



GALA
GLOBAL ADVERTISING LAWYERS ALLIANCE

Emerging Advertising Law Issues in the Asia Pacific Region

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Speakers



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Current key emerging advertising law issues in Australia:

- Greenwashing
- Vaping outlawed in Australia

Greenwashing

- The Australian Competition & Consumer Commission (ACCC) considers 'greenwashing' to be claims which misrepresent the environmental impact associated with a business or the goods and services it supplies
- The Australian Securities Investments Commission (ASIC) considers 'greenwashing' (in relation to investments) to be the practice of misrepresenting the extent to which a financial product or investment strategy is environmentally friendly, sustainable or ethical



MOO Premium Foods Pty Ltd

- MOO Premium Foods Pty Ltd made advertising claims that their yoghurt packaging was made of 100% ocean plastic
 - MOO's claims gave the impression of plastic being collected directly from the ocean
 - In reality the packaging was 'reclaimed ocean bound plastic' waste that was collected within 50km of the shoreline

Packaging with '100% ocean plastic' representations



MOO Premium Foods Pty Ltd

- MOO provided the ACCC with a section 87B undertaking that for a period of 3 years it will, at its own expense:
 - Update the packaging design of its yoghurt products to not include representations regarding “ocean plastic”;
 - Conduct internal audits relating to the nature and location of the “ocean bound plastic” resin used in MOO’s yoghurt packaging; and
 - Establish and implement a compliance program.
- MOO’s undertaking will end on 24 November 2026

Australian Competition and Consumer Commission (ACCC) v Clorox Australia Pty Ltd

- Clorox is alleged to have made false and misleading statements regarding its GLAD-branded kitchen tidy and garbage bags, stating that they were comprised of 50% plastic waste from the ocean by using the term “ocean plastic”
- The garbage bags, however, comprised of:
 - 50% resin – which was recycled plastic taken 50 kilometres from a shoreline and not from the ocean or sea
 - 50% - non-plastic resin, processing aid and dye

ACCC v Clorox Australia Pty Ltd

- The ACCC alleges that the visual elements on the GLAD garbage bags impacted the consumer's overall impression of the product's environmental impact including:
 - size and colour of the font;
 - blue colouring on the backgrounds and product itself; and
 - imagery used including a wave



ACCC v Clorox Australia Pty Ltd

- Like in the MOO case, the ACCC has alleged that Clorox has engaged in contravening sections 18, 29(1)(a), 29(1)(g) and section 33 of the ACL
- The ACCC alleges Clorox's use of the term "ocean plastic" along with the accompanying visual elements meant that the dominant message was that the garbage bags were made from ocean plastic
- A case management hearing is scheduled for 2 November 2024

Australian Securities Investments Commissions (ASIC) v Mercer Superannuation (Australia) Limited 2024 [FCA] 850

- Mercer misled superannuation members about the sustainability of its investments
 - Seven 'Sustainable Plus' investment options were offered by Mercer
 - These investment options were marketed as suitable for members who were 'deeply committed to sustainability' as it excluded companies involved in fossil fuels, alcohol production and gambling
- The Federal Court found that Mercer's 'Sustainable Plus' options were in fact, companies:
 - involved in the extraction of fossil fuels (including BHP Group Ltd, Glencore PLC);
 - involved in the production of alcohol (including Heineken Holding NV, Carlsberg AS); and
 - involved in the gambling industry (including Crown Resorts Limited and Aristocrat Leisure Limited).

ASIC v Mercer Superannuation (Australia) Limited 2024 [FCA] 850

- On 2 August 2024, Federal Court ordered Mercer to pay a penalty of AUD11.3 million for misleading statements about the sustainable nature and characteristics of its superannuation investment options
- Justice Horan commented in that case that *'... it is vital that consumers in the financial services industry can have confidence in Environmental, Social and Governance (ESG) claims made by providers of financial products and services ... Any misrepresentations in relation to ESG policies or practices associated with financial products or services, whether as an aspect of "greenwashing" practices or otherwise, undermines that confidence to the detriment of consumers and the industry generally.'*

What businesses need to consider in order to avoid advertising their products as 'greenwashing'

