

Ad Standards Industry Jury Procedural Guidelines

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1. INTRODUCTION

1.1 Advertising self-regulation in Australia

- (a) Australia's world-class system of advertising self-regulation was established in its current form in 1997 by the Australian Association of National Advertisers (**AANA**). It recognises that advertisers share an interest in promoting consumer confidence in and respect for general standards of advertising.
- (b) The AANA develops, reviews and updates the advertising industry codes including the AANA Code of Ethics which is the cornerstone of the self-regulatory system and is the code under which most complaints are considered.
- (c) Ad Standards manages the complaint resolution component of the advertising self-regulation system, and is the secretariat for the Ad Standards Industry Jury (**Industry Jury**) and Ad Standards Community Panel.

1.2 Ad Standards Industry Jury

- (a) The objective of the Industry Jury service is to provide a system of alternative dispute resolution for competitors to address and resolve challenges to advertising that might otherwise lead to litigation.
- (b) Under Section 1 of the AANA Code of Ethics, an advertiser or business can make a complaint about the truth or accuracy of a competitor's advertisement, or whether a particular advertisement breaches the law (**Competitor Complaint**).
- (c) All Competitor Complaints accepted by Ad Standards for consideration by the Industry Jury, will be determined in accordance with these Procedural Guidelines¹.

1.3 Industry Jury scope

- (a) The Industry Jury have jurisdiction to consider Competitor Complaints about the matters set out in Section 1 of the AANA Code of Ethics, which states that advertising shall:
 - Comply with Commonwealth law and the law of the relevant State or Territory.
 - Not be misleading or deceptive or be likely to mislead or deceive.
 - Not contain a misrepresentation, which is likely to cause damage to the business or goodwill of a competitor.
 - Not exploit community concerns in relation to protecting the environment by presenting or portraying distinctions in products or services advertised in a

¹ Consumer complaints will be considered under Section 2 of the AANA Code of Ethics and other relevant advertising industry codes, and determined by the Ad Standards Community Panel.



misleading way or in a way which implies a benefit to the environment which the product or services do not have.

- Not make claims about the Australian origin or content of products advertised in a manner which is misleading.

The Industry Jury does not have jurisdiction to determine any other matters.

- (b) The Industry Jury will accept complaints about most forms of advertising communications, including cinema, internet, print, radio, telecommunications and TV. However, the Industry Jury does not adjudicate on matters about labels or packaging for products, or public relations communications. This does not preclude the Industry Jury from considering images of product packaging to the extent that those images appear on advertising captured under the definition of “advertising” in the AANA Code of Ethics (e.g. images of product packs that appear on the advertiser’s website or product brochures).
- (c) The Industry Jury does not ordinarily consider complaints involving:
- trivial issues
 - material that does not constitute “advertising” as defined in the AANA Code of Ethics
 - questions of taste, morality or decency
 - advertising that is the subject of litigation, or an order by a court or government agency
 - highly technical or scientific issues
 - issues covered by a voluntary industry code other than the AANA Code of Ethics (e.g. Alcoholic Beverages Advertising Code), or
 - advertising that has been withdrawn or discontinued before challenge.

1.4 Industry Jury panel composition

- (a) Determinations of the Industry Jury are made by a variable panel of legal practitioners experienced in the areas of advertising and/or competition and consumer law.
- (b) A new panel is appointed by Ad Standards for each case eligible for determination by the Industry Jury. Appointments are managed by Ad Standards having regard to the availability of individual lawyers and any conflicts of interest.
- (c) Each panel is comprised of a minimum of three legal practitioners appointed from a list of qualified legal practitioners (the **Register of Lawyers**) maintained by Ad Standards for that purpose. One of the three panel members appointed to the Industry Jury will be appointed to act as Chair.
- (d) At the time of appointment to an Industry Jury panel, each member is required to confirm in writing that they have no conflict of interest. If at any time during the consideration of the matter a member becomes aware of a conflict of interest, the member agrees to bring this immediately to the attention of Ad Standards, and if required by Ad Standards, to resign from the Industry Jury in relation to that matter.



