



**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>0144-22</b>
<b>2. Advertiser :</b>	<b>Steph Pase Planners</b>
<b>3. Product :</b>	<b>House Goods Services</b>
<b>4. Type of Advertisement/Media :</b>	<b>Internet - Social - Instagram</b>
<b>5. Date of Determination</b>	<b>27-Jul-2022</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 story which featured a shared reel from the @stephpaseplanners account, and includes the text, "Another small biz we can support - the beautiful @justanothermummyblog is having a huge sale too (not an ad) Code: for 20% off storewide + a further 20% off 2022 Planners (making them 50% off). \*Discount code excludes bundles\* Run! @stephpaseplanners"

### THE COMPLAINT

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

The complainant was concerned that the story did not comply with the Distinguishable Advertising provision of the AANA Code of Ethics.

### THE ADVERTISER'S RESPONSE

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

*We refer to your correspondence dated 4 July 2022 in respect of the above complaint regarding a social media post made by [the influencer] where she tagged the business*



*Steph Pase Planners (@stephpaseplanners) and the owner of the business Steph Pase (@justanothermummyblog), including a discount code for her followers (the Post).*

*As requested, please find attached a copy of the Post.*

*For the integrity of self-regulation, we consider that it would be important for the determination in respect of this Post to be consistent with the determinations made by the Panel in respect of recent complaints.*

#### **BACKGROUND**

*[the influencer] is a content creator and social media influencer. Steph Pase is also a content creator and social media influencer and owns a small business called Steph Pase Planners which sells physical deluxe planners, journals and stationary.*

*[The influencer] and Steph Pase have maintained a close personal relationship as they both share similar interests and are both mum influencers in Australia. This personal relationship has allowed them to work together on a commercial level on and off throughout the last few months of 2022.*

*Steph Pase Planners' sole marketing agency for the business is Twenty6 Marketing based in Queensland. This marketing agency oversees all of Steph Pase Planners' marketing and as part of its contract with Steph Pase Planners, they also manage and review all promotional content and posts created at the request of Twenty6 Marketing on behalf of Steph Pase Planners before the content is posted into any media including social media channels*

*Accordingly, Twenty6 Marketing has a rigorous pre-approvals process for all social content over which it exercises control on behalf of Steph Pase Planners.*

*Relevant sections of the of the AANA Code of Ethics*

*We understand that the relevant section of the AANA Code of Ethics is Section 2 – Consumer Complaints.*

*Section 2 states that:*

*2.1 Advertising or Marketing Communication shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, gender, age, sexual preference, religion, disability, mental illness or political belief.*

*2.2 Advertising or Marketing Communication shall not employ sexual appeal:  
(a) where images of Minors, or people who appear to be Minors, are used; or  
(b) in a manner which is exploitative or degrading of any individual or group of people.*

*2.3 Advertising or Marketing Communication shall not present or portray violence unless it is justifiable in the context of the product or service advertised.*



*2.4 Advertising or Marketing Communication shall treat sex, sexuality and nudity with sensitivity to the relevant audience.*

*2.5 Advertising or Marketing Communication shall only use language which is appropriate in the circumstances (including appropriate for the relevant audience and medium). Strong or obscene language shall be avoided.*

*2.6 Advertising or Marketing Communication shall not depict material contrary to Prevailing Community Standards on health and safety.*

*2.7 Advertising or Marketing Communication shall be clearly distinguishable as such to the relevant audience.*

#### **RESPONSE**

*Please find our responses to the complaint in your letter of 4 July 2022 with respect to AANA Code of Ethics (Code) and to the specific points the complainant raised as follows:*

*2.1 Advertising or Marketing Communication shall not portray people or depict material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, gender, age, sexual preference, religion, disability, mental illness or political belief.*

*We do not believe that this section of the code is relevant to this complaint. The Post does not portray or depict material in a way which discriminates against or vilifies a person or section of the community.*

*2.2 Advertising or Marketing Communication shall not employ sexual appeal:  
(a) where images of Minors, or people who appear to be Minors, are used; or  
(b) in a manner which is exploitative or degrading of any individual or group of people.*

*We do not believe that this section of the code is relevant to this complaint. There is no sexual content within the Post.*