- Business owners should read the ACCC's 'Making Environmental Claims' guide
- Business owners are recommended to read ASIC's Information Sheet 271, it provides case studies and guidance for businesses to avoid partaking in greenwashing
- Expected to be released on 20 November 2024, businesses should read the Australian Parliament's report based on its inquiry into greenwashing
- Businesses should seek legal advice if you are unsure of how to advertise the 'green' or ESG aspects of their business

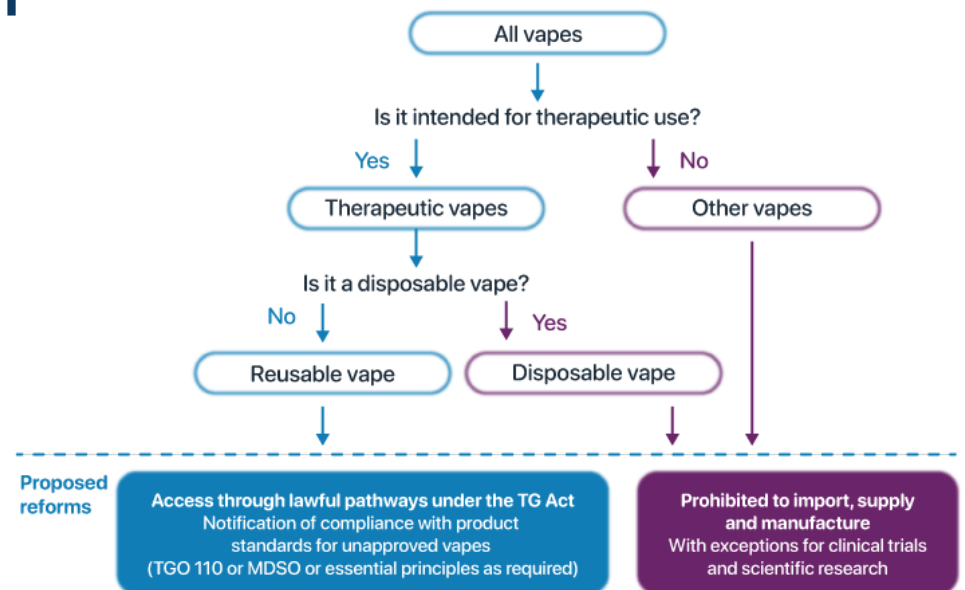
Vaping

- The Department of Health and Aged Care defines vapes as “battery-operated devices that deliver an aerosol by heating a liquid that users breathe in. People commonly refer to this aerosol as ‘vapour’, and to using an e-cigarette as ‘vaping’”
- Various substances can be vaped including:
 - Nicotine
 - Nicotine-free ‘e-liquids’ made from a mixture of solvents, sweeteners, other chemicals and flavourings
 - Other drugs – like, THC (cannabis) e-liquids



The Australian Vaping Landscape in 2024

- From 1 January 2024, doctors and nurses were allowed to prescribe therapeutic vapes for those trying to quit smoking
- On 1 March 2024, import controls on all vapes (including rechargeable vapes) were introduced by the Australian government



Changes from 1 July 2024

- New legislation was introduced in late June 2024, the *Therapeutic Goods and Other Legislation Amendment (Vaping Reforms) Act 2024* resulted in various changes to vaping from 1 July 2024
 - Advertising of vapes is prohibited unless specifically authorised
 - Advertising is banned on all media platforms including social media as well as in areas of promotion and sponsorship
 - Any persons involved in the transportation, storing or handling of vapes must comply with specific requirements
 - Importers and sponsors continue to be required to hold an import licence and permit from the Office of Drug Control and meet relevant product standards
 - Therapeutic vapes that meet TGA requirements will continue to be available from pharmacies where clinically appropriate
 - Non-pharmacy retailers like tobacconists, vape shops and convenience stores cannot sell vapes

Restrictions on advertising and the promotion of vapes

- The advertising of vapes is regulated by *Therapeutic Goods (Vaping Goods – Advertising) Authorisation 2024*
- Advertising is authorised for therapeutic vapes including:
 - on the label and packaging of the goods
 - advertising directed exclusively to medical practitioners, nurse practitioners, pharmacists and their practice managers and purchasing officers
 - advertising directed exclusively to businesses involved in the wholesale of notified therapeutic vaping goods
 - advertising that is advice or information given directly by a medical practitioner, nurse practitioner or pharmacist to a patient in the course of treatment.



