



**AUSTRALIA**

# Submission by Free TV Australia

**Food & Beverages  
Advertising Code Review**

**AANA discussion paper  
for public comment**

June 2020

# Table of contents

- 1. EXECUTIVE SUMMARY ..... 3**
- 2. INTRODUCTION ..... 4**
- 3. NO CASE FOR ADDITIONAL RESTRICTIONS ..... 5**
- 4. AANA CODES SHOULD REGULATE CONTENT NOT PLACEMENT OR SCHEDULING ..... 6**
  - 4.1 AANA CODES SHOULD NOT DISPROPORTIONATELY TARGET TELEVISION ..... 6
  - 4.2 PROPOSED DEFINITION IS ARBITRARY AND HIGHLY IMPRACTICAL ..... 6
  - 4.3 POTENTIAL CONFLICT WITH FREE TV CODE ..... 7
- 5. AANA CODES SHOULD NOT SINGLE OUT TELEVISION FOR SEPARATE RULES ..... 8**
- 6. A CLEAR CARVE OUT FOR INCIDENTAL ADVERTISING AND PRODUCT PLACEMENT ..... 9**
  - 6.1 CONSISTENT RULES FOR INCIDENTAL ADVERTISING ..... 9
  - 6.2 RULES SHOULD ONLY APPLY TO THE PRODUCTS OR SERVICES BEING ADVERTISED ..... 9
  - 6.3 BROAD EXEMPTION FOR PRODUCT PLACEMENT AND INTEGRATED ADVERTISING ..... 9
- 7. DRAFTING ISSUES ..... 11**
  - 7.1 EXCEPTION FOR FRESH FRUIT AND VEGETABLES SHOULD BE EXPANDED ..... 11
  - 7.2 PROPOSAL FOR AN ‘OVERARCHING’ CODE ..... 11
  - 7.3 PROBLEMATIC DEFINITIONS ..... 11

## 1. Executive Summary

- Free TV thanks the AANA for the opportunity to comment on the *Food & Beverages Advertising Code Review Discussion Paper (Discussion Paper)*.
- While we agree it is important to undertake periodic reviews of the AANA Codes to ensure they are meeting their objectives, we believe the current provisions of the AANA Food & Beverages Code (**F&B Code**) adequately cover community concerns and that only minor changes should be made at this time. Additional restrictions should not be adopted in the absence of evidence that the existing rules are not meeting their objectives.
- The AANA's stated objective is to specify standards in its self-regulatory codes that apply equally across all media. We support this objective which is also consistent with the recommendation of the ACCC's Digital Platform Inquiry Final Report that regulatory frameworks should be platform neutral. To the extent that recommended changes to the Food and Beverage Code do not meet this objective they should not be adopted.
- In particular, the recommendation to adopt a placement restriction based on a 35% child audience measure (Question 6) would disproportionately impact on television as a medium and should be rejected on the basis that it does not meet the objective to have standards that apply equally across all media. The proposed 35% placement requirement is also arbitrary and has proven highly impractical in the context of the QSRI & RCMI.
- For the same reason, we also note our strong opposition to any placement rules applying to advertising directed to adults on television (Question 8). We support the existing approach of applying uniform platform neutral principles-based rules to all advertising and marketing material. The AANA codes should not single out television.
- Incidental advertising and product placement should be clearly carved out of the scope of the F&B Code (Question 9). This is consistent with the treatment of incidental advertising under the Commercial Television Industry Code of Practice (**Free TV Code**). It is necessary to avoid restrictions on advertisers in relation to products or services that are not the subject of their advertisement. In addition, it is essential for product placement and integrated advertising where advertisers do not have control over the content in which food & beverage products are placed.

## 2. Introduction

Free TV Australia is the peak industry body for Australia's commercial free-to-air broadcasters. We advance the interests of our members in national policy debates, position the industry for the future in technology and innovation and highlight the important contribution commercial free-to-air television makes to Australia's culture and economy.

