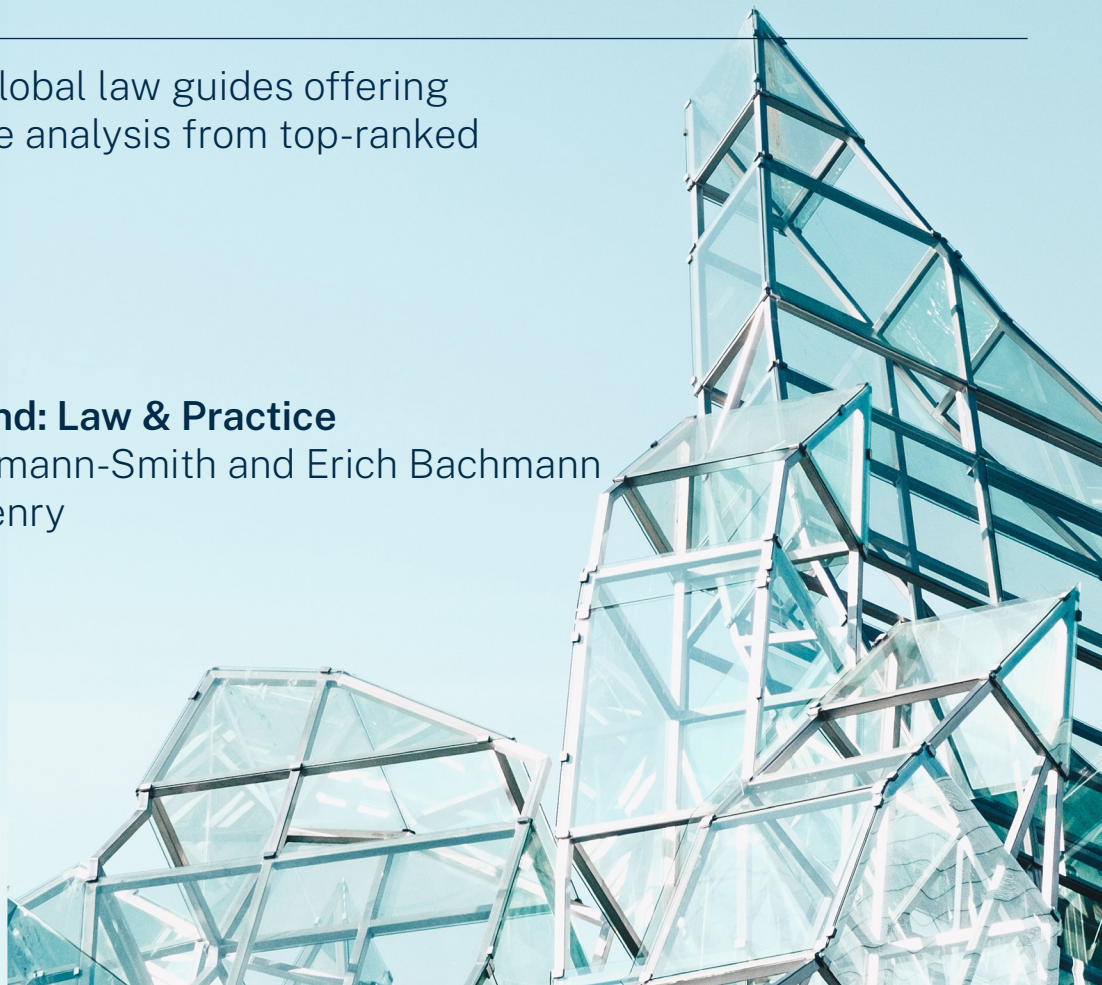

CHAMBERS GLOBAL PRACTICE GUIDES

Advertising & Marketing 2023

Definitive global law guides offering
comparative analysis from top-ranked
lawyers

New Zealand: Law & Practice

Julika Wahlmann-Smith and Erich Bachmann
Hesketh Henry



NEW ZEALAND



Law and Practice

Contributed by:

Julika Wahlmann-Smith and Erich Bachmann

Hesketh Henry

Contents

1. Legal Framework and Regulatory Bodies p.5

- 1.1 Primary Laws and Regulation p.5
- 1.2 Enforcement and Regulatory Authorities p.5
- 1.3 Liability for Deceptive Advertising p.5
- 1.4 What Is Advertising? p.6
- 1.5 Pre-approvals p.6
- 1.6 Intellectual Property and Publicity Rights p.6
- 1.7 Self-Regulatory Authorities p.6
- 1.8 Private Right of Action for Consumers p.6
- 1.9 Regulatory and Legal Trends p.7
- 1.10 Taste and Cultural Concerns p.7
- 1.11 Politics, Regulation and Enforcement p.7

