



Ad Standards Community Panel
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Case Report

1. Case number :	0207-21
2. Advertiser :	Samsung Electronics Australia Pty Ltd
3. Product :	Telecommunications
4. Type of advertisement/media :	Internet - Social - Instagram
5. Date of original determination	28-Jul-2021
6. Original determination :	Upheld - Modified or Discontinued
7. IR recommendation:	Panel to Reconsider
8. Date of reviewed determination:	22-Sep-2021
9. Determination on review:	Dismissed

ISSUES RAISED

AANA Code of Ethics\2.7 Distinguishable advertising

DESCRIPTION OF ADVERTISEMENT

This Instagram Post dated 02/06/2021 is on the @nadiafairfax account and features two images. The caption on the post is "Z FLIP9ing) around FW with these two....@galaxybysamsung [phone emoji] @_yanyanchan @sarahellen Hello! #WorkingWithSaumsuing #GalaxyZFlip #NadiaTakesSamsung". Both images feature three women in front of an elevator holding/looking at their phones.

THE COMPLAINT

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

Because it's false advertising and hasn't been properly declared. Very irresponsible.

THE ORIGINAL ADVERTISER'S RESPONSE

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

BACKGROUND

Samsung Electronics Australia Pty Ltd (Samsung) would like to thank Ad Standards for the opportunity to respond to the complaint made in relation to a social media post



published on 2 June 2021 by Nadia Fairfax, featuring the Samsung Galaxy Z Flip smartphone device (Post).

Samsung takes its responsibilities under the AANA Code of Ethics (Code) seriously and is confident that the Post complies with the Code.

SAMSUNG'S ASSOCIATION WITH MS FAIRFAX

Ms Fairfax was first engaged by Samsung as an influencer to promote Samsung's brand and products approximately seven years ago. Since that time, Ms Fairfax has been involved with a number of flagship product launches by Samsung.

Samsung engaged Ms Fairfax to promote Samsung's folding phones (Galaxy Z Flip and Galaxy Z Fold2 phones) at the Afterpay Australian Fashion Week event, which took place in Sydney from 1-4 June 2021 (AAFW). Samsung was a sponsor of AAFW. While the exact terms of the engagement are confidential, the Post was not part of the deliverables under the AAFW engagement between Ms Fairfax and Samsung.

THE POST

The Post includes two static images of Ms Fairfax with two other women, all holding Samsung Galaxy Z Flip smartphones. The Post caption reads: Z FLIP(ing) around FW with these two.... @galaxybysamsung

@_yanyanchan @sarahellen Hello!?

*#WorkingWithSamsung #GalaxyZFlip
#NadiaTakesSamsung*

The Post also includes a tag or hyperlink to '@galaxybysamsung', an official Samsung Instagram account. We have uploaded screenshots of the Post together with this submission.

THE COMPLAINT

The complaint raises a concern that the Post is not clearly distinguishable as advertising, as required under section 2.7 of the Code. Samsung's position is that the Post is not advertising. However, if the Post is deemed to be advertising, Samsung submits that it is appropriately distinguishable as advertising.

SECTION 2 OF THE CODE

There is no suggestion in the complaint that the Post raises any issues under Section 2.1 (regarding discrimination or vilification); Section 2.2 (regarding employing sexual appeal in an exploitative or degrading manner); Section 2.3 (regarding the presentation or portrayal of violence); Section 2.4 (regarding sex, sexuality and nudity); Section 2.5 (regarding strong or obscene language); or Section 2.6 (regarding Prevailing Community Standards on health and safety) of the Code. Samsung is confident that there are no such issues.

Samsung addresses Section 2.7 of the Code, which is the subject of the complaint, in more detail below.

SECTION 2.7 – DISTINGUISHABLE AS ADVERTISING

Section 2.7 of the Code states Advertising shall be clearly distinguishable as such.



Samsung does not consider that the Post constitutes an 'advertising or marketing communication'. Under 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'.*

Notwithstanding Samsung's relationship with Ms Fairfax, the Post was outside the terms of Ms Fairfax's engagement with Samsung for the AAFW event; it was created and uploaded by Ms Fairfax on her own initiative and Samsung did not have prior knowledge of it. Unlike Ms Fairfax's Samsung-sponsored posts, there was no media spend allocated to the Post in order to attract users beyond Ms Fairfax's and Samsung's existing followers and Ms Fairfax did not use the "paid partnership with @GalaxybySamsung" handle or ' sponsored-' caption which she uses for Samsung-sponsored posts, including posts associated with the AAFW event. Accordingly, Samsung submits that it did not have any reasonable degree of control over the Post. However, Samsung acknowledges that 'reasonable degree of control' is not defined in the Code, and that the Panel has previously deemed advertisers to have the requisite control in similar circumstances. Samsung therefore submits that, if (contrary to its primary submission) the Post is deemed to be advertising, in any event appropriate disclosures have been made for the reasons described below.