Free TV proudly represents all of Australia's commercial free-to-air television broadcasters in metropolitan, regional and remote licence areas.



In Free TV's view the AANA Food & Beverage Code (**the F&B Code**) which applies to all advertising and marketing communication of food or beverage products (other than alcohol) and which operates alongside the AANA Code of Ethics and the AANA Children's Advertising Code is effective and generally working well.

Free TV has had a positive partnership with the AANA and AdStandards over a number of years, enforcing decisions of AdStandards by removing TVCs found in breach of the AANA Codes, and more recently, also ensuring that advertisements for food and beverage products are not placed in programs primarily directed to children. These measures have contributed to the continued strength of the self-regulatory regime and have ensured it is respected on our platform.

While we agree that it is important to undertake periodic reviews of the AANA Codes to ensure that they are meeting their objectives, we believe the current provisions of the F&B Code adequately cover community concerns and that only minor changes should be made to the F&B Code at this time.

In this submission we outline the following key concerns in response to the issues raised in the Discussion Paper:

- Additional restrictions in the F&B Code are not warranted in the absence of any evidence to support the need for them and would be damaging to the industry at this time
- Any restrictions must not disproportionately impact on advertising on television relative to other platforms
- The AANA Codes should continue to regulate the content of ads, not placement or scheduling – we would strongly oppose inclusion of the proposed 35% child audience placement definition and placement rules targeted to adults
- There must be a clear carve out for incidental advertising and product placement.

We set out our reasoning in relation to these and other issues in detail below.

### 3. No case for additional restrictions

In our view, additional restrictions should not be introduced in the absence of evidence that the existing rules are not meeting their objectives. The Discussion Paper does not present any such evidence. While food and beverages appears to be a significant category for complaint, as noted in the Discussion Paper, only 1.56% of complaints received by Ad Standards were considered against the F&B Code, the majority being considered under the Code of Ethics. This indicates that the specific matters covered by the F&B Code are not significant areas of concern for the public and that the subject matter of complaints is more likely to relate to competitor activity or general principles relevant to all advertising.

Ad Standards also reports 100% compliance by food and beverage advertisers with decisions made by its Community Panel, indicating that the current sanctions are working well and are taken seriously by the broader industry.

We strongly oppose the introduction of further regulatory restrictions on advertisers in the F&B Code when all indications suggest that it is working well. Advertisers and media owners have been significantly impacted by the consequences of COVID-19 with many postponing campaigns, significantly reducing their investments, and cost-cutting measures across the industry which some analysts are predicting will leave a permanent mark on the industry and the economy. In these circumstances, and in the absence of significant community concern, it is not appropriate to impose additional hurdles which will delay economic recovery and are likely to be very damaging to the industry.

Free TV also supports the AANA's aim to ensure that its Codes apply equally across all media, and that they do not make a distinction between traditional media advertising and digital advertising. Given the recent consideration of platform specific imbalances by the ACCC, we believe this is a particularly critical consideration in the context of the current review of the F&B Code.

## 4. AANA Codes should regulate content not placement or scheduling

Question 6 of the Discussion Paper asks whether the definition of advertising to children in the RCMI and QSRI should be adopted in the Code. As set out in the Discussion Paper, that definition includes a placement definition as follows:

*“Advertising or Marketing Communications that are placed in Medium that is directed primarily to Children (in relation to television this includes all C and P rated programs and other rated programs that are directed primarily to Children through their themes, visuals and languages’ and/or where Children represent 35 per cent or more of the audience of the Medium”.*

### 4.1 AANA Codes should not disproportionately target television

---

We strongly oppose this proposal which does not satisfy the AANA’s objective to specify standards that apply equally across all media. While television viewing numbers can be measured via OzTAM, there is no equivalent for other media, such as online, social media, outdoor or direct to consumer public relations material. This definition is highly television specific and operates as an additional regulatory requirement on television that does not apply to other platforms.