2. Advertising Claims p.7

- 2.1 Deceptive or Misleading Claims p.7
- 2.2 Regulation of Advertising Claims p.7
- 2.3 Substantiation of Advertising Claims p.7
- 2.4 Product Demonstrations p.8
- 2.5 Endorsements and Testimonials p.8
- 2.6 Disclosures p.8
- 2.7 Representation and Stereotypes in Advertising p.8
- 2.8 Environmental Claims p.8
- 2.9 Dark Patterns p.9
- 2.10 Children p.9
- 2.11 Sponsor ID and Branded Content p.10
- 2.12 Other Regulated Claims p.10

3. Comparative Advertising and Ambush Marketing p.10

- 3.1 Specific Rules or Restrictions p.10
- 3.2 Competitor Copyrights and Trade Marks p.11
- 3.3 Challenging Comparative Claims Made by Competitors p.11
- 3.4 Ambush Marketing p.11

4. Social/Digital Media p.11

- 4.1 Special Rules Applicable to Social Media p.11
- 4.2 Liability for Third-Party Content p.11
- 4.3 Disclosure Requirements p.12
- 4.4 Requirements for Use of Social Media Platforms p.12
- 4.5 Special Rules for Native Advertising p.12

5. Social Media Influencer Campaigns and Online Reviews p.12

- 5.1 Special Rules/Regulations on Influencer Campaigns p.12
- 5.2 Advertiser Liability for Influencer Content p.12
- 5.3 Consumer Reviews p.12
- 5.4 Liability for Consumer Reviews p.12

6. Privacy and Advertising p.13

- 6.1 Email Marketing p.13
- 6.2 Telemarketing p.13
- 6.3 Text Messaging p.13
- 6.4 Targeted/Interest-Based Advertising p.13
- 6.5 Marketing to Children p.13
- 6.6 Other Rules p.14

7. Sweepstakes and Other Consumer Promotions p.14

- 7.1 Sweepstakes and Contests p.14
- 7.2 Contests of Skill and Games of Chance p.14
- 7.3 Registration and Approval Requirements p.15
- 7.4 Free and Reduced-Price Offers p.15
- 7.5 Automatic Renewal/Continuous Service Offers p.15

8. Artificial Intelligence p.16

- 8.1 AI & Advertising Content p.16
- 8.2 AI-Related Claims p.16
- 8.3 Chatbots p.16

9. Web 3.0 p.16

- 9.1 Cryptocurrency and Non-fungible Tokens (NFTs) p.16
- 9.2 Metaverse p.16

10. Product Compliance p.16

- 10.1 Regulated Products p.16
- 10.2 Product Placement p.16
- 10.3 Other Products p.16

Contributed by: Julika Wahlmann-Smith and Erich Bachmann, **Hesketh Henry**

Hesketh Henry has an advertising and promotions team that is known for providing specialist advice to domestic and international clients on a wide range of advertising and promotional matters. The firm's expertise extends to the compliance aspects of sweepstakes and prize competitions. It also assists clients with compliance with the Privacy Act, including preparing privacy policies, advice related to the storage and use of personal information, and other pri-

vacancy issues. Hesketh Henry is part of the Global Advertising Lawyers Alliance (GALA), a Chambers-ranked network, which means it can help clients align campaigns in multiple jurisdictions and also help align international client promotional campaigns to the New Zealand promotional landscape. The firm is often engaged by legal firms in foreign jurisdictions to provide advice on the New Zealand aspects of the operations of large global companies.

Authors



Julika Wahlmann-Smith is a partner in the business advice team, which the advertising and promotions team forms a part of, at Hesketh Henry. Julika provides advice to clients on all

aspects of advertising law. This includes advice on compliance with the Fair Trading Act 1986, the Advertising Standards Authority Codes and industry-specific advertising regulations. She also regularly advises on promotions, sweepstakes, intellectual property, and privacy matters. Julika is Vice President of the Global Advertising Lawyers Alliance (GALA) Asia-Pacific Region.



Erich Bachmann is a partner in the business advice team, which the advertising and promotions team forms a part of, at Hesketh Henry. Erich has over 30 years' experience in advising local and

international clients on legal aspects of their corporate and commercial business activities, including advertising matters. He has advised local and international corporate clients in relation to their general and industry-specific advertising campaigns. He has a long-standing, ongoing association with the Global Advertising Lawyers Alliance (GALA) and is a past President of the Asia-Pacific Region.

