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AUSTRALIAN DIGITAL ADVERTISING
POLICY AND
REGULATION
GUIDE **2015**

Welcome to the IAB Australia guide to digital advertising policy and regulations¹. Everything you need to know about existing rules and regulations, as well as the key policy issues and debates shaping the market, and all in one place.

Interactive digital advertising is a multifaceted practice involving several areas of expertise including but not limited to: content creation, technology build, media broadcasting, copyright development, making representations, collect personal information, data aggregation delivered across multi-platform and multi-device communication channels. These practices collectively complex and portray a multi-dimensional digital life cycle. Because of the diversity of conduct involved we see that legal and regulatory considerations arise at each stage of the digital life cycle, therefore more than one arm of government is involved in overseeing our industry which is also complimented, where possible by self-regulation.

Below you will find answers to a range of questions designed to help you get to grips with what you need to know about current digital advertising regulations. Simply click on the links to be taken to the relevant answer within this page.

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How is digital advertising regulated in Australia? Give me a one-minute overview.

In Australia, the conduct of digital advertising is regulated by federal laws, some state agencies, as well as self-regulation. At a federal level, the Australian Competition and Consumer Commission (ACCC) regulates the content of digital advertising and disclosures through the Australian Consumer Law (ACL), which requires business to ensure that consumers are appropriately and accurately informed by prohibiting misleading or deceptive conduct, false or misleading claims and the imposition of unfair contract terms. Furthermore, the *Spam Act 2003 (Cth)* mandates that you must obtain consent from a consumer before initiating a commercial electronic message, appropriately identify your business and ensure that the consumer is able to unsubscribe from your messages. The *Privacy Act 1988 (Cth)* is also another key piece of legislation that requires business to be open and transparent with respect to their data handling

practices and prescribes the contents of privacy policies as well as several other notifications and data security obligations. Some State agencies mirror the obligations of the ACL but also have specific requirements with respect to the conduct of competitions and lotteries. Self-regulation and good practice supplements legislation and fill the gaps where the law does not or cannot reach, offering an easier way of resolving disputes and adapting guides to new technologies and business models.

What are the basic rules businesses need to follow?

This can depend on the size of your business and whether you are an advertiser, agency, media owner or technology business. There are over numerous pieces of legislation affecting advertising in Australia. A significant piece of legislation to be aware of is the *Competition and Consumer Act 2010 (Cth)* including the *Australian Consumer Law (ACL)*.

The *Competition and Consumer Act 2010 (Cth)* seeks to promote competition, prohibits misuse of market power, uncompetitive conduct, promotes fair trading and provides protection for consumers. A significant provision within the ACL is Section 18 which states *‘a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive’*. This section creates a norm of conduct and applies for both consumer protection and all aspects of *‘trade or commerce’*. A person or business can contravene Section 18 by either act or omission. For example, a claim that a product or service does or does not have certain attributes in advertising, marketing or product specifications may give rise to a contravention. Further, if a person makes a representation with respect to a future matter and the person does not have reasonable grounds for making that representation, then the representation will be taken to be misleading. An omission, or silence, can also be held to be misleading or deceptive conduct. In this regard, the ACCC has issued guidance to help advertisers comply with these requirements, ACCC *‘A Guide for Business, Advertising and Selling Guide April 2014* <http://www.accc.gov.au/publications/advertising-selling>. This guide applies to all digital advertising conduct regardless of the type of technology, device or media delivery.

Publishers and app developers should be aware that claims made on a website or app also are subject to ACCC guidance and oversight. In addition, the privacy commissioner has issued practical guidance- *Mobile privacy: a better practice guide for mobile app developers* [<http://www.oaic.gov.au/privacy/privacy-resources/privacy-guides/guide-for-mobile-app-developers>].

What about the use of data in online marketing? Is this regulated?

Yes. Most interactive advertising involves the collection and use of data to produce, measure and profile advertising, and the most generic law governing all businesses in the sector is the *Privacy Act 1988 (Cth)*. It outlines the legal obligations with respect to the collection, holding, use and disclosure of personal information, including health information, credit information, tax file numbers and credit information. Importantly, digital advertising involves data aggregation and consumer profiling which may in some circumstances lead to consumer identification. Business should be mindful of the current definition of personal information under the Privacy Act that states that personal information means *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*. This definition of personal information includes information about an individual which, when combined with other information (which may not be controlled by the same entity), identifies an individual or renders the individual reasonably identifiable. Multiple documents or data bases are potentially controlled by different entities, may be considered in determining whether an individual is reasonably identifiable under the Privacy Act, thus a key issue that will face advertisers is how and when to determine whether the threshold of 'reasonably identifiable' has been reached. In assessing whether you hold or are likely to be dealing with personal information, you should consider the practicality, cost, difficulty and likelihood that the information will be linked in a way to identify the individual or whether an individual is reasonably identifiable.

Who enforces compliance with the law?

There are a diverse range of businesses practices involved in digital advertising arising at different stages of the digital life cycle of content production and communication. Depending on the conduct of your business, then you should be aware of one or more of the following regulators that administer, oversee and enforce compliance with the law.

