



Ad Standards Community Panel
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Ad Standards Limited
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Case Report

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| 1. Case Number : | 0320-21 |
| 2. Advertiser : | BMW Australia |
| 3. Product : | Vehicle |
| 4. Type of Advertisement/Media : | TV - Free to Air |
| 5. Date of Determination | 24-Nov-2021 |
| 6. DETERMINATION : | Dismissed |
| 7. IR Recommendation: | Panel to Reconsider |
| 8. Date of reviewed determination: | 2-Feb-2022 |
| 9. Determination on review: | Dismissed |

ISSUES RAISED

FCAI Motor Vehicle Advertising Code\2(a) Unsafe driving

DESCRIPTION OF ADVERTISEMENT

This television advertisement features a voice-over saying, "Dear guardians of language. It's time to take a look at the definition of performance. To evolve much-loved but simplistic notions like speed, and power. True drivers now see the world as not just fast, or slow. New performance throws you back into your seat. Squeezes every molecule and watt. And gets a thrill from giving back. Performance, redefined."

Images of a dictionary and black-and white footage are interspersed with various BMWs being driven. The words, "fast", "efficient" and "kind" appear on buildings near the vehicles.

The writing "PERFORMANCE REDEFINED. BMW i. FULLY ELECTRIC. The Ultimate Driving Machine." appears on screen.

THE COMPLAINT

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



Primarily because the white BMW is seen changing lanes, straddling and crossing a broken line without using an indicator.

2. GENERAL PROVISIONS

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.]

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 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.]

Additionally the FCAI GUIDANCE TO ADVERTISERS states:

Clause 2(a): Unsafe driving:

Advertisers should ensure that advertisements do not depict, encourage or condone dangerous, illegal, aggressive or reckless driving. Advertisers need to be mindful that excessive speed is a major cause of death and injury in road crashes and accordingly should avoid explicitly or implicitly drawing attention to the acceleration or speed capabilities of a vehicle.

Advertisers should not use references to the speed or acceleration capabilities of a motor vehicle

BMW is clearly advertising that the BMW "goes beyond simplistic notions of speed" and that a key factor of performance is that the vehicles are "fast".

THE ADVERTISER'S RESPONSE



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

The complaint refers to the shot found at 19 second mark for the TVC that depicts a white BMW i4 seen changing lanes without using an indicator. In addition, the complaint makes reference to BMW Australia promoting speed or acceleration capabilities of a motor vehicle (for example, "0-100 km/h in 6.5 seconds") on a public road where the driving is depicted.

A potential breach of the requirements of FCAI Motor Vehicle Advertising Code\2(a) and 2(c) Unsafe driving\unsafe driving that would breach road rule.

BMW Australia provides its substantive response below.

Section 2(a) of the FCAI Motor Vehicle Advertising Code: Depiction of a motor vehicle travelling across lanes

The notice sets out under the heading "issues raised to date" that the relevant complaint related to a potential breach of the items 2(a) and 2(c) of the FCAI Motor Vehicle Advertising Code (Unsafe driving).

Items 2(a) of the Code sets out that "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."

Notwithstanding this, BMW Australia submits that the depicted behaviour should not offend the code.

Whilst the road depicted in the advertisement has a dividing line, the shot was filmed on closed roads and under safe driving conditions at safe speeds. Depicted in the advertisement has a clear line of sight for the road ahead and is not driving towards a blind corner or over a horizon.

Accordingly, BMW Australia submits that there is no depicted practice or other action which would breach a law of a Commonwealth or State or Territory.

Section 2(a) of the FCAI Motor Vehicle Advertising Code: Use of the word "fast"

With regard to the allegation that BMW Australia is promoting the speed or acceleration capabilities of a motor vehicle, BMW Australia allows that it has used the word "fast" to describe the redefinition of performance motoring in an age of electrification, but denies that it breaches the Code by doing so.



BMW Australia notes that the Code provides guidance to advertisers that they “should not use references to the speed or acceleration capabilities of a motor vehicle (for example, “0-100 km/h in 6.5 seconds”) on a public road where the driving depicted and the reference to such capabilities would contravene clause 2(a)”.

