



Case Report

1	Case Number	0223/10
2	Advertiser	Nissan Motor Co (Aust) Pty Ltd
3	Product	Vehicles
4	Type of Advertisement / media	TV
5	Date of Determination	09/06/2010
6	DETERMINATION	Dismissed

ISSUES RAISED

Motor vehicles Unsafe driving

DESCRIPTION OF THE ADVERTISEMENT

A Nissan Dualis Hatch is shown being driven through empty streets whilst MC Hammer's song "Can't touch this" plays in the background. Paintballs are fired at the car from various angles and the car dodges them throughout the advertisement. The car drives in to an indoor carpark, up to the top of the building then drives off the top. It rolls over in midair before landing in a garbage skip and then driving off. The final over is "Shift the way you drive"

THE COMPLAINT

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

Part 2. GENERAL PROVISIONS of the FCAI Code state:

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.]"

This advertisement clearly shows a vehicle being driven making extreme and unnecessary changes in direction.

Driving in this manner on any public road would be an offence in all jurisdictions and hence is a breach of both clauses 2 (a) and 2 (c).

May I remind the Board that our compliant 280/04 against Daimler Chrysler Aust/Pacific P/L was upheld on 9 November 2004. This advertisement was found to be in breach of the FCAI Code because the driver made sudden turns. This is a direct quote from that determination:

The Board first considered whether clause 2(a) of the FCAI Code had been breached. In order to breach clause 2(a) of the FCAI Code the driving practices depicted must be: “unsafe driving including reckless and menacing driving that would breach any Commonwealth law....if such driving were to occur on a road or road related area...”

The Board formed the view that clause 2(a) had been breached. The Board formed this view based upon the scene in the advertisement which depicted the Mercedes Benz which the Monk was driving engaging in a series of sudden erratic jerking vehicle movements which viewers later learn was for the purpose of avoiding collision with insects. The Board was of the view that the driving practices depicted in this scene were reckless and unsafe and noted that such driving practices would be in breach of the Australian Road Rules and other applicable traffic legislation.

The Australian Road Rules make it an offence to drive other than to the left of the centre of the road unless exempted due to the need to avoid an obstacle. The provisions in the Australian Road Rules that deal with exemptions relevant to this advertisement make it clear that a driver is only permitted to drive to the right of the centre of the road to avoid an obstruction if amongst other things it is necessary and reasonable in all the circumstances. The Board took the view that it would not be considered necessary or reasonable for the driver of the Mercedes Benz to drive in the manner depicted in order to avoid an insect. Furthermore other applicable traffic legislation makes it an offence to drive negligently furiously or recklessly in a manner dangerous to the public on a road or road related area. Having regard to the driving practices depicted in the advertisement the Board formed the view that they represented portrayals of unsafe and reckless driving in breach of Australian laws. The Board did not agree with the advertiser’s descriptions of the vehicle’s movements as “slight” and constant in direction or that they were not jerking or sudden. The Board noted that the movements of the Monk’s vehicle were visually sudden jerking and unpredictable. The vehicle did not travel in a straight line to the left of the centre of the road as required and did in fact make sudden and quick changes in the direction it was facing as it moved. The fact that the movements were sudden and jerking was further confirmed by the looks on the passengers’ faces and the fact that the front seat passenger was holding on to the side of his seat with a look of concern of his face. The passengers in the vehicle behind the Monk also had concerned expressions on their faces and wondered what the Monk was doing. The businessman in fact asked the Monk at the close of the advertisement why the Monk was driving that way which suggests he was not driving in a normal manner.

The Board also disagreed with the advertiser’s assertion that there were no unnecessary movements undertaken by the Mercedes Benz. The advertiser itself noted that the average

viewer would be aware that moving your vehicle out of the line of flight of an insect would not avoid collision with that insect. The Board noted that the advertiser is not permitted to rely on that part of the Explanatory Notes that discusses an advertiser's use of fantasy humour and self-evident exaggeration in creative ways if such use would contradict circumvent or undermine the provisions of the FCAI Code. Therefore the Board confirmed that the advertiser was not entitled to rely on the use of an unreal fantasy situation to justify driving practices that are in breach of the formal provisions of the Code."

Just like the driver swerving to miss insects this driver is swerving to miss paint-bombs.

As was found by the Board in the Mercedes advertisement the advertiser is not permitted to rely on fantasy.

The illegal and dangerous behaviour is virtually identical and as such we ask that the Board finds the advertisement breaches the Code and removes the advertisement from broadcast immediately.

THE ADVERTISER'S RESPONSE

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

At the outset, Nissan wishes to note that it takes motor vehicle and driving safety very seriously. Nissan does not encourage anyone to drive in a reckless and unsafe manner. Accordingly, we respectfully disagree with the complainant's characterization that the Nissan Dualis Hatch is being driven "making extreme and unnecessary changes in direction" in contravention of sections 2(a) and 2(c) of the FCAI Code.