1.5 Parties to Industry Jury proceedings

- (a) The party that submits an Industry Jury application to Ad Standards (as set out in Clause 1.6 of these Procedural Guidelines) is referred to in these Procedural Guidelines as the '**Complainant**'.
- (b) The party about whose advertising the Competitor Complaint is made is referred to in these Procedural Guidelines as the '**Advertiser**'.
- (c) It is not a requirement for either party to be represented by lawyers. At any stage in the process a party can choose to either deal directly with the Ad Standards secretariat, or arrange for a lawyer to represent them and assist them in preparing their submissions (at their own cost).

1.6 User-pays basis

- (a) The costs associated with the Industry Jury process are payable by the Complainant. This includes:
 - an Application Fee to cover administrative costs associated with assessing the application for eligibility for consideration by the Industry Jury (under Clause 2.1 of these Procedural Guidelines)
 - the Initial Costs, payable upfront and representing an estimate of the costs to Ad Standards in administering the complaint and of the members of the Industry Jury panel in making a determination (under Clause 2.5 of these Procedural Guidelines), and
 - any Additional Costs that may be assessed during the process in excess of the Initial Costs estimate – proceedings may be suspended pending payment of any Additional Costs notified to the Complainant (refer Clause 4.9 of these Procedural Guidelines).
- (b) The Complainant must pay all costs estimated to be payable in relation to a particular matter before the Industry Jury process can proceed. A tax invoice will be provided by Ad Standards to the Complainant for costs payable in relation to the Industry Jury process.

1.7 Indemnity

- (a) The Complainant is required to indemnify the Industry Jury, individual members of the Industry Jury panel and the AANA (including Ad Standards) and its officers and employees, against any claims which may be brought against any of those bodies or persons arising out of the determination of the complaint.
- (b) A deed of indemnity signed by the Complainant must be provided to Ad Standards before the Industry Jury process can commence.

1.8 Industry Jury approach to determining conduct

- (a) Section 1 of the AANA Code of Ethics reflects the consumer protection principles in the Australian Consumer Law (part of the Competition and Consumer Act) (**ACL**).
- (b) To determine whether there has been a breach of Section 1 of the AANA Code of Ethics, the Industry Jury will have regard to the approach taken by the Federal Court and appellate courts when assessing conduct under the ACL.



- (c) In doing so the Industry Jury will consider the overall content and context of the advertising material, with reference to the class of consumers likely to be affected by the conduct.

1.9 Standard of proof and evidentiary onus

- (a) The Industry Jury adopts a common-sense approach to matters of proof. This means that there are no strict legalistic rules in relation to onus of proof for either the Complainant or the Advertiser. What is required in order to establish a breach of Section 1 of the AANA Code of Ethics is that the Industry Jury panel is able to reach a reasonable level of satisfaction, having regard to the materials provided (or not provided) by the parties, that the advertising complained about breaches Section 1 of the AANA Code of Ethics.
- (b) Both the Complainant and the Advertiser have a duty to provide substantiation for their respective positions.
- (c) The Complainant is responsible for establishing and substantiating its complaint such as to reach a reasonable threshold in demonstrating a breach of Section 1 of the AANA Code of Ethics (refer Clause 3.1 of these Procedural Guidelines).
- (d) The Advertiser is expected to provide substantiation of any claims made in their advertising material (refer Clause 3.1 of these Procedural Guidelines). This means that the Advertiser must have a reasonable basis for their claims. Substantiation may be in the form of tests, studies or expert reports depending on the type of claim made.

