



Ad Standards Community Panel
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Ad Standards Limited
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Case Report

1. Case Number :	0233-21
2. Advertiser :	McDonald's Australia Limited
3. Product :	Other
4. Type of Advertisement/Media :	Internet - Social - Instagram
5. Date of Determination	25-Aug-2021
6. DETERMINATION :	Upheld - Modified or discontinued

ISSUES RAISED

AANA Code of Ethics\2.7 Distinguishable advertising

DESCRIPTION OF ADVERTISEMENT

This Instagram Post dated 28/07/2021 on the @southaussiewithcosi account features one image. The caption on the post states: "Verified @maccas_sa have been serving South Australians for 50 years. How cool is that? Tonight we are celebrating their birthday with delivery and my girls are wearing the @peteralexanderofficial limited edition maccas PJ's".

The images depicts a man, woman and two children in matching McDonalds pjamas and holding bags stating McDelivery.

THE COMPLAINT

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

I allege the post was sponsored by either Peter Alexander and/or McDonalds and this was not clear in the post by the influencer (South Aussie with Cosi) by using hashtags e.g. #ad or #sponsored.

THE ADVERTISER'S RESPONSE

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

Thank you for requesting a response to complaint number 0233-21 (Complaint).



We note that the Complaint has raised issues under the following code of practice:

- *AANA Code of Ethics – section 2.7*

McDonald's takes its obligations seriously in respect of adherence to all the codes of practice administered by Ad Standards. McDonald's entirely refutes any suggestion in the complaint or otherwise that the Advertisement breaches the Codes. Please see details below.

AANA Code of Ethics

In the current case, the complaint claims that the Advertisement was "sponsored by McDonald's and this was not clear in the post by the influencer (South Aussie with Cosi) by using the hashtags eg #ad or #sponsored."

Section 2.7 provides the following:

"2.7 Advertising or Marketing Communication must be clearly distinguishable as such to the relevant audience".

The first issue to consider is whether the content in question is, in fact, an "advertising or marketing communication" which McDonald's has a reasonable degree of control over.

It is our submission that McDonald's does not have a reasonable degree of control on the following basis:

- *McDonald's has a partnership with SAFM, which is a commercial radio station that broadcasts to Adelaide. McDonald's gifted the products as a gesture of goodwill and to support SAFM. The talent in question is part of the breakfast radio crew with SAFM and has his own personal brand/TV show called "South Aussie with Cosi". McDonald's does not have any commercial relationship with "South Aussie with Cosi" or the talent directly. As such the content posted on the account "SouthAussiewithCosi" is entirely outside of the McDonald's reasonable control.*
- *All the products were provided as gifts, therefore there was no formal agreement or expectation for any content to be created on social media to promote McDonald's. In fact, it is the talent who has the reasonable control over the content.*
- *Furthermore, in respect of advertising materials and communications that McDonald's has a reasonable control over, McDonald's would have the opportunity to re-post the content on its official social media account or provide its feedback or approval on the content. In this case, the post was made independently of McDonald's without its knowledge, authority or approval.*
- *Unlike the previous cases that the Panel has determined, in the current case it is not reasonable to assume that the motivation to provide free products is that they will*



post about the products or otherwise draw attention of their followers to the brand given that McDonald's does not have any affiliation with "SouthAussiewithCosi".

If, notwithstanding the above, the Panel considers the content is an 'advertising or marketing communication', we submit that the post from the talent is clearly distinguishable as advertising for the following reasons:

- The post mentions another third party brands i.e. @peteraleanderofficial*
- The caption of the post reads as a piece of advertising as it refers to McDelivery, limited edition pyjamas and McDonald's 50 year birthday celebration.*
- The products (i.e. the food and pyjamas) are central to the post and the label on the product is visible (e.g. McDelivery).*

AANA Food and Beverages Code

We submit that this code does not apply as the marketing communication does not breach any of the sections.

In relation to section 4.2 of this code please see our submissions below.

AANA Advertising to Children Code

We note that this Code is applicable if the Advertisement is considered as Advertising or Marketing Communications to Children. The definition is set out under section 1 of the Code which provides that "having regard to the theme, visuals and language used, are directly primarily to Children and are for Product."

We submit that this Code is not applicable to the Advertisement considering the language, visuals and theme of the Advertisement has a primary appeal to adults than children aged 14 years or younger.

AFGC- Quick Service Restaurant Initiative

The QSRI is applicable if the Advertisement is considered as Advertising or Marketing Communications to Children or the program is directly primarily to children. In this respect, we submit that the Advertisement is not in breach of the QSRI based on our submissions above.

Other Parts of Section 2 of the AANA Code of Ethics

McDonald's does not believe the Advertisement is in breach of the following parts of section 2 of the Code of Ethics:

- 2.1. Discrimination or vilification;*
- 2.2 – Exploitative and degrading;*
- 2.3 – Violence;*
- 2.4 – Sex, sexuality and nudity;*
- 2.5 – Language;*
- 2.6 – Health and Safety; and*
- 2.7 – Distinguishable as advertising (see details above).*



Conclusion

In light of the above, McDonald's respectfully disagrees with the complaint and requests that the Panel dismiss the complaint on this basis.

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 did not disclose that it was 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.

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 products in the Instagram post with the brand name tagged in the caption and reference to McDonald's 50th birthday 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 the product had been provided for free to the radio station that the influencer worked for, however there had been no control over who at the station received the product.



A minority of the Panel considered that the advertiser had no control over who at the radio station received the product and therefore no influence over the creation of the Instagram post, and therefore could not be seen to have a reasonable degree of control over the post.

The majority of the Panel noted that the advertiser had an ongoing sponsorship arrangement with the radio station which the influencer worked for, and the product was provided in relation to that sponsorship arrangement. The Panel considered that while the advertiser did not have direct editorial control over the post, the influencer was motivated to publish positive content about his employer's sponsor, and in the context of the relationship would not, for example, have posted similarly about a competitor to the employer's sponsor. The Panel considered that the nature of the sponsorship meant that the advertiser would have had an expectation that use of the product provided to the radio station would promote its brand in a positive manner, and that this constituted a sufficient degree of control over the Instagram post to satisfy this provision of the Code.

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 considered that while it may be clear to some people viewing the material that this was an advertisement, the post could also be interpreted as an organic product promotion. The Panel considered that there was nothing in the wording or pictures of the material which identified that the influencer had received the product for free due to the advertiser's sponsorship arrangement with the radio station that he worked for.

The Panel considered that tagging the brand in the caption was not sufficient to satisfy the Code's requirements and that the Instagram 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 DETERMINATION

McDonald's takes its responsibility as an advertiser seriously. We are disappointed with the outcome of the complaint, however, we respect the final decision from the Panel. We have communicated with the influencer, and the influencer has agreed to remove the post.