



Ad Standards Community Panel
PO Box 5110, Braddon ACT 2612
P (02) 6173 1500 | F (02) 6262 9833

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Ad Standards Limited
ACN 084 452 666

Case Report

1. Case Number :	0114-22
2. Advertiser :	Thermomix Australia
3. Product :	House Goods Services
4. Type of Advertisement/Media :	Internet - Social - Instagram
5. Date of Determination	8-Jun-2022
6. DETERMINATION :	Upheld - Modified or Discontinued

ISSUES RAISED

AANA Code of Ethics\2.7 Distinguishable advertising

DESCRIPTION OF ADVERTISEMENT

This Instagram story was posted to the @sarahkearnsofficial account and features the inside of a mixer with the text, "Ok Tuesday is normally quick dinner/takeaway as knox has art until 5:30 and we aren't home till 6. Tonight I made a butter chicken in less time than it would have taken to grab takeout! Will keep the thermomix updates coming for those interested".

Text at the bottom of the image reads, "@thermomixaus".

THE COMPLAINT

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

The Thermomix was gifted to Sarah Kearns, ostensibly for promotional reasons. It has not been declared as a paid advertisement or listed as gifted, or anything to indicate a relationship between Thermomix and Ms Kearns. Thermomix is tagged, in very small white writing hidden against a white bench top.



THE ADVERTISER'S RESPONSE

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

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 complaint relates to an Instagram story that Ms Kearns posted on her Instagram feed on 17 May 2022 at 7pm. It is described as a video in her kitchen she is using a Thermomix appliance. 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 posting of the 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.

As to whether the advertiser or marketer has a reasonable degree of control, the Panel noted that the advertiser had advised it had a relationship with the influencer to promote another product, and that it was the influencer who had requested the thermomix along with a cash payment as consideration for her previous 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 part of her payment for her previous promotion work 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 its products.

The Panel considered that the advertiser had provided the product to Ms Kearnes as part payment for her previous work, 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 brand was tagged in the story, albeit in white text in the bottom corner of the post, and that while it may be clear to some people viewing the material that this was an advertisement, the story could also be interpreted as an organic product promotion. The Panel considered that there was insufficient clarity in the wording or imagery of the content to determine whether the relationship between the influencer and advertiser was commercial in nature.

The Panel considered that tagging the brand was not sufficient to satisfy the Code’s requirements and that the Instagram story was not clearly distinguishable as advertising.



2.7 conclusion

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

Conclusion

Finding that the advertisement breached Section 2.7 of the Code, the Panel upheld the complaint.

THE ADVERTISER'S RESPONSE TO DETERMINATION

The advertising in question is no longer available and our appeal will follow.