



**ADVERTISING  
STANDARDS  
BUREAU**

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## **CASE REPORT**

1.	Complaint reference number	0182/10
2.	Advertiser	Hyundai Motor Company Australia Pty Ltd
3.	Product	Vehicles
4.	Type of advertisement	TV
5.	Date of determination	Wednesday, 12 May 2010
6.	DETERMINATION	DISMISSED
7.	Date of Reviewed Determination	Wednesday 14 July 2010
8.	DETERMINATION ON REVIEW	DISMISSED

### **ISSUES RAISED**

Motor vehicles      Driving practice that would breach the law

### **DESCRIPTION OF THE ADVERTISEMENT**

Opens on a rural road at night. The colour registration of the film has been shifted, the red, the green and the blue layers, altered slightly creating a strange, other-worldly and mesmerizing effect with the ix35 travelling from the country to the city.

Voiceover: "the car where everything we have every learned and everything we have ever dreamed comes together. ix35 the incredible made possible".

Everything we see and everything the ix35 passes is out of registration and fragmented – trees, office buildings, bridges, road markings, tunnel lights, vacant blocks and industrial buildings.

The camera moves around the car in different driving conditions – a gravel road in the forest, fog and mist, then sealed open road. Again the trees and rivers we pass are out of registration.

Gradually the scenery changes as we travel closer to the city through the industrial fringe, then the city itself, under bridges and through lit tunnels.

The ix35 stops at a red light at an intersection. The indicator lights on the driver's side wing mirror blinking.

Then, at instant the light changes from red to green, the colours, and the fragmented world we've been seeing, snaps perfectly into place.

Cut inside to see the lights on the instrument panel snapping back into place. Then back outside to see the silver ix35 in all its glory, looking stunning in the reflective night lights.

As the ix35 moves off, the camera tracks with it capturing it from different angles that best emphasize its shape and fluid lines.

A silver ix35 logo appears on screen and the words: The incredible made possible. As the ix35 moves off, the camera tracks with it capturing it from different angles that best emphasize its shape and fluid lines.

A silver ix35 logo appears on screen and the words: The incredible made possible.

## **THE COMPLAINT**

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

*This practice is becoming more common and 'popular' if you like and is illegal not to mention very annoying to other road users. The law states that fog lights can be used only in inclement weather which is clearly not the case in this advertisement. These ancillary lights on the front of vehicles are more often than not used incorrectly and are a hazard to oncoming traffic. Most of these lights are not aimed well from the factory and are more problematic than normal headlights for oncoming vehicles. I feel that this complaint falls under the FCAI Code below (c) Driving practices or other actions which would if they were to take place on a road or road-related area breach any Commonwealth law or the law of any State or Territory in the relevant jurisdiction in which the advertisement is published or broadcast directly dealing with road safety or traffic regulation. [Examples: Illegal use of hand-held mobile phones or not wearing seatbelts in a moving motor vehicle. Motorcyclists or their passengers not wearing an approved safety helmet while the motorcycle is in motion.]*

*The vehicle is being driven with its fog lights on in perfectly clear weather.*

*The VicRoads web-site states (QUOTE):*

*"Using fog lights*

*Front fog lights are designed to better illuminate the road in fog snowfall rainstorms or dust clouds. They can be recognised by the narrow pattern of light emitted.*

*Road Rule 217 states that drivers must not use front or rear fog lights unless driving in fog or other hazardous weather conditions that cause reduced visibility.*

*Fog lights cannot be accidentally switched on. They must be switched on separate from the main and dipped beam head lights." I have checked this with senior NSW Police and they agree.*

*The advertisement is therefore in breach of sections 2 (a) and 2 (c) of the GENERAL CODE and we ask that it be banned from broadcast without delay.*

## **THE ADVERTISER'S RESPONSE**

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

*The story of the ix35 TVC is that in the first 1/3 of the commercial the car is driven from a foggy, misty forest (ie off-road) environment. The TVC is clearly depicting conditions where use of fog lights are required.*

*The ad is surreal. In the first half the vision has a 'deregistered' treatment where the 3 primary colours are purposely misaligned. The car drives from the countryside along freeways into the city. The roads are totally clear with no other vehicles. Then the picture clarifies when all the colour channels align and the car drives off. The end. It's not mean to be anything more than a visual interpretation of all the great things about Hyundai's ability & dreams to bring the ix35 together.*