We refer to the following decisions of the Panel in which complaints under section 2.7 of the Code have been dismissed:

- 1. Where the hashtag '#crownpartner' was used to disclose a relationship between Anna Heinrich and Crown in lieu of '#ad' or '#sponsored' (see Crown Melbourne Limited – 0057-21, available at <https://adstandards.com.au/sites/default/files/reports/0057-21.pdf>). Other factors relevant to the decision were that the caption mentioned an award received by the advertiser, and that the post contained several hashtags referring to the advertiser, including one stating #crownpartner.*
- 2. A post by Zoe Foster Blake which did not use the express tags '#ad' or '#sponsored', but was in any event deemed to be clearly identified as an advertisement (see Tourism Australia – 0158-21, available at <https://adstandards.com.au/sites/default/files/reports/0158-21.pdf>). The Panel noted that the video in the post was a shared television commercial (which had clear branding for the advertiser and a call to action). The post included references to the material being a TV ad.*

We also note the complaints based on section 2.7 of the Code in relation to advertising which:

- 1. only included the hashtag '#collab' in white writing on a white background which, taken together with use of the brand name and promotion of a sale was not sufficient to satisfy the Code's requirements (see Suboo – 0163-21, available at <https://adstandards.com.au/sites/default/files/reports/0163-21.pdf>);*
- 2. featured a product and the brand's Instagram handle only, which were not sufficient to satisfy the Code's requirements (see Newcastle Distilling Co – 1065-21, available at <https://adstandards.com.au/sites/default/files/reports/0165-21.pdf>) and*



Adidas Australia – 0136/21, available at <https://adstandards.com.au/sites/default/files/reports/0136-21.pdf>, which the Panel has upheld.

Samsung considers the Post is closely analogous to those cases where complaints have been dismissed and can be clearly distinguished from those cases where the complaints have been upheld.

The AANA Code of Ethics Practice Note (the Practice Note) states that:

There is no absolute requirement that advertising or marketing communication must have a label however it must be clear to the audience. If it is clear to the audience that the content is commercial in nature (for example by the nature of the content, where the content is placed, how consumers are directed to the content, the theme, visuals and language used, or the use of brand names or logos), then no further disclosure or distinguishing element is needed.

Samsung submits that in this case it is clear to the audience that the content of the Post is commercial in nature.

Relevantly, in the caption for the Post, Ms Fairfax included a number of indicators to disclose her association with Samsung, including:

- *“@galaxybysamsung” (which is a hyperlink to one of Samsung’s official Instagram accounts);*
- *“#WorkingWithSamsung”;*
- *“#GalaxyZFlip”;* and
- *“#NadiaTakesSamsung”.*

The Post caption also includes an express reference to the product featured in the post ('Z FLIP'), with the Post images clearly highlighting the product. The use of a range of different indicators relating to Samsung presents similar circumstances to those considered in the Crown Melbourne Limited decision. Like '#crownpartner', the use of the hashtags '#WorkingWithSamsung' and '#NadiaTakesSamsung' clearly disclose a commercial relationship between Ms Fairfax and Samsung, especially together with the caption and the other tags used in the Post. Although the Post does not use the specific hashtags '#ad' or '#sponsored', it includes other clear indicators of the relationship with Samsung.

The Panel has upheld complaints where the only disclosure has been to tag the advertiser. However, in this case, while Ms Fairfax did tag an official Samsung account, she also went further, adding a range of hashtags which make the commercial nature of the content abundantly clear.

CONCLUSION

Samsung does not believe that the Post is in breach of Section 2 of the Code in any respect and is firmly of the view that the Post is in line with community standards and expectations more broadly. Accordingly, Samsung respectfully submits that the complaint should be dismissed.

Samsung's position remains that the Post does not fall within the scope of advertising covered by the Code, since Samsung did not have reasonable control over it, but that, in any event, the Post was clearly identifiable as being commercial in nature.

However, Samsung takes issues concerning the adequate disclosure of influencer marketing seriously, and we continually strive to ensure that we, together with our influencers, comply with all applicable laws, as well as the AANA’s Code of Ethics, at all



times. We commit to re-doubling our efforts to ensure that our influencers continue to adequately disclose their associations with Samsung.

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 post is advertising that hasn't been properly declared.

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, the brand name tagged in the comments, the product hashtag and the additional two hashtags referring to the brand did amount to material which would draw the attention of the public in a manner designed to promote the brand.

The Panel noted the advertiser's response that while there was a commercial relationship in place for Ms Fairfax to post about the product this post was outside of that agreement and was created on Ms Fairfax's own initiative. The Panel considered that the motivation for Ms Fairfax to post, although not explicitly part of an agreement, was related to the ongoing commercial relationship between Ms Fairfax and the brand, and was not organic content.



The Panel considered that the advertiser has undertaken the activity of entering into an arrangement with an influencer, and in choosing to do so they are exercising a degree of control.

For these reasons, 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 noted that the wording of the original post included a link to the brand’s account and the hashtag #workingwithsamsung.

A minority of the Panel considered that the hashtag #WorkingWithSamsung did demonstrate that there was a relationship between Ms Fairfax and the brand, and that this was sufficient to clearly distinguish the post as advertising.

The majority of the Panel considered that the hashtag #WorkingWithSamsung could also be interpreted as completing work using a Samsung device, and did not clearly identify that there was a relationship between Ms Fairfax and the brand. The Panel considered that the use of the hashtag #WorkingWithSamsug on its own is not enough for the post to be clearly distinguishable as advertising.

