



ADVERTISING  
STANDARDS  
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## Case Report

1	Case Number	0195/13
2	Advertiser	Nissan Motor Co (Aust) Pty Ltd
3	Product	Vehicle
4	Type of Advertisement / media	TV
5	Date of Determination	19/06/2013
6	DETERMINATION	Upheld - Modified or Discontinued
7	IR Recommendation	Reconfirm original decision

### ISSUES RAISED

FCAI Motor Vehicles 2(a) Unsafe driving  
FCAI Motor Vehicles 2(b) Breaking the speed limit  
FCAI Motor Vehicles 2(c) Driving practice that would breach the law  
2.6 - Health and Safety Within prevailing Community Standards

### DESCRIPTION OF THE ADVERTISEMENT

A man and woman are shown driving through the streets whilst the woman, who appears heavily pregnant, encourages the man to drive quicker.

They come to a stop outside a hospital with a screech of tyres and the man looks at his watch and says, "Ten twenty four! Personal best!" and the woman lifts her jumper to remove her fake pregnancy bump.

### THE COMPLAINT

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

*I would recommend all these involved in the making and promotion of these ads visit the accident trauma centre at the Alfred.*

*I just feel this ad is totally wrong and should be changed or removed as it isn't about the car*

*at all that they are trying to sell to us its displaying dangerous and illegal behaviour.*

- 1. The advertisement promotes unsafe driving.*
- 2. The advertisement implies that such unsafe driving is acceptable in an emergency.*
- 3. The advertisement promotes driving behaviour (rapid acceleration/deceleration/changes of direction) that is counter to sound medical advice regarding the carriage of heavily pregnant women in motor vehicles.*

*The fact that the "fastest time yet" statement indicates the driver was exceeding speed controls to arrive at the hospital and is therefore not acceptable for road safety protocols.*

## **THE ADVERTISER'S RESPONSE**

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

*The complaints focus on the driving depicted in the advertisement, specifically in relation to the perceived speed and manner of driving in which the characters in the advertisement appear to engage in order to reach a hospital in the quickest time possible. You have categorised the complaints under the following sections of the Federal Chamber of Automotive Industries Code of Practice Relating to Advertising for Motor Vehicles (FCAI Code):*

- Section 2(b) Breaking the speed limit; and*
- Section 2(c) Driving practice that would breach the law.*

### *2. Nissan's response to the complaints*

*Nissan takes great care when developing its advertisements to ensure that they comply with the AANA Code and FCAI Code, and to ensure that its advertisements do not depict, encourage or condone any form of unsafe, illegal or reckless driving. Nissan also has taken great care to ensure that the advertisement did not depict a vehicle being driven in a manner that undermines the intent of the FCAI Code. Nissan strongly believes that the advertisement complies with the FCAI Code.*

### *Purpose of the Advertisement*

*The advertisement was produced as part of a series of new television advertisements to showcase the new Nissan Pulsar Hatch range. In the advertisement, a couple are shown driving the vehicle to get to a hospital for what appears to be the passenger's impending childbirth. The intent of the advertisement is to highlight the capabilities of the Pulsar Hatch, and its ability to navigate through city streets efficiently and effectively. The focus is not on the speed or acceleration of the vehicle but rather highlights its manoeuvrability and*

*practicality in a real world environment and conditions. To achieve its purpose the advertisement uses humour in a light-hearted manner, revealing that after the build-up of tension throughout the advertisement the female passenger is not really pregnant and the couple were only rehearsing for a potential future scenario.*

*The quick cuts between shots, the car driving away from the camera and loud engine noises (a feature of the turbo engine that is included in the Pulsar SSS Hatch shown in the advertisement) are all designed to highlight the manoeuvrability of the Pulsar SSS Hatch, and its adaptation to a tight urban environment. Nissan can confirm that the actual vehicle shown in the advertisement was driving within the speed limit at all times and in accordance with all applicable road rules. The vehicle is not shown engaging in any sudden changes of direction that could be considered dangerous or unlawful or being driven recklessly, and great care was taken to ensure that a safe distance was kept between any other vehicle featured in the advertisement.*

### *Compliance with the AANA Code*

*Under the recent changes to the AANA Code, motor vehicle advertising must comply with both the AANA Code and FCAI Code. The complainants show concern about alleged 'reckless' and "irresponsible" driving depicted in the advertisement.*