*2.3 Advertising or Marketing Communication shall not present or portray violence unless it is justifiable in the context of the product or service advertised.*

*We do not believe that this section of the code is relevant to this complaint. There is no violence presented or portrayed in the Post.*

*2.4 Advertising or Marketing Communication shall treat sex, sexuality and nudity with sensitivity to the relevant audience.*

*We do not believe that this section of the code is relevant to this complaint. There is no sexuality or nudity in the Post.*



*2.5 - Advertising or Marketing Communication shall only use language which is appropriate in the circumstances (including appropriate for the relevant audience and medium). Strong or obscene language shall be avoided.*

*We do not believe that this section of the code is relevant to this complaint. There is no use of strong or obscene language in the Post.*

*2.6 Advertising or Marketing Communication shall not depict material contrary to Prevailing Community Standards on health and safety.*

*We do not believe that this section of the code is relevant to this complaint. There is no content which is contrary to prevailing community standards on health and safety in the Post.*

*2.7 Advertising or Marketing Communication shall be clearly distinguishable as such to the relevant audience.*

*This is the relevant section of the Code to be considered in the context of the complaint.*

*For the reasons set out below, we respectfully submit that Steph Pase Planners have not breached this section 2.7 of the Code.*

*[The influencer] has expressly and clearly stated in the Post that the Post is “not an ad”. This is because there was no commercial contract, arrangement or understanding with respect to the Post.*

*As the evidence clearly establishes, and as is manifest from the Post itself by clearly stating this is “not an ad”, [the influencer] published the Post as an organic, unscripted and unsolicited post apparently as part of her desire to support small businesses.*

*The Post was intended to show [the influencer]’s support for small businesses. As [the influencer] and Steph Pase are friends and also both mum influencers / content creators and have previously worked together, [the influencer] posted the story sharing Steph Pase Planners’ pre-existing reel, to show her genuine support for the business and the importance of supporting small businesses generally.*

*This section 2.7 of the Code states that Advertising or Marketing Communication shall be distinguishable as such to the relevant audience. The Code states that 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 Post by [the influencer] was an organic post that was created and published by [the influencer] herself, without any approval by either Steph Pase Planners or their marketing agency Twenty6 Marketing who oversee and manage all authorised marketing and promotional content prior to publishing and going live.*

*There was no degree of control at all by Steph Pase Planners or Twenty6 Marketing as they had no prior knowledge of [the influencer]' intention to share Steph Pase Planners' reel and had not approved of the Post. As stated above, the Post was an organic post for which no payment, consideration or value-in-kind was provided to [the influencer] and the organic and unsolicited nature of the Post is evident in the Post itself (supporting small business and "not an ad").*

*We draw the Panel's attention to the following recent decision: Case 118-22. In this case, one of the factors that the Panel considered in upholding the complaint was that the "the product specific post with the image being solely of the product held by the influencers hand", and the resulting confusion caused by the printing of "Not spon".*

*We note that the Post is entirely different and is distinguishable to Case 118-22 as [the influencer] did not produce content that involved her directly using any products from Steph Pase Planners. The Post itself was merely [the influencer] sharing Steph Pase Planners' reel (which had already been posted on Steph Pase Planners' Instagram page by them), rather than producing brand new content showing [the influencer] using Steph Pase Planners' products.*

*Generally when influencers are endorsing or promoting goods/services of a brand, they create content to show themselves physically using or experiencing the goods/services, in return for payment or free product / value-in-kind. However in this case, there was no reason for [the influencer] to produce content that showed her using any product of Steph Pase Planners as there was no monetary payment or value in kind for the Post. As such, this was an organic post by [the influencer], to show her support for small businesses.*

*The complaint also notes the affiliate code which was included in the Post. As noted above, [the influencer] and Steph Pase Planners have previously worked together before, and this code was a code that [the influencer] was given for an earlier paid and approved post.*

*As the Post was not a paid promotion (no monetary payment or value-in-kind), [the influencer] clearly stated in the Post that this was "not an ad" to clearly distinguish it from other sponsored posts for Steph Pase Planners made under previous commercial arrangements.*

