

## Case Report

1. Case Number :	0143-24
2. Advertiser :	Guzman y Gomez (Holdings) Limited
3. Product :	Food/Beverages
4. Type of Advertisement/Media :	Internet - Social - Instagram
5. Date of Decision:	5-Jun-2024
6. Decision:	Upheld – Modified or Discontinued

### ISSUES RAISED

AANA Code of Ethics\2.7 Distinguishable advertising

### DESCRIPTION OF ADVERTISEMENT

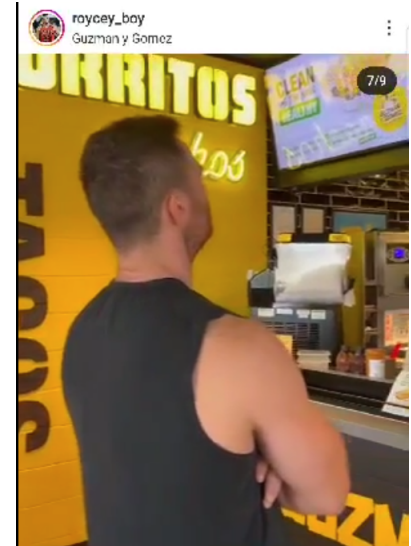
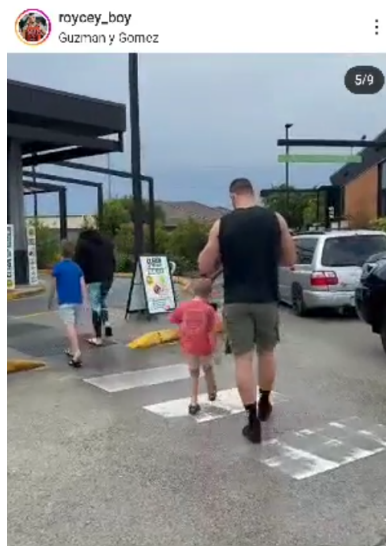
This post on the @roycey\_boy Instagram page on 21 April 2024 features multiple images of the influencer and his family and a package and promotional material with GYG branding, as well as the influencer and his family visiting a GYG store.

The caption for the post states: "@guzmanygomez is a bit of a go to for me when I'm eating out but want to keep it to a healthy option. The perfect place to treat the family to lunch when we get a little cabin fever on a rainy Sunday.

And hopefully keeping @the\_sportsdietitian happy with a higher quality option for hitting macros ;)

It was really cool to see some of the info and the ways they are working to make their food a healthy option for "fast food".

#gyg #family #nutrition #healthy #clean #athlete #thesportsdietitian"



## THE COMPLAINT

Comments which the complainant/s made regarding this advertisement included the following:

*Undeclared ad by social media influencer.*

## THE ADVERTISER'S RESPONSE

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

*Guzman y Gomez Submissions in Response to Complaint 0143-24*

*We write in response to your letter dated 20 May 2024 in relation to Complaint 0143-24 (Complaint) made in respect of an Instagram post by the user @roycey\_boy (User) on 21 April 2024 (Alleged Advertisement). As far as Guzman y Gomez (GYG) is aware, the Alleged Advertisement has only been posted on the User's page.*

*GYG is thankful for the opportunity to respond to the Complaint. GYG reiterates its support for the Ad Standards Community Panel (Panel) and its commitment to ensuring that the marketing and advertising of GYG products complies with relevant laws, industry codes and initiatives.*

### *Advertisement Description*

*The Advertisement is a social media post which can be viewed in full here:  
[https://www.instagram.com/p/C6A6znxyCD4/?hl=en&img\\_index=1](https://www.instagram.com/p/C6A6znxyCD4/?hl=en&img_index=1).*

*The post includes several photos of the User and the User's family at a GYG restaurant, photos of a GYG premises and materials found at GYG's premises and a merchandise pack which was gifted to the User. The post includes the caption below:*

*"Clean is the new Healthy!*

*@guzmanygomez is a bit of a go to for me when I'm eating out but want to keep it to a healthy option. The perfect place to treat the family to lunch when we get a little cabin fever on a rainy Sunday.*

*And hopefully keeping @the\_sportsdietitian happy with a higher quality option for hitting macros ;)*

*It was really cool to see some of the info and the ways they are working to make their food a healthy option for "fast food".*

*#gyg #family #nutrition #healthy #clean #athlete #thesportsdietitian”*

*The post was made by the User on Instagram and has not been reposted or reproduced by GYG. GYG’s Instagram account however did engage with the post, sending a comment with several black and yellow love hearts. GYG was made aware of this post due to the User tagging GYG in the post.*

#### *Description of Complaint*

*The complainant has raised an issue that falls within the Australian Association of National Advertisers (AANA) Code of Ethics (Code). The complainant has asserted that the Alleged Advertisement is an “undeclared ad by social media influencer”, which may constitute a breach of section 2.7 of the Code.*

*Section 2.7 of the Code states that:*

*Advertising for shall be clearly distinguishable as such.*

*In dealing with similar complaints under section 2.7, the Panel has noted that it must consider two matters, being:*

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

*GYG also understands that the Panel will assess the Alleged Advertisement against the whole of section 2 of the Code, as well as potentially other codes which are administered by the AANA. Based on our understanding of the Code and the other AANA administered codes, it is only section 2.7 which will be applicable to the Alleged Advertisement.*