The Panel considered that tagging the brand and use of hashtags referring to the brand and the product was not sufficient to satisfy the Code’s requirements and that the post 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 ORIGINAL DETERMINATION

Samsung Electronics Australia respectfully disagrees with the Community Panel's determination and maintains its view that the original post complies with the Code. However, Samsung takes its obligations as an advertiser seriously and respects the role of Ad Standards and the Community Panel. Accordingly, and on a without admission basis, we have asked Ms. Fairfax to modify the post by inserting the text 'Branded Content' into the post caption. Ms. Fairfax actioned this request on 12 August 2021.

Samsung is concerned by the broader implications of the finding that the post was deemed to be advertising material under the Code despite the fact that Samsung did not pay for the post or have prior knowledge of it in advance of publication. We also maintain that, in any event, the hashtag #WorkingWithSamsung was sufficient to distinguish the post as advertising, as a minority of the Panel found. In the circumstances, Samsung intends to request an independent review of the Community Panel's determination in accordance with Ad Standards' independent review process.

REQUEST FOR REVIEW

Substantial Flaw in Reviewer's decision

We refer to our previous correspondence with Ad Standards regarding case reference number 0207-21. Consistent with that earlier correspondence and adopting the same defined terms, Samsung appreciates the opportunity to respond to the complaint made in relation to the Post and takes its responsibilities under the Code seriously. Samsung is seeking an independent review of the determination dated 28 July 2021 on the grounds that:

- there was a substantial flaw in the Community Panel's determination (determination clearly in error having regard to the provisions of the Codes or Initiatives, or clearly made against the weight of evidence); and/or*
- there was a substantial flaw in the process by which the determination was made.*

We confirm that no legal action is underway or contemplated in relation to the case.

The determination by the Panel that the Post was 'advertising' within the meaning of the Code was clearly in error having regard to the provisions of the Code and clearly made against the weight of evidence. Samsung is particularly concerned by the Panel's determination that Samsung had a 'reasonable degree of control' over the Post, applying the following reasoning:

"The Panel noted the advertiser's response that while there was a commercial relationship in place for Ms Fairfax to post about the product this post was outside of that agreement and was created on Ms Fairfax's own initiative. The Panel considered that the motivation for Ms Fairfax to post, although not explicitly part of an



agreement, was related to the ongoing commercial relationship between Ms Fairfax and the brand, and was not organic content.

The Panel considered that the advertiser has undertaken the activity of entering into an arrangement with an influencer, and in choosing to do so they are exercising a degree of control."

The Panel pointed to the commercial relationship between Samsung and Ms Fairfax to support its conclusion that Samsung had a 'reasonable degree of control' over the particular Post. The evidence established that the Post was created on Ms Fairfax's own initiative, outside the terms of Samsung's engagement with Ms Fairfax and without Samsung having prior notice of the Post. In these circumstances, regardless of a pre-existing commercial relationship with Ms Fairfax, Samsung did not have had any control over this particular Post and accordingly the Panel's determination was clearly made against the weight of evidence.

The Panel's decision also relied on unsubstantiated assumptions made by the Panel as to Ms Fairfax's motivation which led to her submitting the Post, which Samsung submits is an entirely separate question to whether Samsung had the requisite 'control'.

The conclusion in this is also clearly in error having regard to the definition of advertising in the Code (emphasis added):

"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 erroneously failed to consider the threshold requirement of the definition of advertising, i.e. whether the Post was published, or an activity undertaken "by, or on behalf of" Samsung. The determination is silent on this fundamental issue and instead only addresses other elements of the definition of advertising under the Code. At best, this threshold question was conflated with the question of 'control'. Had the Panel given this issue due consideration in light of the evidence, it would have concluded that the Post was not advertising by or on behalf of Samsung, within the meaning of the Code.

Samsung's secondary submission was that, if the Post was deemed to be advertising, it was clearly distinguishable as such. Samsung respectfully submits that the minority of the Panel who found that the hashtag #WorkingWithSamsung was sufficient to clearly



distinguish the post as advertising made the correct decision having regard to the weight of evidence. However, the majority of the Panel took the view that this hashtag:

"could also be interpreted as completing work using a Samsung device, and did not clearly identify that there was a relationship between Ms Fairfax and the brand".

The Practice Note in relation to section 2.7 of the Code does not prescribe the exact form of influencer advertising disclosures, but merely provides that "any relationship must be clear, obvious and upfront to the audience and expressed in a way that is easily understood". Samsung considers that the plain words "working with Samsung" meet this requirement. The reference to "Samsung" is well understood as a reference to a brand or company, and not to a particular device that might be supplied by that company or under that brand.

Applying this strained and theoretical construction, without also considering the overall context of the Post, further supports the conclusion that the Community Panel's determination was clearly made against the weight of evidence. There is nothing in the Post to suggest that Ms Fairfax was "completing work using a Samsung device" – the images featured in the Post are of Ms Fairfax with two other women attending Fashion Week. The women are dressed in designer clothing and Ms Fairfax is holding a glass of wine. The first image shows Ms Fairfax holding the smartphone to her ear, while the second image shows all three women reacting to their smartphone screens. While accepting that 'work' can take a number of forms, the evidence does not support the majority of the Panel's interpretation of the hashtag #WorkingwithSamsung, particularly in light of the other hashtags used in the Post, and the fact that Ms Fairfax had tagged @samsungau, which clearly indicate her commercial relationship with Samsung.