In addition to the AANA’s own stated platform neutral objectives, the ACCC’s recent Digital Platforms Inquiry Final Report found that having more onerous rules for commercial television operates to competitively disadvantage television relative to online platforms. The ACCC recommended that the regulatory framework should ensure comparative functions are consistently regulated, including in relation to advertising regulations.

The ACCC’s final report recommended that a new platform-neutral regulatory framework be developed and implemented to ensure effective and consistent regulatory oversight of all entities involved in content production or delivery in Australia, including media businesses, publishers, broadcasters and digital platforms.

### 4.2 Proposed definition is arbitrary and highly impractical

---

Secondly, the 35% placement definition in the QSRI & RCMI is not only arbitrary but highly impractical. It has proven very problematic even on television. It is not possible to determine the exact constitution of an audience for a program before it is aired (this is not usually known to the broadcasters until after that program is aired). More specifically, advertisers have little to no transparency of the makeup of the audience that will be watching a program that their advertisement may appear in. In many cases, advertisers are only aware of timeframes, not programs, that their advertisements may appear in. Imposing a 35% child audience rule would detrimentally affect the purchasing of airtime on television by advertisers and would place an additional, unnecessary burden on advertisers and broadcasters.

The highly impractical nature of this requirement was highlighted in a recent Ad Standards determination in relation to a McDonalds ad. AdStandards found that the ad was not directed primarily to children and that the evidence showed only some instances where the ad was placed during programs with over 35% child audience which could not have been predicted. In addition, it found that the average child audience for the programs was under 35%. However, it also found that, while the broadcaster did not predict the demographic skew in these instances, the fact that the child

audience was over 35% in some instances meant that it was “not unlikely or unpredictable that there would have been a high percentage of children under 14 watching”. It therefore determined that the QSRI had been breached.

McDonalds sought an independent review of the decision. McDonalds argued that the small number of instances where the audience was found to be over 35% children was too small to be reliable, and provided data using a rolling average method which found that the child audience exceeded 35% only 0.47% of the time the ad appeared on air which is insufficient to be a breach of the QSRI. The independent reviewer did not understand or accept the data (it found that the data was only adopted after the adverse decision, however the data could not have been obtained prior as the audience numbers would not have been known). The reviewer ultimately upheld the original decision based on the time slots of the programs the ad was placed in, noting ‘Given the time slots of 6:00pm to 6:30pm for some of the programs where the number was exceeded, the reviewer is not surprised that the percentage audience of children exceeded 35%’.

This decisions of AdStandards and the independent reviewer highlight the difficulty with implementing the 35% child audience requirement. It is not possible to measure in advance and very difficult to implement after the fact. We strongly oppose including these in the Code.

### 4.3 Potential conflict with Free TV Code

---

Finally, we would note that classification and placement requirements are specifically addressed in the Free TV Code and are subject to investigation and oversight by the ACMA. Adding specific placement restrictions in the AANA codes would give rise to the potential for conflicts. Part of the reason the AANA Codes are effective in regulating all advertising and marketing across mediums including television, is that they are principles-based rather than rules-based. This minimises the potential for conflicts to arise.

The fact that the AANA Codes and the Free TV Code (as currently drafted) are complementary rather than conflicting is extremely important and enables Free TV to support the AANA self-regulatory system by:

- Ensuring that food & beverage TVCs on television are not placed in programs principally directed to children
- Removing from broadcast, TVCs which AdStandards have found to be in breach of any of the AANA Codes
- Referencing the AANA Codes in the Free TV Code requiring television advertisers to comply.

The existing principles-based approach also allows the F&B Code to be interpreted and adapted over time by the AdStandards Community Panel to ensure that changing community standards are met at any point in time.

In summary, we would therefore suggest the existing definition of Advertising or Marketing Communications to Children in the Code remain – regard should be had to the theme, visuals and language used in advertising or marketing to determine whether the advertisement for a children’s food or beverage product is directed primarily to Children. This test allows for all relevant matters to be taken into account. We believe it is clearer and easier to understand and is currently working well. As indicated by the complaints statistics quoted in the Discussion Paper, this definition appropriately addresses the risks posed by advertising food and beverage products to children.

