



**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>0191-22</b>
<b>2. Advertiser :</b>	<b>Coles</b>
<b>3. Product :</b>	<b>Other</b>
<b>4. Type of Advertisement/Media :</b>	<b>Internet - Social - Instagram</b>
<b>5. Date of Determination</b>	<b>14-Sep-2022</b>
<b>6. DETERMINATION :</b>	<b>Upheld - Modified or Discontinued</b>
<b>7. IR Recommendation:</b>	<b>Panel to Reconsider</b>
<b>8. Date of reviewed determination:</b>	<b>9-Nov-2022</b>
<b>9. Determination on review:</b>	<b>Upheld – Modified or Discontinued</b>

### ISSUES RAISED

AANA Code of Ethics\2.7 Distinguishable advertising

### DESCRIPTION OF ADVERTISEMENT

This series of 18 stories posted to the “@The\_stingy\_mama account features pictures of various Harry Potter products and price tags with the tag “@colessupermarkets”.

### 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 ORIGINAL RESPONSE

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

*Coles confirms that it has a current commercial relationship, via agreement (the Agreement), with the owner and controller of the Instagram account.*



*As part of this agreement, Coles requires that we will be provided with all content that uses the Coles name or is related to the agreement for review, prior to that content being distributed.*

*Additionally, Coles has previously provided clarification and instruction to our content creator partners via ongoing communications reminding them of the requirements as set out under the AANA Code of Ethics.*

*Coles understands the Instagram account distributed 22 Instagram stories on 8 August 2022. Coles confirms the initial five Instagram stories distributed on 8 August 2022 were related to the Agreement and had been approved by Coles prior to distribution. These stories were marked "AD" in accordance with AIMCO Code of Practice to ensure the content was distinguishable as advertising.*

*Following that initial distribution, Coles understands the Instagram account proceeded to distribute another 17 Instagram stories approximately three hours later which related to a shop undertaken that evening at a local Coles store and is the subject of this complaint. Coles was unaware of this content and had not approved the stories as required by the Agreement.*

*As a result of the complaint made to Ad Standards, Coles raised this action directly with the owner and controller of the Instagram account to discuss the concerns raised and remind them of the requirements to adhere to the AANA Code of Ethics. In Coles' view it has not breached the provisions of the AANA Code of Ethics as the Instagram account holder had not adhered to the contractual provisions outlined in the Agreement. Additionally, Coles had no reasonable control of the posts in question when the material was published.*

#### *AANA Code of Ethics*

##### *2.1 Discrimination or vilification*

*Coles does not believe this distribution of content portrays people or depicts material in a way which discriminates against or vilifies a person or section of the community on account of race, ethnicity, nationality, gender, age, sexual orientation, religion, disability, mental illness or political belief.*

##### *2.2 Exploitative and degrading*

*Coles does not believe this distribution of content employs sexual appeal where images of Minors, or people who appear to be Minors, are used; or in a manner which is exploitative or degrading of any individual or group of people.*

##### *2.3 Violence*

*Coles does not believe this distribution of content presents or portrays violence.*

##### *2.4 Sex, sexuality and nudity*

*Coles does not believe this distribution of content presents or portrays sex, sexuality or nudity in any way.*

##### *2.5 Language*



*Coles believes this distribution of content uses language appropriate in the circumstances. The content does not include any strong or obscene language.*

#### *2.6 Health and Safety*

*Coles does not believe this distribution of content depicts material that is contrary to Prevailing Community Standards on health and safety.*

#### *2.7 Distinguishable as advertising*

*As noted above, content distributed by the Instagram account that related to the Agreement was provided for review and approval by Coles prior to distribution, as required, and is clearly distinguishable as advertising. The subsequent distributions were acts of the Instagram account owner and controllers' own volition and were not related to the Agreement. Resultingly, in Coles' view, we have not breached the provisions under the AANA Code of Ethics as we had no input or control over the influencer content or outcome.*

*Following receipt of this complaint, and in accordance with Coles' commitment to compliance with the AANA Code of Ethics Coles immediately addressed the matter with the owner and controller of the Instagram account to ensure this matter does not arise again.*

### **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 content was 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 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 noted that the stories had a clear focus on the products, the prices of the products and the tag directing people where to purchase the products. The Panel considered that the material was drawing the attention of the public in a manner calculated to promote the products.

