



**Ad Standards** Community Panel  
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**AdStandards.com.au**

Ad Standards Limited  
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## Case Report

<b>1. Case Number :</b>	<b>0133-21</b>
<b>2. Advertiser :</b>	<b>Hennes &amp; Mauritz UK Ltd</b>
<b>3. Product :</b>	<b>Clothing</b>
<b>4. Type of Advertisement/Media :</b>	<b>Internet - Social - Instagram</b>
<b>5. Date of Determination</b>	<b>16-Jun-2021</b>
<b>6. DETERMINATION :</b>	<b>Upheld – Modified or Discontinued</b>

### ISSUES RAISED

AANA Code of Ethics\2.7 Distinguishable advertising

### DESCRIPTION OF ADVERTISEMENT

This Instagram post from @laurennburns features eight images of a woman in a black coat and sunglasses holding a grey bag with 'COS' written on it in rainbow letters. The caption accompanying the post reads, "Celebrating @cosstores X @blackrainbowaus with this limited edition tote in pursuit of well-being and inclusivity, specifically for Aboriginal and Torres Strait Islanders in the LGBTQIASB community. These recycled cotton totes are complimentary at COS stores across Australia with any donation of \$30 or more. Wear you pride #cosstores #blackrainbow".

### THE COMPLAINT

A sample of comments which the complainant/s made regarding this advertisement included the following:

*It has not been made clear that this is a paid advertisement*

### THE ADVERTISER'S RESPONSE

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

*The complaint concerns a social media post on Instagram by influencer Laurenn Burns, in detailed described under the section "Advertisement Description" below (hereinafter referred to as the "Social Media Post").*



*Please note that after the complaint came to our attention we have arranged an amendment of the Social Media Post so that it is in compliance with the AANA Code of Ethics. The Social Media Post now includes the hashtag “#sponsored”. The amendment was executed on Friday 11 June 2021 (please find evidence of the amended post attached as Appendix 1). As the Social Media Post is thereby compliant with the AANA Code of Ethics we consider this should have the same effect as the given option to withdraw the advertisement. Naturally, we undertake to not re-publish the Social Media Post again without the “#sponsored” addition at a later date. COS is committed to comply with all applicable laws and regulations and we will review and analyze our current procedures to ensure our compliance going forward.*

*If Ad Standards Community Panel despite the above decides to consider this matter, we would like to make the following statement.*

*The Social Media Post does not constitute a breach of Section 2.7 in the AANA Code of Ethics since it is clearly distinguishable as advertising material to the relevant audience. As is evident from the text of the Social Media Post, it constitutes a clear promotion of COS by exclusively providing information about COS collaboration with the organization Black Rainbow Australia and its ongoing campaign where COS gives away tote bags (with the trademark “COS” in rainbow colors) for any donation of \$30 or more. It is thus clear that the text has a commercial origin. Furthermore, the Social Media Post directs users to COS own social media presence by clickable link and the use of “#cosstores”. It must therefore be considered that the relevant audience of followers of the influencer Laurenn Burns, and other users of Instagram, would be aware that this is a sponsored post for COS and is therefore clearly distinguishable as advertising material.*

*The case at hand is comparable with a previous case having been considered by Ad Standards, namely case no 0360/17 which concerned a post on Instagram by an influencer featuring a review of a certain product. In that case, the Community Panel held that the post was clearly distinguishable as advertising material even without any such explicit statements, referring to the text reading as having commercial rather than personal origin, as well as the inclusion of hashtags and links to the product company. The Community Panel concluded that the influencer’s followers and other users of Instagram would be aware that it was a sponsored post, and thereby not constituting a breach of Section 2.7 of the AANA Code of Ethics.*

*Based on what has been outlined above regarding the circumstances in the matter as well as the precedent set by case 0360/17, we request the Community Panel to dismiss the complaint.*

## **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 post has not made it clear that this is a paid advertisement.

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 clear placement of the product, the brand name tagged in the comments and the further information provided about the product did amount to material which would draw 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 the advertiser's response stated that this was a promotional post and it has now been amended to include the #sponsored.

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, sometimes provided with free product and sometimes post about products in the context of longer term relationships without immediate incentive. 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 relationship with a brand, whatever form it takes.



The Panel noted that the precise nature of the arrangement between the advertiser and Ms Burns was not known, however it is clear that the advertiser had the ability to request that Ms Burns add #sponsored to her post, and that this would constitute relevant control over the advertisement.

The Panel considered that the post did meet the definition of advertising in the Code.

### **Is the material clearly distinguishable as such?**

The Panel noted the advertiser's response that the post would be clearly distinguishable as advertising to Ms Burns followers and noted the 2017 precedent case referenced by the advertiser. The Panel noted that as of 1 February 2021 the Code and Practice Note had been updated to remove the reference to relevant audience and to provide new guidelines on what is considered sufficient to render advertising content distinguishable.

The Panel noted the current 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 since the complaint had been received the post had been updated to include #sponsored.

The Panel considered that there was nothing in the wording of the original post and no hashtags which clearly demonstrated the relationship between Ms Burns and the brand and the circumstances surrounding the posting of the product. The Panel noted that the post appeared to be promoting a charitable cause, and that it is possible that consumers viewing the post would conclude that Ms Burns was voluntarily supporting the cause with no commercial agreement to do so.

The Panel considered that tagging the brand on its own was not sufficient to satisfy the Code's requirements and that the wording of the original post was not sufficient to make it clearly distinguishable as advertising.

### **2.7 conclusion**

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



## **Conclusion**

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

## **THE ADVERTISER'S RESPONSE TO DETERMINATION**

The advertiser did not respond to the upheld determination, however Ad Standards notes their original response which states that the post not includes the hashtag #sponsored.