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AANA Code on Advertising and Marketing Communications to Children Review

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**SUBMISSION TO THE AANA CODE ON ADVERTISING AND MARKETING COMMUNICATIONS TO CHILDREN  
REVIEW**

Thank you for the opportunity to provide a submission to the review of the *AANA Code on Advertising and Marketing Communications to Children*.

Children and Media Australia (CMA) is a national peak not-for-profit organisation whose mission is to support families, industry and decision makers in building and maintaining a media environment that fosters the health, safety and wellbeing of Australian children.

**ACCM membership** includes ECA (Early Childhood Australia), ACSSO (Australian Council of State Schools Organisations), APPA (Australian Primary School Principals Association), ASPA (Australian Secondary Principals Association), AHISA (Association of Heads of Independent Schools Australia), AEU (Australian Education Union), Parenting Research Centre, Council of Mothers' Union in Australia, SAPPA (South Australian Primary Principals Association), and other state-based organisations and individuals.

**ACCM's core activities** include the collection and review of research and information about the impact of media use on children's development, and advocacy for the needs and interests of children in relation to media use.

This submission has been written by our President, Professor Elizabeth Handsley, in consultation with our Hon CEO, Barbara Biggins OAM. Our comments in response to the AANA's questions are set out below.

In its work, ACCM is strongly influenced by child development research and the UN Convention on the Rights of the Child (CRC). Research evidence can keep us mindful of important facts such as children's passage through different stages of development, with strengths and vulnerabilities evolving over time; and not coincidentally, the Convention too, recognises children's evolving capacities as an important principle (articles 5 and 14). The provisions of the Convention have been given further and more specific meaning in the context of the digital world by a very recent General Comment, GC25, which states:

41. States parties should make the best interests of the child a primary consideration when regulating advertising and marketing addressed to and accessible to children. Sponsorship, product placement and all other forms of commercially driven content should be clearly distinguished from all other content and should not perpetuate gender or racial stereotypes.

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42. States parties should prohibit by law the profiling or targeting of children of any age for commercial purposes on the basis of a digital record of their actual or inferred characteristics, including group or collective data, targeting by association or affinity profiling. Practices that rely on neuromarketing, emotional analytics, immersive advertising and advertising in virtual and augmented reality environments to promote products, applications and services should also be prohibited from engagement directly or indirectly with children. ...

97. States parties should encourage the use of digital technologies to promote healthy lifestyles, including physical and social activity. They should regulate targeted or age-inappropriate advertising, marketing and other relevant digital services to prevent children's exposure to the promotion of unhealthy products, including certain food and beverages, alcohol, drugs and tobacco and other nicotine products. Such regulations relating to the digital environment should be compatible and keep pace with regulations in the offline environment. ...

110. Leisure time spent in the digital environment may expose children to risks of harm, for example, through opaque or misleading advertising or highly persuasive or gambling-like design features. By introducing or using data protection, privacy-by-design and safety-by-design approaches and other regulatory measures, States parties should ensure that businesses do not target children using those or other techniques designed to prioritize commercial interests over those of the child.

The rights laid down by the Convention are binding on signatory governments, but they are also coming to be recognised as general norms for appropriate behaviour where children's interests are at stake. This is further supported by the development of the Children's Rights and Business Principles, which explicitly state that 'All businesses should ... [u]se marketing and advertising that respect and support children's rights.' We trust that it goes without saying that any self-regulatory development in relation to children's media use should have the rights of the child squarely in focus, and should comply with the statements in GC25.

### General comments about process

The Discussion Paper states that 'both complaints and decisions are dealt with transparently' (p4) but CMA would beg to differ. Decision reports are notoriously opaque as the way they are framed, as a series of observations followed by a conclusion, does not communicate the reasoning being employed. There is scope for considerable improvement on this.

CMA commends the fact that 'The platform neutral, national self-regulatory model allows complaints to be made without the consumer having to consider the medium or geographical location'. (p4) We make other suggestions below as to possible changes to the Code to make consumers' task less burdensome.

In relation to the observation about the small proportion of overall complaints made up by those under the Children's Code, CMA would note this is not at all surprising considering the very small proportion of ads that the Code covers. We have suggestions below about how to broaden the scope of the Code.