*In terms of this story, leaving the fog lights on added to the 'comes together' visual treatment and is also a simple case of continuity where someone has driven out of the country to the city. It would be very odd in an advertising context to have them off later in the TVC and so that would require showing them turning off or being turned off which is not practical.*

*Hyundai doesn't condone any driving practices that are illegal or irresponsible. We work hard to ensure our ads are of quality in production and also in communication. For this single complaint we don't see their argument being justified.*

## **THE DETERMINATION**

The Advertising Standards Board ("Board") was required to determine whether the advertisement complied with the Federal Chamber of Automotive Industries' Advertising for Motor Vehicles Voluntary Code of Practice (the "FCAI Code"). The advertisement is an "advertisement for a motor vehicle" and therefore the FCAI Code applies.

The Board noted the complainant's observation that the vehicle was depicted driving during the day with its fog lights on and considered whether the advertisement was in breach of sections 2(a) or 2(c) of the FCAI Code.

Section 2(a) of the Code states: Advertisers should ensure that advertisements for motor vehicles do not portray any of the following: (a) unsafe driving, including reckless and menacing driving

that would breach any Commonwealth law or the law of any State or Territory in the relevant jurisdiction in which the advertisement is published or broadcast dealing with road safety or traffic regulation, if such driving were to occur on a road or road-related area, regardless of whether the driving is depicted in the advertisement.’

Section 2(c) of the Code states: Advertisers should ensure that advertisements for motor vehicles do not portray any of the following: "(c) Driving practices or other actions would, if they were to take place on a road or road related area, breach any Commonwealth law or the law of any State or Territory in the relevant jurisdiction in which the advertisement is published or broadcast directly dealing with road safety or traffic regulation. (examples: illegal use of hand-held mobile phones or not wearing seat belts in a moving motor vehicle. Motor cyclists or their passengers not wearing an approved safety helmet, while the motorcycle is in motion]."

The Board noted that Australian Road Rule 217 states that: 'The driver of a vehicle fitted with front fog lights or rear fog lights must not operate the fog light unless the driver is driving in fog or other hazardous weather conditions causing reduced visibility.' The Board also noted Rule 213 Using Lights When Driving At Night or In Hazardous Weather Conditions, which provides that: (3) Also, a driver driving during the day in fog, or other hazardous weather conditions causing reduced visibility, may drive without the headlights of the driver's vehicle operating if the vehicle is fitted with front fog lights and those lights are operating effectively and are clearly visible.

The Board noted that the vehicle was depicted driving at night in the country and then in the city with its fog-lights on. However, the Board considered that the vehicle is driven in a safe manner and that there are no other vehicles on or around the advertised vehicle. The Board rejected the advertiser's assertion that it would be impractical to have fog lights on in one scene but not in others. However the Board noted that the use of fog lights as depicted in this advertisement was certainly justified in the country sequences and that there was no unsafe driving in the city scenes. The Board determined that the advertisement did not portray any unsafe driving and did not breach section 2(a) of the FCAI Code.

The Board also considered that the use of fog lights relates to the safety or otherwise of driving and is not a 'driving practice' as envisaged within section 2(c) of the FCAI Code. The Board therefore considered that the use of the fog lights is not an issue to be considered under section 2(c) of the Code.

Finding that the advertisement did not breach the FCAI Code, the Board dismissed the complaint.

## **INDEPENDENT REVIEWER'S RECOMMENDATION**

I refer to the documentation and information I received relevant to the request, by the Pedestrian Council of Australia, for an independent review of the above Advertising Standards Board (The Board) Determination.

As previously agreed, I have accepted the request and have read and considered all of the material that was before the Board together with the subsequent submissions made to me as the reviewer.

The three grounds, as contained in Clause 7.2 of the ASB Procedures Manual upon which a request for review may be made and considered are:

1. Where new or additional relevant evidence which could have a significant bearing on the decision becomes available (an explanation of why it was not submitted previously will be required);
2. Where there was a substantial flaw in the Board's decision (decision clearly in error having regard to the provisions of the Code or clearly made against the weight of the evidence);
3. Where there was a substantial flaw in the process by which the decision was made.