Hesketh Henry

Level 14
188 Quay Street
Auckland 1010
New Zealand

Tel: +64 9 375 8700
Fax: +64 9 309 4494
Email: lawyers@heskethhenry.co.nz
Web: www.heskethhenry.co.nz

Hesketh Henry

1. Legal Framework and Regulatory Bodies

1.1 Primary Laws and Regulation

There are approximately 50 pieces of legislation that regulate advertising practices in New Zealand. Some are more commonly applied than others, such as the:

- Fair Trading Act 1986 (FTA);
- Electoral Act 1993;
- Gambling Act 2003;
- Sale and Supply of Alcohol Act 2012; and
- Financial Markets Conduct Act 2013.

Alongside legislation, the Advertising Standards Authority (ASA) is a self-regulatory body that governs advertising practices by administering codes. The ASA has published one general code, and five industry-specific codes, covering the advertising of alcohol, gambling, health services, financial services, and where advertising is targeted at children.

1.2 Enforcement and Regulatory Authorities

The Commerce Commission administers and enforces the FTA, which is a primary piece of legislation that advertising is subject to in New Zealand. Potential breaches of the FTA may carry fines of up to NZD600,000 per breach. The Commerce Commission gathers information upon receiving complaints and may lay charges if the alleged conduct is considered serious. As an example of the extensive remedies available to be claimed by the Commerce Commission, they recently were successful in fining One NZ (previously Vodafone) NZD3.675 million for running a misleading advertising campaign.

The ASA is a self-regulatory body which establishes standards for responsible advertising in

New Zealand. The ASA enforce breaches of their codes through a complaints process. Once a complaint is submitted by a member of the public:

- it will be reviewed by the ASA;
- if the complaint is accepted, it may be put through an adjudication process, which involves a complaints board comprising five elected members of the public and four industry members; and
- if the complaint is upheld, and the advertisement is in breach of an advertising code, the ASA may require the advertiser to withdraw the advertisement.

Although compliance with the decisions of the complaints board is voluntary, in 2022, the ASA recorded a voluntary compliance rate of over 96%.

Several other regulators have powers to enforce laws that govern advertising practices, such as the Department of Internal Affairs, the Financial Markets Authority, and the NZ Police.

1.3 Liability for Deceptive Advertising

The FTA governs misleading and deceptive conduct, unsubstantiated representations, and other kinds of deceptive advertising. The FTA applies broadly and covers anyone who is “in trade”.

The ASA codes apply to all advertisements. The responsibility to comply with the ASA codes applies to all those that are involved with the advertisement, including the advertiser, media organisations, and agencies. It can also apply to influencers, publishers, or other media, depending on the degree of control they have exercised in publicising an advertisement.

1.4 What Is Advertising?

The ASA considers advertising to be a situation where an advertiser directly or indirectly controls the content of a message to influence a choice, opinion, or behaviour. In effect, this may extend to all types of communications, in all media. For the purposes of the application of the ASA codes, there are specified exclusions, for example, advertisements on mediums such as labelling and packaging are not regulated by the ASA.

The FTA considers an advertisement to be “any form of communication” so long as it is made to a section of the public and is intended to promote the supply of goods or services. Under this definition, any type of communication may be considered advertising. The FTA also regulates aspects of advertisements that fall outside its definition of advertising (such as misleading representations).

1.5 Pre-approvals

Television commercials may not be broadcast by New Zealand television stations without prior approval from the Commercial Approvals Bureau. The Commercial Approvals Bureau handles pre-approvals, and will consider an advertisement’s compliance with ASA codes, as well as a broadcaster’s own policies, before issuing approval.

The Association of New Zealand Advertisers (ANZA) has set up several pre-vetting services for the advertisement of more regulated products such as therapeutics (TAPS), liquor (LAPPS), and food and beverage when targeted at children (CAPS).

1.6 Intellectual Property and Publicity Rights

An advertiser generally cannot use another’s intellectual property (IP) in an advertisement,

unless they have obtained permission, such as in the form of a licence from the owner of that IP.

The use of a person’s name, picture, voice, and likeness would be subject to the Privacy Act 2020.

The use of an individual’s photograph may be acceptable if that photograph was taken in a public space and does not intrude to an unreasonable extent on the individual’s personal affairs.

Certain common law protections also exist, including by the common law tort – public disclosure of private facts and passing-off.

1.7 Self-Regulatory Authorities

The ASA is a self-regulatory authority that governs advertising in New Zealand. The ASA governs advertising practices by issuing codes. It reviews complaints made regarding advertisements that may breach the codes and can request that an advertisement be taken down if a complaint is upheld. Compliance is voluntary. However, the rate of compliance is very high.

1.8 Private Right of Action for Consumers

Consumers can take a private action against an advertiser for a breach of the FTA. The court has a number of remedies available to it if such an action is successful including imposing a fine on the advertiser, requiring it to stop the offending behaviour and order compensation.