In response, BMW Australia submits that:

- a) The word “fast” is synonymous with concepts of immediacy and responsiveness, and not necessarily only with the concept of speed and acceleration;*
- b) BMW Australia does not at any time in the relevant advertisement make any claim about the acceleration capabilities of the vehicle in quantifiable terms such as in the time taken to reach 100km/h from a stationary position;*
- c) any allegation of depiction of unsafe driving which would offend clause 2(a) of the Code is restricted to the position of the vehicle across two lanes of a closed road, and is completely unrelated to the speed at which the vehicle is depicted to be travelling; and*
- d) there is no depiction of any vehicle travelling at unsafe speed at any point in the advertisement.*

Issues raised to date – section 2(c) of the FCAI Motor Vehicle Advertising Code

Item of 2(c) of the Code sets out that “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.”

BMW Australia repeats its submission above relating to the driving of the vehicle across lanes on a closed road.

THE DETERMINATION

The Ad Standards Community Panel (Panel) was required to determine whether the material before it was in breach of the Federal Chamber of Automotive Industries Voluntary Code of Practice for Motor Vehicle Advertising (the FCAI Code).

The Panel noted the complainant’s concern that the advertisement features a strong suggestion that vehicles are going to race, and in particular focuses on the speed capabilities of the vehicle.

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

Is this an advertisement for a motor vehicle?



The Panel 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 Panel determined that the BMW i4 vehicle depicted as a Motor Vehicles as defined in the FCAI Code.

The Panel determined that the material before it was an advertisement for a motor vehicle and therefore that the FCAI Code applied.

The Panel noted that the complainant had specifically referred to the Clause 2(c) of the FCAI Code however considered that the complaint was more appropriately considered under Clause 2(a).

Clause 2(a): 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.

Changing lanes

The Panel noted the complainant's concern that the advertisement depicts a vehicle changing lanes without indicating.

The Panel noted that the vehicle in question is depicted on screen for approximately one second and is shown to be changing lanes, from the left to the right. The Panel noted that the road depicts a broken line, indicating that changing lanes is allowed.

The Panel noted that it was possible that the scene was shown in between the flashing of an indicator, as the scene is very brief.

The Panel noted the Australian Road Rules which state:

"48 Giving a right change of direction signal

(1) Before a driver changes direction to the right, the driver must give a right change of direction signal in accordance with rule 49 for long enough to comply with subrule (2) and, if subrule (3) applies to the driver, that subrule.

Offence provision.

Note: Changes direction to the right is defined in rule 45 (3).

(2) The driver must give the change of direction signal for long enough to give sufficient warning to other drivers and pedestrians.

(3) If the driver is about to change direction by moving from a stationary position at the side of the road or in a median strip parking area, the driver must give the change of direction signal for at least 5 seconds before the driver changes direction.



49 How to give a right change of direction signal

(1) The driver of a vehicle must give a right change of direction signal by operating the vehicle's right direction indicator lights."

The Panel noted that there is no rule about a driver indicating while performing an action such as changing lanes, only that they must indicate for a reasonable time before beginning the action.

The Panel considered that in the context of a one second scene in which it is unclear whether the vehicle is currently indicating or indicated for sufficient time prior to changing lanes, the advertisement did not depict unsafe driving.

Speed

The Panel noted the complainant's concern regarding references to speed and their referral to the Guidance Note.

The Panel noted that the Guidance Note for this Section of the Code includes:

"Advertisers should ensure that advertisements do not depict, encourage or condone dangerous, illegal, aggressive or reckless driving. Advertisers need to be mindful that excessive speed is a major cause of death and injury in road crashes and accordingly should avoid explicitly or implicitly drawing attention to the acceleration or speed capabilities of a vehicle.

"Advertisers should not use references to the speed or acceleration capabilities of a motor vehicle (for example, "0-100 km/h in 6.5 seconds") on a public road where the driving depicted and the reference to such capabilities would contravene clause 2(a). Depictions of such capabilities in a closed-circuit environment must comply with clause 3"

The Panel noted the advertiser's response and noted the voiceover of the advertisement.

The Panel considered that while there are broad references to speed and power, these references do not encourage or condone unsafe or reckless driving.