CMA questions the approach taken in the preparation of the Discussion Paper, of limiting statements about past complaints to what is 'recent' and providing information only on complaints that have been upheld. There is no obvious reason to see 'recent' complaints as any more significant than older ones; and knowing what complaints have been knocked back is just as revealing as information about those that have been upheld. Indeed, the complaints that were not upheld can give an indication of community standards and where the Code is currently misaligned with these – which should precisely be the focus of this process. Failure to provide further information unjustifiably puts the onus on submitters to seek it out, and undermines any conclusion, based on the information provided, as to how the current Code is working.

### 1. Does the Children’s Code continue to meet its stated objectives? If not, why not?

If the Children’s Code meets its stated objective/object, it is because this is very modest, due to the narrow definition of Advertising and Marketing Communications to Children (AMCC). We comment elsewhere in this submission on that definition, and submit that it should be broadened. Because the current definition is so narrow, and applies to such a tiny subset of communications, it must be a relatively simple matter to ‘maintain a sense of social responsibility’ in relation to them.

In any case, we find it difficult to gauge whether the Code meets the objective of ensuring a particular state of mind on the part of advertisers and marketers. Only they can know what their ‘sense’ is. For this reason we submit below that there should be a change in the objective itself.

### 2. Do the current objectives need to be amended? If so, what are the objectives that the Children’s Code should address?

As mentioned above, the current objective is faulty in that it centres around the idea of advertisers’ and marketers’ ‘sense of social responsibility’. The Code should instead express its objectives in terms of the advertising to which children are and are not exposed, for example:

‘to ensure that children are not exposed to advertising that is detrimental to their health, wellbeing and development’.

We note the statement elsewhere in the Discussion Paper that ‘The various AANA Codes ... reflect community concern around *what children see* and the *impact of advertising* on children.’ (p7, emphasis added) If it is true that exposure and impact are matters of community concern, then it would make sense to have an objective reflecting that.

At the very least, the objective should refer to advertisers’ and marketers’ behaviour, rather than their state of mind, for example:

‘to ensure that advertisers and marketers behave in a socially responsible way when advertising or marketing to children in Australia’.

### 3. Are Practice Notes helpful in assisting the interpretation of the Code?

Practice Notes can be of some help, but it would be preferable to make the Code clear enough that Practice Notes aren’t required. Potential complainants should be able easily to find all relevant rules and principles in one place; and any additional information produced to accompany the Code should have the aim of supporting potential complainants in deciding whether a complaint is warranted and if so how to frame it. Therefore CMA recommends measures to improve the general public’s access to the Panel’s past decisions. This could take the form of encouragement to conduct a keyword search of the Community Panel’s decision database, and/or easy-to-read summaries of past decisions on each section. It is important that the information provided be closely linked to the Panel’s decisions.

Regarding information to guide the Panel’s decisions, CMA suggests that up-to-date summaries should be provided of research findings on matters such as children’s cognitive and emotional development, their capacity to interpret advertising, and what is likely to mislead or deceive them.

#### 4. Should the Children's Code and Practice Notes continue to evolve outside of formal public reviews?

CMA submits that all changes to the Children's Code and the Practice Notes should be the subject of a process of public notification and consultation. If such a process is advisable for an overall review, it is also advisable for smaller changes.

#### 5. Are changes required to the Children's Code to ensure consistency with the TV Standard?

CMA does not see any need for the Children's Code to be consistent with the Children's Television Standard. The most important thing is that at least one set of provisions provide meaningful protection to children. At present, neither does so.

#### 6. Are changes required to the Children's Code to ensure consistency with the Code of Practice?

Based on our reading of the Commercial Television Industry Code of Practice, there are no provisions in it with which this Code could be inconsistent. This is because the CTICP simply states that advertisers on commercial TV (not broadcasters) are expected to comply with the AANA Codes. In this it imposes no additional obligation on advertisers, because they are not bound by the CTICP. Other restrictions are only as to scheduling, not as to ad content.