For the reasons set about above, the determination by the majority of the Panel in relation to the hashtag #WorkingWithSamsung was substantially flawed, as it was clearly in error having regard to the provisions of the Code and clearly made against the weight of evidence.

Substantial Flaw in Process

Samsung also considers that there was a substantial flaw in the process by which the Panel's decision was made. Samsung refers to and repeats its reasons in support of the ground that there was a substantial flaw in the Panel's decision.

INDEPENDENT REVIEWER'S RECOMMENDATION

I have decided, as an Independent Reviewer, to review an Instagram post with two images from the Instagram account of Nadia Fairfax, an influencer for Samsung Electronics Australia Pty Ltd (Samsung/company). A decision on 28 July 2021 by a majority of the Ad Standards Community Panel (Panel)



upheld the complaint about the posts as a breach of section 2.7 of the *AANA Code of Ethics* and its related *Practice Note*. The decision was that the post was ‘an advertising or marketing communication’ and was not clearly distinguishable as such. On being notified of the decision, Ms Fairfax, at the instigation of Samsung, modified the text of the post with the additional text: ‘Branded Content’.

BACKGROUND

The Instagram post of June 2021 is on the @nadiafairfax Instagram account. It features two images of Ms Fairfax and two other women all holding Samsung Galaxy Z Flip smartphones. The captions read: ‘Z Flip(ing) around FW with these two ... @galaxybysamsung.

There is a greeting: @_yanyanchan@sarahellen Hello!?

Other information in the heading to the post is shown in two hashtags: #WorkingWithSamsung#GalaxyZFlip, and #NadiaTakesSamsung.

COMPLAINT

The complaint was ‘this should be called out ... and influencer held responsible, as there are some influencers who do play by the rules and always declare paid partnerships yet others get away with it’.

ROLE OF REVIEWER

The Independent Reviewer role is limited. The reviewer may recommend that the Community Panel reconsider its decisions only in the following circumstances:

- Where new or additional relevant evidence which could have a significant bearing on the determination becomes available. An explanation of why this information was not submitted previously must be provided.
- Where there was a substantial flaw in the Community Panel’s determination (determination clearly in error having regard to the provisions of the Codes or Initiatives, or clearly made against the weight of evidence).
- Where there was a substantial flaw in the process by which the determination was made.

This application for review only falls within the third dotpoint.

Samsung acknowledged that Ms Fairfax is an influencer on their behalf, but the company said it did not authorize the post. This is not new evidence (the point was also made in its original response) and if it were it is not of such a nature as would lead a reviewer to recommend the Panel decision be changed.

There has also been no suggestion that ‘there was a substantial flaw in the process’.



The focus of this review, accordingly, is on whether the decision evidenced a ‘substantial flaw’ being clearly in error under the Codes and Initiatives, or clearly made against the weight of the evidence.

CONTEXT OF REVIEW

Section 2.7 of the Code requires the Panel to consider two tests:

- Does the material constitute an ‘advertising or marketing communication’; and if so
- Is the advertising material clearly distinguishable as such?

IS THE POST ‘ADVERTISING OR MARKETING COMMUNICATIONS?’

Under 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:

- (a) Over which the advertiser or marketer has a reasonable degree of control, and*
- (b) That draws the attention of the public in a manner calculated to promote or oppose directly or indirectly a product, service, person, organization or line of conduct.*

There is no issue that the post was not produced by Samsung. To fall within section 2.7 posts by an influencer must be due to ‘*an activity ... on behalf of an advertiser or marketer*’. That issue will be considered under (a), following.

I consider in reverse order the two criteria which determine whether the material is ‘advertising or marketing communication’.

(b) Does the Post draw the attention of the public to a product?

The *Practice Note* states:

Advertising or marketing communication should not be disguised as, for example, ... user-generated content, [or] private blogs.

Samsung

Samsung denied that the post was ‘advertising’ on the ground that, despite Ms Fairfax being an influencer for the company, it had not authorized the post. As evidence, Samsung noted that it had not paid for the post and ‘Ms Fairfax did not use the “paid



partnership with @GalaxybySamsung” handle or “sponsored” caption which she uses for Samsung-sponsored posts, including posts associated with the AAFW event’. The acronym ‘AAFW’ refers to ‘After-pay Australian Fashion Week’.

Community Panel

The Panel did not agree, stating:

- ‘[T]he placement of the product, the brand name tagged in the comments, the product hashtag and the additional two hashtags referring to the brand did amount to material which would draw the attention of the public in a manner designed to promote the brand’;
- [T]he motivation for Ms Fairfax to post, although not explicitly part of an agreement, was related to the ongoing commercial relationship between Ms Fairfax and the brand and was not organic content’.

By ‘organic content’ is meant ‘genuine user generated content’ or UGC: *Code of Ethics Practice Note* clause 2.7 column 1, para 4, p 13, p 14. ‘Organic content’ accordingly does not fall within ‘advertising or marketing communication’ and the Code does not apply.

Reviewer consideration

The post appears on Ms Fairfax’s Instagram account. There is a brief message to ‘@yanyanchan@sarahellen Hello!’ which together with the words ‘Z Flip(ing) around FW with these two ... @galaxybysamsung’ weigh in favour of the post being organic content and not advertising.

