



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

AdStandards.com.au

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
7. IR Recommendation:	Panel to Reconsider
8. Date of reviewed determination:	13-Jul-2022
9. Determination on review:	Dismissed

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 ORIGINAL 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 ORIGINAL 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.

INDEPENDENT REVIEW

Independent review request

The Panel considered whether the advertisement in question breached Section 2 of the AANA Code of Ethics.

It is to be noted that the complaint was "Sarah Kearns is being deceptive in not clearly declaring she was given this Thermomix for free – saving about \$2,000 – and probably been paid to continue to advertise it. This is not the first time she has done this type of thing."

Firstly, it is clear that the complainant was complaining about the conduct of Ms Kearns.

Secondly, the complaint was that she was given the Thermomix for free.

Thirdly, it was said, without any evidence, that she was probably paid to continue to advertise it.

The evidence submitted on behalf of the company was:

- Ms Kearns was not engaged to advertise the Thermomix appliance. She had been engaged to advertise a floor cleaning product, being a very different product under a very different name (Kobold). That is unchallenged.
- Ms Kearns was not given the Thermomix for free. It formed part of the consideration or fee she was paid to promote the Kobold product. As such, it was provided in lieu of a cash payment.



- Ms Kearns was not engaged to promote the Thermomix appliance.
- There is no evidence of any payment being made to Ms Kearns to advertise the Thermomix appliance and the fact is that there was no payment made to her to advertise that appliance.
- There was no request, direction or requirement for Ms Kearns to promote the Thermomix appliance.

These matters were clearly set out in the company's response.

The Panel fell into error in considering that there was a relevant sponsorship. There was no sponsorship. There was no evidence that there was a sponsorship. It was not open for the Panel to find there was a sponsorship. Any featuring by Ms Kearns of the advertisement was not done with the knowledge, permission or direction of the company. Nor was it the advertising or marketing of a product which was gifted to Ms Kearns. Ms Kearns had, in effect, purchased her own Thermomix. That she made her own decision to feature it in her private Instagram story was a personal decision.

The Instagram story was not a promotion over which the company had any degree of control or that was done in a manner calculated by the company to draw attention to the product. The Panel ought to have found that if there was placement of the product, it was done by Ms Kearns of her own volition and in a private capacity.

In relying on Case 0323-21, the Panel fell into error. This was not a gift to Ms Kearns of a Thermomix. This was not a situation where the influencer had a relationship with the brand: the influencer had a relationship with the Kobold brand of floor cleaner. The Thermomix brand and the Kobold brand are quite distinct and are very different products in different market sections.

The reasoning by the Panel that:

- The product was provided as a gift instead of payment is wrong. The product was provided as part of the payment to promote the Kobold floor cleaner. Ms Kearns forwent an additional cash payment by, in effect, setting off that payment against the purchase of a Thermomix appliance;
- The engagement with Ms Kearns was to promote a wholly different product;
- There was no engagement of Ms Kearns to promote or advertise the Thermomix appliance;



- There was no evidence of, nor was there in fact, any request by the company to have Ms Kearns display the Thermomix appliance or promote it, and, as such, the company had no control whatsoever over the story;
- Ms Kearns received no payment and no benefit by the display of the Thermomix appliance in her story.

Independent Reviewer's determination

I recommend that the Community Panel review its determination in this matter.

Issue in dispute

The Community Panel upheld a complaint relating to an Instagram posting at @sarahkearnsofficial in May 2022 relating to a Thermomix appliance. The Panel concluded that the posting breached Section 2.7 of the AANA Code of Ethics, which provides:

2.7 Advertising shall be clearly distinguishable as such.

The advertiser, Thermomix Australia, has made a request for review of the Panel decision. Its request is in similar though more forceful terms than its earlier submission in response to the complaint.

The advertiser's request for review does not, in any substantive way, present '*new or additional relevant evidence*' that was not considered by the Community Panel and that could have a significant bearing on its determination. Nor has the advertiser claimed there was '*a substantial flaw*' in the Panel's *process* of determination.