## 5. AANA Codes should not single out television for separate rules

The Discussion Paper also asks whether food advertising targeted at adults through the themes, visuals and language used should be permitted during TV programming during certain times, e.g. 9pm – 6am.

This proposal seems to suggest that the AANA Codes should possibly regulate the placement of advertising ‘directed to adults’ on television. As indicated above, we strongly oppose the introduction of any restrictions which single out television, given a) that consistent advertising rules should be applied across platforms, as recommended in the ACCC’s recent Digital Platform’s Inquiry final report and b) that advertising on television is squarely addressed in the Free TV Code and overseen by the ACMA. We also do not support any changes to the AANA Codes to regulate placement of advertising to adults.

The AANA Codes currently apply uniform platform neutral principles-based rules to all advertising and marketing material. They do not and should not introduce rules which apply to television specifically – this would be both contrary to the ACCC’s recent recommendations as well as a marked change in approach to the self-regulatory system which has not previously been envisaged and which would be contrary to the AANA’s current approach of acting in the interests of all of Australia’s advertisers across all platforms.

We would also note that, while it does not appear to be the intention of this question in the Discussion Paper, there is no policy basis for any further restrictions on advertising of food and beverages targeted to adults. The Code already provides standards that discourage excess consumption of food and beverage products, promote healthy and balanced diets and prohibit misleading and deceptive practices. Additional placement requirements are therefore unnecessary.



## 6. A clear carve out for incidental advertising and product placement

Question 9 of the Discussion Paper asks whether advertisements where food and beverages are merely incidental to the ad should be required to comply with the requirements to promote good dietary habits and physical activity. It is noted that currently, there is no definitive rule or guidance regarding the application of the Code in cases of incidental placement of food or beverages in an ad.

In our view the AANA should make clear that incidental placement is not captured by the Code.

### 6.1 Consistent rules for incidental advertising

---

This is consistent with the treatment of incidental advertising under the Free TV Code, which recognises the distinction between advertisements which promote a specific product or service and ads which merely contain incidental references to a product or service.

The Free TV Code carves out certain incidental references to alcoholic products or gambling services from the restrictions on advertising on television. Advertisements are not restricted merely because an alcoholic beverage or a gambling service might be incidentally depicted, for example in a tourism commercial. This approach ensures that the rules are practical and do not unnecessarily restrict advertising where the subject matter of the ad is not in fact the target of the restriction. It is not reasonable for advertisements where a food or beverage product is only incidentally placed in the ad to have to promote good dietary habits or physical activity.

### 6.2 Rules should only apply to the products or services being advertised

---

In our experience, the lack of clarity around whether incidental advertising is captured by the Code has already started to create problems. For example, it is not reasonable for there to be a requirement on the advertiser to promote good dietary habits and physical activity in any of the following scenarios:

- an advertisement for a shampoo that features a woman drinking a protein shake
- an ad for a supermarket which includes prices for food products, or showing a family eating dinner in the background
- an ad for a produce company advertising fruit, vegetables and nuts as healthier alternatives (because nuts are not within the exemption from this requirement – see section 8.1 below)
- an ad for a shopping centre that shows food options available at its various eateries
- a restaurant advertising its alfresco dining options incidentally showing a couple eating a meal (or in other words, ads which focus on the services provided at cafes and restaurants rather than the specific foods on the menu).

The Code is intended to capture advertising and marketing of food & beverage products by companies selling those products – a clear carve out for incidental depiction is necessary so that the requirements of promoting good dietary habits and physical activity do not extend to a whole range of other companies that do not sell and are not promoting these products.