There are contrary factors.

- There is minimal content in the post – just the caption, one part of which refers pointedly to the Z Flip phone. The consequence is to heighten attention to the visual images.
- The visuals show three women dressed in glamorous dresses, appropriate for AAFW, but posing in a manner which inevitably means the viewer is aware of the Z Flip phone. This suggests the images are intended as commercial advertising, and since this is AAFW, the item is appropriately new and fashionable.
- Each is holding and focusing on a Samsung Z Flip phone in one image, and in the other image, while each still holds a Z Flip phone, one person is looking at the camera, but the other two appear to be concentrating on a phone conversation.
- Use of the Z Flip phone is prominent in both images. In neither image are the women addressing each other, suggesting this was not a social occasion recorded for personal friends or followers on an Instagram account.
- Ms Fairfax’s brief caption is ‘Z Flip(ing) around FW [a shortened version of AAFW] with these two’ followed by the reference to



@galaxybysamsung'. The reference to 'Z Flip(ing) around is another not so subtle drawing attention to the product. Use of the hashtag "@galaxybysamsung", the official Samsung Instagram account, suggests this is an event organized by Samsung at which the women are present; and their prominent use of and reference to the Z Flip phone implies that the purpose of their presence is to draw the attention of the public to this item.

- The Z Flip phone has been widely advertised by Samsung so that the phones are clearly recognizable as such and the post's reference to Z Flip(ing), @galaxybysamsung coupled with the hashtags #WorkingWithSamsung and #NadiaTakesSamsung, provide multiple references to connect the images to Samsung.
- Use of Ms Fairfax's Instagram account indicates the immediate audience is Ms Fairfax's followers. This cohort is likely to be tech savvy and keen to acquire the most recent phones such as the Z Flip phone. Influencers are chosen because businesses want to advertise to likely customers. So, this is an appropriate medium through which to achieve that end. In that context see "'Lines are being blurred' on Instagram gravy train", *The Australian* 20 September 2021, 19.
- At the same time Instagram posts are available to the general public and are used for advertising products and services, so the wider audience must also be taken into account. I am not tech savvy. Nonetheless, as part of that wider general audience, I am aware from the widespread and recent marketing of the Z Flip phone that it is a new product.

On balance, in my opinion, despite the post being on Ms Fairfax's Instagram account, the minimum caption content to followers, the depiction of the women, their clothing and posture, the prominent focus on the Z Flip phones, as well as the multiple use of the brand names, 'Samsung' and 'Galaxy' in the hashtags '@galaxybysamsung', '#WorkingithSamsung#GalaxyZFlip' and '#NadiaTakesSamsung', indicate to subscribers to Ms Fairfax's Instagram account that the post is designed draw the attention of the viewer to the Z Flip phone.

That finding was also the finding of the Panel, is uncontroversial and does not fall within the criteria for review.

(a) Did Samsung have a 'reasonable degree of control' over Ms Fairfax when acting as an influencer?

Samsung

Samsung argued that as the Code defines 'advertising or marketing communication' as published information 'by, or on behalf of an advertiser or marketer' and as it had not authorized the post, had no prior knowledge of it, had not been paid for it, and lacked the handles or captions used by Ms Fairfax for Samsung, the company could not be held to have had a 'reasonable degree of control' over Ms Fairfax. Nonetheless, Samsung did acknowledge that the circumstances were similar to other cases where the requisite degree of control



was established.

Community Panel

The Panel considered that the advertiser has undertaken the activity of entering into an arrangement with an influencer, and in choosing to do so they are exercising a degree of control.

Reviewer consideration

‘Reasonable degree of control’ over ‘any activity ... undertaken ... on behalf of an advertiser’, and the timing of that control, is only defined under ‘User Generated Content’: *Practice Note* p 14. As it is accepted that the material is not ‘user generated content’, nor is it on the brand owner’s platform, this definition is irrelevant. Accordingly, the Code and the relevant section of the Practice note do not define the time at which that control must be established, nor what is meant by ‘reasonable degree of control’ for the purposes of section 2.7.

Timing

In 0207-21, the Panel focused on whether there was an ‘*ongoing commercial relationship*’ between Ms Fairfax and Samsung, that is, was there a relationship between the two *at the time* the post was uploaded.

Most other cases concerning influencers which have been found to breach section 2.7 have also found that there was an *existing* relationship: see 0160-21; 0163-21; 0165-21; 0136-21; 0222-21; 0057-21; 0158-21. See Attachment B.

It is significant that in 0190-21 in which the relationship was in the past, there was no breach of section 2.7. The former influencer had noted on YouTube that the relationship was not current, and this acknowledgement, coupled with the content of the YouTube video, was sufficient to bring the finding within the organic content category.

This survey of the cases indicates that if there is a *current relationship* between the influencer and the brand, however, tenuous, or based on inference, at the time of the complaints that is sufficient for satisfaction of the timing issue.

The finding that a current relationship is sufficient is consistent with the principle that ‘Responsibility for developing content that is aligned to the AANA Codes falls to the advertiser’ (brand owner): *Practice Note*, col 2, para 3, p 13..