#### 7. Are any changes required to the definitions in the Children's Code? If yes, please give reasons.

CMA submits the following:

- The various exclusions are not justified from the point of view of children's interests, and should be removed
- The definition of Advertising or Marketing Communications to Children (AMCC) is too narrow to support meaningful action in protecting children from advertising. It should be changed to read: *Advertising or Marketing Communications which, having regard to the theme, visuals or language used, are likely to attract the attention of Children or are for goods, services and/or facilities which are targeted toward or have significant appeal to Children.*
- There should be no need to include a reference to the Community Panel having regard to the Practice Note in determining whether a Communication meets this definition, because it is implicit that it should have regard to relevant Practice Notes on all matters.
- The suggested new definition would provide greater protection to children in that it looks at the communications from their perspective ('likely to attract the attention'), rather than the intent of the advertiser or marketer ('directed primarily to' – and note how the word 'primarily' here unjustifiably limits the protection of children where an advertisement is directed also to adults).
- The suggested new definition would also address issues under the current Code where, for example, an ad can be designed to be highly appealing to children but not come under the Code because it is for a product (eg chocolate) that also has appeal for adults. The fact that adults also consume a product is no reason not to limit ads for that product which are likely to be influential on children.
- The definition of Children presumably has its basis in the Children's Television Standards, which were drafted for a very different purpose (ie the provision of quality content for children on free-to-air

TV). Protection from certain categories of advertising, especially in the modern day when privacy and data sharing are such a major concern, is needed until at least age 16.

- Premium should be defined to take account of the main kind of product that the advertiser sells, so that anything outside that category is included. For example, if a company mainly sells food, any toys included with its products should be treated as a premium.
- In the suggested new definition of AMCC, the definition of 'Product' is incorporated. This is to make it clearer to users of the Code, especially members of the general public deciding whether a complaint is justified, just how restrictive the category of AMCC is. Users should not have to cross-reference other definitions to get a clear sense of what is covered. (Note we have also suggested changing the 'and' to 'or', for the purpose of broadening the definition and enhancing the protection of children.)

#### 8. Are any changes required to Section 2.1 of the Children's Code [prevailing community standards]? If yes, please give reasons.

The Discussion Paper states that there have been few complaints under this Section. If this is the case it is mostly likely because the average member of the community would not know what it means, beyond what is covered by the specific provisions that follow. Moreover, such a person is unlikely to feel confident of knowing what Prevailing Community Standards are on a given matter. CMA submits that this Section could be removed, and all the other provisions made clearer.

#### 9. Are any changes required to Section 2.2 of the Children's Code [factual presentation]? If yes, please give reasons.

The words 'must not mislead or deceive Children' should be changed to 'must not be misleading or deceptive to Children'. It should not be necessary to show an ad misled or deceived anybody, rather the Code should look at the ad's inherent tendency. This would be consistent with other laws, such as s 18 of the *Australian Consumer Law*. The practice notes could then give evidence-based examples of images or statements that would be misleading to children.

Once again the Discussion Paper states that there have been few complaints under this section; CMA would suggest misleading and deceptive conduct is well covered by consumer law, so advertisers and marketers are well motivated to avoid such issues.

This section would benefit from the inclusion in a Practice Note of examples of content that would be misleading or deceptive to children at different ages.

#### 10. Are any changes required to Section 2.3 of the Children's Code [placement]? If yes, please give reasons.

CMA understands that this Section can protect children when a game they are playing online or in an app is interrupted by an ad that allows them to continue on to adult content. If this is correct, the Section should stay.

If this Section remains it should be updated to refer specifically to online influencers as a source of 'editorial comment'.

11. Are any changes required to Section 2.4 of the Children’s Code [s\*xualisation]? If yes, please give reasons.

Once again CMA refers to the narrow definition of AMCC, and notes that no AMCC (as defined) would dream of doing (a) or (b). In this sense those subsections function as window-dressing, creating the appearance that the Code is addressing an issue when there is fact no issue.

Regarding (c) we are unable to identify any ad that has done this either, even before this Section was adopted. There was considerable community discussion of ‘s\*xualisation’ of children in advertising in the 2000s, but this was not on the basis of ads doing what (c) describes. Rather the issue identified was something much closer to the kind of advertising covered in Section 2.2 of the AANA Code of Ethics. CMA suggests removing this Section, and relying on the Code of Ethics instead (noting that this document has broader coverage due to its definition of advertising, and is therefore able to provide better protection to children in any case).

To the extent that a specific child-related provision is required, it could clarify that any ad showing a child behaving in a suggestive or sexy manner is exploitative or degrading. However, such a provision should apply to all advertising, not just the narrow subset covered by this Code.

12. Are any changes required to Section 2.5 of the Children’s Code [safety]? If yes, please give reasons.

CMA commends this Section’s use of the phrase ‘which may encourage children’, as broad language like this enhances the protection of children (compared, for example, to the language in Section 2.2 as discussed above).