Clause 2(a) conclusion

The Panel determined that the advertisement did not breach Clause 2 (a) of the FCAI Code.

Conclusion



Finding that the advertisement did not breach any other section of the FCAI Code the Panel dismissed the complaint.

INDEPENDENT REVIEWER'S RECOMMENDATION

I recommend that the Community Panel review its determination, on two matters:

- whether lane changing by a vehicle depicted in the advertisement was in breach of clause 2(a) of the *Voluntary Code of Practice for Motor Vehicle Advertising*, which provides that an advertisement for a motor vehicle should not portray unsafe driving
- whether the advertisement implicitly promotes the speed capability of the vehicle as a desirable feature, and if so whether that is in breach of the Code requirement that an advertisement should not portray unsafe driving.

I recommend that Ad Standards take account of observations made in this report regarding the interaction of the Code and the Explanatory Notes to the Code, and its relevance to the vexed issue of the application of the Code to advertisements that explicitly or implicitly refer to vehicle speed.

Complaint

This was a complaint made on 18 October 2021 about a television advertisement for a BMW i electric motor vehicle that appeared on a free-to-air channel.

The complainant alleged two breaches of the Code, which is promulgated by the Federal Chamber of Automotive Industries (FCAI). The Ad Standards Community Panel considers complaints relating to compliance with the FCAI Code.

The two alleged breaches of the Code were:

- **Lane changing:** The advertisement shows a BMW vehicle changing lanes, across a broken line from left to right, without the right indicator light flashing. This scene is approximately one second in length in an advertisement that is thirty seconds in length.

The complainant alleged that this was a breach of clauses 2(a) and 2(c) of the FCAI Code, which provide in part:

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 ...

(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 with road safety or traffic regulation.

- **Speed:** The advertisement contained a couple of references to vehicle speed. The most direct reference is that the BMW vehicle is driven past buildings that display the words *'fast', 'efficient', 'kind'*. The indirect references to speed are in two voice-over comments in the advertisement – that the definition of vehicle performance must go beyond *'much loved but simplistic notions like speed, and power'* and *'True drivers now see the world as not just fast, or slow'*.

The complainant alleged that this was a breach of clause 2(a) of the FCAI Code requiring that advertisers should not portray *'unsafe driving'*. The Code provides examples that may breach clause 2(a), including *'Vehicles travelling at excessive speed'* and *'People driving at speeds in excess of speed limits in the relevant jurisdiction'*. The complainant did not allege any breach of those examples, but referred instead to FCAI guidance on unsafe driving in the Explanatory Notes to the Code:

Advertisers need to be mindful that excessive speed is a major cause of death and injury in road crashes and should avoid explicitly or implicitly drawing attention to the acceleration or speed capabilities of a vehicle.

Community Panel decision

The Community Panel dismissed both elements of the complaint in a decision on 24 November 2021:

- **Lane changing:** The Panel referred to the Australian Road Rules (that are adopted in Australian jurisdictions). Rule 49 provides that a change of direction to the right must be given *'by operating the vehicle's right direction indicator lights'*. Rule 48 provides that this indication must be given *'for long enough to give sufficient warning to other drivers and pedestrians'*.

The Panel noted that the requirement did not apply while the lane changing action was being performed, but *'for a reasonable time before beginning the action'*. Further, in the context of the one second scene in the advertisement, the Panel said *'it is unclear whether the vehicle is currently indicating or indicated for sufficient time prior to changing lanes'*. The Panel accordingly determined that the advertisement did not portray unsafe driving.



- **Speed:** The Panel determined that the broad references to speed and power in the advertisement *'do not encourage or condone unsafe or reckless driving'*.

Request for review

The complainant's request for review made the following points:

- **Lane changing:** The complainant relies on a letter dated December 2021 addressed to the complainant and authored by the Chief, Centres for Road Safety and Maritime Safety in the NSW Department of Transport. The Chief advised that he had viewed the advertisement and was of the opinion that it depicted non-compliance with the Road Rules (but added a caveat that Transport for NSW is not qualified or authorised to determine whether an advertisement breaches an advertising standard). The Chief's opinion that a breach of the Road Rules was depicted was explained as follows:

These rules apply so that drivers give other road users reasonable and consistent notice of their intention to change lanes, both before and while they are completing a change of direction, to reduce the risk of a crash.