*Relevantly, Section 2 of the AANA Code currently provides:*

*2.6 Advertising or Marketing Communications shall not depict material contrary to Prevailing Community Standards on health and safety.*

*Nissan submits that the advertisement does not depict any material contrary to prevailing community standards on health or safety.*

*The scenario depicted is intended to be tense given the perceived urgency in delivering the pregnant passenger to the hospital. This sense of urgency is enhanced by the use of quick scene cuts and close up shaky "action" shots of the vehicle coupled with the palpable stress of the female passenger and her heavy breathing. Contrary to the statements of the complainants, at no time does the driver exceed the speed limit, endanger the passengers of the vehicle or any road-users, nor engage in any dangerous or reckless driving practices.*

*Nissan maintains that the scene in which the vehicle "screeches" to a halt in front of the hospital does not depict an example of "hoon behaviour" rather it fits with the sense of urgency expected of a driver adamant to get his partner out of the vehicle and into the hospital as quickly as possible. The vehicle makes a safe and legal parking manoeuvre in front of the hospital with the "screech" sound effect used to add dramatic effect to the story of the advertisement. There is nothing unlawful about the car making this noise in this context- and great care was taken in the production of the advertisement to ensure that no vehicles or pedestrians were shown nearby when the parking manoeuvre was performed.*

### *The FCAI Code*

*When preparing the advertisement, Nissan carefully considered its obligations under the*

*FCAI Code. Relevantly, section 2 of the FCAI Code provides:*

*"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".*

*[Examples: Vehicles travelling at excessive speed; sudden, extreme and unnecessary changes in direction and speed of a motor vehicle; deliberately and unnecessarily setting motor vehicles on a collision course; or the apparent and deliberate loss of control of a moving motor vehicle];*

*(b) People driving at speeds in excess of speed limits in the relevant jurisdiction in Australia in which the advertisement is published or broadcast.*

*(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.]*

*Nissan maintains that the advertisement meets and fully discharges Nissan's obligations under section 2 of the FCAI Code. The footage of the Nissan Pulsar Hatch SSS vehicle was captured with the specific requirements of sections 2(a), 2(b) and 2(c) of the FCAI Code in mind. At no point in the advertisement is the vehicle depicted driving above the acceptable speed limits for public roads in Australia, nor is any dangerous, reckless or otherwise illegal manoeuvring featured.*

*The content of the complaints are particularly pertinent to section 2(a) of the FCAI Code as the complainants allege that the advertisement shows "reckless behaviour". As discussed above in relation to the AANA Code, Nissan maintains that all manoeuvring depicted was in strict accordance with applicable road rules. In discharging Nissan's obligations under section 2(a) of the FCAI Code, the advertisement contains no instances of swerving, unnecessary changes in direction or instances of driving which put either the drivers of the vehicle or the public in any danger.*

*Similarly, the advertisement does not breach section 2(b) of the FCAI Code as the vehicle is driving well within the legal speed limits at all times during the advertisement. At all times when the vehicle accelerates, the acceleration and speed are all within the limits of the law.*

*Nissan maintains that the advertisement does not depict any driving practices that would*

*breach any Commonwealth, State or Territory road safety rules or traffic regulations. Both passengers are restrained by their seatbelts and as mentioned above the vehicle is never driven erratically and does not create a hazard for itself or any other road users.*

*Finally, the FCAI Code specifically acknowledges that advertisers may make legitimate use of fantasy, humour and self-evident exaggeration in creative ways in advertising for motor vehicles. Nissan firmly believes that the vast majority of viewers would see the advertisement as a light-hearted and humorous way of showing the Pulsar Hatch's performance capabilities in urban driving situations, and not as encouraging or condoning unsafe, unlawful or reckless driving.*

### *3. Summary*

*While Nissan acknowledges the complainants' concerns with the advertisement, we firmly believe that the advertisement does not breach the FCAI Code or the AANA Code.*

*For the reasons above, we request that the complaints be dismissed. We look forward to receiving the results of the Board's determination.*

## **THE DETERMINATION**

The Advertising Standards Board (Board) was required to determine whether the material before it was in breach of the Federal Chamber of Automotive Industries Advertising for Motor Vehicles Voluntary Code of Practice (the FCAI Code) and the Advertiser Code of Ethics (the Code).