### **Ground for Review 1 – Additional Relevant Evidence**

In the request for review the complainant provides additional evidence, termed 'expert advice' from Dr Soames Job, Director of the NSW Road Safety Centre, Roads and Traffic Authority (RTA), together with further advice, in the form of an email, from Assistant Commissioner John Hartley, Traffic Services Branch, NSW Police. I have accepted and considered this additional information and advice although I note that no explanation was provided by the complainant as to why this evidence was not submitted at the time of the original complaint.

### **Ground for Review 2 – Flaw in Determination**

Whilst not stated in the words of Clause 7.2 of the ASB Procedures Manual, the request for review also, in my opinion, alleges that there was a substantial flaw in the decision of the Board.

I will deal with both grounds conjointly.

### **Consideration of Reviewer**

The Board in its Determination of 12 May, 2010, considered whether the advertisement was in breach of Sections 2(a) or 2(c) of the Federal Chamber of Automotive Industries' Advertising for Motor Vehicles Voluntary Code of Practice (FCAI Code).

In summary, the Board noted *'that the use of fog lights as depicted in this advertisement was justified in the country sequences and that there was no unsafe driving in the city scenes.'*

The Board also determined that the advertisement did not portray any unsafe driving and did not breach Section 2(a) of the FCAI Code.

In regard to Section 2(c) of the FCAI Code, the Board considered that the use of fog lights relates to the safety or otherwise of the driving and was not a 'driving practice' as envisaged under the section.

As a consequence the Board considered that the use of the fog lights was not an issue to be considered under Section 2(c) of the FCAI Code and, as an overall Finding, found that the advertisement did not breach the FCAI Code and dismissed the complaint.

The relevant provisions under section 2 of the FCAI Code state that:

*‘Advertisers should ensure that advertisements for motor vehicles do not portray any of the following:*

- (a) Unsafe driving, including reckless and menacing driving that would breach any Commonwealth law or the law of any State or Territory in the relevant jurisdiction in which the advertisement is published or broadcast dealing with road safety or traffic regulation, if such driving were to occur on a road or road-related area, regardless of where the driving is depicted in the advertisement; and,*
- (c) Driving practices or other actions which would, if they were to take place on a road or road-related area, breach any Commonwealth law or the law of any State or Territory in the relevant jurisdiction in which the advertisement is published or broadcast dealing directly with road safety or traffic regulation.’*

In the explanatory notes to Section 2(c) the examples of *illegal use of handheld mobile phones or not wearing seatbelts in a moving vehicle* are provided as examples of *driving practices or other actions*.

It is difficult in my view to distinguish between the above examples and the use of fog lights in the circumstances depicted in the subject Hyundai advertisement. However, I agree with the advertiser that the advertisement is intentionally surreal and stylistic and that, as the Board determined, the manner of driving (standing aside the issue of the actual use of fog lights) in the city scenes is clearly not unsafe.

Essentially the grounds upon which the request for review is made is that driving with fog lights on is a *‘driving practice or other action’* within the meaning of section 2(c) of the FCAI Code and that the Board was in substantial error when it determined that the use of fog lights relates only to the safety or otherwise of driving and is not a *‘driving practice’* as envisaged under the section.

The request for review also referred to a previous Determination by the Board, made in December 2009 (Lexus 576/09), in which the Board determined that the use of fog lights on a vehicle, when there is no fog or other impairment to vision, was not justified and that the advertisement did breach section 2(a) of the FCAI Code.

Whilst the Board is not bound by its former decisions, consistency in decision making is important and previous decisions are not necessarily irrelevant to the Board’s consideration of a later matter. In this regard it is relevant to note that in making the earlier decision (576/09) the Board found that the use of fog lights was a breach of Section 2(a) of the FCAI Code but decided that the use of fog lights was not a *‘driving practice’* under section 2(c) of the FCAI Code and that no breach of that provision had occurred. This decision, in my view, is not necessarily inconsistent with the decision of the Board in the current Hyundai case.