- **Speed:** The complainant does not directly address the brief reasoning of the Community Panel that the broad references in the advertisement to speed and power do not encourage or condone unsafe or reckless driving. Instead, the complainant explains his reliance on the guideline statement in the FCAI Explanatory Notes to the Code that advertisements should not draw attention to the acceleration or speed capabilities of a vehicle. The complainant observes that BMW is a *'serial offender and promoter of speed'*, *'they promote speed in every possible shape or form'* and *'speed is the biggest killer on our roads'*.

The complainant notes two previous decisions of the Advertising Standards Board, discussed below and in which he was a complainant, that dismissed complaints that similarly relied on the FCAI guidance rather than on the terms of the Code. In both decisions the Independent Reviewers were critical of a misalignment of the Code and the Explanatory Notes. It was recommended that action be taken to review the Code.

The complainant also included a 2018 letter sent to him by the Minister for Infrastructure and Transport, the Hon Michael McCormick MP. The Minister noted that the FCAI Code had been introduced *'in response to government and community concerns about the portrayal of unsafe driving practices such as speeding'*. The Minister acknowledged that it may be appropriate to review the Code to examine if it appropriately addresses vehicle speed and acceleration.



The complainant accepts that it may be futile to base his application for review on a breach of the Explanatory Notes. He asks the Independent Reviewer in this case to endorse the remarks of previous Independent Reviewers.

The advertiser's response

The advertiser (BMW Australia Limited) responded in similar terms to both the original complaint and the application for review. The advertiser observes that the application for review provides no additional grounds of objection to the advertisement. The advertiser also relies on the reasoning of the Ad Standards Community Panel.

The advertiser's main points are, in summary:

- The advertisement does not make any reference to the vehicle's acceleration capability
- The Road Rules impose an obligation to give sufficient warning to other drivers of a change of lane, but do not set out a positive obligation to maintain signalling throughout a lane change
- The contrary view expressed by the Chief of the NSW Centre for Road and Maritime Safety is an opinion that is not authoritative or binding on Ad Standards
- The depiction of the lane change in the advertisement was of extremely short duration and there is uncertainty as to whether there was any breach of the Road Rules.

The advertiser made an additional claim in its first response that should, in my view, be put to one side. It is that *'the shot was filmed on closed roads and under safe driving conditions at safe speeds [and with] a clear line of sight for the road ahead'*. That may be the case, but it is speculative for a viewer to draw that inference, particularly given the brevity of the clips that depicted vehicle movement. The Community Panel noted that claim but did not discuss it.

Analysis of the application for review

Preliminary observations

The role of the Independent Reviewer in the Ad Standards complaint and review process is to examine whether the Community Panel should review an earlier determination on the basis that

- there was a substantial flaw in the Panel's determination, or
- there is new and relevant evidence not earlier considered by the Panel that could have a significant bearing on its determination.

The Community Panel's decision as to lane changing



It is not in dispute in this case that the advertisement briefly depicted a vehicle changing lanes without the right indicator blinking. There are three points in contention:

- Do the Australian Road Rules require signalling to be maintained during a lane change?
- Bearing in mind the brief one second video clip of the lane change, is it reasonable to infer that signalling may have occurred both before the lane change commenced and during the lane change?
- Does the absence of any visual evidence of signalling constitute a depiction of unsafe driving?

As to the **first** issue, the Road Rules require that a change of direction be signalled '*for long enough to give sufficient warning to other drivers and pedestrians*'. I am not aware (from a brief internet search) as to whether there are any authoritative judicial rulings on the meaning of that requirement.

On general principle it is likely to be a question of fact and degree in individual cases as to whether the obligation to give '*sufficient warning*' means that signalling must be maintained for some period after the lane change has commenced. The Community Panel may have construed the requirement too rigidly in stating that the requirement is only to display signalling '*for a reasonable time before beginning the action*'. On the other hand, it is probably going too far to state (as the Chief of the NSW Centre for Road and Maritime Safety has stated) that signalling must continue '*both before and while they are completing a change of direction*'. I note that the NSW Road User Handbook (p 114) advises drivers to use the indicator signal '*to warn other drivers that you intend to move left or right*' and that '*you must indicate before you ... move to the left or right*'.