We are also pleased to note the inclusion of the possible impact of advertising on parents and carers, and would like to see more recognition of this throughout the Code.

13. Are any changes required to Section 2.6 of the Children’s Code [social values]? If yes, please give reasons.

CMA finds it troubling that this Section, with the use of the term ‘unduly’, seems to imply that some fright or distress is acceptable. CMA would like to see frightening / distressing content addressed more directly as there is significant research evidence that this can have a major impact on children’s development. That research should be given a direct and explicit role in the Code, both in setting the rules and in applying them. Inclusion of relevant information in a Practice Note would be appropriate.

Paragraph (b) should be expanded to include: ‘or use stereotyped depictions of these groups’. The inclusion of such wording is more likely to capture what goes on in some advertising and to address the cumulative impact that such depictions can have on children’s perceptions.

14. Are any changes required to Section 2.7 of the Children’s Code [parental authority]? If yes, please give reasons.

The expression ‘must not undermine’ raises a similar issue to ‘must not mislead or deceive’ in Section 2.2. It implies that complainants need to show that a parent’s or carer’s authority (etc) was undermined by the ad. A preferable expression would be ‘must not have a tendency to undermine’, or ‘must not question’ as this refers directly to the content of the ad rather than its impact.

This kind of provision is often referred to as an ‘anti-pester power’ provision, but it is important to note that this mischaracterises how ‘pester power’ works. It not by appealing to children to pester adults, rather it is by creating such a strong desire in children for a product that they will naturally tend to put strong pressure on their parents and carers. In this sense, creation of the conditions for ‘pestering’ is part and parcel of the mission of advertising. CMA is not opposed to provisions against an ‘appeal to children to urge their parents’ but it is unfortunate that these seem to give the impression that pester power is being addressed. This is especially so when the Code addresses such a narrow subset of advertising and provides such weak protection.

15. Are any changes required to Section 2.8 of the Children’s Code [qualifying statements]? If yes, please give reasons.

Considering that the children who are exposed to advertising may be too young to read, let alone to understand information that qualifies a strong message that is being delivered through advertising, CMA questions whether any advertising that needs a disclaimer should be allowed at all.

16. Are any changes required to Section 2.9 of the Children’s Code [competitions]? If yes, please give reasons.

As competitions are highly likely to lead to the collection of personal information about children, this Section should be expanded to state that advertisers must collect only information about the child, or the device the child is using, that is strictly necessary to the running of the competition and that the information must not be used for any other purpose.

17. Are any changes required to Section 2.10 of the Children’s Code [popular personalities]? If yes, please give reasons.

CMA submits that ‘popular personalities or celebrities, characters or influencers’ should not be used at all in the very small subset of advertising to which the Code applies (or even in the expanded subset that would be covered by our proposed definition of AMCC).

Also the blurring of ‘the distinction between commercial promotions and program or editorial content’ should be disallowed in all contexts, not only in relation to personalities or celebrities. An evidence-based Code would adopt such an approach, as we know from the research that this distinction is one of the things children are likely to have difficulty with.

CMA submits further that Section 2.10 should be amended to clarify that it applies to ‘personalities’ who have always been animated. These are perhaps better described as ‘characters’. Similarly, influencers should be expressly included.

18. Are any changes required to Section 2.11 of the Children’s Code [premiums]? If yes, please give reasons.

Paragraph (b) seems to undermine the overall intent of the Section, as the requirement of ‘conspicuousness’ is at odds with the requirement the reference to the premium be ‘incidental’. Some of the confusion could arise from the fact that the paragraph is phrased to apply to the communication as a whole, whereas it

makes sense only if it refers to the premium offer itself, or better still an explanation that the offer is indeed of a premium. CMA suggests that this paragraph could usefully be omitted.

Paragraph (d) is poorly phrased. CMA suggests: 'must refer to the Premium only incidentally, if at all, and focus on the advertised Product' or words to that effect.

Finally CMA reiterates the need to ensure that 'Premium' is defined in such a way as to cover the provision of any product that is outside the category with which the advertiser is usually associated.

#### 19. Are any changes required to Section 2.12 of the Children's Code [alcohol]? If yes, please give reasons.

If the current definition of AMCC is retained – that is, that they must be for a Product of principal appeal to children – then the Code will never apply to alcohol advertising. CMA suggests that it is misleading to include provisions in the Code that can never apply.

The phrase 'draw any association with' is unclear; CMA suggests replacing it with 'mention'.