In particular, we wish to make the following points:

- 1. At no stage during the Advertisement are there any pedestrians around or near the car.*
- 2. There are no skidding tyres or other sounds or visual indications that the car is being driven unsafely.*
- 3. In our view, the car is being driven in a controlled and slow movement.*
- 4. The paint bombs are an artistic device to demonstrate the reliability and handling features of the Nissan Dualis Hatch. The message is that the driver can be assured of a safe and secure drive. More mundane methods of cones or potholes in the road could have achieved the same effect.*
- 5. The complainant suggests that the ASB should find against Nissan as it found against Mercedes Benz in relation to an ad showing a car dodging an insect. Nissan considers that there is no parallel between a car dodging an insect and a car dodging a paint bomb for the simple reason that while it was not necessary or reasonable for the driver of the Mercedes Benz to drive to avoid the insect given that there would be no real damage to the car in hitting an insect, it cannot be suggested it would be necessary or reasonable for the driver to allow the paint bomb to hit the car. In Nissan's view, the driver's response in avoiding the paint bombs is measured, similar to the reaction taken in avoiding a cone or pothole.*

6. *For the reasons above, we respectfully submit that the complaint should be dismissed.*

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 which came into effect on 1 July 2004 (the “FCAI Code”).

To come within the FCAI Code, the material being considered must be an “advertisement”. The FCAI Code defines “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 published or broadcast in all of Australia or in a substantial section of Australia for payment or other valuable consideration given that it was being broadcast on television in Australia.

The Board determined that the material draws the attention of the public or a segment of it to a “product” being a Nissan Dualis Hatch “in a manner calculated to promote...that product”. Having concluded that the material was an “advertisement” as defined by the FCAI Code, the Board then needed to determine whether that 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 Dualis Hatch depicted was a “Motor 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 then analysed specific sections of the FCAI Code and their application to the advertisement. The Board identified that clauses 2(a) and 2(b) were relevant in the circumstances. The Board had to consider whether those clauses of the Code had been breached.

The Board first considered whether clause 2(a) of the FCAI Code had been breached.

In order to breach clause 2(a) of the FCAI Code, the driving practices depicted must be: “unsafe driving, including reckless and menacing driving that would breach any Commonwealth law...if such driving were to occur on a road or road related area...”

The Board considered that clause 2(a) had not been breached. The Board noted the scenes in the advertisement which depicted the Nissan Dualis Hatch driving through empty streets when paintballs are fired at the car from various angles and the car dodges them to avoid a collision. The Board considered that the driver’s response is measured and appropriate in the circumstances depicted in the advertisement.

The Board was of the view that the driving practices depicted in this scene were safe and noted that such driving practices would not be in breach of the Australian Road Rules and other applicable traffic legislation. The Australian Road Rules make it an offence to drive other than to the left of the centre of the road unless exempted due to the need to avoid an obstacle. The provisions in the Australian Road Rules that deal with exemptions relevant to this advertisement make it clear that a driver is only permitted to drive to the right of the centre of the road to avoid an obstruction or obstacle if, amongst other things, it is necessary and reasonable, in all the circumstances.

The Board considered that it would be considered necessary or reasonable for the driver of the Nissan Dualis Hatch to drive in the manner depicted in order to avoid an obstacle, in this instance paint bombs and noted that in the circumstances depicted there were no unnecessary movements undertaken by the Nissan Dualis Hatch and that there were no pedestrians or other obstacles depicted around or near the car. The Board considered that the average viewer would be aware that moving your vehicle out of the line of an obstruction, such as a paint bomb, to avoid a collision is appropriate provided that it is safe to do so. In the circumstances depicted around avoiding the paintballs the Board considered that the advertisement did not depict unsafe driving.

The Board also considered the images of the car flying through the air. The Board noted that the advertiser is not permitted to rely on that part of the Explanatory Notes that discusses an advertiser’s use of fantasy, humour and self-evident exaggeration in creative ways if such use would contradict, circumvent or undermine the provisions of the FCAI Code. The Explanatory Notes indicate that an advertiser is not entitled to rely on the use of an unreal fantasy situation to justify driving practices that are in breach of the formal provisions of the Code.

The Board considered that the image of the car flying through the air is fantasy but that the movements of the car are so exaggerated that they would not be mimicable by regular drivers to whom road safety messages are targeted. On this basis the Board considered that the images of the car flying did not depict unsafe driving and did not breach clause 2(a) of the Code.

The Board then considered whether clause 2(b) of the FCAI Code had been breached. In order to breach clause 2(b), the driving practices must depict: “people driving at speeds in excess of the speed limits in the relevant jurisdiction in Australia in which the advertisement

is published or broadcast.” The Board formed the view that clause 2(b) had not been breached. The Board noted that there was no overt indication that the car was driven at excess speeds.

On the above basis, the Board determined that the advertisement did not breach clauses 2(a) or 2(b) of the FCAI Code and therefore dismissed the complaint.