2 INITIATION OF COMPLAINT PROCEDURE

2.1 Making a complaint

- (a) To initiate an Industry Jury complaint the Complainant is required to submit to Ad Standards:
 - a completed Industry Jury Complaint Application Form that includes a detailed written complaint setting out each claim challenged and any supporting material;
 - the relevant advertisement (digital format preferred);
 - a signed Industry Jury Deed of Indemnity in the form required by Ad Standards;
 - a signed Industry Jury Costs Agreement in the form required by Ad Standards; and
 - a non-refundable Application Fee in the sum of \$1,100 (\$1,000 plus GST) to cover administrative costs of assessing the eligibility of the complaint.
- (b) The Application Fee is non-refundable whether or not the complaint is found by Ad Standards to be eligible for consideration by the Industry Jury.
- (c) The written complaint should set out as much detail as possible to facilitate a response by the Advertiser. It should include:
 - details of the alleged misrepresentations including listing each claim that the Complainant challenges;
 - the relevant parts of Section 1 of the AANA Code of Ethics that are alleged to have been breached;
 - a description of the relevant advertisement(s); and
 - all supporting data to substantiate the complaint.



2.2 Confidentiality considerations – Complainant

- (a) The Complainant should be aware that its written complaint together with all of its submitted material will be made available to the Advertiser.
- (b) If the Complainant wishes to withhold certain information from the Advertiser, then it must make a written request to Ad Standards claiming confidentiality and provide both a redacted and unredacted form of its submission to Ad Standards.
- (c) In its request to Ad Standards, the Complainant must:
 - clearly identify the specific information which is the subject of the confidentiality claim;
 - explain the basis for the confidentiality claim; and
 - affirm that the information which is the subject of the confidentiality claim is not publicly available.
- (d) The redacted form of the Complainant’s submission will be provided to the Advertiser, however any material which the Complainant requests be withheld from the Advertiser will not be considered or included in the case materials.
- (e) If Ad Standards considers that the redacted form of the Complainant’s submission does not provide sufficient information to facilitate a response from the Advertiser, it will contact the Complainant to request that additional information or clarification be provided before the case proceeds.

2.3 Complaints about more than one advertisement

- (a) Where a Complainant seeks to complain about more than one advertisement made by a single Advertiser, a separate Industry Jury application (including the Application Fee and other documentation) should be made for each advertisement, unless the advertisements clearly form part of a single campaign or are sufficiently similar to warrant consideration as a single complaint.

2.4 Eligibility of complaint for consideration by the Industry Jury

- (a) Ad Standards will assign the complaint an Industry Jury Case Reference Number that should be used by both parties in all subsequent correspondence regarding the complaint.
- (a) Ad Standards will consider the Industry Jury Complaint Application Form and accompanying materials provided by the Complainant to make an initial determination of whether the complaint is within the scope of the Industry Jury (as set out in Clause 1.3 of these Procedural Guidelines), and the number of claims that are likely to require consideration.
- (b) Ad Standards will also consider whether sufficient information has been provided to facilitate a response from the Advertiser. Ad Standards will contact the Complainant if additional information or clarification is required regarding the complaint before the matter can proceed.
- (c) If Ad Standards determines that the complaint is not eligible for consideration by the Industry Jury, Ad Standards will notify the Complainant in writing, setting out the reasons for this decision. As set out at Clause 2.1 of these Procedural Guidelines, the Application Fee is non-refundable whether or not the complaint is found to be eligible for consideration by the Industry Jury.



2.5 Acceptance of complaint and payment of Initial Costs

- (a) If the complaint is determined to be eligible for consideration by the Industry Jury, Ad Standards will estimate the Initial Costs payable by the Complainant and will provide the Complainant with a tax invoice for this amount.
- (b) The Initial Costs are an estimate of an amount sufficient to cover the fees payable to the Industry Jury panel members and to cover the costs to Ad Standards in administering the complaint. The Industry Jury process will not proceed further until the Initial Costs are received in full.

3 SUBMISSIONS PROCEDURE AFTER COMPLAINT ACCEPTED

3.1 Advertiser notified of complaint and response requested

- (a) After the Complainant pays the Initial Costs, Ad Standards will provide the Advertiser with written notification that a complaint has been received and is to be considered by the Industry Jury. The Advertiser will be provided with a copy of the complaint and all supporting materials provided by the Complainant (subject to Clause 2.2 of these Procedural Guidelines regarding confidentiality claims).
- (b) The Advertiser is requested to provide a substantial written response to the complaint within ten (10) business days of the date of Ad Standards' written notification of the complaint.
- (c) The Advertiser is expected to provide the following:
 - A substantial written response, including
 - responses to the specific issues raised in the complaint;
 - the Advertiser's substantiation of the claims at issue; and
 - a summary of arguments.
 - Any supporting data to substantiate the claims that are the subject of the complaint.
 - All advertising material relevant to the complaint.