There is, accordingly, no firm basis in this case for concluding that the advertisement contravened clause 2(a) or 2(c) of the Code by depicting driving on a public road in breach of an Australian road law.

As to the **second** issue, it is possible that signalling did occur either side of the one second clip in the advertisement. However, that is surmise. There is no factual basis in the advertisement for drawing that inference. The advertisement should be evaluated against the Code on the basis that it depicts a vehicle changing lanes without the right indicator blinking.

The **third** issue is whether the absence of signalling is a depiction of '*unsafe driving*'. I read clause 2(a) of the Code as applying generally to '*unsafe driving*', without the need to establish that it constitutes a breach of Australian road law. That would be the more normal reading of clause 2(a), having regard to both the punctuation in the clause and clause 2(c) which applies generally to driving practices that breach Australian road law. On this reading of clause 2(a), the reference to '*reckless and*



menacing driving' that breaches an Australian road law is simply an example of unsafe driving.

Consequently, the advertisement should be evaluated on the basis that (albeit briefly) it shows a vehicle on a two-lane road straddling a broken centre line, seemingly while undertaking a lane change. There is nothing in the advertisement to indicate that the vehicle has provided sufficient warning to other drivers. Accordingly, it is an open inference that the vehicle is being driven unsafely.

My view is that the Panel gave undue weight to the brevity of the lane change clip in the advertisement. If the video is frozen at the 19 second mark it shows a BMW straddling a centre line alongside a building that displays the word '*fast*'. The Code requires an advertiser not to display unsafe driving practices. There are strong public policy reasons for imposing that obligation on advertisers. If an advertisement, on its face, appears to breach that obligation, limited weight should in my view be given to a claim by the advertiser that the clip is brief and fails to capture signalling that may have occurred prior to the commencement of the clip.

I also believe that some weight can be given to the opinion of the Chief of the NSW Centre for Road and Maritime Safety that the advertisement depicts non-compliant driving. It is appropriate to have regard to his informed opinion without resolving whether he correctly explained the lane changing requirement in the Australian road rules.

In summary, my view is that the reasoning of the Community Panel is open to question, having regard to the form of the advertisement, the reliance placed by the panel on the brevity of the lane change clip, and the fundamentally important obligation imposed by the Code upon advertisers not to portray unsafe driving. I would treat this as a substantial flaw in the Panel's determination. I am also of the view that the Panel should take account of new evidence in the form of the NSW Chief of Road Transport Safety's view. I therefore recommend that the Community Panel review its determination.

The Community Panel's decision as to speed

The complainant has in effect conceded that the references to speed in the advertisement do not contravene clause 2(a) of the Code. There is no factual basis for concluding that the vehicle speed depicted in the advertisement is in breach of Australian road law or is unsafe in the circumstances. There is no direct portrayal of unsafe or reckless driving.

The complainant's main concern is that the Code sets an inappropriate standard by referring only to '*unsafe driving*', without defining that term other than stating that it includes reckless and menacing driving that would breach an Australian road law.



Examples given in the Code are excessive vehicle speed, extreme and unnecessary change in direction, and deliberate loss of vehicle control.

Whether ‘*unsafe driving*’ should be construed more broadly is an open question. The FCAI Explanatory Notes seem to support a broader construction, as the following examples illustrate:

Advertisers should ... not depict, encourage or condone dangerous, illegal, aggressive or reckless driving.

[Advertisers] should avoid explicitly or implicitly drawing attention to the acceleration or speed capabilities of a vehicle.

In interpreting and applying the FCAI Code, the FCAI asks that advertisers consider both the explicit and implicit messages conveyed by an advertisement. Advertisers should make every effort to ensure that advertisements not only comply with the formal provisions of the FCAI Code, but are also consistent with the objectives and guidelines expressed in the Explanatory Notes which accompany the FCAI Code.