With regards to whether the advertiser or marketer has a reasonable degree of control, the Panel noted that the advertiser advised they have a current commercial arrangement with the influencer, but that this content was posted outside of that arrangement.

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 where there is no commercial 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 had an existing relationship with the influencer and was aware of her position as an influencer. The Panel considered that while there was no direct request or stipulation for the influencer in relation to these specific stories, the post was in line with the existing relationship with the advertiser. The Panel considered that this existing relationship could motivate the influencer to promote this product, for example instead of products of a competing business. The Panel considered that in choosing to partner with an influencer the advertiser is exercising a degree of control.

For these reasons, the Panel considered that the Instagram stories 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 influencer was known for promoting content relating to bargains and deals available at different locations. The Panel considered that while the focus on the products and tagging of the advertiser may in other circumstances be clearly identifiable as advertising, in this instance the advertising blended with the other content produced by the influencer and could be mistaken for editorial content.

The Panel considered that people following the influencer would rightly expect that the nature of the relationship between the advertiser and influencer be disclosed, otherwise may assume that it is unbiased editorial content. As such, the Panel considered that the advertisement was not clearly distinguishable to the audience.

## **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**

Coles thanks Ad Standards for affording us the opportunity to respond to the Community Panel’s determination.

Coles notes that the Instagram stories posted by the user “@The\_stingy\_mama” and subject to the complaint ran from around 8pm on 8 August 2022 for a period of 24 hours and were automatically deleted after this period. Coles advises that this content will not be published again and the stories were not seen after the initial distribution. Coles reiterates that it was not aware of the distribution of the Instagram story posts subject to this complaint and it was outside of our reasonable control. Please note, where advertising is within the reasonable control of Coles we have agreements in place with our influencers. These agreements require influencers to comply with all applicable laws, regulations and codes of conduct relating to their commitments, specifically including the AANA Code of Ethics and AIMC Code of Practice.

We would like to exercise the option to request an independent review of the Community Panel’s determination, and look forward to receiving further correspondence from Ad Standards on this process.



## REVIEW REQUEST

*We refer to your correspondence dated 4 October 2022 and addressed to Coles Supermarkets Australia Pty Ltd (Coles) regarding the determination and final case report produced by the Ad Standards Community Panel (the Panel) in respect of Ad Standards Case Number 0191-22 (the Complaint).*

*Coles writes to request Independent Review of the Panel's determination in respect of the Complaint on the grounds that there was a substantial flaw in the process by which the determination was made; and there was a substantial flaw in the Community Panel's determination (determination clearly in error having regard to the provisions of the Code).*

*Coles respectfully submits that there was a substantial flaw in the Community Panel's determination in respect of the Complaint by failing to consider the guidance outlined in the AANA Code of Ethics Practice Note (February 2021) (the Practice Note).*

### *Coles' submission:*

*The AANA Code of Ethics (February 2021) (the Code) states "[t]his Code is accompanied by a Practice Note which has been developed by the AANA. The Practice Note provides guidance to advertisers and complainants and must be applied by the Ad Standards Community Panel in making its determinations. In the event of any ambiguity the provisions of the Code prevail". The Practice Note's objectives reaffirm this statement.*

*Coles understands its obligations under Section 2.7 of the Code that requires that advertising must be clearly distinguishable as such.*

*The Practice Note provides further guidance on Section 2.7 of the Code including "[t]he 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". The Practice Note clarifies that "UGC is material which has not been created by the brand owner but by a person interacting on the brand owner's digital marketing platform" and states "[a] brand owner has reasonable control of user generated content when it becomes aware of the material. An advertiser becomes aware of material when:*

- it has posted or published material;*
- it becomes aware of UGC through reasonable review;*
- a user notifies the advertiser/marketer of the UGC;*

*or a complaint is lodged with Ad Standards about the UGC."*

*The agreement between Coles and the owner of the Instagram account (Instagram Account Owner) provides that the Instagram Account Owner must provide all promotional and other publicity materials related to the agreement or that uses Coles' name, to Coles for approval before posting any such material (Agreement). As noted in Coles' initial response to Ad Standards regarding the Complaint, dated 22 August*