3.2 Applications by the Advertiser for confidentiality

- (a) If the Advertiser wishes to withhold certain information in its response from the Complainant, then it must make a written request to Ad Standards claiming confidentiality and provide both a redacted and unredacted form of its response to Ad Standards.
- (b) In its request for confidentiality to Ad Standards, the Advertiser must:
 - identify the specific information which is the subject of the confidentiality claim;
 - explain the basis for the confidentiality claim; and
 - affirm that the information which is the subject of the confidentiality claim is not publicly available.
- (c) The redacted form of the Advertiser's response will be provided to the Complainant, however any material which the Advertiser requests be withheld from the Complainant will not be considered or included in the case materials.
- (d) If Ad Standards considers that the redacted form of the Advertiser's response does not provide sufficient information to facilitate a response from the Complainant, it



will contact the Advertiser to request that additional information or clarification be provided before the case proceeds.

3.3 Complainant reply to Advertiser response

- (a) Ad Standards will notify the Complainant in writing of the Advertiser's response, and provide a copy of the response including all supporting materials received from the Advertiser.
- (b) The Complainant has seven (7) business days from the date of Ad Standards' written notification to submit a reply to the Advertiser's response.

3.4 Further Advertiser response

- (a) Ad Standards will notify the Advertiser in writing of the Complainant's reply, and provide a copy of the reply including any materials received from the Complainant as part of its reply (subject to Clause 3.2 of these Procedural Guidelines regarding confidentiality claims).
- (b) The Advertiser has seven (7) business days from the date of Ad Standards' written notification to submit a response to the Complainant's reply.
- (c) No further reply is required from the Complainant on receipt of the Advertiser's further response under this clause.

3.5 Industry Jury request for additional information

- (a) Following receipt of final submissions (or once the relevant time frame for receipt of final submissions has elapsed), Ad Standards will provide the members appointed to the Industry Jury panel with copies of all submissions and supporting materials received from both parties.
- (b) The Industry Jury panel members may request additional information/clarification from either party. Ad Standards will notify the relevant party in writing if the Industry Jury makes such a request. The requested party has five (5) business days from the date of the written notification from Ad Standards to provide this information.
- (c) Additional information received by the Industry Jury from either party in accordance with this clause will be copied to the other party. However, no further response is required unless requested by the Industry Jury.

3.6 Meeting of parties in lieu of or in addition to written submissions

- (a) The Industry Jury may agree to a written proposal from the Complainant or the Advertiser for a meeting with either or both of the parties in addition to or in lieu of a written submission. The proposal for such a meeting should be provided in writing to Ad Standards and should specify the reasons why a meeting is required, a list of particulars, an agenda, a proposed date and a list of participants.
- (b) The Industry Jury is not bound to accept such a proposal but has the discretion to do so.

4 RESOLUTION OF COMPLAINT

4.1 Determination made by the Industry Jury

- (a) Industry Jury members will meet to determine the outcome of a complaint once they have had an opportunity to review the parties' submissions and view the relevant



advertising material. A meeting of Industry Jury members may be convened by telephone, in person or by electronic means.

- (b) Industry Jury determinations will be by a simple majority and no single panel member will have a casting vote. Determinations are published after resolution.
- (c) The Industry Jury members must reach a determination and prepare a written determination for inclusion in the Industry Jury Case Report within fifteen (15) business days of the date of receiving:
 - a. the Advertiser's further response under Clause 3.4; or
 - b. if applicable, any additional information requested from the parties in accordance with Clause 3.5.

However, this timing excludes any days captured under the office closure periods for Ad Standards and each Industry Jury member during the Christmas and New Year period each year.