To come within the FCAI Code, the material being considered must be an advertisement. The FCAI Code defines an advertisement as follows: "matter which is published or broadcast in all of Australia, or in a substantial section of Australia, for payment or other valuable consideration and which draws the attention of the public, or a segment of it, to a product, service, person, organisation or line of conduct in a manner calculated to promote or oppose directly or indirectly that product, service, person, organisation or line of conduct".

The Board decided that the material in question was available in Australia or in a substantial section of Australia for payment or valuable consideration.

The Board determined that the material draws the attention of the public or a segment of it to a product being a Nissan Pulsar Hatch in a manner calculated to promote that product. The Board considered that in line with previous decisions around the scope of the FCAI Code, the marketing communication is an advertisement as defined by the FCAI Code. The Board also considered whether the advertisement was for a motor vehicle. Motor vehicle is defined in the FCAI Code as meaning: "passenger vehicle; motorcycle; light commercial vehicle and off-road vehicle".

The Board determined that the Nissan Pulsar Hatch shown in the advertisement was a vehicle as defined in the FCAI Code.

The Board determined that the material before it was an advertisement for a motor vehicle

and therefore that the FCAI Code applied.

The Board noted the complainants' concerns that the advertisement depicts a vehicle being driven at high speeds and in an unsafe manner through a suburban area, and that it uses a woman's fake pregnancy as an excuse to show this dangerous driving.

The Board considered clause 2(a) of the FCAI Code. Clause 2(a) requires that: Advertisements for motor vehicles do not portray ...unsafe driving, including reckless or 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.' The Code provides the following as examples, "Vehicles travelling at excessive speed; sudden, extreme and unnecessary changes in direction and speed of a motor vehicle..."

The Board noted that the advertisement depicts a man being encouraged by his female passenger to drive quickly through a suburban environment and that when the car comes to a stop outside a hospital the man announces that it was their quickest time yet. The Board noted that in response to this, the woman removes a fake pregnancy pouch and we see the couple embracing outside the hospital with the car in the foreground.

The Board noted that in the driving scenes the audio includes the female passenger encouraging the driver to drive faster ("Go, go go!") and we can hear sounds of high engine revs which is suggestive of the vehicle moving quickly. The Board also noted that when the car comes to a halt outside the hospital we can hear the tyres squealing. The Board noted that we do not see what speed the car is driving at however the Board considered that these audio effects in conjunction with the visual images of the vehicle driving in a manner which suggests they are in a hurry are suggestive of driving which is not appropriate for the urban environment depicted and is unsafe and reckless.

The Board noted that the man's comment that the time it took them to drive to the hospital is their "personal best" is strongly suggestive of having driven the route on a number of occasions in hope of doing it faster each time. The Board noted that the explanatory notes for the FCAI Code "...urges also advertisers to avoid any suggestion that depictions of.... competitive driving are in any way associated with normal on-road use of motor vehicles" and considered that the suggestion of a driver timing a route and trying to beat his own time is not appropriate and is a depiction of driving which is unsafe.

The Board noted that the advertisement uses the premise of a pregnancy as a reason for the couple to be hurrying to the hospital and considered that it is not appropriate to depict a woman faking pregnancy as an excuse to drive in a manner which is unsafe.

On the above basis, the Board determined that the advertisement does depict unsafe driving and does breach clause 2(a) of the FCAI Code.

The Board considered Section 2.6 of the Code. Section 2.6 of the Code states: "Advertising or Marketing Communications shall not depict material contrary to Prevailing Community Standards on health and safety".

The Board noted the complainants' concerns that it is not possible to park outside a hospital

entrance and that it is not appropriate to fake pregnancy in order to drive in a 'hoon' manner. The Board noted that in the advertisement the car is shown parking at the entrance to a hospital's emergency department and that the writing on the road indicates that where the car parked is a "drop off" zone.

The Board noted that the use of a fake pregnancy is not of itself a breach of the Code however a minority of the Board considered that the depiction of a couple using a fake pregnancy as an excuse to park outside the entrance to an emergency department is not appropriate as the space could be needed by someone in a real emergency.