In 0207-21, as there is an admitted relationship between Ms Fairfax, any timing anomalies do not arise. Nonetheless, Ad Standards may wish to consider clarifying the timing issue.

Level of control

The Panel in 0207-21 considered that as Samsung had entered into an arrangement



with an influencer, the company was exercising a degree of control, even though the post had not been authorised. As the Panel In 0158-21 commented: ‘the clear relationship would constitute a reasonable degree of control’.

The existence of a relationship with an influencer has been cited as evidence of control even if the material complained about was not within the terms of that relationship. As a consequence, in 0207-21, the Panel ‘considered that the post[s] did meet this aspect of the criteria for the material being ‘advertising or marketing communication’ in the Code’. See Attachment A.

Reviewer consideration

It is common to see comments in the cases that the mere existence of a relationship between a company and an influencer is sufficient to establish ‘reasonable control’: Case 0163-21

In other cases, whether a relationship exists is not known and control has been inferred from references to brands or companies in the material: eg 0165-21 and see Attachment B.

The Panel has also noted in several cases that *‘influencers’ posts may also be created in circumstances in which there is no relationship context*: 0160-21; 0165-21; 0136-21. Despite that, the determination in these cases noted: *‘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 definition of ‘advertising’ in the Code refers to advertising etc as ‘any activity ... undertaken ... *on behalf of* an advertiser or marketer’. ‘On behalf of’ is defined as: ‘in someone’s interest; in aid of someone’: *Macquarie Concise Dictionary* (5th edn, 2009) 106. While the definition does not suggest that the brand owner must authorize the advertisement for it to be on the owner’s behalf, to do something to further someone’s interests suggests there must be a sufficiently close relationship for the person taking action to have knowledge of those interests, and hence a relationship with the person.

The reviewer takes no issue with that conclusion when it relates to an actual relationship. The suggestion is that to fall within section 2.7 there must be a clear indication in the material that a relationship exists.

Given the variety of approaches evident in the cases, it would be helpful if AANA took steps to clarify the timing at which the degree of control is to be established and what amounts to ‘reasonable control’.

In 0207-21, there was an existing relationship between Ms Fairfax and Samsung. In addition, Samsung in fact did exert control over Ms Fairfax and she complied. This



supports the existence of the relationship and requisite level of control over her.

In my view, that conclusion contains no substantial flaw.

IS THE ADVERTISING MATERIAL CLEARLY DISTINGUISHABLE AS SUCH?

The *Practice Note* states:

There is no absolute requirement that advertising or marketing communication must have a label however it must be clear to the audience. If it is clear to the audience that the content is commercial in nature (for example by the nature of the content, where the content is placed, how consumers are directed to the content, the theme, visuals and language used, or the use of brand names or logos), then no further disclosure or distinguishing element is needed. ...

... 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 (eg #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.

Samsung

Samsung pointed out that 'in the caption for the Post, Ms Fairfax included a number of indicators to disclose her association with Samsung. These include:

- @galaxybysamsung (tag or hyperlink to Samsung's official Instagram account);
- #WorkingWithSamsung;
- #GalaxyZFlip; and
- #NadiaTakesSamsung.

As to the hashtags '#WorkingWithSamsung' and '#NadiaTakesSamsung' Samsung submitted these 'clearly disclose a commercial relationship between Ms Fairfax and Samsung, especially together with the caption and the other tags used in the Post'. Samsung noted the wording was comparable to the #crownpartner hashtag in 0057-21 which was held in that case to be sufficient attribution.

Community Panel

- A minority of the Panel considered that the hashtag #WorkingWithSamsung did demonstrate that there was a relationship between Ms Fairfax and the brand, and that this was sufficient to clearly distinguish the post as advertising.
- The majority of the Panel considered that the hashtag #WorkingWithSamsung could also be interpreted as completing work using as Samsung device, and did not clearly identify that there was a relationship between Ms Fairfax and the



brand. The Panel considered that the use of the hashtag #WorkingWithSamsung on its own is not enough for the post to be clearly distinguishable as advertising.

Accordingly, the Panel, by majority, upheld the complaint.

Consideration

I acknowledge that discrimination between these cases is often reduced to fine distinctions. Nonetheless, they do give an indication of the kinds of factors which tip the balance. The factors referred to in the Practice Note quoted earlier include:

- Multiple use of brand names or logos;
- Language;
- Nature of content – is it clearly commercial;
- Visuals or theme.

Use of brand names or logos

Findings of breach for being insufficiently distinguishable as advertising arose in:

- 0160-21: tagging the brand but no hashtags demonstrating the relationship and nothing in the wording of the caption;
- 0165-21: featuring the product and a single reference to the brand's Instagram handle;
- 0136-21: tagging the brand on its own;
- 0222-21: nothing in the wording of the caption, no hashtags, no explanation of why the product was involved in the post.

By contrast, as Samsung notes, in 0057-21, the caption referred to the brand and there were two hashtags referring to the brand, accompanied by a hashtag at the foot of the advertisement #crownpartner.

The existing cases indicate that a reference to a brand in a hashtag or handle on its own is insufficient attribution.

By contrast, if the caption wording mentions the brand, coupled with more references to hashtags or other references to the brand or the product, coupled with a hashtag in some form which indicates the relationship this appears to be sufficient attribution.