- (d) The Chair of the Industry Jury is responsible for preparing the written determination of the Industry Jury, which is approved by the other members for inclusion in the Case Report for publication.

4.2 No appeal in regard to Industry Jury determinations

- (a) A determination of the Industry Jury in relation to a particular complaint is final and not subject to appeal.

4.3 Types of determinations

- (a) The Industry Jury is part of a voluntary system and determinations cannot be enforced by Ad Standards. Parties agree to comply with determinations as part of their commitment to supporting the self-regulatory system. However, there are significant consequences, including potential action by government agencies, which may follow if parties refuse to comply with determinations (refer to Clause 4.6 of these Procedural Guidelines).
- (b) Determinations in the Industry Jury case report will be published under the following headings:
 - Advertising substantiated;
 - Advertising modified or discontinued;
 - Advertising referred to government agency;
 - No substantiation received.

4.4 Advertising substantiated

- (a) If the Industry Jury finds the Advertiser has substantiated the advertising claims that were the subject of the complaint, it will make a determination of 'Advertising Substantiated' and this will be recorded in the final Industry Jury Case Report.

4.5 Advertising modified or discontinued

- (a) If the Industry Jury determines that the Advertiser has not substantiated the advertising claims under consideration and the complaint should be upheld, Ad Standards will notify the Advertiser of the Industry Jury's determination and will provide the Advertiser with a draft copy of the Industry Jury case report.



- (b) Ad Standards will request the Advertiser to provide, within five (5) business days, an 'Advertiser Statement' as to whether the Advertiser agrees to modify or discontinue the advertising.
- (c) If the Advertiser has agreed to modify or discontinue the advertising, this will be recorded in the final Industry Jury Case Report, which will record the determination as 'Advertising Modified or Discontinued.'

4.6 Advertising referred to government agency

- (a) If the Advertiser does not agree to modify or discontinue the advertising and/or fails to provide an 'Advertiser Statement' in accordance with Clause 4.5, the final Industry Jury Case Report will record the determination as 'Advertising Referred to Government Agency' and the matter will be referred to an appropriate government agency. Copies of the final Case Report may also be sent to the media proprietors.

4.7 No substantiation received

- (a) The Industry Jury will consider and determine a complaint even if it does not receive an Advertiser response at any stage in the proceedings.
- (b) In these circumstances, the Industry Jury will make a determination 'No Substantiation Received.' A draft Case Report will be prepared, summarising the claims challenged in the complaint and noting the Advertiser's default. Ad Standards will notify the Advertiser of the determination and provide a copy of the draft Case Report.
- (c) The Advertiser will then be given five (5) business days to provide an 'Advertiser Statement' confirming whether the Advertiser will modify or discontinue the advertising in accordance with Clause 4.5.
- (d) If the Advertiser does not agree to modify or discontinue the advertising and/or fails to provide an 'Advertiser Statement', then Ad Standards will notify the Complainant of the outcome.
- (e) The final Industry Jury Case Report will record the determination as 'Advertising Referred to Government Agency' and the matter will be referred to an appropriate government agency. Copies of the final Case Report may also be sent to the media proprietors.

4.8 Distribution of final Case Report

- (a) Once the Case Report is finalised, Ad Standards will write to both parties notifying them of the determination and enclosing a copy of the final Case Report.

4.9 Notification of any Additional Costs payable

- (a) Prior to the distribution of the final Case Report, or shortly thereafter, Ad Standards will notify the Complainant in writing of any Additional Costs not already paid that are payable in accordance with Clause 1.6 and the Costs Deed.
- (b) Additional Costs are costs incurred by either Ad Standards or by members of the Industry Jury in excess of the Initial Costs estimate made under Clause 2.5. Such additional costs may arise because the complaint was more complex, procedural matters required greater attention or substantially more documentation was received than initially expected when the estimate was provided.
- (c) Ad Standards will provide the Complainant with a tax invoice for the Additional Costs.



- (d) Such costs must be paid before the final Case Report is distributed or published.

4.10 Distribution of final Case Report

- (a) Once the Case Report is finalised and any Additional Costs paid by the Complainant, Ad Standards will write to both parties notifying them of the determination and enclosing a copy of the final Case Report.