It is also relevant, in my opinion, to refer to the *“Determination on Review”* by the Board, made in Case Report 511/09 (a Land Rover advertisement), which gave rise to consideration of the application of section 2(c) of the FCAI Code. In this matter the Board, in reconsidering its initial decision, *‘considered that the examples that accompany clause 2(c) give a clear indication of the types of breaches that are considered to be an infringement of clause 2(c).*

The Board also considered the following Explanatory Note to the FCAI Code:

*'vehicle occupant protection and road safety are primary concerns for the automotive industry in the design and operation of all motor vehicles supplied to the Australian market. FCAI endorses the National Road Safety Strategy and acknowledges the importance of increased road safety awareness in the Australian community...'*

As reinforced later in this review I agree with the above conclusions by the Board and support the contention that the *'driving practices or other actions'* referred to in section 2(c) of the FCAI Code are concerned with vehicle occupant protection and road safety.

The central issue of contention, in the current case is relevant to this point as the issue is not whether the manner of driving is unsafe but rather, whether the simple act of using fog lights in conditions of clear visibility is, of itself, an unsafe driving practice.

In the current case the argument of the complainant is supported by new or additional evidence supplied by Dr Soames Job and Assistant Commissioner Hartley. In summary, both submissions allege that driving with fog lights on in the circumstances of the subject Hyundai advertisement is an offence under the NSW Road Rules.

Dr Job's submission claims that *'the RTA considers that driving a vehicle with fog lights on is a driving practice'*. His submission also makes reference to Rule 218-1 of the NSW Road Rules 2008 which creates a specific offence under which a driver of a motor vehicle must not use any fog light fitted to the vehicle unless the driver is driving in fog, mist or under other atmospheric conditions that restrict visibility.

Additionally, Victorian Road Rule 217 as quoted in the original complaint to the Board makes it clear that the use of fog lights where the driver is not driving in fog, mist or in other conditions that reduce visibility is an offence within Victoria.

The Explanatory Notes to the FCAI Code, which operate to provide the context within which the specific provisions of the FCAI Code should be interpreted, make it clear that the primary purpose of the FCAI Code is to provide guidance to advertisers in regard to appropriate standards relating to vehicle occupant protection and road safety.

Importantly, as stated in part by the Board in Case 511/09 referred to earlier in this review, the FCAI Code states that the:

*'FCAI endorses the National Road Safety Strategy and acknowledges the importance of increased road safety awareness in the Australian community and fully supports the efforts of all relevant Commonwealth State and Territory authorities to secure this outcome.'*

### **Summary and Finding**

On all the evidence now available to me, I am of the opinion that the use of fog lights is a *driving practice* or, alternatively is an *'other action/s'* within the meaning of Section 2(c) and that the Board should have considered the use of fog lights as a *driving practice* or *other action* in making its Determination

The basis of my finding is that, in my opinion, the use of fog lights on a motor vehicle is, of itself, a driving practice which, if occurring at night in clear weather and visibility, potentially puts the occupants of the vehicle (or of other vehicles in the area) in a position of harm or risk. As such it is a *driving practice or other action* within the terms of section 2(c) of the FCAI Code.

I am also of the view, however, that the advertisement is surrealistic and clearly intended to portray the features of the Hyundai ix35 in the most favourable light. The vehicle is driven at a safe speed and in an, otherwise, safe manner.

Despite my finding, above, that the use of fog lights, as depicted in the subject advertisement was a driving practice or other action under section 2(c), I am of the opinion that the public or the broad community viewing the advertisement is unlikely to see the advertisement as depicting unsafe driving or as an endorsement or encouragement for the use of fog lights in conditions of clear visibility. To that extent any breach of the FCAI Code, which may have occurred, is in my view of a technical or minor nature.

I think it is also relevant for me to raise the issue of the importance of requiring complainants, wherever possible, to submit all the evidence and material available to them at the time of the original complaint. Clearly, when new or additional evidence is provided at the time of a *request for review*, there is potential for a recommendation to be made that the original decision be reviewed. A better option, in my view, would be that, if reasonably available, all of the relevant evidence be provided in the first instance to the Board. This is more likely to lead to a decision that is satisfactory, or acceptable, to all parties and would avoid unnecessary cost and time delays.

I suggest that the Board consider requesting the Advertising Standards Bureau to make this preference clear to any person desiring to complain and to require, on each occasion when new or additional evidence is provided, an explanation of the reasons why the evidence was not provided at the time of the original complaint.

