



Mr Geoffrey Leveritt
Senior Lawyer
Strategic Policy
Australian Securities and Investments Commission
GPO Box 9827
Melbourne VIC 3001

By email: policy.submissions@asic.gov.au

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Dear Mr Leveritt,

**Consultation Paper 167
Advertising financial products and advice services: Good practice guidance**

ANZ is pleased to provide a submission on the Consultation Paper on 'Advertising financial products and advice services: Good practice guidance' (CP 167).

Introduction

Advertising is an important means by which businesses communicate key messages to existing and future customers about their products and services. It is in the interests of consumers, promoters and regulators to ensure that such communication is clear, concise and effective.

ANZ welcomes balanced and appropriate regulatory guidance to clarify the interpretation of the existing law on misleading and deceptive advertising of financial products and services. Whilst ANZ recognises that advertising must not mislead consumers, it is concerned that some of the positions proposed in CP 167 will expand the scope of the law and establish unrealistic expectations of the role of advertising. This risks a situation where ASIC's guidance is impractical, unnecessarily complex and difficult to comply with, contrary to the intention that consumers be better placed to make informed decisions about the acquisition of financial products and services.

Role of Advertising

CP 167 establishes an expectation that advertisements contain all information necessary for a consumer to make an appropriate investment decision. In ANZ's view, this expectation does not accurately reflect the role that advertising plays.

Advertising is designed to provide a general level of awareness about the existence and key features of a product or service and to trigger further enquiries. It is not the point at which an investment or acquisition decision is made.

Group Corporate Affairs

Consumers learn more about a product or service as they make further enquires and get closer to making an investment decision. Disclosure which is made closer to the point of customer decision is likely to be more effective.

Existing law and the CP167 proposed approach

The existing law already requires an appropriate level of disclosure at each stage of the acquisition process and supports the aim of clear and accurate advertising, including prohibitions against:

- Inducing consumers to deal with financial products by knowingly or recklessly making false or misleading statements (*Corporations Act* section 1041E);
- Engaging in misleading or deceptive conduct in relation to financial products or services (*Corporations Act* section 1041H, *Australian Securities and Investment Commission Act* section 12DA);
- Making representations about future matters without reasonable grounds (*Corporations Act* section 769C *ASIC Act* section 12BB); and
- Engaging in conduct that could mislead the public as to the nature, characteristics, suitability for their purpose or the quantity of any financial services (*ASIC Act* section 12DF).

Recent ACCC prosecutions under the analogous provisions of the former Trade Practices Act show that the existing law is both robust and flexible enough to respond to varied forms of misleading conduct, including inadequate disclosure of conditions and qualifications and misleading use of common words.

CP 167 appears to extend the scope of the existing law and subject advertising to a new standard. Rather than requiring that advertising not be misleading, CP 167 proposes that advertising must be:

1. 'Balanced' and helps consumers to make decisions that are appropriate for them. This creates a positive obligation on promoters to include all information that may be relevant to a potential customer's investment decision, even where the advertisement would not be misleading at law without such information. This misrepresents the role of advertising, which is not to give a full picture of the suitability of a product or service; and
2. 'Self contained'. The fact that an advertisement is not self contained does not necessarily mean that it is misleading when viewed holistically. For an advertisement to be appropriately 'self contained', it needs to contain not just those qualifications and explanations required to ensure that it is not misleading, but also those required to inform and educate the consumer's investment decision. Due to space limitations, these expectations are unrealistic for many forms of media, such as electronic media, and will effectively eliminate their use.

ANZ agrees that the potential risks and complexity associated with financial products warrant detailed disclosure. However, it is not the function of advertising to be the vehicle for this disclosure. Extensive disclosure obligations are imposed on promoters once a consumer is actively considering acquiring a financial product or service and these replicate much of the information contemplated under CP 167, e.g. presenting balanced information about the benefits and risks of the product, explaining significant features and disclosing qualifications, obligations and costs associated with the product.

ANZ welcomes balanced and appropriate regulatory guidance to clarify the interpretation of the existing law on misleading and deceptive advertising of financial products and services. In our view this should take into account:

- How consumers wish to receive information about products and services and their preference for information to be compact, concise and succinct. A balance must be struck between facilitating effective communication and ensuring that consumers are not misled.

The approach in CP 167 pre-supposes that the provision of a large amount of detailed information in an advertisement will help consumers to make more appropriate investment decisions. We do not believe most consumers anticipate that they will receive through advertising all information necessary to make an investment decision.

Providing too much information may also be counterproductive. More detailed advertisements may cause consumers to overlook or become de-sensitised to important information and discourage them from seeking out further information, thereby increasing the chances of ill-informed decisions by consumers in the belief they have all relevant information.

- The growing use of newer technologies and the benefits to consumers from the online availability of information. The requirement for advertisements to be self contained is difficult in relation to online advertising, where there are typically space limitations.