Consumers can also lay complaints directly with the ASA. The ASA will consider undertaking a complaints process to determine whether an ad should be taken down in whole or in part.

1.9 Regulatory and Legal Trends

At the time of writing, the Commerce Commission has taken recent action against several advertisers who misled consumers in marketing campaigns. As referred to in **1.2 Enforcement and Regulatory Authorities**, the Commerce Commission recently fined One NZ NZD3.675 million for misleading consumers regarding its FibreX broadband service. The Commerce Commission has also fined:

- Strandbags NZD780,000 for misleading consumers by advertising discounts at special prices that were offered for extended periods of time; and
- The Market.com NZD840,000 for advertising long-standing deals as “today only”, displaying an inaccurate countdown timer for sales that would repeat themselves, and understating stock levels to create buyer panic.

1.10 Taste and Cultural Concerns

Rule 1(c) of the ASA Advertising Standards Code, states that advertisements must not be indecent, exploitative, or cause widespread offence. The reason for such indecency and offensiveness could, for example, be due to race, ethnic origin, and cultural beliefs. Advertisers should exercise caution when incorporating traditional or cultural Māori practices or *Te Reo Māori* in their advertising. Pursuant to Sections 177–180 of the Trade Marks Act 2002, a Māori Advisory Board was established to consider Māori heritage and *Te Reo Māori* in relation to trade marks.

1.11 Politics, Regulation and Enforcement

Regulation of alcohol advertising has been something that the current government has taken some interest in.

2. Advertising Claims

2.1 Deceptive or Misleading Claims

Whether an advertisement is considered to be misleading or deceptive pursuant to the FTA is dependent on whether a reasonable person is likely to have been misled or deceived. There is no requirement for the advertisement to actually have misled or deceived a person. The capacity to mislead or deceive is enough.

2.2 Regulation of Advertising Claims

All conduct and claims are subject to regulation, including express and implied claims made by advertisers. So long as a claim has the capacity to mislead or deceive a reasonable person, an advertiser may be liable for making that misleading claim. As mentioned in **2.1 Deceptive or Misleading Claims**, there is no requirement for an individual to have been actually misled or deceived.

2.3 Substantiation of Advertising Claims

Section 12A of the FTA requires, with very limited exceptions, that all claims in advertising need to be substantiated.

The extent of substantiation required will depend on the claim made. There must be reasonable grounds for the representations when they are made (ie, for the duration of an advertising campaign). What constitutes reasonable grounds will depend on the nature of the representation. Substantiation should include written evidence that any required standard is met and continues to be met.

Substantiation is not required for a representation that a reasonable person would not expect to be substantiated.

The substantiation must be consistent with the headline claim. Generally, the closer the substantiation information is to the claim, the lower the risk that the claim is likely to be considered misleading.

Courts have the power to consider all relevant circumstances, in deciding whether a representation has been made on reasonable grounds.

2.4 Product Demonstrations

Product demonstrations are subject to the same laws and standards as other kinds of advertisements. Advertisements containing product demonstrations must not breach any of the provisions in the FTA, nor any of the advertising standards codes. In addition, the Consumer Guarantees Act 1993 requires that if goods are supplied by reference to a sample or a demonstration model, the goods must correspond to such sample or demonstration model.

2.5 Endorsements and Testimonials

Section 13 of the FTA prohibits making a false or misleading representation, in connection with the supply, possible supply, or promotion of goods and services with regards to any sponsorship or endorsement.

In addition, several kinds of products and services are restricted from using endorsements or testimonials in their advertisements. For example, under Rule 2(e) of the ASA's Therapeutic and Health Advertising Code, advertisements of health and therapeutic products may not "claim or imply endorsement by any government agency, professional body, or independent agency" unless specific exceptions apply. Similarly, advertisers of financial products may not claim to be endorsed by any regulatory body, either expressly or by implication. Advertisers of financial products must also ensure that sponsored

content (including content on social media) is clearly identified as paid advertising.

Rule 2(f) of the general Advertising Standards Code states that testimonials may not be referred to unless they are "verifiable, genuine, current, and representative of the typical, not the exceptional".

2.6 Disclosures

The ASA Advertising Code requires that advertisements are identified as such. If it is clear to the relevant audience (in the context of the medium in which the advertisement is placed) that the content is controlled by an advertiser, then no further disclosure is required. When this is not clear, identifiers, such as "advertisement", "promotion feature", or "paid for ad" may be required.

2.7 Representation and Stereotypes in Advertising

The ASA Standards Code prohibits advertisements from containing content that is likely to cause harm or widespread abuse or give rise to hostility, abuse, or ridicule. Grounds for offence include gender and sexual orientation, gender identification, marital status, and family status. The use of stereotypical roles, which, through their context, are likely to be harmful or offensive to people, in particular children and young people, is also prohibited. For example, it is not permitted to make fun of people for not conforming to a gender stereotype.

