



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 :	0161-22
2. Advertiser :	Lounge Underwear
3. Product :	Clothing
4. Type of Advertisement/Media :	Internet - Social - Instagram
5. Date of Determination	27-Jul-2022
6. DETERMINATION :	Upheld - Not Modified or Discontinued

ISSUES RAISED

AANA Code of Ethics\2.7 Distinguishable advertising

DESCRIPTION OF ADVERTISEMENT

This Instagram post was posted to the @emileehembrow account on 6 July 2022 and featured the caption, "I don't know about you guys but there's nothing like fresh sheets and silky pyjamas [cloud emoji][heart with arrow emoji] So cozy in this colder weather here on the Gold Coast [face with hearts emoji] pjs, bra both from my fav @loungeunderwear."

The post includes two images, the first of a woman wearing pyjamas holding a baby and the second of the woman wearing pyjamas with the top unbuttoned to reveal a lace bra.

THE COMPLAINT

A complaint was received that this material was not distinguishable as advertising.

THE ADVERTISER'S RESPONSE

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

Advertiser did not provide a response.

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 does not clearly communicate that it is advertising.

The Panel viewed the advertisement and noted the advertiser did not respond.

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: *"any 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 in the advertisement and the use of the brand name '@loungeunderwear' 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 that the advertiser had not provided a response to the case. The Panel therefore was unable to confirm whether the advertiser had arranged for the Instagram post. However, the Panel proceeded on the presumption that the Instagram post was authorised by the advertiser, on the basis that the influencer is a well-known influencer who would be likely to post such material under an arrangement with the brand.

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 post included two pictures of the product and tagged the product brand.

The Panel considered that while it may be clear to some people viewing the material that this was an advertisement, it could also be interpreted as an organic post detailing where she purchased her clothes. The Panel considered that there was nothing in the wording or pictures of the material which clearly identified the nature of the relationship between the influencer and brand.

The Panel considered that in this case tagging the brand and featuring the product was not sufficient to satisfy the Code’s requirements and that the Instagram stories were 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 did breach Section 2.7 of the Code, the Panel upheld the complaint.

THE ADVERTISER’S RESPONSE TO DETERMINATION

The advertiser has not provided a response to the Panel's determination. Ad Standards will continue to work with the advertiser and other industry bodies regarding this issue of non-compliance.