### 6.3 Broad exemption for product placement and integrated advertising

---

Product placement and integrated advertising in programs is increasingly important to both advertisers and media owners and should continue to be permitted. Currently, there is an exemption

from the distinguishable advertising requirements in section 2.7 of the Code of Ethics for product placement. That exception makes clear that, where advertisers have arranged a product placement, and no other claim is made about the products, no further label or disclosure is required. In our view a broader exception for product placement and integrated advertising is required from the AANA Codes to make clear that advertisers are not required to comply where they do not have control over the relevant content that the product is placed in. This exception should cover the requirements of the F&B Code – where advertisers do not have control over the content in which food & beverage products are placed, they should not be required to comply with the requirements of promoting good dietary habits and physical activity.

---

## 7. Drafting Issues

### 7.1 Exception for fresh fruit and vegetables should be expanded

---

Currently, the Code requires all food and beverage advertisements, other than advertisements for fresh fruit and vegetables, promote good dietary habits and physical activity. Free TV agrees with the proposal in Question 7 of the Discussion Paper that the current exception which only applies to fresh fruit and vegetables is too limited and is placing unnecessary restrictions on advertisers that could be advertising other foods or beverages with known nutritional benefits.

In our view, this exception should be expanded to include all fresh and unprocessed foods. This includes but is not limited to legumes, nuts, milk, all meat and fish, all fruit and frozen vegetables including frozen, dried, canned and packaged, bread, milk and all unsweetened dairy products, eggs, flour and other baking ingredients, spices, condiments, oil, rice, pasta, bottled water, and unsweetened fruit and vegetable juices.

The requirement that an ad specifically promotes good dietary habits and physical activity should be limited to discretionary food items only, not everyday foods.

### 7.2 Proposal for an ‘overarching’ Code

---

Question 4 of the Discussion Paper asks whether the Initiatives remain separate or whether they should be incorporated into an overarching Code. While we do not have a strong view about the approach taken, it is critical to note that the purpose of the Initiatives and the purpose of the Code are very different. The Code is intended to apply a set of minimum standards in relation to advertising and marketing of food and beverages to all advertisers across all mediums. The RCMI and QSRI on the other hand were designed to apply to a limited number of specific signatories. The QSRI covers food sold in quick service restaurants and the RCMI covers products found in retail outlets.

For this reason, not all obligations in the Initiatives are suitable to include in a Code applying to all advertisers. At the time the RCMI and QSRI were incorporated under the umbrella of the AANA, no consultation was undertaken and no changes to the Initiatives were made to ensure each of the obligations contained in them are appropriate or workable when applied to all advertisers generally.

These compatibility issues should now be considered. The aspects of the AFGC Initiatives that related specifically to a limited and targeted group of companies (such as the 35% placement requirement discussed above, the requirement to develop a Company Action Plan communicating how an AFGC signatory will meet the Core Principles of the Initiatives, and the requirement that advertisers develop nutrition criteria to determine their own view of ‘healthier dietary choices’ before they can advertise to children) are not workable in the context of a Code that is intended to apply to all advertisers across all mediums. They should be removed.

### 7.3 Problematic definitions

---

Question 17 of the Discussion Paper asks whether any changes are required to the definitions in the Code. Free TV does have concerns that the following definitions in the Code are not providing the clarity advertisers need in order to comply:

- ‘Prevailing Community Standards’ is generally defined as the community standards determined by the Advertising Standards Board at the relevant time. However, this varies depending on the members of the Community Panel and the attitudes of society at the time. It would be helpful to have concrete, practical examples included within the Code or the Practice Notes so advertisers can adhere to the Code, rather than having to rely on what the Ad Standards Community Panel may believe at a certain point in time, which we note is often unknown until after a complaint is considered and a decision handed down. These standards can also change when the Community Panel changes members.
- The Code does not contain definitions of ‘nutrition’ or ‘health claims’ which, given the prominence of the reference to nutrition and health claims in the Code, would be of assistance in interpretation. We recommend adopting definitions consistent with the *Australia New Zealand Food Standards Code* - Standard 1.2.7 – Nutrition, health and related claims.