2.8 Environmental Claims

The Advertising Standards Code includes specific rules regarding green marketing, being that environmental claims must be accurate and able to be substantiated by evidence that reflects scientific and technological developments. Guidelines under such rules include:

- absolute environmental claims, such as environmentally friendly, safe, and kind, will be assessed on the complete life-cycle of the product and its packaging;
- qualified claims, such as environmentally friendlier, safer, and kinder, must be able to prove a meaningful environmental advantage over competitors or a meaningful improvement on previous packaging, formulations, components, method of manufacture, or operation;
- environmental benefit claims must be genuine – they must meet relevant local and international standards, as appropriate for the relevant claim, such as biodegradable or organic; and
- environmental claims based on the absence of a damaging effect or harmful chemical can only be made if other products in the market cause the effect or contain the chemical.

The FTA also prohibits unsubstantiated representations in trade. The Commerce Commission has published guidance about making environmental claims in trade. This guidance includes that environmental claims must be truthful, accurate and specific, substantiated, use plain language, not exaggerate, exercise caution when relying on tests or surveys, and consider the overall impression.

2.9 Dark Patterns

The practices that are considered to be Dark Patterns are often already covered by existing legislation. For example, the Privacy Act 2020 governs the collection of personal information and requires that personal information is collected in a manner that is fair and does not unreasonably intrude on the personal affairs of the person concerned.

Certain Dark Patterns will contravene the FTA prohibitions on misleading and deceptive behaviour. For example, in 2022, The Market.com was held liable under Section 10 of the FTA for misleading conduct in relation to goods by:

- advertising “daily deals” that were offered on multiple days; and
- displaying low stock of products when they were not low in stock.

2.10 Children

The ASA Children and Young People’s Advertising Code applies to advertising that targets children or young people. Children are defined as individuals under the age of 14 years. Young people are defined as individuals between the ages of 14 and 18 years. The Code has three overarching principles under which there are a number of rules. The three main principles relate to the following.

- Social responsibility, prohibiting advertisements that condone, encourage, or unreasonably feature conduct that is, amongst other conduct: dangerous; anti-social; peer pressure; promotes an unrealistic body image or unhealthy lifestyle; or sexual. There are also specific rules regarding food and beverages, including that advertisements for occasional food and beverages must not target children.
- Truthful presentation, ensuring advertisements are identified as advertisements, and are clear as to price, additions, privacy, and rules of competitions. In relation to food and beverage advertisements, they must not mislead viewers as to potential physical, social, or mental health benefits from the consumption of the advertised product.
- For sponsorship advertising, there are specific rules regarding occasional food and beverage sponsorship advertising targeted

to young people, including that sponsorship advertising must not show an occasional food or beverage product.

2.11 Sponsor ID and Branded Content

The ASA Advertising Standards Code has a general requirement that advertisements are identified as such. The FTA also prohibits a person in trade from making a false or misleading representation, in connection with the supply, possible supply, or promotion of goods or services, that the goods and services have any sponsorship.

In addition, sponsorship in relation to certain industries is subject to industry-specific restrictions, for example:

- Tobacco sponsorship is prohibited by the Smoke-free Environments and Regulated Products Act 1990.
- Alcohol sponsorship is regulated by the ASA Alcohol Advertising and Promotion Code. Principle 3 covers “Alcohol Sponsorship Advertising and Promotion”, and includes two primary rules:
 - (a) Alcohol-sponsored advertising must target adults.
 - (b) Alcohol-sponsored advertising must only feature alcohol, and the alcohol advertiser in a subordinate manner.
- Occasional food and beverage sponsorship targeted at young people is restricted by the ASA Children and Young People’s Advertising Code.

2.12 Other Regulated Claims

Claims made in relation to financial products are regulated by the Financial Markets Authority. Generally, claims must be substantiated. Several other requirements apply to advertisers of financial products, including that fees and costs

must be disclosed, performance should not be overemphasised, and industry jargon should be sufficiently explained. The ASA also released the Financial Advertising Code in 2022, which is intended to uphold social responsibility and protect non-expert consumers of financial products.

The FTA applies universally to all claims made by advertisers, regardless of what category a claim fits within. While the Commerce Commission has issued guidance regarding several unique categories of claim, they will generally seek to apply the FTA in a way that protects consumers from misleading, deceptive, and unfair conduct. Similarly, the ASA will seek to apply their advertising codes to all relevant advertisements in a way that seeks to ensure a requisite standard of non-misleading advertising is maintained.