#### 20. With the growth in the zero-alcohol market, are any amendments required to the Children's Code?

This question appears to be inviting stakeholders to support advertising to children of zero-alcohol versions of products that normally contain alcohol (such as beer). CMA considers that this would take too literal an approach to the way advertising works. If we are serious about ensuring that advertising and marketing are not used to make alcoholic beverages more appealing to children, then we need to address the 'sizzle' as well as the 'sausage'. In this case, alcoholic beverages are the 'sausage' and zero-alcohol versions are the 'sizzle'.

#### 21. Are any changes required to Section 2.13 of the Children's Code [privacy]? If yes, please give reasons.

CMA shares community concerns about children's data privacy, and we have suggested above a change to the Section on competitions to directly limit the collection of their data. This provision, too, should directly limit such collection. There would normally be no justification at all for an advertiser or marketer to collect data on a child, and the Code should establish such activities as the exception rather than the rule.

Provisions requiring parental consent are insufficient in any case, as many hold the view that parents should not be able to consent to the collection of their children's data, any more than they can consent to other harmful practices.

#### 22. Are any changes required to Section 2.14 of the Children's Code [food and beverages]? If yes, please give reasons.

CMA generally questions the approach of including matters in one Code that are covered in more depth in another Code. In this case there is an argument for leaving all food and beverage provisions for the Food and Beverage Code as this is less likely to lead to consumer confusion. CMA emphasises once again the onus placed on consumers to notice breaches and take the trouble to complain. Their load should be lightened



wherever possible. Referring to the other relevant Code(s) should be sufficient, without replicating any of its/their provisions or adding to them.

Regarding the wording of paragraph (a), CMA identifies the familiar problem of the Code addressing a kind of advertising that nobody has ever been interested in making. Ads for unhealthy foods (such as sugar-laden breakfast cereals) frequently align the product with images of health, vitality and sporting achievement, and this is the kind of misleading association that the Code should disallow. CMA commends the AANA to the UK provision which stated: 'The scientific meaning of the word "energy", i.e. calorific value, should not be confused with its colloquial meaning of physical vigour'. (Ofcom, *Television Advertising of Food and Drink Products to Children: Final Statement* (2007), Annex 4, Section 8.3.1). This is notable for the way it directly addresses an advertising strategy that is in fact common.

### 23. Are any changes required to Section 2.15 of the Children's Code [AANA Code of Ethics]? If yes, please give reasons.

See our comments above on cross-referencing of other Codes.

The Code of Ethics (at 2.3) needs to be revised to take into account the impact of scary content on children.

### 24. Are there any other issues, rules or standards that should be included in the Children's Code? If so please, give details.

CMA would like to emphasise once again the importance of delineating strictly between advertising and other content, and avoiding children's exposure to scary content (which is not the same thing as violence). We would very much like to see this Code addressing both of these issues directly, and in an evidence-informed way. In particular we would like to see restrictions placed on 'advergames' as these confuse ads with gaming activity in a way likely to be indistinguishable by children); and on promotions for programs, films and games rated higher than G on the ground of 'sense of menace'.

Do you know of any other evidence-based research which could inform the evolution of the Children's Code? If so, please give details.

CMA systematically keeps up to date with research on children's needs and interests as media users. This includes research on what content and techniques are likely to mislead or deceive, to be ambiguous, and scare or otherwise harm children. It also covers the needs of children at different ages. CMA is available to be consulted about access to this information.

### 25. Do you have any additional suggestions or comments on the review of the Children's Code?

Regarding the Code of Ethics, the Discussion Paper states that 'violence is generally viewed by the Ad Standards Community Panel as being completely unacceptable unless it is relevant to the product or service advertised'. (p7) In view of the extensive evidence that exposure to violent content risks harm to children's development, CMA submits that a more robust approach is needed here. In particular, violent advertising (that might otherwise have been judged overly impactful for its placement) should not be seen as justified in any way by the nature of the product. Products that cannot be advertised without violence should not be advertised to children. This includes violent programs, films and games, and especially those classified as

unsuitable for children under the National Classification Scheme. We submitted above that there should be no exemption under the Codes for program promotions.

Finally, it may be time to introduce into the Code some standards for these reviews: that is, how often they should happen and how they should be conducted. We have made some comments earlier in this submission which could provide some guidance in drawing such standards up (eg provide information about complaints dismissed as well as those upheld).

**END OF SUBMISSION**