INDIA

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ASCI's Guidelines for Advertisements making Environmental/Green Claims

- **Green Claims:** Claims suggesting that a product (and/or its packaging) or a service as a whole:
 - has a neutral or positive impact on the environment;
 - is comparably less damaging to the environment than a previous version;
 - is less damaging to the environment than competing goods or services; or
 - has specific environmental benefits.
- Absolute claims such as **"environment friendly"**, **"eco-friendly"**, **"sustainable"**, **"planet friendly"** must be capable of being substantiated by **robust data** and/ or **well-recognised and credible accreditations**.
- Comparative claims such as **"greener"** or **"friendlier"** need supporting **evidence** and basis of comparison.

- General environmental claim must be based on the **full life cycle**, unless otherwise stated.
- Environmental claims, to specify whether it refers to the product, the product's packaging, a service, or just to a portion.
- Highlighting the absence of an environmentally damaging ingredient **not permitted**, if that ingredient is not usually found in competing products or services.
- Ads must not claim an environmental benefit that results from a **legal obligation**.
- If certifications or seals suggest environmental claims, the advertiser must clarify which product or service attributes were assessed by the certifier.

- No use of visual elements conveying a false impression.
- Refrain from making aspirational claims about future environmental objectives in absence of clear and actionable plans.
- Advertisers must clearly disclose if carbon offsets won't occur within two years.
- Advertisers must qualify *compostable*, *biodegradable*, *recyclable*, *non-toxic*, or **'free-of' claims**, specifying their scope, supported by scientific evidence.

CCPA's Draft Guidelines for Prevention and Regulation of Greenwashing

- **Greenwashing prohibited, including:**
 - any deceptive or misleading practice, such as **concealing, omitting, or hiding relevant information**, by exaggerating, making vague, false, or unsubstantiated environmental claims;
 - use of misleading words, symbols, or imagery, placing emphasis on positive environmental aspects while downplaying or concealing harmful attributes.
- Greenwashing does not include use of obvious hyperboles, puffery, or the use of generic colour schemes or pictures, unless misleading.

- **Substantiation of Environmental Claims**
 - Generic terms such as **'clean', 'green', 'eco-friendly', 'eco-consciousness', 'good for the planet', 'minimal impact', 'cruelty-free', 'carbon – neutral'** not to be used without adequate qualifiers and substantiation
 - Meaning or implications of technical terms like Environmental Impact Assessment (EIA), Greenhouse Gas Emissions, Ecological Footprint, to be clear.
 - Environmental claims to be supported by **verifiable evidence**.
- **Aspirational or futuristic environmental claims permissible only with clear and actionable plans**

- **Adequate disclosures**

- Accurate and all material information to be disclosed
- Highlighting only favorable observations not permissible.
- Specify scope of claims.
- Comparative environmental claims must be verifiable and scope of comparison to be disclosed.
- Specific environmental claims such as **Carbon Offsets, carbon neutral, Compostable, Degradable, Free-of, Sustainability claims, Non-Toxic, 100% Natural, Ozone-Safe and Ozone-Friendly, Recyclable, Refillable, Renewable**, must be supported by disclosure about credible certification, reliable scientific evidence, or independent third-party verification.

CCPA's advisory on prohibition of ads on unlawful activities

- CCPA issued an advisory dated March 6, 2024 on prohibition of advertising, promotion, and endorsement of unlawful activities prohibited under various laws:
 - Advertising of online gambling and betting, given its unlawful status in majority of the states, renders one equally liable for participating in an illegal activity.
 - Celebrities and influencers to refrain from endorsing and promoting illegal betting and gambling activities.
 - In case of violation, stringent measures under Consumer Protection Act, 2019 shall be initiated against the entire spectrum encompassing manufacturers, advertisers, publishers, intermediaries, social media platforms, celebrities, influencers, endorsers, and any other relevant stakeholders.