This survey of the cases suggests, on the evidence, that Ms Fairfax's post is more aligned with the 'sufficient attribution' than the 'insufficient attribution' cases. Her caption refers to the Instagram account of Samsung - '@galaxybysamsung', the material contains several other Samsung references, namely, the hashtags



#WorkingWithSamsung' and #GalaxyZFlip as well as #NadiaTakesSamsung. The caption also reads 'Z FLIP(ing) around' which is a further reference to Samsung's new phone. In summary, the post contains multiple references to the brand owner and the product.

Language

Apart from the many references to the brand owner and to the product, the hashtag #WorkingWithSamsung' is similar in meaning to the equivalent '#crownpartner'.

The word 'partner' is defined as 'an associate with another as a principal or contributor... in a joint venture': *Macquarie Concise Dictionary* (5th edn, 2009) 916. In the hashtag '#workingwithsamsung', the expression 'working with' suggests a common enterprise. This meaning is supported by at least one of the definitions of 'working', namely, 'that performs the work of a business': *Macquarie Concise Dictionary* (5th edn, 2009) 1461. The definitions of the two hashtags have equivalent meanings.

Nature of content – is it clearly commercial

The Panel's earlier finding under the first test – is the post 'advertising or marketing communication' - supports a finding in support of their content being commercial in nature. In addition, the virtual absence of social content, also supports this finding.

Visuals, or theme

As discussed under the first test, the prominent focus in the post on the Z Flip phones would be artificial in a socially oriented Instagram. The conclusion on these issues reached earlier also reflect the commercial nature underpinning the post for the purpose of this second element of the tests.

Although I understand the point made by the majority of the Panel in relation to this hashtag, in my view, the factors just discussed based on the explanation in the Practice Note of the circumstances which indicate that the advertising material is clearly distinguishable as such, support a finding that this advertising was attributed to the advertiser. I note too, that the Practice Note states: 'There is no absolute requirement that advertising or marketing communication must have a label'.

In summary, it is my opinion that there was a substantial flaw in the determination of the majority of the Panel. The majority gave insufficient weight to the factors in the Code and the Practice Note, and too little weight to the evidence, as discussed. In particular, given the discussion of the factors leading to the finding that the post was clearly 'advertising or marketing communication', the same factors in combination are capable of meaning that the advertising material was commercial and was clearly distinguishable as such. In my opinion that is the case here. So too was the relationship between Ms Fairfax and Samsung, particularly in light of the hashtag #workingwithsamsung'



in conjunction with the other factors discussed which enabled this finding to fall within those for which ‘there is no absolute requirement ... for a label’

I recommend, taking into account the factors above, that as there was a substantial flaw in the initial determination of the Panel, the case should be reconsidered by the Panel.

Attachment A: whether there was an ‘existing relationship’

- **0222-21** (section 2.7 breached): *While it may be clear to some people ... that this was an advertisement, the post could also be interpreted as an organic produce promotion. The Panel considered that there was nothing in the wording of the caption to the video and no hashtags which clearly demonstrated the relationship between [the influencer] and the brand and the circumstances surrounding the posting of the product.*
- **0136-21** (section 2.7 breached): ‘there was nothing in the wording of the post and no hashtags which clearly demonstrated the existing relationship between [the influencer] and the brand and the circumstances surrounding the posting of the product’.
- **0165-21** (section 2.7 breached): ‘there was nothing in the wording of the Instagram story and no hashtags which clearly demonstrated the relationship between the influencer and the brand and the circumstances surrounding the posting of the product.’
- **0163-21** (section 2.7 breached): ‘most people would not be able to see the hashtag #collab written in white on the white background. ... [T]he use of the brand name and promotion of the sale was not sufficient to satisfy the Code’s requirements and that the placement of the hashtag #collab was not sufficient to make it clearly distinguishable as advertising.’
- **0160-21** (section 2.7 breached): [T]here was nothing in the wording of the original post and no hashtags which clearly demonstrated the relationship between [the influencer and the brand and the circumstances surrounding the posting of the product. [T]aging the brand on its own was not sufficient to satisfy the Code’s requirements.
- **0057-21** (section 2.7 not breached): [T]he post refers to an achievement/award received by the advertiser and [it] considered that it would [be] unlikely a person would post about such an accolade unless they had an investment in the promotion. The Panel noted that the post contains several hashtags referred to the advertiser, including one stating #crownpartner’. ... [T]he combination of the caption and the hashtags made it clear that the post was sponsored by the advertiser.
- **0158-21** (section 2.7 breached): [T]he commercial contained clear branding for the advertiser and a call to action. ‘W]hile the post did not include hashtags such as #ad or #sponsored, the caption for the post includes references to the material being a TV ad as referenced by the asterisk ‘incredible TV ad’ and also detailed ‘the influencer’s]



participation in filming the advertisement.

- **0190-21** (section 2.7 not breached): The Panel noted that the influencer clearly indicated on the material that the collaboration with the producer of the products had ceased and the text of the video featured several references to other brands.

