



**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>0223-22</b>
<b>2. Advertiser :</b>	<b>Natio</b>
<b>3. Product :</b>	<b>Toiletries</b>
<b>4. Type of Advertisement/Media :</b>	<b>Internet - Social - Instagram</b>
<b>5. Date of Determination</b>	<b>28-Sep-2022</b>
<b>6. DETERMINATION :</b>	<b>Dismissed</b>

### ISSUES RAISED

AANA Code of Ethics\2.7 Distinguishable advertising

### DESCRIPTION OF ADVERTISEMENT

This Instagram story posted to the @emmahawkins\_ account features an image of a tinted moisturiser on a shop shelf with the text, "PSA while I'm waiting in the pharmacy [Face with tears of joy emoji] This is the Bomb! @natio beauty".

### 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:

*I'm writing in response to Case 0223-22 relating to an Instagram Story by [the influencer] which included a Natio colour cosmetic product. This post was published on [the influencer's] account without financial support, contractual obligation or direction from Natio Pty Ltd.*



*It is our belief that the content does not constitute ‘advertising or marketing communication’. We as the brand had no control over this content, it did not receive brand approval and we had no prior knowledge of its existence prior to its publication. A commercial agreement was made between [the influencer] and Natio for a three-month period (Please see attached Creative Brief). The agreement saw [the influencer] create three Instagram posts/ reels and corresponding stories over the course of April-June 2022. As per Ad Standards, [the influencer] was required to acknowledge these posts as a paid partnership. All material was approved by both parties prior to publication.*

*Natio again hired [the influencer] to produce paid content for Father’s Day, posted on 31 August 2022. This content clearly stipulates that it is part of a paid partnership and required approval from the brand prior to posting. Every paid post was covered in our agreements with [the influencer]’s team. There is no ongoing agreement with [the influencer] and we can confirm she was not under contract at the time she posted the story in question, 8 September 2022.*

*The post in the Ad Complaint is not included in our content calendar, it does not align with our marketing communications, and was not requested or supported by Natio in anyway. This content was not posted in an attempt to provide additional value to any past agreements.*

*We appreciate that [the influencer] genuinely values the Natio brand and our products. It is this alignment in values that is a contributing factor as to why we have worked with her on the two aforementioned campaigns. We as a brand look to produce content with creators who appreciate our products and whose genuine opinions resonate with their engaged audiences. It is not within our interest to work with influencers who are disingenuous about their selected brand partners. We hope that you will take this into consideration when forming your decision.*

*Our sincere thanks for providing the opportunity to respond.*

## **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 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”.

### **Does the material constitute an ‘advertising or marketing communication’?**

The Panel considered that the post did draw attention of the public to the products through the still image on the story, the close up of the product, product name and price, and the tagging of the brand.

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.

A minority of the Panel considered that while the advertiser did have an existing relationship with the influencer, that relationship was for one-off rather than ongoing promotions, this post was outside the provisions of that agreement and the advertiser did not have any expectation of promotion, nor did it have control over the content or posting of this image. The minority noted that the influencer did not receive payment or other apparent benefit from posting the image.

Further, the minority of the Panel considered that the post did not appear to be ‘staged’ but rather appeared to be an opportunistic moment while the influencer was in store and the intention was simply to share a favourite product with followers.

The majority of the Panel acknowledged that the advertiser may not have had creative control over the video, however noted that the brand had a paid advertisement in the Influencer’s Instagram stories during the week before this advertisement appeared. The majority noted it had considered a similar scenario in case 0160-22, in which:

*“The Panel noted the advertiser’s response that a commercial relationship did exist between the influencer ... and the brand, however the requirements for that agreement had been fulfilled and the agreement had ended. The Panel further*



*noted the advertiser's statement that this post in this case was outside the arrangement and the advertiser was unaware of it.*

*...The Panel acknowledged that the advertiser did not have creative control over the video, however there was an affiliate relationship between the content creator and the advertiser and that this would constitute a reasonable degree of control."*

Consistent with the previous determination, the majority of the Panel considered that there was a very recent affiliate relationship between the content creator and the advertiser and that this constituted a sufficient degree of control to satisfy the definition of advertising under the Code. The Panel noted that the post was about the advertiser's products and not, for example, a competitor's.

The Panel determined that the Instagram story was an advertisement.

#### **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 image is a close-up of the product in which the product name, model (colour) and price is visible. The Panel further noted the large tag of the brand and the strong endorsement of the product – "This is the Bomb!".

The minority of the Panel considered that the post does not declare the existing relationship between the brand and the influencer, and suggests that it is a public service announcement (PSA) rather than an advertisement. The minority considered that the post was not clearly distinguishable as advertising.

The majority of the Panel noted that the brand had a paid advertisement in the Influencer's Instagram stories during the week before this advertisement, and considered that typical viewers of the stories would be aware of the existing relationship. The majority noted that while this was not a determining factor, it was an important consideration.

The majority of the Panel considered that while the Influencer had indicated that this post was a public service announcement (PSA) rather than clearly stating it was an



advertisement, the combination of the product name, model (colour), price and strong endorsement did mean that the post was clearly commercial in nature and would be perceived as such by typical readers.

Overall the Panel considered that while the individual use of the brand name or product image would not be sufficient to distinguish this material as advertising, the combination of these elements meant that the commercial nature of this post was clear, obvious and upfront and expressed in a way that is easily understood.

### **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.