



Ad Standards Community Panel
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Ad Standards Limited
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Case Report

1. Case Number :	0111-22
2. Advertiser :	Thermomix Australia
3. Product :	House Goods Services
4. Type of Advertisement/Media :	Internet - Social - Instagram
5. Date of Determination	25-May-2022
6. DETERMINATION :	Dismissed

ISSUES RAISED

AANA Code of Ethics\2.7 Distinguishable advertising

DESCRIPTION OF ADVERTISEMENT

This Instagram story posted by the @sarahkearnsofficial account features a person referring to their new Thermomix.

THE COMPLAINT

Comments which the complainant/s made regarding this advertisement included the following:

The advertisement is not clearly marked as an ad. The first slide does say "gifted" in small writing, however it is not clear what the nature of the relationship is between Thermomix and Kearns. The subsequent three slides do not mention any sort of relationship between the two parties, despite the appliance being provided for promotional reasons. Relevant portion of the AANA code of ethics attached.

It is deceptive advertising by an instagram "influencer"

THE ADVERTISER'S RESPONSE

Comments which the advertiser made in response to the complainant/s regarding this advertisement include the following:

I am in receipt of the two letters of 17 May 2022, directed at complaints brought about conduct on the internet account of Ms Sarah Kearns.



Ms Kearns has entered into an influencer agreement to promote a floor cleaning product known as a Kobold vacuum cleaner via Instagram marketing. She was paid a fee for this, at her request as a combination of a cash payment, and the delivery to her of a Thermomix TM6 appliance. That is, the TM6 was part of her fee for promoting the Kobold appliance.

Mr Kearns was engaged to promote only the Kobold. She had no authority, direction or retainer to promote the TM6 appliance. Any promotion of that appliance, if it has occurred, was without this company's knowledge or approval, nor as a paid sponsorship.

It is an express term of the agreement to promote the Kobold that "the Influencer must declare all posts as part of the Agreement are sponsored/paid content."

I understand that the complaint raised is that Ms Kearns failed to distinguish certain of her content as advertising. My understanding is that she complied with her agreement to identify the Kobold as sponsored. Nor do I understand that any complaint is raised in relation to the Kobold. Rather, both complaints centre on the Thermomix TM6.

The date of the first complaint relates to an Instagram story that Ms Kearns posted on her Instagram feed on 4 May 2022 at 6pm. It is described as a video in her kitchen where a Thermomix appliance can be seen. Further, it appears that the word "gifted" appeared.

The description of "gifted" isn't really correct. The TM6 formed part of payment to sponsor the Kobold. By the arrangement Ms Kearns either earned the TM6 or purchased by taking it in lieu of a cash sum by her promotion of the Kobold.

The second complaint relates to an Instagram post by Ms Kearns, apparently on 9 May 2022, where she asks for recipe suggestions for her TM6 to deal with her condition as a celiac.

Again, I understand Ms Kearns used the word "gifted" which is not correct.

Both postings were part of Instagram stories which automatically expire after a limited period of time. It is not always possible for The Mix to view footage before it is unable to be seen. In any event, the posts complained of are not relevant to her paid sponsorship.

It is a matter that The Mix takes very, very seriously. That is why it has a contractual clause requiring compliance by any influencer to make it clear that they are engaging in promotional or advertising activity. On this occasion, with respect, the conduct of Ms Kearns does not relate to a paid sponsorship.

In summary, Ms Kearns did not receive a free TM6; she was not engaged or paid to promote it and this company has not engaged in any breach of the advertising standards.



THE DETERMINATION

The Ad Standards Community Panel (the Panel) considered whether this advertisement breaches Section 2 of the AANA Code of Ethics (the Code).

The Panel noted the complainant's concern that the Instagram story did not disclose that it was sponsored.

The Panel viewed the advertisement and noted the advertiser's response.

Section 2.7: Advertising or Marketing Communication shall be clearly distinguishable as such.

Is the material advertising?

The Panel noted that it must consider two matters:

- Does the material constitute an 'advertising or marketing communication', and if so
- Is the advertising material clearly distinguishable as such?

Does the material constitute an 'advertising or marketing communication'?

