

AUSTRALIA

Peter Le Guay
Thomson Playford

Level 25
Australia Square Tower
264 George Street
Sydney 2000
Tel: +61 2 8248 3424
Fax: +61 2 8248 5899
E-mail: pleguay@thomsonplayford.com.au
Website: www.thomsonplayford.com.au



Is there case law or any statutory regulation governing advertising and promotion incentives? Are there any special consumer protection laws? What role do free gifts, tie-in offers, sweepstakes, rebates and other benefits, play in this context?

Yes. The Trade Practices Act 1974 (Cth) regulates conduct by corporations and Part V (Consumer Protection) has particular application to all advertising, marketing and promotional activity (including above the line and below the line advertising, free gifts, tie-in offers, sweepstakes, contests, rebates and any other benefits). Part V, among other things, prohibits a corporation from:

- engaging in conduct that is misleading or deceptive or which is likely to mislead or deceive;
- making false representations with respect to things such as the goods' standard, quality, value, grade, composition, style or model,
- representing that goods or services have sponsorship, affiliation or approval that they do not have
- offering gifts, prizes or other free items with the intention of not providing or of not providing them as offered;
- bait advertising
- referral selling and pyramid selling

'Sweepstakes' (in which winners of prizes are determined wholly or partly by chance, such as by way of draw or instant win ticket) are also subject to the lottery laws of each Australian State and Territory, some of which require lottery permits to be obtained. Promotions that are determined entirely by skill (i.e. contests), are not subject to the lottery laws.

In your jurisdiction, are there any industry sectors which are subject to special regulations for advertising and promotion incentives (for instance the health products and pharmaceutical industries in some countries)? Please name applicable statutes and self-regulatory codes.

Legislation

Therapeutic Goods Act 1989 (Cth) regulates all goods and devices defined as being for "therapeutic use" which covers such things from prescription only medicines and over the counter pharmaceutical products through to medical devices. The *Therapeutic Goods Advertising Code* regulates the advertising of such goods.

The *Consumer Credit Code* covers all 'credit' transactions including credit cards, personal loans etc.

Self regulation (general)

Australian Association of National Advertisers (AANA) Code of Ethics
AANA Code for Advertising to Children (Advertising to Children Code)

Self regulation (industry specific)

AANA Food & Beverages Advertising and Marketing Communications Code (Food & Beverages Code)
Australian Self Medication Industry Code of Practice – for non prescription medicines
Alcoholic Beverages Advertising Code
Weight Management Industry Code (including Slimming Advertising Guidelines)
Federal Chamber of Automotive Industries Code of Practice for Motor Vehicle Advertising
Australian eMarketing Code of Practice
Mobile Premium Services Industry Code
Internet Industry Association (IIA) Spam Code of Practice (although note that there is also spam legislation)
IIA Content Code of Practice

Some of the above industry codes are binding on members only.

Does industry self-regulation replace or supplement government and legislative regulation of advertising and promotion incentives? Is self-regulation an effective tool?

Self-regulation supplements legislative regulation. In addition to the above industry specific codes, the AANA Code of Ethics is the overarching system of self-regulation. For some issues (i.e. taste and decency), the self-regulatory body would be first place that a consumer complaint would be directed, for other issues (such as for therapeutic goods), it will be the regulatory body.

For the most part it would appear that self-regulation works well and that both industry and consumers are satisfied in that there is little public discussion about the majority of the above codes. The only real area that draws public comment and criticism are the Food and Beverages Code and the Advertising to Children Code, and, to a lesser extent (but usually in reference to either food and beverages or advertising to children), the AANA Code of Ethics. The Food & Beverages Code and the Advertising to Children Code are both relatively new and the criticism that is made tends to be that either the codes are insufficiently enforced or deficient.

To what extent do promotional incentives extended to staff in public institutions pose legal issues in your jurisdiction (i.e., paying for travel and accommodation costs on the occasion of conferences, personal entertainment, hidden education sponsoring, sponsoring of school snacks for promotional purposes)?

This would need to be considered on a case by case basis as an incentive for schools (whether government or private) would require different consideration to an incentive for a local government official. Incentives (whether promotional or otherwise) to government officials are essentially prohibited under anti-corruption legislation. By contrast, a promotion that is open, for example, to all school canteens who purchase a particular product and go in the draw to win sporting equipment for their school would be permitted.

Are there any formal disclosure requirements for promotional incentives (i.e., rule of separation of procurement from personal dealings, rules of employer consent requirements, written form requirements, adequacy of consideration granted for a service)?

If only in relation to staff in public institutions, no, it is an outright prohibition.

If in relation to promotional activities generally, then the only real 'formal disclosure' required is the information that must be provided to the lottery departments in order to obtain lottery permits (and follow up documentation regarding winners) and disclosure to entrants regarding the rules of the promotion or sweepstakes.

Other Codes, such as the Therapeutic Goods Advertising Code and the Consumer Credit Code require that certain information be included on advertisements for particular products.