#### **CONCLUSION**

*Based on the points above, we respectfully submit that the complaint should be dismissed on the basis that the Post, does not breach any of the relevant codes, in particular section 2.7 of the AANA Code of Ethics. It has been established that Steph*



*Pase Planners did not have the requisite degree of control or knowledge about the Post.*

*If the complaint were to be upheld, it would result in the absurd outcome that every time commercial entities' pre-existing social posts are simply shared on social media (by what we understand to 'influencers' or 'lay people') would result in a breach of section 2.7 of the Code because there would always be no disclosure that there was some form of ad or sponsorship.*

*Furthermore, if [the influencer] had actually stated that it was in fact an #ad or #sponsored post (or similar), this would have been false, misleading and unlawful. It is not the intention of the Australian Consumer Law or of the Code to somehow prevent the organic and unsolicited sharing of business' social media posts – that is the whole purpose of social media.*

*We note that there has only been one complaint made in relation to the Post and generally the public response to the Post to date has been overwhelmingly positive.*

*We regret if any members of the general public did not feel that the Post was misleading and would like to take this opportunity to assure the Panel and the general public that this was never our intention.*

*If the Panel feels that Steph Pase Planners has not responded adequately (or at all) on a particular issue arising from the complaint, we respectfully request that we be notified and given the opportunity to provide a further response before an adjudication is made.*

*We appreciate the opportunity to respond to the complaint and acknowledge our commitment to self-regulation of advertising in Australia. We sincerely hope that the Panel reviews the Post positively having regard to the points raised above.*

## **THE DETERMINATION**

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

The Panel noted the complainant's concern that the advertisement is misleading as it does not disclose the stories as an 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 to the relevant audience.**

### **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 noted the advertiser’s response that they did not request this post be made and did not have control over it, and that it is therefore not advertising.

The Panel considered that the shared story, the tagging of both the product owner and the product, and the promotion of a sale did amount to material which would draw 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 the advertiser’s response that there was a prior professional arrangement in place between the influencer and the advertiser, and a continuing personal relationship between the influencer and the advertiser.

The Panel noted that the Code does not define ‘reasonable degree of control’. 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 brands should be transparent about their relationships with influencers.

The Panel considered that while the advertiser may not have had direct control over the individual post, it did have control over the provision of the discount code to the influencer. The Panel considered that the advertiser does have control over who it provides discount codes to, and the terms on which they allow this code to be shared.

The Panel noted that the advertiser had an existing relationship with the influencer and was aware of her position as an influencer. The Panel considered that while there was no direct request or stipulation for the influencer in relation to this specific post, it is reasonable to assume that the motivation for an advertiser to provide an active



discount code to someone is that they will post about the product or otherwise draw the attention of their followers to the brand as the influencer did in this case.

The Panel considered that while the advertiser has advised that the influencer did not receive a specific benefit by posting, the post was in line with her existing relationship with the advertiser and the provision of a benefit to her (the influencer's) followers (a discount code) was by extension a benefit to the influencer. The Panel considered that in choosing to provide an active discount code to a person who is an influencer they are exercising a degree of control, and the post did draw the attention to the product.

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 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 considered that noting the context of the influencer's existing relationship with the brand, the product specific post, the tagging of the brand and the discount code, there is a strong suggestion that the post is an advertisement.

However the Panel considered that the inclusion of “not an ad” is confusing to viewers and hides the existence of the relationship (the existence of a personal discount code). The Panel considered that whether intentional or not, the advertisement's distinguishability is obscured by “not an ad” and the Panel determined that the post was not clearly distinguishable as advertising.

### **Section 2.7 Conclusion**

The Panel considered that the advertisement was not clearly distinguishable as such.

### **Conclusion**

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





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

Thankyou for the opportunity to respond to the determination. Steph Pase Planners take our ethical advertising obligations very seriously, and understand our responsibilities.

The post in question was a 24 hour 'story' post, so was not available for public viewing after 24 hours of the original post time, and hence, has been taken down. We would like it to be known, however, that if this had been in a different medium, we would have promptly removed this post.

Moving forward, Steph Pase Planners, and any agency acting on our behalf will strongly consider the use of codes, and educate our advertisers of their responsibilities for transparency and distinguishability of their advertisements.