However, it is not my role to determine policy or to remake the Determination of the Board or express an opinion as to its substantive merits. My role is simply to audit compliance by the Board with the FCAI Code.

In this regard I find that:

- (1) There is new or additional relevant evidence that has been provided by the complainant in the request for review that, in accordance with the provisions of the FCAI Code, could have a significant bearing on the Determination of the Board made on 12 May 2010; and,
- (2) By failing to consider the use of fog lights as a '*driving practice or other action*' there was a substantial flaw in the Board's decision.

I recommend that the Board review its original decision to dismiss the complaint:

- having regard to the new or additional evidence provided by and on behalf of the complainant,
- taking into consideration that the use of fog lights is a '*driving practice or other action*' to which section 2(c) of the FCAI Code applies.

## **BOARD DECISION FOLLOWING INDEPENDENT REVIEWER RECOMMENDATION**



The Board noted the Independent Reviewer's recommendation that it reconsider its original decision to dismiss the complaint having regard to the new or additional evidence provided by and on behalf of the complainant, and taking into consideration that the use of fog lights is a '*driving practice or other action*' to which section 2(c) of the FCAI Code applies.

The Board noted that the use of fog lights must be considered under clause 2(c) of the FCAI Code. Clause 2(c) provides that: [Advertisers should ensure that advertisements for motor vehicles do not portray any of the following]: Driving practices or other actions which would, if they were to take place on a road or road-related area, breach any Commonwealth law or the law of any State or Territory in the relevant jurisdiction in which the advertisement is published or broadcast directly dealing with road safety or traffic regulation.'

The Board noted Rule 218-1 of the New South Wales Road Rules 2008 which provides: The driver of a [vehicle](#) must not: (a) use any fog light fitted to the [vehicle](#) unless the driver is driving in fog, mist or under other atmospheric conditions that restrict visibility..'

The Board also noted Victorian Road Rule 217 which provides: '(1) The driver must not operate any front or rear fog light fitted to the vehicle unless the driver is driving in fog or other hazardous weather conditions causing reduced visibility.'

The Board also noted the Australian Road Rule 217 which provides that: '(1) The driver of a vehicle fitted with front fog lights or rear fog lights must not operate the fog light unless the driver is driving in fog or other hazardous weather conditions causing reduced visibility.'

The Board noted that the advertiser has stated that the vehicle is depicted with its fog lights on. The Board considered that the test in the Victorian Road Rule and the Australian Road Rule is possibly a stricter test requiring that the weather conditions should be fog or other '**hazardous**' weather conditions causing reduced visibility, whereas the NSW test requires only that there is restricted visibility. The Board considered that it must therefore consider whether the conditions that the car is depicted driving in are 'fog, mist or other atmospheric conditions that restrict visibility' and that such a consideration is a subjective judgment about which people may well have different views.

The Board carefully viewed the advertisement. The Board noted that the advertisement is deliberately shot in a style where the vehicle and its surroundings are out of focus. The vehicle is seen driving at night through rural and city scapes.

The Board considered that, for the majority of the advertisement the atmospheric conditions in which the car is being driven appear to be conditions of reduced visibility and are appropriate conditions for use of fog lights. The Board noted that there is an image of a person carrying an umbrella to further suggest that there may be precipitation.

The Board noted that in the final scenes of the advertisement the vehicle is seen driving in clear night conditions but still has its fog lights on. The Board noted that in the images preceding this scene the vehicle stops at an intersection in conditions of reduced visibility. The scene then clears and the vehicle drives off - with its fog lights still on. The Board considered that, when driving through fog it is common to drive in and out of fog and that it is not realistic to suggest that a driver will turn off fog lights the instant that he or she is out of one patch of fog, when the conditions are such that it may well be foggy again around the next corner or in the next low lying area. The Board considered that there is reduced visibility in much of the advertisement which would justify the use of fog lights and that the image of the car coming out of the fog (or

‘atmospheric conditions that restrict visibility’) is justified. The Board considered that in the context of the entire scenario depicted in this particular advertisement the vehicle’s use of fog lights would be unlikely to be in breach of relevant Road Rules and did not breach clause 2(c) of the FCAI Code.

Finding that the advertisement did not breach the FCAI Code on any other grounds the Board dismissed the complaint.