For example, search engine marketing utilises a 25 character headline followed by two description lines of 35 characters each and a URL of a maximum of 35 characters. Other forms of social media such as Twitter and Facebook are subject to similar character limitations.

When viewed holistically, it is possible for marketing via new media to avoid being misleading or deceptive within the current law. ANZ believes that consumers are accustomed to and expect to click through to linked pages online for further information. Rather than being viewed as misleading or a barrier to effective decision making, the unique functionality of the internet provides promoters with the potential to provide more detailed information, thereby enhancing a consumer's overall understanding of a financial product or service.

ASIC's Regulatory Guide 221 notes that online communication has the potential to make financial disclosure more user friendly and is generally preferred as it is more engaging and easier to understand. The suggestion that a "consumer should not need to click through" and the discouragement of online communication appear inconsistent with this earlier approach.

- The costs of implementing the proposed regulatory guidance. The draft regulatory guide will require advertisements to be longer or larger (depending on the medium) and therefore more expensive.

Responses to specific proposals and questions

ANZ's responses to selected proposals set out in CP 167 are as follows:

Application of Guidance – Proposal B3

ASIC has indicated in proposal B3 that the regulatory guidance will initially apply to credit facilities but that additional guidance for regulated credit will be developed at a later stage.

One of the purposes of regulatory guidance is to create greater certainty for a particular industry as to how it will be regulated. ANZ is concerned that the proposed approach will create uncertainty for promoters of credit facilities as to how their advertisements will be

regulated in the period between finalising this regulatory guide and the credit specific guide. There may also be significant compliance costs if the later guidance significantly changes the position in respect of credit products and requires additional updates to pre-existing advertising.

ANZ agrees that it is appropriate for credit to be considered separately as the considerations relevant to credit are different to those relevant to other financial products. However, ANZ suggests that if further guidance for credit facilities is to be issued that either the draft regulatory guide does not apply to credit or ASIC indicates how the credit specific guidance will differ from the regulatory guide.

Good Practice Guidance – Proposals C1 – C3

ANZ believes that the draft regulatory guide should include an overarching principle that ASIC will consider all of the relevant circumstances when assessing whether an advertisement is misleading or deceptive. ANZ is concerned that the draft guidance will create a regulatory environment that is inflexible and will stifle innovation. Interactions between consumers and promoters are evolving rapidly and ASIC's regulatory approach needs to be able to quickly adapt to this changing environment.

In response to proposals C2 and C3, ANZ considers that this type of information (benefits, rewards, detailed information about the nature of the product) are legally required to be included in disclosure documents and that they are more appropriately given at the relevant point of the acquisition process.

Warnings, Disclaimers, Qualifications and Fine Print – Proposal C4

ANZ agrees with the principle that warnings and disclaimers should not be inconsistent with the body of the advertisement. Disclaimers should provide the necessary detail to support headline claims. However, the existing law already requires such considerations to ensure that advertisements are not misleading or deceptive.

ANZ does not believe that the fact that an advertisement cannot be self-contained necessarily makes it misleading; particularly in an online environment where further information is easily available and consumers are accustomed to accessing it via links to further pages. The guidelines should have scope and flexibility to consider the overall impression given by the advertisement and whether that is misleading.

In response to proposal C4(b), ANZ contends that it is not practical to expect all disclaimers, risks, disclosures and qualifications to be set out in a single advertisement. There will be too much information and this will inundate the consumer at first point of contact. ANZ's market research suggests that this is not consistent with consumers' current preference to receive succinct advertising with links or references to more detailed information being available. From a practical perspective, increasing the size of advertisements will lead to increased production costs due to additional advertising space required for the advertisement to be self-contained.

Comparisons, Past Performance and Forecasts – Proposals C6 – C7

In response to proposal C6, ANZ does not consider it beneficial for consumers to be inundated with information regarding product comparisons at the first point of contact.

ANZ's market research suggests that:

- Seventy-nine percent of consumers spent three or more hours gathering information prior to acquiring a deposit product; and

- Eighty-six percent of consumers conducted some information search before acquiring a mortgage product, with 19% gathering a lot of information and 36% a moderate amount of information.

Soon to be published ANZ financial literacy research shows that 40 percent of consumers said they had used the internet during 2011 to compare financial products. The types of financial products most frequently compared using internet websites were:

- Traditional banking products, especially mortgages and investment loans (28%), everyday bank accounts (16%), credit cards (14%) and personal loans (9%); and
- Insurance products (36%).

This data suggests that many consumers seek out further information and wish to draw their own comparisons prior to making a decision to acquire a financial product.

In our view, being provided with voluminous information at the first point of contact may de-sensitise the consumers and work against their best interests. It may lead them to:

- Incorrectly believe that they have enough information to make an investment decision and as a result, not make the necessary inquiries with the financial product or service provider to find out more about product features, risks and benefits; or
- To avoid acquiring or investing altogether as the products appear "too complex".