Indian Medical Association & ANR. Versus Union of India & ORS

- A writ petition was filed against Patanjali Ayurved for publishing misleading ads with claims of curing diseases with ayurvedic products and disparaging allopathy, especially during the COVID pandemic.
- Hon'ble Supreme Court vide its order dated May 07, 2024 held:
 - Advertisers/advertising agencies and endorsers are equally responsible for issuing false and misleading advertisements.
 - Mandatory submission of a 'Self-Declaration Certificate' regarding compliance of relevant laws and regulations, before publishing or broadcasting any ad.
 - FSSAI to take suo moto cognizance of misleading advertisements, without waiting for any complaint to be received.

Compliance by MIB

- Pursuant to the direction of the Hon'ble Supreme Court dated 07.05.2024, in *Indian Medical Association & ANR. Versus Union of India & ORS.*, Ministry of Information and Broadcasting (MIB) issued a notification on 03.06.2024:
 - All advertisers/ Advertising Agencies must submit a 'Self-Declaration Certificate' before publishing or broadcasting any ad.
 - The Self-Declaration Certificate is required for all new ads that will be issued/telecast/aired/published on or after 18th June, 2024.
 - The self-declaration certificate is to certify that the advertisement -
 - does not contain misleading claims, and
 - complies with all relevant regulatory guidelines, including those stipulated in Rule 7 of the Cable Television Networks Rules, 1994 and the Norms of Journalistic Conduct of Press Council of India.

Updated Notification

- Following Industry uproar, Internet and Mobile Association of India (IAMAI), the Indian Newspaper Association (INS), and the Indian Society of Advertisers (ISA) requested MIB to reconsider the mandate as it requires more consideration and resolution before implementation.
- MIB issued a new advisory dated 3rd July, 2024 which supersedes previous advisories on self-declaration certificate requirements.
 - **Advertisers/advertising agencies issuing ads for products and services related to Food and Health sectors are required to upload an annual self-declaration certificate.**
 - For TV/Radio Advertisements: Broadcast Seva Portal (<https://new.broadcastseva.gov.in>) and
 - For advertisements on print media/internet: the portal of the Press Council of India (PCI) (<https://presscouncil.nic.in/>)

Updated Notification

- Advertisers/advertising agencies have to make available the proof of uploading the self-declaration to the concerned media stakeholders, such as TV channels, newspapers, entities involved in publishing of ads on the internet, etc. for the record.
- It is the responsibility of the advertisers/advertising agencies to ensure that every ad being issued by them is in adherence to the applicable Indian laws, rules and regulations in letter and spirit.

Collaboration of CCPA and ASCI

- ASCI's code and advertising guidelines align closely with guidelines of the CCPA.
- CCPA has asked ASCI to forward any ad that is non-compliant with the ASCI Code and is in potential violation of the Consumer Protection Act, 2019, to CCPA for appropriate action.
- Any such ad forwarded by ASCI will be promptly addressed and handled by the CCPA.



JAPAN

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Topics

- *Stealth Marketing*
- *Use of Generative AI in Advertising*

Stealth Marketing in Japan

- Stealth Marketing was not prohibited in Japan and was frequently used
- However, this was problematic as consumers could be misled to believe that an influencer/the post is genuinely giving a high evaluation of the product or service hiding the fact that it is an advertisement.
- Some voluntary guidelines recommend advertisers to add #AD, #Sponsored in order to clarify the purpose is advertising.

Stealth Marketing in Japan

Example 1



This kind of post was made by influencers at the request of the distributor. Influencers were instructed to post the comments under the guise of being a product monitor in exchange for free products.

Stealth Marketing in Japan

Example 2



ウォルト・ディズニー・ジャパン株式会社

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お知らせ

「『アナと雪の女王2』感想漫画企画」に関するお詫び

2019年12月5日

この度は、「『アナと雪の女王2』感想漫画企画」につきまして、ご参加いただきましたクリエイターのみなさま、ファンのみなさまに多大なご心配、ご迷惑をお掛けし、深くお詫び申し上げます。

An apology posted on Disney's website after several cartoonists and illustrators' SNS posts about "Frozen II" which were criticized as "stealth marketing".