Consequently, the issue in this independent review is whether there was '*a substantial flaw*' in the Panel's *determination*. A substantial flaw exists if the Panel's determination was '*clearly in error*' having regard to the Code of Ethics, or the Panel's determination was '*clearly made against the weight of the evidence*'.

The advertiser's submission

The main points in the advertiser's two submissions were:

- The advertiser entered into an influencer agreement with Ms Kearns to promote a floor cleaning product via Instagram marketing. She was paid a fee for this. She requested a combination of a cash payment and a Thermomix appliance. In effect, she purchased her own Thermomix.
- The influencer agreement for the floor product stated that '*the Influencer must declare all posts as part of the Agreement are sponsored/paid content*'. She complied with that requirement.



- The influencer was not requested, directed, required or engaged to promote the Thermomix appliance, or paid money to do so.
- The advertisement of the Thermomix appliance was not done with the knowledge, permission or direction of the advertiser. It was a personal decision of the influencer, and was done in a private capacity.
- Case 0232-21 (referred to below) was not relevant, as it involved a gift of a product. The Thermomix appliance was not gifted to the influencer.
- The complainant in this matter incorrectly claimed that the influencer was being deceptive in not declaring that she was given a Thermomix for free.

The Community Panel's reasoning

The Community Panel was required to reach a positive finding on three criteria in order to find a breach of Section 2.7 of the Code:

- The Instagram posting of the Thermomix was an advertisement, in that the posting –
 - was a communication or activity *'undertaken by, or on behalf of an advertiser ... over which the advertiser ... has a reasonable degree of control'*
 - *'draws the attention of the public in a manner calculated to promote ... directly or indirectly a product'*
- The advertisement was not *'clearly distinguishable as such'*.

The main points in the Community Panel's reasoning on those three issues were:

- The Instagram posting drew the attention of the public to the Thermomix appliance and was designed to promote it.
- The advertiser was aware of the influencer's position as an influencer and had an arrangement with her to promote other products. In providing the Thermomix appliance to her as payment under that other arrangement, the advertiser was exercising a degree of control in a story that drew attention to the Thermomix appliance.
- The advertisement contained insufficient wording or imagery to identify the nature of the relationship between the influencer and the brand. Tagging the



brand in the advertisement was insufficient to satisfy the Code requirement that an advertisement be clearly distinguishable as an advertisement.

The Panel also referred to and relied upon an earlier Panel determination in Case 0323-21. In that matter the Panel found a breach of Section 2.7 in relation to a series of photos by an influencer of a Prada handbag, without clearly declaring that the influencer had received it as a gift from Prada.

The Panel in Case 0323-21 observed that in applying the AANA Code, account should be taken of the business context for influencer postings. Influencers operate as an advertising medium to promote products, for which they may be paid or provided with free products. An influencer arrangement may be established by an agent or business, and there may be no relationship context for a posting. Influencers should be transparent about their relationship with brands, as the purpose of the AANA Code is to ensure that consumers are informed.

The Panel in that case went on to find that it was reasonable to assume that the motivation for an advertiser to provide a free product to an influencer was that they would post about the product. By giving a gift in those circumstances the advertiser exercises a degree of control over the influencer's posts.

Analysis of the application for review

The issue in contention in this case is the first of the three criteria referred to above – did the advertiser have a reasonable degree of control over the influencer's posting? As to the other two criteria, it is clear that the Instagram post drew attention to the Thermomix appliance, and that the posting was not depicted as an advertisement.

The Community Panel's reasoning on the first criterion rests on surmise – that the advertiser could reasonably expect in the circumstances that the influencer would promote the Thermomix appliance, and on that basis had a reasonable degree of control over the influencer's conduct.