3. Comparative Advertising and Ambush Marketing

3.1 Specific Rules or Restrictions

The ASA Advertising Standards Code requires that comparative advertisements must:

- be factual and accurate;
- make clear the nature of the comparison;
- not disparage a competitor; and
- only compare “like” products or services available in the same market.

Section 94 of the Trade Marks Act 2002 provides that trade marks may be used in comparative advertising provided that the advertisement does not take unfair advantage of, and is not detrimental to, the character or reputation of the trade mark.

The FTA also regulates the substance of comparative advertisements, by prohibiting misleading and deceptive conduct and representations.

3.2 Competitor Copyrights and Trade Marks

Generally, advertisers may use a competitor's name or trade mark for the purpose of comparative advertising so long as the advertisement:

- does not take unfair advantage of the reputation of the competitor;
- does not damage the reputation of the competitor;
- is not misleading or deceptive;
- is factual and accurate;
- clearly identifies the nature of the comparison; and
- fairly and honestly compares similar products or services available on the same market.

3.3 Challenging Comparative Claims Made by Competitors

An advertiser may challenge claims made by a competitor about such advertiser's products by:

- making a complaint with the ASA – following a relatively inexpensive complaints process, the advertisement may be removed;
- making a complaint with the Commerce Commission – the Commerce Commission may then take representative action; or
- taking private action against the competitor – in the first instance, an advertiser may seek an interim injunction to immediately prevent a competitor publishing an advertisement which they believe is not a legitimate comparative advertisement, after which an advertiser may claim breach of copyright or of a registered trade mark.

3.4 Ambush Marketing

The Major Events Management Act 2007 restricts ambush marketing and provides sponsors and event organisers with a certain amount of protection around the investment a sponsor makes in a major event.

The Act does not apply automatically. An event organiser must first apply to have the event declared a "major event" for the protections of the Act in relation to ambush marketing by association and introduction to apply to it. Ambush marketing by association occurs where an advertiser (who is not a sponsor of the event) misleads the public into thinking that it is associated with the event.

4. Social/Digital Media

4.1 Special Rules Applicable to Social Media

General advertising laws, including the FTA and the ASA codes, apply to advertising in online and social media. The ASA has developed specific guidance for influencer advertising which includes guidance on identifying advertisements on social media.

4.2 Liability for Third-Party Content

Advertisers can be liable for user-generated content on their social media channel over which the advertiser has a reasonable degree of control. For example, user-generated content that tags an advertiser and appears on the advertiser's social media channel will be subject to the ASA codes. The ASA suggests that advertisers monitor tagged content and remove or untag content that does not comply with the codes.

4.3 Disclosure Requirements

Advertisements must be clearly identified as such. If it is not clear from the content and context of the advertisement, then identifiers can be used. There is a degree of flexibility as to how advertisements are identified. This could include using the following labels: “Advertisement”; “Advertorial”; “Ad”; “Paid-for Ad”; and/or “Promotional Material”.

4.4 Requirements for Use of Social Media Platforms

There are no unique rules and no common social media platforms that are not permitted.

4.5 Special Rules for Native Advertising

Advertising must be clearly identified as such and must be readily recognisable by its audience as advertising. If this is not immediately clear from the advertisement and its placement, then identifiers are required.

5. Social Media Influencer Campaigns and Online Reviews

5.1 Special Rules/Regulations on Influencer Campaigns

All parties to an advertisement, including influencers involved in advertising, are responsible for ensuring compliance with the ASA codes. In addition, influencer advertising will be subject to general laws, such as the FTA, covering advertisements.

The ASA Alcohol Advertising and Promotion Code requires that influencers that are currently popular with minors and/or have particular appeal to minors, can only be used in an alcohol promotion that is placed in media where appropriate tools are used to ensure that the content can only be accessed by adults, or inside prem-

ises whose primary purpose is to sell alcohol. In addition, influencers with alcohol advertising and promotion content must be at least 25 years of age and must appear to be at least 25 years of age.

5.2 Advertiser Liability for Influencer Content

All parties to an advertisement are responsible for its compliance with the code. Advertisers need to take steps to ensure that influencers identify content that is advertising. This should be clearly set out in any contracts engaging influencers. The ASA can request details of the engagement with an influencer if a complaint is made against an advertising post made by an influencer.

5.3 Consumer Reviews

The FTA prohibits false or misleading statements made in connection with the supply, possible supply, or promotion of goods and services that such goods or services have any approval or endorsement.

The Commerce Commission has also issued guidance on online reviews. The guidance sets out a number of considerations when using customer reviews, including that only genuine reviews should be collected, reviews should not be edited, reviews should be verified to ensure they are from genuine customers, any relationship affecting the impartiality of a review should be disclosed, the order in which reviews are displayed should not be changed, and it is ensured that customers know how their reviews will be used.