Stealth Marketing in Japan

- The Cabinet Office issued Cabinet Office Notification No. 19 of 28 March 2023 (Notification) which designated stealth marketing as a misrepresentation under Article 5, item 3 of the Act against Unjustifiable Premiums and Misleading Representations.

Stealth Marketing in Japan

The Notification applies to advertisements that the public may not recognise as advertisements and which are:

- Made in any type of media (i.e., not only statements on the internet but also TV, newspapers, radio, magazines, and so on), and
- by businesses that supply goods and services. (Third parties such as influencers who receive requests from companies to advertise or promote their products and services, and advertising companies, are not included in the scope of such businesses.)

Stealth Marketing in Japan

If, as a result of an investigation by the Consumer Affairs Agency, a business is found to have violated the Notification, the CAA can issue a cease-and-desist order against the business, ordering the business to:

- Discontinue the statement.
- Inform the public of the violation.
- Take measures to prevent the violation occurring again.
- Not repeat the violation in the future.

A person who violates such an order shall be liable to **imprisonment for up to two years and/or a fine of up to three million yen.**

Use of Generative AI in Advertising

- Japan's Copyright Act is tolerant towards AI learning, allowing the use of others' copyrighted works for AI training without permission.

Article 30-4 (Use of Works Not Intended for the Enjoyment of Expressed Thoughts or Emotions)
A work may be used to the extent deemed necessary in the following cases and other cases where the purpose is not for oneself or others to enjoy the thoughts or emotions expressed in the work, by any method. However, this does not apply if it would unjustly harm the interests of the copyright holder in light of the type and purpose of the work and the manner of its use.

1. When used for testing in the development or practical application of technologies related to the recording, filming, or other use of works.
2. When used for information analysis.
3. In cases other than those listed in the previous two items, when the work is used in a processes involving electronic data processing by computers, or other uses without the recognition of the work's expression through human perception (excluding the execution of a work that is a program on a computer).

Use of Generative AI in Advertising

- Due to cultural influences from characters like Astro Boy and Doraemon, it is said that Japanese people are generally more accepting of the use of AI in advertising.



Use of Generative AI in Advertising

First use of AI talent in a TV-CM in Japan



動画はこちら：https://itoen.co/catechinCM_2024 →

Use of Generative AI in Advertising

This AI talent is an exclusive original talent generated by AI technology, and uses services provided by an AI model, which optimises the branding and promotion of a major beverage company.

The AI talent appearing in the TV commercials is a persona that everyone, regardless of gender, will find "healthy/active/progressive/strong-willed".

The designer and creator selected a number of AI-generated face outputs and fine tuned the talent images to that end.

Use of Generative AI in Advertising

Example of a commercial that received criticism



This is an advertising promotion created for a discount campaign on McDonald's French fries, which was exclusively released on the platform X on August 17, 2024. It was reportedly produced by the AI creator Kaku Drop.

Use of Generative AI in Advertising

東洋経済
ONLINE

お知らせ 最新!『会社四季報 業界地図2025年版』発売
9月22日(日)

記事

トップ 連載・特集 会員限定 ビジネス 政治・経済 マーケット キャリア・教育

ライブ 災害・事件・裁判

マクドナルド「AI広告の炎上」が示す嫌悪感の正体



AIクリエイター架空館 (Kaku Drop) 氏が手がけた日本マクドナルドのAI広告。AIで生成された美少女が多数登場する (画像: 日本マクドナルド公式Xより)

女子SPA 14 時間

「気持ち悪い!」と炎上した日本マクドナルドのAI広告に“決定的に ...

女子SPA!で2024年8月に公開された記事のなかから、ランキングトップ5入りした記事を紹介し
ます。(初公開日は2024年8月24日記事は公開時の状況) ===== マックフラ...



G-N Times 江南タイムズ on MSN 27 日

「指が6本...?」マクドナルドのAI広告が引き起こした波紋、不自然 ...

マクドナルドの新しい広告に登場した人工知能 (AI) モデルが批判を浴びている。「指が6本に
見える」、「手が大きすぎて不自然だ」という指摘 ...