*2022, the initial five Instagram stories distributed by the Instagram Account Owner on 8 August 2022 were compliant with the terms of the Agreement as they had been approved by Coles prior to distribution. These stories were marked “AD” in accordance with the AIMCO Code of Practice to ensure the content was distinguishable as advertising.*

*Following these five initial Instagram stories, Coles understands the Instagram Account Owner proceeded to distribute another 17 Instagram stories on 8 August 2022 in breach of the terms of the Agreement, as Coles had not created or approved of the material prior to it being distributed by the Instagram Account Owner. In fact, Coles was unaware of these stories until it was advised by Ad Standards on 15 August 2022. Each of these 17 Instagram stories had tagged @colessupermarkets and were displayed on Instagram for 24 hours.*

*Oxford Languages defines the word “control” to mean “the power to influence or direct people's behaviour or the course of events”. Coles contends that it cannot be considered to have had ‘reasonable control’ over an Instagram Account Owner who has contravened the terms of the Agreement by not adhering to the contractual obligations that regulates Coles’ use of the Instagram Account Owner for advertising.*

*In light of the information above, Coles submits that there is a substantial flaw in the Ad Standards process and determination in upholding this case. In regards to the process, the Practice Notes must be considered in conjunction with the Code. In regards to the determination, the Practice Note makes it clear that the Code does not apply to UGC content that was not created by Coles as the Brand Owner and Coles did not have ‘reasonable control’ as Coles was unaware of the UGC until notified by Ad Standards.*

## **INDEPENDENT REVIEWER’S RECOMMENDATION**

### **Independent Review Decision**

I recommend that the Community Panel review its determination in this matter. In my view there was a substantial flaw in the Panel’s determination in that it did not expressly consider an important issue concerning the interpretation and application of the AANA Code of Ethics.

### **Issue in dispute**

The issue in dispute in this matter can be briefly stated: does a communication that would ordinarily fall within the definition of ‘advertising’ in the Code fall outside that definition if it occurred contrary to the contractual arrangement put in place by an advertiser?

In this matter the advertiser (Coles Supermarkets Australia Pty Ltd) had a commercial arrangement with the owner and controller of an Instagram account, (‘the influencer’). That agreement required the influencer to comply with the AANA Code of Ethics and to submit all content that uses the Coles name or is related to the agreement for review and approval prior to the content being distributed.



On 8 August 2022 the influencer distributed 22 stories about items that could be purchased from a Coles store. The 5 initial stories were submitted to and approved by the advertiser prior to distribution, in accordance with the agreement. Those stories were marked 'AD' to signify that it was advertising.

The subsequent 17 posts were not submitted to the advertiser, and nor was it aware of the content prior to publication.

After receiving a complaint about the 17 posts the advertiser raised the matter with the influencer and reminded her of the requirement to adhere to the Code. The posts were live for a period of 24 hours.

The Community Panel upheld a complaint that the advertiser was in breach of Section 2.7 of the Code of Ethics – that '*Advertising shall be clearly distinguishable as such*'.

#### **The advertiser's submission**

The advertiser has submitted, both in response to the complaint and in the application for review of the Panel decision, that the 17 posts did not fall within the definition of '*advertising*' in the Code. That term is defined (in part) as follows:

*... 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 ...*

The advertiser submits that it did not have reasonable control over the 17 posts by the influencer as she did not adhere to the contractual agreement, and in particular did not submit the posts to the advertiser for review and approval before distribution. Her actions did not fall under the agreement and were of her own volition. The posts were '*user generated content*', as defined in the AANA Code of Ethics Practice Note (Feb 2021). As the advertiser was not aware of that content prior to distribution, that activity was not within the advertiser's reasonable control as discussed in the Practice Note.

The advertiser's submission also draws attention to the definition of '*control*' in Oxford dictionaries – '*the power to influence or direct people's behaviour or the course of events*'.

For those reasons, the advertiser submits that there was a substantial flaw in the Panel's determination, in failing to have proper regard to the provisions of the Code and the Practice Note.