Attachment B - 'reasonable level of control'

- **0222-21** (section 2.7 breached) 'The Panel considered that the motivation for [the influencer] to post, although not explicitly under contract, was closely related to the commercial relationship between [the influencer] and the brand and was not organic content created without incentive. The Panel considered that the advertiser has undertaken the activity of entering into an arrangement with an influencer, and in so doing it is exercising a degree of control.'
- **0057-21** '[T]he Panel noted that the advertiser had provided a response to the case confirming that they have an agreement with [the influencer] for the production of social media material and that therefore they did have a reasonable degree of control over the post.'
- **0158-21** 'The Panel noted that as [the influencer] is an ambassador for the advertiser and that while it is not known whether the creation of this post was at the request of the advertiser, the clear relationship between [the influencer] and the brand would constitute a reasonable degree of control over the post.'
- **0190-21** The Panel noted the advertiser's response that 'they had had a previous relationship with [the influencer] ... contracted for one year and that [the influencer] had met the requirements of the agreement prior to the posting of this YouTube video'. The Panel did not make a finding that this amounted to 'a reasonable degree of control'. Panel had also found that the video met the definition of advertising.

THE DETERMINATION ON 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 Panel's determination. Specifically, the Independent Reviewer found that the Panel had failed to give sufficient weight to the guidance in the Practice Note and the evidence when making a determination in relation to whether the advertising material was clearly distinguishable as such.



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

Is the material advertising?

The Panel noted the Independent Reviewer's confirmation of the Panel's initial decision that the material constituted advertising, and that this aspect was not in need of review.

Is the advertising material clearly distinguishable as such?

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

The Panel noted the Practice Note for the Code states:

"There is no absolute requirement that advertising or marketing communication must have a label however it must be clear to the audience. If it is clear to the audience that the content is commercial in nature (for example by the nature of the content, where the content is placed, how consumers are directed to the content, the theme, visuals and language used, or the use of brand names or logos), then no further disclosure or distinguishing element is needed...."

"...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 it had considered a similar issue in case 0057-21, in which:

"The Panel noted that the post refers to an achievement/award received by the advertiser, and considered that it would unlikely a person would post about such an accolade unless they had an investment in the promotion. The Panel noted that the post contains several hashtags referring to the advertiser, including one stating #crownpartner. The Panel considered that the combination of the caption and the hashtags made it clear that the post was sponsored by the advertiser."

The Panel noted that it had also considered a similar issue in case 0130-21, in which:

"The Panel noted that the caption for the advertisement included information relating to where the product could be purchased and considered that this would be an



indication to some members of the community that this was a commercial post. However, the Panel considered that not all members of the community would be able to identify this as advertising based on this description alone. The Panel noted that since the complaint had been received the advertiser had added #ad and a paid promotion tag to the advertisement. The Panel considered that before these additions the post was not clearly distinguishable as advertising.”

The Panel noted that in order to make a determination on whether the material was clearly distinguishable it needed to consider the nature of the content, where the content is placed, how consumers are directed to the content, the theme, visuals and language used and the use of brand names or logos.

The nature of the content

The Panel noted that the clear focus of the post was on promoting the new Samsung phone. The phone was mentioned by name in the caption and in a hashtag and in both images the women are shown holding and looking at their phones. While there is some focus on the women in the post, the main focus is on promoting the phone. Overall, the Panel considered that the post was clearly commercial in nature.

The placement of the content and how consumers are directed to the content

The Panel noted that the majority of consumers who saw this content would have been followers of the @nadiafairfax account, or people looking at or following one of the hashtags used in the account. The Panel noted that the relevant audience provision had been removed from the Code in February 2021, however the placement of the content on the @nadiafairfax account and the use of brand hashtags would indicate that this advertisement was targeted at people already following Ms Fairfax who would be aware of her involvement with the brand, or who were interested in the product being promoted.

The theme, visuals and language used

As noted above, the Panel considered that the clear focus of the post is on the phones and the women using the phones. The Panel noted that in both images the phones are shown prominently, and the caption mentions the brand three times in tags and hashtags and the name of the phone twice.

The Panel considered that there is also some focus on the women and their outfits. The Panel noted that while this post was in line with a fashion event, there is no mention of the event in the caption of the post.

Overall, the Panel considered that the theme, visuals and language of the advertisement highlighted the focus on the brand and promotion of the phone.

Use of brand names or logos

The Panel noted that the brand name Samsung was used three times in the post (@galaxybysamsung, #WorkingWithSamsung #NadiaTakesSamsung) and the phone name was referenced twice (Z FLIP(ing) around, #GalaxyZFlip). The Panel considered



that the repeated use of the brand and product names gave a sufficient indication that the post was commercial in nature.

Is the relationship clear, obvious and upfront, and expressed in a way that is easily understood?

Consistent with the determination in case 0057-21, the Panel considered that the combination of the themes, visuals and language of the ad and the use of the brand and product name multiple times, did mean that the post was clearly commercial in nature. Unlike the determination in case 0130-21, the identification of the material as commercial did not rely solely on one element of the caption.

The Panel considered that the individual use of the brand name, hashtags or product images would not be sufficient to distinguish this material as advertising, but the combination of these elements mean that the commercial nature of this post was clear, obvious and upfront and expressed in a way that is easily understood. Though irrelevant to this determination, the later addition of #BrandedContent put the matter beyond doubt.

2.7 Conclusion

On review, the Panel determined that the advertisement was clearly distinguishable as such, did not breach Section 2.7 of the Code.

Conclusion

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