Use of Generative AI in Advertising



- ✓ Clearly indicated to be generated by AI
- ✓ The creator's name was also specified.

Criticized as:

- The food does not look appetizing.
- The characters appear unnatural, especially the number of fingers seem to be incorrect.

Use of Generative AI in Advertising

There is no regulation of the use of AI for advertising in Japan, but it is recommended in practice to:

- Clearly indicate the use of AI
- Confirm whether the expressions used are appropriate for the product or service being advertised
- Confirm whether the images generated by AI infringe on anyone's portrait rights or copyrights
- Confirm whether there are any expressions that might be offensive to the target audience



NEW ZEALAND

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Overview

- Advertising Standards Authority code review
 - Children's Advertising Code
 - Food and Beverage Advertising Code
- Biometrics
 - Privacy Act 2020 considerations
 - Biometric Processing Privacy Code
- Recent Case
 - Milkio Foods Limited

Advertising Standards Authority code review

- 5-yearly review of all ASA Codes
- ASA launched review of Children and Young People's Advertising Code in 2022
- Public Consultation
- Determined the need for two new Codes
 - Children's Advertising Code
 - Food and Beverage Advertising Code
- New codes effective from 1 August 2024

Children's Advertising Code

- Applies to advertising targeted at children
- Two key principles - Social Responsibility and Truthful Presentation
- Similar to CYPAC with some key changes:
 - Age of Children - "children" are defined as individuals who are under the age of 16.
 - Targeting - expanded criteria for determining whether an advertisement is "targeted" at children.
 - Safety - more detailed guidance regarding children's safety.

Children's Advertising Code

- Disclosure - enhanced disclosure requirements for certain advertisements targeted at children.
- Fear/distress - expressly applying existing restrictions regarding unjustified fear or distress to advertising which targets children
- Apps/Video game advertising - additional guidance requiring app and videogame advertisers to make it clear to children that in app purchases involve real currency.

Food and Beverage Advertising Code

- Applies to all food and beverage advertising
- “Food and Beverage” – any consumable food or beverage product other than alcohol.
- Two key principles - Social Responsibility and Truthful Presentation
- Key features:
 - Health and Wellbeing
 - Consumption
 - Occasional Foods
 - Brand Advertisements
 - Sponsorship Advertisements.

Biometrics

- Rising issue in New Zealand
- Biometric Billboards
- Privacy Commissioner / Privacy Act 2020
- Biometric Processing Code



Recent Case

- Milkio Foods Limited
 - Section 13 Fair Trading Act 1986
 - False/misleading representation – Place of origin of dairy ingredients



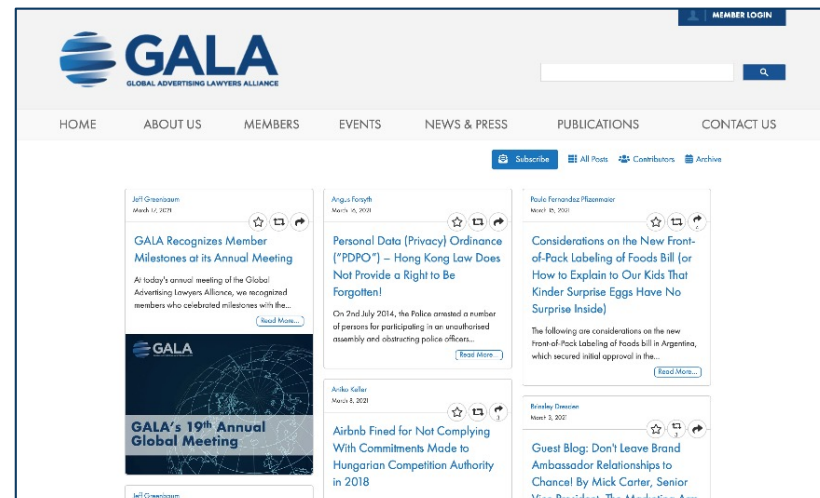
Milkio.co.nz

Resources

- GALA Website - www.galalaw.com



- GALA Blog - blog.galalaw.com



Thank you!



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