



Case Report

1	Case Number	0246/13
2	Advertiser	Nissan Motor Co (Aust) Pty Ltd
3	Product	Vehicle
4	Type of Advertisement / media	Internet
5	Date of Determination	10/07/2013
6	DETERMINATION	Upheld - Modified or Discontinued

ISSUES RAISED

FCAI Motor Vehicles 2(a) Unsafe driving
2.6 - Health and Safety Within prevailing Community Standards

DESCRIPTION OF THE ADVERTISEMENT

A Nissan Pulsar is shown being driven in a hurry to a hospital by a male driver accompanied by a pregnant female passenger. Upon arrival they park at the front entrance and the man comments on their time. It turns out the female passenger is not actually pregnant and the drive was just a test to see how quickly they could get to the hospital.

THE COMPLAINT

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

As this is an advertisement for a motor vehicle, it should comply with the relevant FCAI code. I believe the advertisement breaches the relevant code for the following reasons:

The Nissan Pulsar driver is arguably seen to breach Australian Road Rule 126 which requires a safe distance to be maintained to the vehicle in front. In the two related scenes, the Pulsar actually appears to accelerate toward a champagne coloured Mercedes ahead of it, to the point where the following distance becomes too close. In the next scene the Mercedes is seen to be turning left, only metres ahead of the Pulsar. Given this occurs in a residential street, had the Mercedes needed to brake in an emergency (due to a child or pet running out onto the road for example), the Pulsar may well have crashed into the back of it, since the distance it is maintaining is not even sufficient for a normal reaction time.

The code requires that the advertisement does not depict competitive or aggressive driving

behaviour. Towards the end of the advertisement, however, the driver announces at the entrance to the Emergency Department "ten twenty four - personal best!". Given that we only see one example of the progress of the Pulsar being physically impeded in any way during its 10 minute journey (the aforementioned Mercedes incident), a reasonable person may conclude that the only way to gain a "personal best" point-to-point time was to increase the actual road-speed of the vehicle (as opposed to, for example, reducing the time by running through favourable traffic lights or avoiding a congested area, neither of which are depicted). One may then be forced to conclude that the driver was reducing his time by employing one or more of the following techniques (i) speeding in a straight line (ii) taking corners at a faster speed (iii) braking later (iv) deliberately driving well below the speed limit in previous attempts. Three of these factors amount in my opinion to a display of competitive and aggressive driving (even though in this instance the driver is only competing against himself). This manner of driving is specifically advised against in the code. As for the driver deliberately driving well below the speeds limits in previous attempts, whilst this of course might be theoretically possible (at least for some of the time), this is not a reasonable conclusion given the alleged situation of transporting a (faked) pregnant woman to a hospital as quickly as possible, nor does it fit with the overall ambit of the advertisement (given the vehicle is a "hot hatch" and given the audio track that depicts the engine being revved well into the upper power band of its operating range). The code specifically states that claims an advertisement was filmed under controlled conditions (or expressed in other similar terms) should be avoided. Nissan however, makes claims that I believe fall under this section of the code. These claims are seen at the beginning of the advertisement in the form of a white-font sub-title on the bottom of the screen as follows: "Filmed under controlled conditions. Driving shown adheres to all road safety regulations".

THE ADVERTISER'S RESPONSE

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

As you would be aware from previous correspondence, Nissan had previously published a Pulsar SSS Hatch television advertisement (the original TVC). The original TVC was the subject of complaints with reference numbers 0195/13 (TV), 0203/13 (Pay TV), 0204/13 (Cinema) and 0205/13 (Internet) (the previous complaints).

Nissan decided to modify the TVC pending the outcome of the independent review in an effort to address the concerns expressed by the Board (the modified TVC). This response addresses complaints that have been made about the modified TVC. The modified TVC has been on air since 27 June 2013.