#### *Response to Complaint*

*Does the material constitute 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.”*

*GYG is of the view that the material does not constitute “advertising or marketing communication”.*

*This is because the Alleged Advertisement was not undertaken by, or on behalf of GYG, nor did GYG have any degree of control over the Alleged Advertisement.*

*GYG confirms that it does not have, nor has it ever had an agreement with any social media users or influencers, including the User, for the promotion of GYG products or the GYG brand. At present, GYG has no intention to do so in the future.*

*GYG further confirms that it has never gifted any social media users, including the User, any merchandise, or gifts, with an expectation that they prepare social media posts promoting the brand, or perform any other promotional activities generally.*

*GYG maintains a list of GYG customers who have displayed that they are genuine and loyal fans GYG’s products and the brand (VIP List). This VIP List consists of GYG customers from all demographics, including the User, with the only common feature being the fact they are regular GYG customers who have positively interacted with GYG previously. This includes both GYG customers with large, and limited or no social media presence.*

*From time to time, GYG will send merchandise packs to those on the VIP List. These gifts are provided on a strictly pro bono basis, as thanks for the VIP List customer’s ongoing loyalty and support to the brand. These gifts frequently contain merchandise or items which are not available for purchase at GYG restaurant and do not promote products which may be purchased by customers.*

*In this instance, GYG provided the User, along with several other people, a merchandise pack as they were part of the VIP List. The User, without consulting GYG prior and without GYG’s express consent, posted the Alleged Advertisement. We presume this was done by the User to show their appreciation and fondness of GYG’s brand.*

*GYG notes that in previous determinations, the Panel has often considered that where products are gifted to “influencers”, the advertiser displays a “reasonable degree of control” as the gifting is done with the intention that the advertiser will post about the product to entice other consumers to purchase the product or otherwise raise brand awareness. The Alleged Advertisement is distinct in that:*

1. *GYG's sole motivation in providing the gift to the User was to reward their loyalty, which is based on an organic customer-supplier relationship as a result of the User purchasing GYG's products, as opposed to being solicited by GYG for advertising purposes;*
2. *The decision to send the User the gifts was not determined based on their potential level of influence or social media following, but rather their personal relationship with the brand. GYG gifts its VIP List customers with exclusive merchandise regardless of their social media status or following;*
3. *GYG gifted the User exclusive merchandise. GYG did not gift products which may be purchased by other customers in a GYG restaurant. There was no direct correlation between the gift contents and the User's purchase in our restaurant and subsequent post; and*
4. *The information that the User posted about in the Alleged Advertisement is publicly available information, which can be accessed by any consumer via the GYG website. GYG does not provide this information with the intention of encouraging specific consumers to post advertisements. It is provided for educational purposes only.*

*On this basis, GYG asserts that did not have a "reasonable degree of control" over the Alleged Advertisement, nor was the Alleged Advertisement posted on GYG's behalf.*

*Is the advertising material clearly distinguishable as such?*

*Notwithstanding GYG's view that the Alleged Advertisement did not satisfy the criteria of an advertisement under the Code, GYG acknowledges that the Alleged Advertisement did not contain information which could have identified that the User received a gift from GYG.*

*GYG understands that this omission could reasonably result in a person viewing the Alleged Advertisement being unaware that the User was provided a gift by GYG and taking the view that this was a paid advertisement, despite this not being the case.*

*Accordingly, where any gifts are provided to members of the VIP List in the future, GYG will also provide a note with that gift reminding the VIP List customer that, should they choose to post about the gift on social media, GYG suggests the inclusion of "#gifted" or other wording to that effect.*

## **THE DECISION**

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 advertisement featured undisclosed advertising.

The Panel viewed the advertisement and noted the advertiser's response.

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

**Is the material advertising?**

The Panel noted the definition of advertising in the Code: "any material which is published or broadcast using any Medium or any activity which is undertaken by, or on behalf of an advertiser or marketer,

- over which the advertiser or marketer has a reasonable degree of control, and
- that draws the attention of the public in a manner calculated to promote or oppose directly or indirectly a product, service, person, organisation or line of conduct".

The Panel considered that the advertiser had provided goods to the influencer for free. The Panel considered that the advertiser had chosen to provide the products to the influencer, and that it was reasonable for advertisers to expect such gifts to be posted to social media accounts. The Panel considered that sending these types of gifts are a form of marketing for the brand. The Panel considered that the brand had control over sending the products and who they are sent to, and considered that the advertiser had a reasonable degree of control over the post.

**Is the material clearly distinguishable as advertising?**

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, it could also be interpreted as an organic post reflecting the influencer's recommendation of the restaurant. The Panel considered that there was nothing in the wording or pictures of the material which clearly identified the nature of the relationship between the influencer and brand.

The Panel considered that in this case tagging the brand was not sufficient to satisfy the Code's requirements and that the Instagram post was not clearly distinguishable as advertising.

## **2.7 conclusion**

The Panel concluded that the advertisement did breach Section 2.7 of the Code.

## **Conclusion**

Finding that the advertisement did breach Section 2.7 of the Code, the Panel upheld the complaint.

## **THE ADVERTISER'S RESPONSE TO DECISION**

[We] confirm that GYG has contacted the relevant individual who posted the content and has requested the individual take it down. We have received confirmation from the individual that they have done so.