The Panel noted the definition of advertising in the Code. Advertising means: "any advertising, marketing communication or material which is published or broadcast using any Medium or any activity which is undertaken by, or on behalf of an advertiser or marketer,

- over which the advertiser or marketer has a reasonable degree of control, and
- that draws the attention of the public in a manner calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct".

The Panel considered that the placement of the product and the tagging of the brand drew the attention of the public in a manner designed to promote the brand.

With regards to whether the advertiser or marketer has a reasonable degree of control, the Panel noted that the advertiser had advised they had a relationship with the influencer to promote another product, and that the influencer had requested the thermomix as payment for this work.

The Panel noted that it had considered a similar issue in case 0323-21, in which:

"The Panel noted that in the case of gifts to influencers the context in which the product is given cannot be ignored. The Panel noted that influencers operate as an advertising medium utilised by businesses to promote their brands and products. The Panel noted that many influencers have agents and



that businesses exist which put brands and influencers in touch with each other. The Panel noted that influencers are sometimes paid, and sometimes provided with free product. The Panel noted that influencers' posts may also be created in circumstances in which there is no relationship context. The Panel considered that the Code's requirements should be interpreted with its purpose in mind, that is to ensure that consumers are informed, and that influencers should be transparent about their relationships with brands.

The Panel noted that the advertiser chose to send Ms Stone a gift. The Panel considered that while there was no direct request or stipulation for Ms Stone to post about the gift, it is reasonable to assume that the motivation for an advertiser to provide free product to an influencer is that they will post about the product or otherwise draw the attention of their followers to the brand as Ms Stone did in this case. The Panel considered that the advertiser has undertaken the activity of giving a gift to an influencer, and in choosing to send the gift they are exercising a degree of control, and the post did draw the attention to the product."

The Panel noted that in the current case the product had been provided as payment and had not been given for free. However, similar to the previous case, in the current case the advertiser was aware of Ms Kearnes' position as an influencer and had a previous arrangement in place with her for the promotion of other products.

The Panel considered that the advertiser had provided the product to Ms Kearnes instead of payment, and that in agreeing to provide the product to the influencer in the context of an ongoing commercial arrangement the advertiser was exercising a degree of control; and that the story did draw attention to the product.

For these reasons, the Panel considered that the Instagram stories did meet the definition of advertising in the Code.

Is the material clearly distinguishable as such?

The Panel noted the Practice Note for the Code states:

"Influencer and affiliate marketing often appears alongside organic/genuine user generated content and is often less obvious to the audience. Where an influencer or affiliate accepts payment of money or free products or services from a brand in exchange for them to promote that brand's products or services, the relationship must be clear, obvious and upfront to the audience and expressed in a way that is easily understood (e.g. #ad, Advert, Advertising, Branded Content, Paid Partnership, Paid Promotion). Less clear labels such as #sp, Spon, gifted, Affiliate, Collab, thanks to... or merely mentioning the brand name may not be sufficient to clearly distinguish the post as advertising."

The Panel noted that the influencer had used the hashtag '#gifted' in text superimposed over one of the stories. The Panel noted the complainant's concern



that this was in small writing, only on one of the stories and was a tag that the Practice Note said may be less than clear.

The Panel also noted the advertiser's response that the use of #gifted was not correct as she had been provided the product as payment for another arrangement.

The Panel considered that there was an ongoing relationship between the advertiser and the influencer, which may be hard to summarise in one word, but that in this case in the context of the advertisement as a whole 'gifted' would be enough for most people viewing the story to understand there was a commercial arrangement of some kind between the advertiser and the influencer.

The Panel considered that the stories would be seen sequentially and not in isolation, so having this hashtag on only one story was likely to be sufficient to alert the viewer. The Panel considered that although small, the tag was clear and would be easily noticed by those watching the Instagram stories.

The Panel considered that in addition to the hashtag, the influencer had tagged the brand and was clearly displaying the product in a manner to promote it. The Panel considered that the combination of these elements was sufficient to satisfy the Code's requirements and that the Instagram story was distinguishable as advertising.

2.7 conclusion

In the Panel's view the advertisement was clearly distinguishable as such and did not breach Section 2.7 of the Code.

Conclusion

Finding that the advertisement did not breach any other section of the Code, the Panel dismissed the complaint.