The complaints about the modified TVC 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. In addition, Nissan received a complaint on 9 July 2013 in which the complainant has raised concerns regarding:

- *an alleged breach of Australian Road Rule 126 regarding keeping a safe distance between vehicles;*
- *the modified TVC allegedly “depicting aggressive or competitive driving behaviour”;* and
- *the statement “Filmed under controlled conditions. Driving shown adheres to all road safety regulations” that is included in the modified TVC.*

Nissan’s response to the complaints

You have categorised the complaints under the following section of the FCAI Code:

- *Section 2(a): Unsafe driving.*

For the reasons outlined in our 12 June submission in relation to the original TVC (copy attached), Nissan maintains that the modified TVC does not show unsafe driving or reckless or menacing driving that would breach any applicable law, and therefore does not breach clause 2(a) of the FCAI Code.

In relation to the complaint received on 9 July, which contains allegations that have not been referred to in previous complaints, Nissan responds as follows:

Complaint:

Claim that the modified TVC “arguably shows” a breach of Australian Road Rule 126 regarding keeping a safe distance between vehicles.

Response:

The vehicle is only shown for a very short of time driving behind a Mercedes model vehicle. At the low speed at which the Pulsar is shown driving behind this vehicle, the distance between the Pulsar and the Mercedes is more than adequate to be considered a “safe distance”.

Complaint:

Claim that the modified TVC depicts “aggressive or competitive driving behaviour”.

Response:

The comments in the Explanatory Notes about “competitive driving” are made in the context of clause 3 of the FCAI Code (“Use of Motor Sport in Advertising”), which contains an exception for motor sport / vehicle testing and proving activities shown in advertising. It seems clear that the intent of these comments is to prohibit cars being shown as competing against each other on a public road. Nissan submits that the man’s comment in the TVC regarding “personal best” (and having arrived more quickly at the hospital than on previous occasions) is not “competitive driving” that this section of the Explanatory Notes is seeking to prevent.

In relation to the complainant’s comments about engine noise, we note that even if the modified TVC was considered to have high engine noise (which we deny), the fact that a vehicle produces a higher than normal engine noise does not mean that the vehicle is travelling at excessive speed or driving aggressively, particularly in a vehicle with manual transmission (such as the vehicle shown in the modified TVC). We also note that the frequency measurements that the complainant claims the vehicle produces in the modified TVC (which are raised as the basis for the complainant’s claim that the vehicle is being driven aggressively) would need to be examined carefully, as they could include other sound elements not related to engine speed (e.g. noise from rotation of other components).

Complaint:

Complaint about the statement “Filmed under controlled conditions. Driving shown adheres to all road safety regulations”.

Response:

For the reasons explained in this letter (and our 12 June submission), we deny that the modified TVC does not comply with the provisions of the Code. In these circumstances, the statement “Filmed under controlled conditions. Driving shown adheres to all road safety regulations” is completely appropriate as it confirms to the viewer that the driving shown is safe, and was performed in a controlled way.

In addition to the reasons described in our 12 June submission and our response to the 9 July complaint above, Nissan believes that the modifications to the original TVC remove any possible claim (which we deny) that the modified TVC breaches clause 2(a) of the FCAI Code.

The modifications

The modified TVC contains substantial changes to the original TVC. These changes are significant, and were made at substantial cost to Nissan in order to address the concerns raised by the Board. The changes made to the original TVC (and the effect of these changes) are summarised below:

Modification:

The volume of the engine noise has been lowered.

Effect:

Removes any perceived impression of aggressive at excessive speed.

Modification:

The words “quick, quick, quick” and “go, go, go” have been removed from the female voiceover.

Effect:

Removes the sense that the driver is being encouraged to drive at excessive speed.

Modification:

The squeaking noise that could be heard when the vehicle comes to a stop outside the hospital has been removed.

Effect:

Removes any impression that the parking manoeuvre upon arrival at the hospital was done in an unsafe or reckless manner.

Modification:

The following prominent on-screen statement has been added: “Filmed under controlled conditions. Driving shown adheres to all road safety regulations”.

Effect:

This message clarifies to the viewer that the driving shown was performed in a controlled way and in accordance with all applicable laws.

Whilst Nissan maintains that these modifications were not actually necessary to ensure compliance with the FCAI Code (for the reasons we have provided in our submission in relation to the original TVC), Nissan firmly believes that with the addition of these modifications, the modified TVC cannot possibly be viewed as portraying unsafe or reckless

or menacing driving that breaches applicable laws.