#### **The Community Panel's reasoning**

The Community Panel noted the advertiser's submission that the content was posted outside the commercial arrangement it had with the influencer. The Panel did not further explore that point, other than to note that '*the advertiser had an existing*





*relationship with the influencer and was aware of her position as an influencer [and] the post was in line with the existing relationship with the advertiser’.*

Otherwise, the Panel relied on a line of reasoning that has been adopted in other Panel determinations (eg, Case 0323-21). The Panel commented that in applying the concept of ‘*reasonable degree of control*’ in the Code, account should be taken of the business context for influencer postings. Influencers operate as an advertising medium to promote brands and products, for which they may be paid or provided with free products. An influencer arrangement may be established by an agent or business, and there may be no commercial relationship context for a posting or direct request that it be made. Given the relationship that existed, that the post was in line with that relationship, and the possible motivation of an influencer to support the advertiser, the Panel found that ‘*in choosing to partner with an influencer the advertiser is exercising a degree of control*’.

#### **Complainant’s view**

**The complainant reiterated their view that Coles should take responsibility for the posts. Analysis of the application for review**

In my view, the Panel has not properly – or at least, expressly – addressed the advertiser’s contention that it does not have a ‘*reasonable degree of control*’ over the activity of an influencer that occurs outside or contrary to terms of a commercial agreement between the advertiser and the influencer. The failure to address that contention is, in my view, a substantial flaw in the Panel’s reasoning, having regard to the importance of that concept in the Code and the Practice Note.

In recommending that the Panel reconsider its determination I observe that there are considerations pointing each way. On the one hand, an advertiser can reasonably argue that it should not bear responsibility for unauthorised activity when it has been astute and careful enough to put a formal agreement in place with an influencer. In that way the advertiser displays its commitment to ensuring that the requirements of the AANA Code of Ethics are observed. Some weight should be attached to the positive steps taken by the advertiser to exert its control over influencers it has engaged.

On the other hand, it is orthodox that an organisation can be held vicariously liable for actions taken by its staff and contractors, even when contrary to established work practices. The Code explicitly places a responsibility on advertisers to ensure compliance with advertising standards. It may be unfortunate for an advertiser that it is held responsible for unauthorised actions, but that could be viewed as a necessary consequence of the regulatory obligation placed on advertisers. It is always open to the advertiser – as occurred in this case – to publicly explain yet apologise for unauthorised action by an influencer.

I recommend, accordingly, that that Panel reconsider its determination having regard to these and other relevant considerations.

#### **PANEL 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 the Panel's determination. Specifically, the Independent Reviewer noted that the Panel had made a determination without giving adequate consideration to whether the advertiser had a reasonable degree of control over the activity of an influencer that occurs outside or contrary to the terms of a commercial agreement between the advertiser and the influencer.

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

**Section 2.7: Advertising shall be clearly distinguishable as such.**

The Panel noted that in its previous consideration of the advertisement it had determined that the material met the definition of advertising finding that the advertiser had a reasonable degree of control over the stories.

The Panel noted the advertiser's submission and the Independent Reviewer's comments that the advertiser did not have knowledge of the additional posts and that they were done outside of the contract in place between the advertiser and influencer setting out the influencer's obligations.

The Panel acknowledged that the advertiser had done the right thing in putting a contract in place with the influencer, which required disclosure on authorised posts. The Panel considered that it was unfortunate that the influencer had chosen to post additional images outside of the agreement.

The Panel noted that under the Code it is the responsibility of advertisers to ensure influencers engaged by their business comply with advertising standards. In particular, the Panel considered that when an influencer is contracted to promote a business, it is the responsibility of that business to ensure that the contract covers all mentions of their business and addresses disclosure in relation to unauthorised mentions (or prohibits them).

The Panel noted that the material subject to the complaint was posted on the same day as material authorised by the brand. The Panel considered that most members of the community would consider it reasonable that posts made within a period of less than a day of contracted posts should disclose a relationship with the advertiser.

The Panel considered that the advertiser's obligation under the code extended to ensuring that influencers engaged by them understand the requirements for advertising disclosure, and that they have control over influencers' posts at least to the extent that they control of the wording of contracts under which they engage them.



Finding that the advertiser did have a reasonable degree of control over the material, the Panel determined that the stories did meet the definition of advertising under the Code.

Consistent with the original determination, the Panel determined that the advertisement was not clearly distinguishable as such.

**Section 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**

On review, the Panel determined that the advertisement breached Section 2.7 of the Code and the Panel upheld the complaint.