The majority of the Board however considered that the advertisement is clearly filmed under controlled conditions and that the advertisement does not depict any material which would be contrary to community standards on health and safety.

Based on the above the Board determined that the advertisement did not breach Section 2.6 of the Code.

Finding that the advertisement breached the FCAI Code, the Board upheld the complaints.

## **INDEPENDENT REVIEWER'S RECOMMENDATION**

This is an application for review of the Determination of the Advertising Standards Board (the Board) dated 19 June 2013 relating to an advertisement by Nissan Motor Co (Aust) Pty Ltd (Nissan). The advertisement is described in the Case Report as follows:

A man and woman are shown driving through the streets whilst the woman, who appears heavily pregnant, encourages the man to drive quicker. They come to a stop outside a hospital with a screech of tyres and the man looks at his watch and says, "Ten twenty four! Personal best!" and the woman lifts her jumper to remove her fake pregnancy bump.

The Board found that the advertisement depicted unsafe driving and was thereby in breach of clause 2(a) of the Federated Chamber of Automotive Industries Advertising for Motor Vehicles Voluntary Code of Practice (the FCAI Code).

Nissan has sought review of the Board's finding.

The grounds on which a decision of the Board may be reviewed are:

- (1) Where new or additional relevant evidence which could have a significant bearing on the determination becomes available. An explanation of why this information was not submitted previously must be provided.
- (2) Where there was a substantial flaw in the Board's determination (determination clearly

in error having regard to the provisions of the Code, or clearly made against the weight of evidence).

(3) Where there was a substantial flaw in the process by which the determination was made.

Nissan has sought review on ground (2) only.

The relevant clause of the FCAI Code reads:

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.

[Examples: Vehicles travelling at excessive speed; sudden, extreme and unnecessary changes in direction and speed of a motor vehicle; deliberately and unnecessarily setting motor vehicles on a collision course; or the apparent and deliberate loss of control of a moving motor vehicle.]

In its Determination the Board observed that the advertisement depicts a man being encouraged by his female passenger to drive quickly through a suburban environment and that when the car comes to a stop outside a hospital the man announces that it was their quickest time yet. It noted that the female passenger is to be heard encouraging the driver to drive faster (“Go, go, go”). The engine is heard to be revving in a way suggestive of a vehicle being driven quickly. When the car arrives at the hospital there is a squeal of braking tyres. These matters were considered by the Board to indicate that the car was being driven at speed. The Board also considered that the suggestion of a driver timing a route and trying to beat his own time is not appropriate and is a depiction of driving which is unsafe.

In its submission on the appeal Nissan asserts that there was a substantial flaw in the Board’s decision in that the advertisement does not depict unsafe driving or reckless driving that would breach a relevant State law. It states that the driving featured in the advertisement was in fact conducted in compliance with all road rules and, in particular, relevant speed limits. It says that clause 2 (a) of the Code proscribes unsafe driving and the driving depicted in the advertisement was not unsafe: “the fact the fact that a driver and passenger are shown in a hurry to get to a destination does not constitute a portrayal of unsafe driving”.

It also supports its case for there being a flaw in the Board’s Determination by pointing to the inclusion by the Board of a reference to explanatory notes to the Code which are directed to



competitive driving not ordinary road use.

I do not consider that the argument that there was a substantial flaw in the Board's decision is made out.

When considering whether an advertisement has been in breach of an advertising code it is the impact on the viewers of the advertisement that has to be considered, not the actual circumstances in which the advertisement was made. The fact that, in making the advertisement, the car was driven in compliance with all road rules is irrelevant to the issue whether there was a breach of the FCAI Code. The test is the impression that the advertisement would have on viewers.

The Board is required to bring its own perception to the analysis of what conclusions viewers might reach on seeing the advertisement. Not all people will agree with the Board's conclusion but that does not mean that the Board's conclusion is substantially flawed. It was clearly open to the Board to arrive at its Determination of the effect of the advertisement.

I do not consider that the Board's reference to the explanatory notes in the Code renders the Board's decision flawed. The notes may be referring to competitive driving but the point that is being made is valid for any driving: depiction of excessive speed is to be avoided. The fact that the driver is timing his journeys and trying to improve his time is part of the mix of features to which the Board was entitled to have regard in reaching its decision.

The appeal is dismissed.