5.4 Liability for Consumer Reviews

The advertiser should monitor reviews on media which it controls (such as its social media chan-

nel) to ensure that the content of the review does not breach the ASA codes.

6. Privacy and Advertising

6.1 Email Marketing

The Unsolicited Electronic Messages Act 2007 prohibits commercial, electronic messages being sent to or from New Zealand without the consent of the receiver. “Electronic messages” includes email, instant messaging, mobile phone texts, and image-based messaging. However, voice calls made using standard telephone services or voice-over internet protocol (IP) (ie, Skype, WhatsApp, and Zoom) are exempt. Commercial messages include messages that market or promote goods or services.

Consent can be given expressly or be reasonably inferred from the parties’ conduct and business. A recipient is deemed to have consented if their electronic address has been clearly published by that person in a business or official capacity, and the publication is not accompanied by a statement to the effect that they do not want to receive unsolicited electronic messages and any message sent to that address is relevant to the business, role, function, or duties of the person in a business or official capacity.

The message must identify the sender and how they can be contacted, and include a functional and free-of-charge unsubscribe function. The unsubscribe function must be easy to use and use the same medium of communication as the original message.

Failure to comply with the Unsolicited Electronic Messages Act could result in a fine of up to NZD500,000.

In addition, any use of personal information is required to be in compliance with the Privacy Act 2020.

6.2 Telemarketing

The FTA has specific requirements in relation to uninvited direct sales agreements entered into over the phone. These requirements include that the consumer must be given a copy of the agreement entered into within five working days. The consumer is also given the right (and must be informed of the right) to cancel within five working days of receiving the agreement.

Breaches can result in fines of NZD30,000 for businesses and NZD10,000 for an individual. A court can also make an order requiring compensation to be paid, or requiring the contract to be cancelled, for example.

In addition, any use of personal information is required to be in compliance with the Privacy Act 2020.

6.3 Text Messaging

See 6.1 Email Marketing.

6.4 Targeted/Interest-Based Advertising

The Privacy Act 2020 requires that personal information is only used for the purpose for which it is collected (unless certain limited exceptions apply). The purpose for which it is collected must be made clear to a person when their information is being collected.

6.5 Marketing to Children

The ASA Children and Young People’s Advertising Code sets out that extreme care must be taken when requesting or recording personal information about children or young people to ensure that their privacy is appropriately protected. Advertising that will collect personal infor-

mation about a child must include a statement that a parent or guardian's verifiable consent is required. Advertisers must also not request that a child discloses more personal information than necessary. An advertisement that breaches the Code can be requested to be withdrawn.

6.6 Other Rules

The ASA Advertising Standards Code requires that advertisements only portray or refer to personal information that is publicly available and that other personal information is only collected and used with the consent of the individual concerned. Publicly available information cannot be disclosed if doing so would be unreasonable.

Consent from a parent or guardian is required before any personal information of anyone under 18 is used in an advertisement.

7. Sweepstakes and Other Consumer Promotions

7.1 Sweepstakes and Contests

Games of chance, such as sweepstakes and contests, are governed by the Gambling Act 2003.

The Gambling Act prohibits "gambling", unless permitted by it. "Gambling" is defined as "paying or staking consideration directly or indirectly on the outcome of something; seeking to win money when the outcome depends wholly or partly on chance". The term "consideration" in the context of gambling can be read wider than simply monetary consideration. Money is defined as including "moneys' worth", whether or not convertible into money.

If no consideration is payable to enter a sweepstake or contest then it falls outside the scope

of the Gambling Act and is permitted (provide the contest complies with general legal requirements, such as the FTA).

If the purchase of a product is required to enter the contest, then provided it falls within the definition of a permitted sales promotion under the Gambling Act, it is a permitted form of gambling.

A "sales promotion scheme" is defined as "gambling that does not involve a gaming machine... used by a creator, distributor, or vendor of goods or services to promote the sale of those goods or services if:

- participation in the gambling requires a person to purchase the goods or services promoted for a price not exceeding the usual retail price;
- the date or period on or over which the outcome of the gambling will be determined is clear to the participant at the time and place of sale;
- the person is not required to pay direct or indirect consideration other than to purchase the goods or services; and
- the outcome is determined:
 - (a) randomly or wholly by chance; or
 - (b) partly by chance (where the chance plays the greater or lesser part) and partly by the application of some knowledge or skill."

7.2 Contests of Skill and Games of Chance

The definition of gambling in the Gambling Act includes where the outcome "depends wholly or partly on chance". A game of only skill that does not involve any chance is not caught by the Gambling Act and is permitted. Case law has commented, in the context of an activity that does not depend wholly or partly on chance, that

skill would be the predominant, normally decisive, feature.