ASIC's Regulatory Guide 53 provides general guidance to the financial services industry on the appropriate use of past performance information in promotional material. In ANZ's view these provisions are extensive and appear capable of addressing the issues raised in CP 167 without the need for a prescriptive approach.

Photographs, Diagrams and Images – Proposal C11

ANZ's general view in respect of proposal C11 is that photos and images are subjective and consequently, any approach to regulate them must be carefully considered. ANZ notes that proposal C11(a) appears to conflict with ASIC's previous comment about broadcasting media being able to use images in advertisements.

In particular RG000.110 states that for audio advertisements, "unlike video or print advertising, warnings and disclaimers cannot be run at the same time as the headline message or main body of the advertisement" whereas RG000.114 states, "warnings or disclaimers...used in film and video advertisements...should be prominent despite the distractions." In ANZ's view these two paragraphs are contradictory and consequently it is unclear how ASIC will regulate images in advertisements. The appropriateness of photos and images should be assessed on a case by case basis and should not be addressed by generic guidance.

Media Specific Issues – Proposals D1 – D6

In response to Proposal D5(a), ANZ contends that it is not possible or practical for all internet advertisements to be self-contained and house all disclaimers due to the size and nature of the media. Further, ANZ believes that the guidelines should be flexible enough to consider whether an advertisement, when taken as a whole, is misleading rather than applying an absolute requirement that the advertisement be self contained. We note that this approach is taken by the ACCC in its Advertising Guidelines, which set out its expectations when administering the misleading and deceptive conduct provisions of the Competition and Consumer Act. The ACCC's approach is to give the greatest weight to its assessment of the "overall impression imparted to the audience".

If an online advertisement, when viewed holistically, is misleading then the existing law has the capacity to respond to this and the benefit of expanding the scope of this is unclear. Internet advertisements are traditionally short and succinct in order to capture consumers' attention while browsing, especially when consumers try to search for keywords that they have seen in other forms of advertisements. If promoters were to provide all proposed information in respect of a product in an online advertisement, this will dilute the effectiveness of the advertisement, cause consumers to lose interest and de-sensitise them to the importance of the message in the fine print.

In response to Proposal D5(b), new online media and social media sites have proven to be an effective channel to engage consumers as well as manage their expectations. As stated earlier in this submission, CP 167 has the potential to prevent current and emerging forms of online advertising that are subject to strict character limitations, such as search engine marketing advertisements. These advertisements are targeted and relevant to the keyword the consumer has searched. ANZ recommends that ASIC's proposed guidance be revised so that advertisements such as this can comply with it.

ANZ notes that there are practical implications in respect of proposal D5(c) as video and rich media advertisements across publishers are usually housed on different servers, so when a page is printed, the advertisements do not always get printed along with it.

ANZ generally agrees with ASIC's views in respect of consumers' ability to keep a record of advertisements (e.g. by printing), however notes that in many instances, the ability to do so will be reliant on the publishers providing this ability to consumers on a promoter's behalf. ASIC's proposal B1(b) anticipates that publishers would be expected to comply with ASIC's guidance (in the case of SEM, publishers would be the search engines e.g. Google, Bing etc.).

ANZ agrees that the promoter should ensure that printing facilities are available to consumers where possible, noting that in many instances, the promoter will be in no position to determine matters such as browser compatibility. This means that the promoter is reliant on the publisher to ensure that the media housed is compatible for printing with all browsers. Therefore ANZ is of the view that ASIC's regulatory approach should be based on ensuring a promoter has taken reasonable steps to permit consumers to record advertisements whilst acknowledging there will be some circumstances where an advertisement is not recordable by a consumer or may only be replicated using "print screen" functionality.

In response to proposal D6, ANZ submits that it is not necessary for ASIC to develop additional guidelines for outdoor advertising. The existing law adequately deals with the potential issues that this form of advertising can present.

Conclusion

The existing law is robust, flexible and capable of responding to the concerns raised by CP 167 by viewing advertising holistically and asking whether its overall impact is misleading.

The benefit of adopting a more prescriptive approach as proposed is unclear and it does not appear that CP 167 has been developed in response to any identified deficiency in the existing law. Several of the provisions represent an expansion of the current law and apply new and unrealistic standards to advertising. ANZ provides disclosure documents like the Product Disclosure Statement (PDS) and Terms & Conditions that accompany every product when enquiries are made by the consumer, in order to arm them with appropriate and adequate information to make financial decisions. This should not be

confused with marketing or advertising material which taps on consumers' initial product need 'discovery' processes.

ANZ would be pleased to provide any further information on this submission. I can be contacted on (03) 8654 3459 of Michael.Johnston2@anz.com.

Yours sincerely

A handwritten signature in black ink, appearing to read 'MJ Johnston', with a long horizontal flourish extending to the right.

Michael Johnston
Head of Government & Regulatory Affairs