Ad Standards Community Panel
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Ad Standards Limited
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Case Report

1. Case Number :	**0189-22**
2. Advertiser :	**Treasury Wines Estates**
3. Product :	**Alcohol**
4. Type of Advertisement/Media :	**Internet - Social - Instagram**
5. Date of Determination	**14-Sep-2022**
6. DETERMINATION :	**Dismissed**

ISSUES RAISED

AANA Code of Ethics\2.7 Distinguishable advertising

DESCRIPTION OF ADVERTISEMENT

This Instagram post from the @amy.gerard account on 3 August 2022 features several images and videos of an influencer at an event. The caption reads "The most incredible Wednesday night! You outdid yourself @penfolds [clap emoji] the Australian shiraz was an absolute stand out, can't wait to order more! Thanks for having us xx #venturebeyond".

THE COMPLAINT

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:

According to the complaint, the Instagram Post raises issues under Section 2 of the AANA Code of Ethics (the 'Code').

As we have been asked to address all parts of Section 2 of the Code, our responses in relation to each section are set out below.

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2.1 - Discrimination or vilification - In Penfolds opinion, the Instagram post does not contain material that discriminates against or vilifies any section of the community.
2.2 - Exploitative and degrading - In Penfolds opinion, the Instagram post does not contain material that employs sexual appeal which is exploitative or degrading to any individual or group.
2.3 – Violence - In Penfolds opinion, the Instagram post does not contain material that is violent towards any individual or group.
2.4 - Sex, sexuality and nudity - In Penfolds opinion, the Instagram post does not contain material that is sexual in nature.
2.5 - Language - In Penfolds opinion, the Instagram post does not contain inappropriate, strong or obscene language.
2.6 - Health and Safety - In Penfolds opinion, the Instagram post does not contain any unsafe or unhygienic behavior or other material which is contrary to prevailing community standards on health and safety.
2.7 – Distinguishable as advertising – In Penfolds opinion, the post should not be classified as advertising within the meaning of the Code for the reasons outlined below.

The AANA Code of Ethics defines an "advertising or marketing communication" as 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.
As flagged above, the Instagram Post was not created by Penfolds, nor was it posted on a social media account owned or controlled by Penfolds. As mentioned above, the Instagram Post was generated by a third party ([the influencer]), who independently chose to publish this content on her own personal Instagram account.

The Instagram Post was not sponsored, paid for, endorsed or otherwise encouraged by Penfolds. There was no agreement (written or otherwise) in place between Penfolds and [the influencer] in relation to publicising the event, whether via social media or otherwise. Penfolds had no expectation that [the influencer] would post any content relating to the event.

We respectfully submit that Penfolds has no "reasonable degree of control" over [the influencer's] personal Instagram account, to which only [the influencer] has access. As a result, the Instagram Post is not an 'advertising or marketing communication' as defined within the Code, and therefore does not contravene section 2.7 of the Code.

Further to the above, pages 13 & 14 of the AANA Code of Ethics Practice Note dated February 2021 ('AANA Practice Note') provide a detailed explanation of the requirement to clearly distinguish advertising materials.

In particular, page 14 of the AANA Practice Note expressly states that the Code does not apply to user generated content (UGC) on pages and sites which are not within an advertiser's reasonable control even if brands or products are featured. Examples

provided in the AANA Practice Note include UGC featuring hashtags that may relate to a brand or brand campaign from platforms such as Instagram or Twitter.

Given the wording of the AANA Practice Note, Penfolds does not believe that the AANA Code applies to user generated content such as [the influencer]'s post, since this post was published on [the influencer]'s personal Instagram page – which is clearly not within the reasonable control of the Penfolds brand. The fact that our brand/products are featured and brand hashtags are used is not relevant, this is made very clear in the Practice Note (as set out above).

Lastly, both TWE and Penfolds are familiar with the requirements of the Code and have internal guidelines (in the form of a Responsible Marketing Handbook which specifically refers to the Code) to assist our sales, marketing and communication teams to develop marketing campaigns that meet the TWE & Penfolds Responsible Marketing Guidelines. These teams are also trained regularly on responsible marketing, including the requirement to ensure that any advertising is clearly distinguishable as such.

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 material is not distinguishable as advertising.

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 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 photos of wine and with the Penfolds branding, the reference to the Australian shiraz, the tagging of the brand, and the use of the brand hashtag 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 did not state in their response whether they had provided the influencer with an invitation to the event. The Panel considered it was likely that she had been invited to the launch event on the third of August, as the event only appeared to be open to the public to buy tickets from the fourth of August.

The Panel noted that in the case of gifts or invitations to influencers the context in which this occurs 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 apparently chose to invite the influencer, knowing that she has a large social media presence and is likely to post about the experience. The Panel considered that while there was no direct request or stipulation for the influencer to post about the event or to say anything in particular if she did, it is reasonable to assume that the motivation for an advertiser to provide anything for free to an influencer is that they will post about it or otherwise draw the attention of their followers to the brand as the influencer did in this case.

For these reasons, the Panel considered that the Instagram 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 noted that the first image in the post included the Penfolds and Venture Beyond branding, as did the following video. The Panel noted the next image was a

display of the products, followed by images of people posing with wine glasses. The Panel also noted that the caption tagged the brand and included the brand hashtag.

A minority of the Panel considered that there was nothing in the advertisement which clearly stated that the influencer had been invited to the event for free and identified the material as advertising.

The majority of the Panel considered that the Code did not require the precise nature of the relationship between the advertiser and influencer to be clear, the requirement is that it is clear that the material is advertising. The Panel considered that in addition to tagging the brand, the caption included the brand hashtag "#venturebeyond", this \ combination with the fist image of the post featuring a photo of the influencer posing on the red carpet with the large brand signs created an overall impression that the material was an advertisement. The Panel considered that the combination of elements in the advertisement, including the prominent branding, did make it clear that this content was advertising.

Section 2.7 Conclusion

The Panel considered that the advertisement was clearly distinguishable as such.

Conclusion

Finding that the advertisement did not breach any other section of the Code the Panel dismissed the complaint.

ABAC

The Panel noted that advertisements about alcohol products may be considered against the provisions of the AANA Advertiser Code of Ethics as well as the Alcohol Beverages Advertising Code Scheme (ABAC). The Panel noted that complaint/s in this case were referred to ABAC for assessment. The Panel noted that the ABAC Responsible Alcohol Marketing Code (ABAC Code) is an alcohol specific code of good marketing practice and has specific standards which apply to the promotion of alcohol products. The Panel further noted that it can only consider complaints about alcohol advertising under the concept of prevailing community standards as set out by the AANA Code of Ethics. The Panel noted that the advertisement may be considered by the ABAC Chief Adjudicator or the ABAC Adjudication Panel applying the ABAC Code, as well as this determination under the Code of Ethics