A clear weakness in that assumption is that it does not sit comfortably with the evidence. The advertiser had entered into an arrangement with the influencer to pay her to promote a floor cleaning product. There is no evidence that it was the advertiser's intention – unstated or otherwise – to provide a Thermomix appliance to the influencer. It was provided at the influencer's request in lieu of a cash payment. That is not an altogether unusual situation. It is common in business transactions that trade-offs of one kind or another are requested or made as a payment for services.

It is possible that the influencer chose to promote the Thermomix appliance in order to entice the advertiser to support her. Other assumptions are equally open – for example, that she used the opportunity of a new appliance to promote herself and to connect with her followers. Her intentions are entirely speculative, and reveal little about the advertiser's knowledge or expectation. All that is known is that the



advertiser required the influencer to enter into a written agreement to declare that all posts of the floor cleaning product were sponsored/paid content.

There would be a stronger basis for surmising that the advertiser had reasonable control of the Thermomix post if the appliance had been given to her as a gift, as in Case 0323-21. However, that was not so in this case.

The facts of this case do not come squarely within the terms of the Practice Note on 'Clearly Distinguishable Advertising' (to which the Community Panel referred). The Practice Note advises that a relationship between an influencer and an advertiser must be '*clear, obvious and upfront*' if an influencer '*accepts payment of money or free products or services from a brand in exchange for them to promote that brand's products or services*'. In the present case the only evidence of an arrangement is that relating to the promotion of the floor cleaning products.

Furthermore, the Practice Note recognises that a brand owner may be taken as having control of user generated content after being notified of it or learning about it through a post or complaint. At that point the first criterion in Section 2.7 (reasonable control) is satisfied as regards any future posting.

I acknowledge that the Community Panel's surmise regarding the relationship between the advertiser and the influencer may be realistic in this case. However, the AANA Code currently states an objective standard before a Code breach can be determined – that an advertiser has a reasonable degree of control over a promotional activity that is undertaken on its behalf by another person. As an objective standard, its application requires an evidence-based decision.

In my view there is no evidence to support, and in this case insufficient ground to infer, a finding that the advertiser had control over the decision of the influencer to make a posting about the Thermomix appliance that she had, in effect, bought from the advertiser. Accordingly, I find there was a substantial flaw in the Community Panel's determination in that it was made against the weight of the available evidence.

FINAL DETERMINATION FOLLOWING REVIEW

The Ad Standards Community Panel (Panel) noted the request for review of its decision and the findings of the Independent Reviewer.

The Panel noted that the Independent Reviewer considered that there was a substantial flaw in the Panel's determination. Specifically, the Independent Reviewer considered that the Panel had made a determination against the weight of available evidence.

The Panel noted that it needed to reconsider the case under Section 2.7 of the the AANA Code of Ethics (the Code) taking into account the Independent Reviewer's recommendations and comments.



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

The Panel noted that in its previous consideration of the advertisement it had determined that the material met the definition of advertising finding that the advertiser had a reasonable degree of control over the image.

The Panel noted the advertiser's submission and the Independent Reviewer's comments that the advertiser did not arrange for or have knowledge of the post. Further, the Panel noted the advertiser's submission that the product was provided as payment for another promotion, and there was no request or direction for Ms Kearns to post about the appliance.

The Panel considered that the advertiser had provided reasonable evidence that the product had been provided as a payment in lieu of cash, and that there had been no direction for Ms Kearns to post.

The Panel considered that while it is likely that any provision of product to an influencer is done in the hope they will post about the product and draw attention to it, the advertiser had provided some evidence to support its position that this was not the case in this instance. In the absence of any direct evidence to contradict the advertiser's position, and noting the Independent Reviewer's analysis, the Panel determined that the advertiser did not have a reasonable degree of control over the material posted by Ms Kearns.

2.7 conclusion

The material does not meet the definition of advertising in the Code and therefore does not breach Section 2.7 of the Code.

Conclusion

On review, the Panel determined that the advertisement did not breach Section 2.7 of the Code and the Panel dismissed the complaint.