed in public or at home affect whether it should be classified?

In response to both these questions, The Communications Council notes that the ASB currently already takes into account the audience and time zone when adjudicating complaints. These considerations are relayed through The Communications Council's training programs to ensure agencies treat content for different mediums with sufficient consideration.

The Communications Council notes that the previous enquiry into the regulation of outdoor advertising has referred to the specific nature of outdoor advertising as 'public and unavoidable'³.

We submit that the self-regulatory system and the complaint handler ASB, the AANA and The Communications Council, which is a lead educator of the system recognize the unique nature of outdoor advertising and have a number of pre-vetting systems in place to deal with this medium⁴.

We submit that given the instantaneous and public nature of billboards, classifying its content with a view to informing consumers' choice and /or warning them of its offensiveness is practically impossible. This is because there is no other content to classify bar that which is on display.

We submit this is an effective way to deal with content that is widely accessible and has a universal audience and that there is no need, beyond the recognition of its specific nature, to treat this content differently to other content under the code.

³ Reclaiming Public Space, Inquiry into the regulation of billboard and outdoor advertising report by the House of Representatives standing Committee on Social Policy and Legal Affairs, July 2011, section 2.58, p 19

⁴ We note that the AANA, The Communications Council and the OMA have previously developed an Advisory Paper which provides agencies with a checklist to guide their creative process around outdoor advertising with a view to recognizing the sensitive nature of outdoor advertising. See here: <http://www.communicationscouncil.org.au/public/content/ViewCategory.aspx?id=301>. We also note that the OMA has recently announced the introduction of a formal Content Review Policy which has provisions to ensure no member displays advertisements that are likely to breach a self-regulatory Code.

Question 17: Would co-regulatory models, under which industry itself is responsible for classifying content, and government works with industry on a suitable code, be more effective and practical than current arrangements?

The Communications Council notes that Australia adopted a quasi-regulatory system for alcohol advertising on 1 July 1998 because of community sensitivities in the area of alcohol marketing. These guidelines for advertising have been negotiated with government, consumer complaints are handled independently, with costs borne by industry.

The Alcohol Beverages Advertising Code (ABAC) Scheme is the centrepiece the system and is administered by a Management Committee which includes industry, advertising and government representatives. Complaints are referred on to the full Alcohol Beverages Advertising Adjudication Panel.

The Code is designed to ensure that alcohol advertising will be conducted in a manner which neither conflicts nor detracts from the need for responsibility and moderation in liquor merchandising and consumption, and which does not encourage consumption by underage persons.

The ABAC Scheme also offers advertisers a confidential, 'user pays' pre-vetting service where proposed advertisements can be assessed against the provisions of the code by experienced pre-vetters in the early stages of campaign development.

The current figures for ABAC complaints stem from 2009. In that year there were 117 complaints, 47 were considered (the rest was referred to the ASB under the Code of Ethics) and 12 upheld.

Upheld complaints were dealt with, on average, within 31 business days, according to ABAC figures.

The Communications Council submits that the ABAC scheme is an effective co-regulatory system given the specific community concerns around over consumption of alcohol, as well as the highly regulated nature of this product.

However, The Communications Council considers that the current system of self-regulation for advertising other than alcohol is the most efficient, flexible and cost effective means of ensuring that marketing communications meet community expectations.

This position is informed by the fact that:

- The self-regulatory system is industry funded and supported, and operated at no cost to government; the current system is funded by industry at a relatively small level of 0.035% of advertising expenditure.
- The classification system is operated at a cost to the tax payer; and
- The self-regulatory system costs are borne by those responsible for the communications, rather than the consumer.
- the ASB meets twice a month and is capable of providing a 24 to 48 hour turn around for cases where it is likely that the advertisement will breach the Code or if there is immediate and significant community concern.

The Communications Council would urge the ALRC to consider closely the financial impact of potential changes to the existing system by bringing advertising under the classification system.

We submit that placing communications under the classification system would place a financial and administrative burden on the industry, which would ultimately burden the consumer.

We also draw attention to the fact that classification may hamper government advertising efforts significantly, including in critical time-sensitive areas such as public health and safety and in election advertising.

Finally, we submit that a co-regulatory system would be less flexible than the current self-regulatory system as it is to a lesser extent able to respond to changing community standards. We consider the strength the system to lie in the system's ability to evolve over time.