

INFORMATION SHEET

Producing a TVC containing Testimonials and Endorsements

What is a testimonial?

A testimonial is a personal statement certifying or attesting to the value or qualities of a product or service, including an endorsement or recommendation. It does not matter who is giving the testimonial – what does matter, is the statements that are made.

Expressions of personal support for a product, as distinct from objective facts or statements, are testimonials. For example, a statement such as “Consumer research has shown that this product is suitable for the majority of users” is a statement of fact, but a statement by a person that “The product works for me and probably will for you” is a testimonial.

Note that even if the statement made is not a testimonial, it nevertheless needs to comply with general consumer law requirements regarding its accuracy and truthfulness.

Whether something is a testimonial will depend on a range of circumstances. When assessing whether or not a statement is a testimonial, CAD will consider the statements made by an individual within the context of a commercial, having regard to all elements of the commercial.

Testimonials and endorsements

Testimonials and endorsements from individuals can be used to add credibility to a claim in a commercial. The Australian Consumer Law prohibits the making of a false or misleading representation that purports to be a testimonial or endorsement. In 2010 new legislation was introduced, which had the effect of deeming a testimonial to be misleading if evidence is not provided to the contrary.

Advertisers must ensure that any representation or claim made is accurate and truthful. CAD requires supporting evidence to support any testimonial – acceptable forms are set out below.

Examples of statements that are unlikely to be considered testimonials

Example 1:

“This product is used by over 5,000 people in Australia every day”. This is not a testimonial because it is a statement, rather than a personal endorsement or recommendation. However, the advertiser must still supply substantiation for the claim.

Example 2:

“You can buy this product for less than \$50” or “You can buy this product at [Store name]”. This statement does not contain any element of personal endorsement or recommendation, so it would be unlikely to be considered a testimonial. However, it would be considered a testimonial if the statement was expanded to include a favourable opinion – for example – “You can buy this product for less than \$50 and it is fantastic”.

Examples of testimonials that may be misleading

Example 1:

A well-known actress endorses a hair product with the words “I use it every day”. If the actress does not use the product every day, this testimonial will be misleading.

Example 2:

An advertisement includes people making favourable comments about a product, such as “I would never use anything else now”, when in fact they are not genuine consumers but paid actors who do not actually hold that favourable opinion. These testimonials are misleading.

Example 3:

Edited transcripts of consumer feedback are presented in an advertisement, but negative comments are edited out. For example, if a consumer has stated in feedback that “This product cured me of my symptoms overnight, but did make me very drowsy”, but the advertisement states only that “This product cured me of my symptoms overnight”, it is misleading.

Example 4:

A well-known sports person states that an energy drink improved their performance, when in fact there was no such improvement over any period when the drink was used by the sports person. This testimonial is misleading.

Example 5:

A pensioner states that he has invested in a particular pension fund all his life and is now enjoying a comfortable retirement. If this is not true, the testimonial will be misleading. In this case, the testimonial implies a connection between the pension fund and the pensioner’s retirement, but if in fact only a proportion of the pensioner’s retirement income was derived from the pension, the testimonial would be misleading.

Example 6:

A celebrity gives an opinion about a product, such as “This product is fantastic”. If the celebrity does not honestly hold that opinion the advertisement is misleading.

The evidence required to support a testimonial

Before classifying a commercial that contains a testimonial, CAD will require certain information from the advertiser to support the testimonial.

The evidence required to support a testimonial will depend on the nature of the testimonial, but as a general rule CAD will require the following material, which may be provided in a single document:

1. A release

A release or other statement by the person in the advertisement agreeing to be in the advertisement is mandatory. In the case of a celebrity or sports person, this can be made by an agent or other person with authority to represent them. Where anonymous feedback is used, or actors simulating feedback, then the agency or advertiser will need to confirm that the feedback is accurate, complete and appropriately presented (for example, without distorting or unbalanced editing).

2. Confirmation of any personal experiences

Where the endorsement includes statements regarding personal use or personal experience of the product, the person providing the release must confirm that this use or experience has taken place. Where an agent or another person is providing a release on behalf of a celebrity (or paid actor), the confirmation must be based on personal knowledge. For example, “As X’s agent for five years, I am

familiar with their routine and I know that they do use this product every day”, where the claim is that the celebrity or actor uses the product every day.

3. Confirmation of opinions or recommendations

Where the person gives an opinion or recommendation about the product, the person providing the release must state that this is the person’s honestly held opinion or recommendation. Where an agent or other person is providing the release on behalf of a celebrity, they must state that they have discussed the statements in the advertisement with the celebrity and the celebrity genuinely holds that opinion. Note that whether the advertisement contains an opinion does not depend on whether words such as “In my opinion” or “In my view” are used. A celebrity who states “This is a great product” is stating an opinion, for example.

Please see Appendix A of this Information Sheet for an acceptable form of evidence to support a testimonial.

Currency of Evidence

The evidence described above must relate to the advertisement being submitted and to the claims made in that advertisement. An old or stale statement made in the context of a different advertisement with different claims will not suffice.

Disclaimers

In some cases, a disclaimer or qualification may sufficiently qualify or give context to a testimonial, so that it is not misleading despite the absence of supporting evidence as required above.

However, those cases will be rare, because the usual purpose of a testimonial is to add an element of personal commitment to an advertisement, which is persuasive with a consumer. For example, if a celebrity gives an opinion about the quality of a product, it will be very difficult to provide a disclaimer which addresses that opinion (such as a disclaimer that the views expressed in the advertisement are not necessarily held by the celebrity - this is obviously in conflict with the intention of the testimonial).

Nevertheless, there may be cases where a celebrity or paid actor is in a simulated situation, in which a disclaimer that the scene is simulated and not based on an actual event or experience may be sufficient. However, as the Australian Consumer Law requires an advertiser to demonstrate that a testimonial is not misleading, an advertiser who believes that a disclaimer will address any potentially misleading impression should consult CAD at an early stage for a free, confidential discussion.

APPENDIX A

Example of Testimonial Release/Confirmation

The evidence required to support a testimonial will vary, depending on the type of testimonial involved. Accordingly, the following example should be used only as a guide:

I, [name of celebrity, actor or other person giving the testimonial], appeared in the television commercial [insert key number] promoting [good or service promoted] (**Commercial**). I confirm that:

1. I consented to the use of my name, image, likeness and reputation in connection with the Commercial.

2. The opinions and views stated by me in the Commercial are genuinely held by me.
3. All statements in the Commercial regarding my use, or other experience of, the [advertised product or service] are correct and fairly represent that use and experience.

Signature:
[Name]
[Date]

As an example, a confirmation statement in relation to a sporting figure who endorses an energy drink could provide the following:

I, Tom Bowler, appeared in a television advertisement promoting the Cricket Energy Drink (Commercial). I confirm that:

1. I consented to the use of my name, image, likeness and reputation in connection with the Commercial.
2. The opinions and views stated by me in the Commercial are genuinely held by me.

All statements in the Commercial regarding my use and experience of the Cricket Energy Drink are correct and fairly represent that use and experience.

For further information please contact CAD on 02 8968 7200 or email us at cad@freetv.com.au