Compliance with the AANA Code

For the reasons set out in our 12 June submission (attached), Nissan believes that the modified TVC does not breach the AANA Code. Given that the Board found that the original TVC did not breach the AANA Code, we would respectfully anticipate a similar finding in relation to the modified TVC.

Summary

While Nissan acknowledges the complainants' concerns with the modified TVC, for the reasons outlined in our 12 June submission, together with the reasons outlined in this letter, we firmly believe that the modified TVC does not breach the FCAI Code or the AANA Code.

We therefore request that the complaints 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 (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 too close to another car in front, suggests racing and uses a disclaimer which is advised against in the FCAI Code.

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 is a modified version of a recently upheld advertisement (case reference 0195/13) and that it depicts a man driving his pregnant partner 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 its reasoning for upholding the original version of the advertisement it had stated 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 in this modified version of the advertisement the advertiser has removed the audio of the woman encouraging the man to drive faster, the volume of the engine noise has been lowered and the tyre squealing when the car comes to a stop outside the hospital has been removed. The Board considered that despite the amendments made by the advertiser there is still an audio indicator of speed, and this accompanied by the visual footage of the car being driven down narrow streets is still suggestive of a vehicle driving in a manner which is not appropriate for the urban environment depicted and is unsafe.

The Board noted that in this instance the complainant is also concerned that at the start of the advertisement the Nissan is shown driving too close to the car in front. The Board considered that this scene is very brief and that it is not clear how close the vehicles are to one another and that when the car in front turns left the Nissan is shown to be driving past at a reasonable distance.

The Board noted that in its determination against the upheld version of the advertisement, the Board had 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 in the modified version of the advertisement the overall theme of the advertisement retains the concept of racing against the clock and considered that consistent with its original determination the suggestion of a driver trying to beat his own time is a depiction which is not appropriate for a vehicle being driven on public roads and 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.

The Board noted the advertiser’s inclusion of a disclaimer on the screen indicating that the advertisement has been filmed under controlled conditions and that driving practices comply with all road safety regulations. The Board noted the Explanatory Notes to the FCAI Code which provide that disclaimers cannot be used to justify the inclusion of material which otherwise does not comply with the provisions of the FCAI Code. The Board considered that the overall theme of racing against the clock to beat a previous time taken for the journey to the hospital is a depiction of unsafe driving that is inconsistent with the FCAI Code.

Based on the above, 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 that in the advertisement the vehicle is shown parking at the entrance to a hospital’s emergency department and that the writing on the road indicates that where the vehicle 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 whilst it is morally questionable as to whether using a fake pregnancy in order to drive to the hospital and park in a premium spot outside it is acceptable, 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 complaint.

ADVERTISER RESPONSE TO DETERMINATION

I refer to your letters dated 12 July 2013 in relation to the modified Pulsar Hatch television advertisement (TVC) that has been showing on television and on the Internet (the “modified TVC”).

Nissan Motor Co. (Australia) Pty. Ltd. (Nissan) respectfully maintains that the modified TVC does not breach clause 2(a) of the FCAI Code of Practice Relating to Advertising for Motor Vehicles for the reasons outlined in our 9 July response.

However, in order to address the comments made by the Board in its most recent determinations, Nissan has made several further modifications to the modified TVC. These modifications are additional to the significant modifications that Nissan had already been to the original TVC (which is still the subject of an independent review application).

The modifications made in the latest version of the TVC are as follows:

- the words '10.24. Personal best.' have been removed from the voiceover
- parts of the TVC (such as the couple kissing) have been removed to slow down the driving footage (even though the footage shown was already below applicable speed limits)
- the following driving shots have been removed: 1. the car turning into alleyway and 2. the first shot of the car going by the camera in the alleyway
- the revving sounds have been removed
- the stop watch 'beep' upon arrival at the hospital doors has been removed.

We trust that any remaining concerns the Board had in relation to the modified TVC have

been addressed by these modifications.