4.11 Publication of final Case Report

- (a) Within seven (7) business days of distribution of the final Case Report to the parties, the Case Report will be made publicly available via Ad Standards' website.

5 ADMINISTRATIVE MATTERS

5.1 Address for complaint, submissions, correspondence

- (a) Complaints and all other correspondence for consideration by the Industry Jury should be addressed to Ad Standards as secretariat of the Industry Jury.
- (b) All correspondence must be sent via email to: administration@adstandards.com.au
- (c) Parties must include the Industry Jury Case Reference Number in the email subject line of all correspondence. Ad Standards will notify parties of the Case Reference Number with its first contact regarding the complaint.

5.2 Payment of fees

- (a) All fees should be paid by Electronic Funds Transfer to AANA:
Account Name: Australian Association of National Advertisers
BSB: 062 000
Account Number: 1721 8651
- (b) The reference line of the Electronic Funds Transfer should include the Industry Jury Case Reference Number and Complainant name (or abbreviation).

5.3 Extensions of time and failure to respond within time frames provided

- (a) The Industry Jury will consider a complaint whether or not it has received a response from the Advertiser.
- (b) There are no automatic provisions for extension(s) of time. However, a party may make an application to Ad Standards as secretariat to the Industry Jury for an extension of time within a reasonable time prior to the expiry of a deadline under these Procedural Guidelines.
- (c) All applications must be set out clearly in writing and must include an explanation of the basis for the request. Each application will be considered on a case-by-case basis and may be granted (or refused) by Ad Standards in its absolute discretion. Ad Standards should be satisfied in all cases where a request is granted that the extension sought is reasonable and that the granting of an extension will in no way prejudice the other party to the proceedings.

5.4 Withdrawal by Complainant

- (a) The Complainant is entitled to withdraw their complaint at any time, including if the matters in dispute are settled between the parties.



- (b) If the Complainant wants to withdraw the complaint it must notify Ad Standards in writing providing reasons for its withdrawal.
- (c) If Ad Standards receives written notification of the withdrawal prior to the appointment of the members of the Industry Jury, the Complainant will be liable to forfeit 20% of the Initial Costs paid. The remaining 80% of the Initial Costs will be refunded.
- (d) If such written notification is received after the Industry Jury members have been appointed, in addition to the 20% already forfeited, an additional amount may be forfeited having regard to costs already incurred by Ad Standards and the Industry Jury members in considering the complaint. The remaining balance will be refunded to the Complainant.
- (e) The Complainant will be liable to pay an amount of Additional Costs for any costs incurred in excess of the Initial Costs up to the date Ad Standards receives written notification of the withdrawal, in accordance with Clause 1.6 and the Costs Deed.

5.5 Commencement of litigation by either party

- (a) If the Complainant commences litigation that deals with the same or similar matters in dispute, it must notify Ad Standards in writing that it is withdrawing its complaint. In this instance, Clause 5.4 shall apply in respect of Complainant costs to be refunded or payable.
- (b) If the Advertiser commences litigation that deals with the same or similar matters in dispute, the Complainant must notify Ad Standards in writing. In this instance, Ad Standards will consider that the complaint has been withdrawn and Clause 5.4 shall apply in respect of Complainant costs to be refunded or payable.

5.6 Responsibility of Complainant to establish claim

- (a) It is the responsibility of the Complainant to establish and substantiate its claim such as to reach a reasonable threshold in demonstrating a breach of the AANA Code of Ethics.

5.7 Time available for all meetings

- (a) The time available for all meetings and the last two responses must not exceed twenty (20) business days from the time of the initial Advertiser response unless Ad Standards as secretariat for the Industry Jury has granted extensions of time or requested further information on behalf of the Industry Jury.

5.8 References to business days

- (a) All references to *business days* in these Procedural Guidelines are references to any day which is not a Saturday, Sunday or public holiday in New South Wales, the Australian Capital Territory, and the State or Territory in which each party and Industry Jury member has its registered business address.