7.3 Registration and Approval Requirements

Registration requirements depend on the nature of the gambling. Sales Promotion Schemes (as defined in the Gambling Act) do not require a licence or approval.

Other types of gambling where consideration is payable are subject to different requirements depending on the scale and character of the activity. There are four different classes of gambling.

Licences are not required for Class 1 and Class 2 gambling. However, the gambling activity must comply with the relevant rules which include restrictions on who can run these types of gambling and that no commercial gain can be made from them.

Class 3 and 4 gambling require licences. Class 3 relates to gambling where the value of the prizes exceeds NZD5,000. Class 4 is gambling that generally involves gaming machines. There are restrictions on who can run these types of gambling and how the proceeds of these forms of gambling can be used.

Licence applications for Class 3 and 4 gambling must be filed with the Department of Internal Affairs.

7.4 Free and Reduced-Price Offers

The FTA prohibits false or misleading representations in connection with the supply, proposed supply, or promotion of goods and services, in respect of the price of any goods or services. If something is advertised as being “free”, it must actually be free.

In addition, the FTA prohibits bait advertising, which involves advertising a product at a price that the person does not intend to offer the product for or have reasonable grounds to believe that they will be able to supply at that price for a time period and in quantities reasonable, having regard to the market in which the person carries on business, and the nature of the advertisement.

7.5 Automatic Renewal/Continuous Service Offers

Subscriptions and automatic rollover or renewal terms that extend a contract beyond the term that customers would normally expect have been identified by the Commerce Commission as a type of term that could potentially be declared an unfair contract term.

The FTA prohibits the inclusion of terms that have been declared to be “unfair contract terms” in standard form consumer contracts. If a term in a standard form consumer contract is declared to be an unfair contract term, that term must not be included in a standard form consumer contract and must not be used, enforced, or relied on.

Generally, a term will be “unfair” where the term would cause a significant imbalance in the parties’ rights and obligations arising under the contract, which would cause detriment to a party where it was enforced.

Automatic rollover terms are more likely to be considered fair if it was made clear to consumers from the beginning how the rollover will work and if they were sent a reminder (which clearly sets out how to stop the rollover from occurring) a reasonable time before the rollover occurs. Other factors such as reasonable notice periods to

terminate without cancellation fees also weigh in favour of a term being considered fair.

8. Artificial Intelligence

8.1 AI & Advertising Content

At the time of writing, there are no specific regulations governing the use of artificial intelligence (AI) in advertising in New Zealand.

8.2 AI-Related Claims

Claims relating to the use of AI would currently be subject to the FTA. This includes that such claims must not be misleading or deceptive and must be able to be substantiated.

8.3 Chatbots

At the time of writing, there are no specific regulations regarding the use of chatbots in New Zealand.

9. Web 3.0

9.1 Cryptocurrency and Non-fungible Tokens (NFTs)

At the time of writing, there are no specific regulations regarding cryptocurrencies and NFTs. Certain existing laws can apply, such as the Financial Market Conduct Act 2013, depending on the nature of the assets.

The FTA will also generally apply to representations regarding cryptocurrencies and NFTs.

9.2 Metaverse

At the time of writing there is no specific regulation in place regarding the metaverse.

10. Product Compliance

10.1 Regulated Products

There are specific rules regarding the advertising of certain products (in addition to the requirements that apply pursuant to the ASA codes and the FTA). They include the following.

Alcohol Advertising

- Sale and Supply of Alcohol Act 2012.

Financial Services/Products Advertising

- Financial Markets Conduct Act 2013.
- Credit Contracts and Consumer Finance Act 2003.
- Credit Contracts and Consumer Finance Regulations 2004.

Therapeutic and Health Products Advertising

- Medicines Act 1981.
- Medicines Regulations 1984.
- Dietary Supplements Regulations 1985.

Advertising for Gambling

- Gambling Act 2003.

Advertising for Tobacco Products

- Smoke-free Environments Act 1990.

Food Advertising

- Food Act 2014.

10.2 Product Placement

Advertisements are required to be clearly and appropriately identifiable for the relevant audience.

10.3 Other Products

Certain categories of products have product-specific considerations that should be taken into account when advertising, including, for example, hazardous substances.

CHAMBERS GLOBAL PRACTICE GUIDES

Chambers Global Practice Guides bring you up-to-date, expert legal commentary on the main practice areas from around the globe. Focusing on the practical legal issues affecting businesses, the guides enable readers to compare legislation and procedure and read trend forecasts from legal experts from across key jurisdictions.

To find out more information about how we select contributors, email Katie.Burrington@chambers.com