Australian Communications and Media Authority (ACMA)

The ACMA attends to the day to day regulation of some of the areas overseen by the Department of Communication. It provides guidance, compliance standards, receives and adjudicates complaints and enforcement for matters relating to regulation of all forms of electronic communication including the:

- Internet content
- Internet security ñ anti-malware initiative
- Content and advertising ñ by setting license conditions, mandatory program standards, codes of practice, disclosure of sponsorship, setting standards for the delivery of Australian content

- Telecommunications
- Radio content and spectrums
- Broadcasting
- Anti-spam

Australian Competition and Consumer Commission (ACCC)

The ACCC promotes competition and fair trade in markets to benefit consumers, businesses, and the community. One of its primary responsibilities is to ensure that individuals and businesses comply with Australian competition, fair trading, and consumer protection laws as they apply under the *Competition and Consumer Act 2010*. Of particular note are the Australian Consumer Law provisions that address the disclosure, transparency and factual obligations of businesses when promoting goods and services to consumer, which includes online advertising through the use of any form of digital infrastructure. The ACCC is concerned with:

- False or misleading claims
- Managing online reviews
- Shopping online
- Internet banking
- Online auctions
- Online group buying
- Social media advertising
- Pricing displays
- Unfair practices

Office of the Australian Information Commissioner (OAIC)

Is responsible for privacy functions and other laws that confer privacy obligations as part of that law, for example compliance with Anti-Money Laundering and Telecommunications laws also triggers obligations by relevant entities with respect to disclosure of personal information. Generally, privacy laws only apply to organisations with an Australian Link that have an annual turnover of \$3 million dollars or more (though they may elect to comply with a lower turnover). *The Privacy Act 1988* is the primary legislation dealing with collection, holding, use and disclosure of personal information that belongs to an individual as it arises within the commercial business sector.

What happens if an organization does not comply with the law?

Each of the above regulators administer laws that affect a different aspect of the digital advertising life cycle. In this regard, you should be mindful of the various regulatory guidance documents that are issued by regulators from time to time. Such guidance

documents outline the manner in which the regulator will interpret the law and its response in the event of a breach. A business that is not fully complying with the law may find itself in discussions with a regulator enquiring about its conduct. If and when this arises, then you will need to respond within the required time frame and provide written reasons or explanation as to why you are not complying with the law. An issue may come to the attention of a regulatory either by way of a complaint from a consumer or even without a complaint. Where this happens then the regulatory will want to hear from you. Depending on the reasons that you provide, you may be asked to take action or refrain from taking certain actions by way of a simple request or through a formal court order or undertaking. In some instances where the breach is considered to be more serious, then you could be faced with an infringement notice or even a court imposed fine. Your conduct will need to be either corrected, amended or even stopped completely. You should be in a position to provide suitable responses within a timely manner.

What happens if an organisation does not comply with advertising self-regulatory rules?

The IAB assists members stay abreast of legislative changes by providing best practice guidelines that outline accepted industry standards. Business are encouraged to actively stay abreast of any self-regulatory guidelines as they represent a unique industry position and practices for their conduct of the digital advertising life cycle. Self-regulatory guides are not law and generally not overseen by any of the regulators. But any conduct that could be seen inconsistent with an accepted industry standard could be seen as the catalyst for government and regulators to take a second look at the conduct and introduce measures to remedy or improve behaviour within the industry. An example of industry standards of conduct are the IAB Guidelines for Ad Verification [<http://www.iabaustralia.com.au/guidelines-and-best-practice/guidelines-best-practice/item/3-guidelines-and-best-practice/35-ad-verification-guidelines-2013>] and Digital Workflow [<http://www.iabaustralia.com.au/guidelines-and-best-practice/guidelines-best-practice/item/3-guidelines-and-best-practice/1787-digitalworkflowguidelines>].

The AANA have a number of codes that are relevant to the advertising industry and these are administered by a third party complaints resolution body call the Advertising Standards Bureau (ASB). The ASB provides a free public service in complaint resolution. It provides determinations on complaints about any form of advertising in relation to issues including the use of language and the discriminatory portrayal of people, concern for children, portrayals of violence, sex, sexuality and nudity, and health and safety. The Advertising Claims Board provides a competitive complaint resolution service. It is

designed to determine complaints issues of truth, accuracy and legality of advertising on a user pays cost recovery basis.

What is the ADAA Self-Regulatory Program?

The Australian Digital Advertising Alliance (ADAA) is a self-regulatory program designed to help provide consumers with the ability to exercise choice in ad-supported online media. Consumers are provided the opportunity to select and opt-out of interest based ads from a number of publishers that are signatories and registered within www.youronlinechoices.com.au. These consumer selections do not eliminate the online delivery of ads, rather it limits the delivery of third party interest based ads that appear within their device. The ADAA is a collective committee that is administered by IAB Australia and is represented by the IAB, Media Federation of Australia, Australian Association of National Advertisers and the Communications Council and several online publishers. The ADAA has developed and supports the Guideline for Third Party Interest Based Advertising [<http://www.youronlinechoices.com.au/adaa-best-practice-guideline>] which outline conduct principles of transparency, notice, choice, security education and accountability for the betterment of both consumer and business and visibility by regulators.

I still have questions – who do I contact?

For any questions on the work of IAB Australia contact Daad Soufi, Director, Legal and Regulatory Affairs at daad.soufi@iabaustralia.com.au or contact us on 02 9211 2738.

ⁱ Note: The information contained in this document is for informational purposes only and should not be considered legal advice. This document may or may not reflect the most current legal developments and is not promised or guaranteed to be correct or complete. The purpose of this guide is to help digital advertisers and marketers become aware of the basic regulations that govern the industry. It is not intended to be comprehensive in its explanation of these requirements, but rather to exemplify some of their important aspects.