It is at least arguable that the term ‘*unsafe driving*’ can be construed broadly, consistently with the stated intention of FCAI, the author of the Code. On this approach, portrayal of speed and acceleration capability could contravene the Code. A residual difficulty, nevertheless, is that the Code uses the term ‘*portray*’, which ordinarily means to show, depict, represent or picture. It is doubtful that the term ‘*portray*’ goes as far as the phrase used in the Explanatory Notes – ‘*depict, encourage or condone*’.

The prevailing view, in earlier decisions of the Advertising Standards Board and opinions of Independent Reviewers, is that there is a misalignment between the Code and the Explanatory Notes:

- **Case 289/08:** The Independent Reviewer expressed agreement with a submission from the advertiser ‘*that reliance on the explanatory material as a breach of the Code was to misuse it*’.
- **Case 0215/10:** The Board dismissed a complaint on the basis that, while a reference to speed capability ‘*is a clear breach of the spirit and intent of the Code ... mention of the speed capability is not a breach of the substantive provisions of the Code*’. The Board asked that this issue be brought to the attention of the FCAI.

The Independent Reviewer in this case expressed a similar view: ‘*This advertisement [in referring to speed capability] makes a clear breach of the spirit and intent of the Code. ... [T]his spirit and intent is not included in the Code but appears in the Explanatory Notes to the Code. ... [I]gnoring this advice does not amount to a breach of the Code.*’



- **Case 0493/17:** In reviewing an advertisement that referred to the acceleration capability of a vehicle, the Board expressed the view that the guidance in the Explanatory Notes was *'a suggestion only'*, though the advertisement was *'on the border of what is acceptable in an advertisement for a vehicle of this nature'*.

The Independent Reviewer discussed the issue at some length, commenting: *'The actual situation is, and has been for some years, that the Board does not interpret Explanatory Notes as part of the substantive provisions of the FCAI Code and, accordingly, takes the view that it can only find a breach of the substantive Code provisions and not of the Explanatory Memorandum.'* The Independent Reviewer did not disagree with the Board's *'longstanding position'*, commenting only that the *'misalignment'* of the Code and Explanatory Notes has been *'an ongoing frustration'* and that it was to be hoped the FCAI will act speedily to resolve the misalignment.

As noted earlier, the complainant in the present matter also drew this issue to the attention of the Commonwealth Minister for Infrastructure and Transport, who wrote to the complainant in August 2018 expressing concern that advertisements could refer to acceleration capability contrary to the specific guidance in the Explanatory Notes. The Minister noted that he had conveyed his concerns to the FCAI.

I conclude with three observations:

1. While acknowledging the consistent reasoning of the Panel and the Independent Reviewers in earlier cases, my view is that there may be greater latitude to construe the phrase *'unsafe driving'* by reference to the guidance given in the Explanatory Notes. The term *'unsafe driving'* is potentially broad, and on my reading of the Code is not limited to driving that is in breach of Australian road law (which is given only as an example of unsafe driving). It may therefore be open to a Community Panel to have regard to the formal guidance provided by the FCAI, the author of the Code, as to what comes within unsafe driving (notably excessive speed and rapid acceleration).
2. The better approach, nevertheless, may be a revision of the Code to spell out more clearly what is meant by unsafe driving. The term is not defined in the Code. It is unhelpful that the only examples given are of unlawful driving practices, since those are separately covered by the wording of both clauses 2(a) and 2(c) of the Code. Furthermore, thought should be given to replacing the term *'portray'* in clause 2, which is potentially narrow in meaning. The phrase used in the Explanatory Notes – *'depict, encourage or condone'* – seems more appropriate for a code that is addressed to advertising that, as the Explanatory Notes observe, can convey meaning both explicitly and implicitly.
3. It is uncertain whether the advertisement in the present case would in any case contravene the guidance in the Explanatory Notes about not referring to the speed and acceleration capability of a vehicle. As noted earlier, the



advertisement refers to vehicle speed as a general consideration, but not specifically in reference to the vehicle depicted in the advertisement. Nor, as the Community Panel decided in this case, does the advertisement expressly *'encourage or condone unsafe or reckless driving'*. On the other hand, a Panel may take the view that the advertisement implicitly promotes the speed capability of a BMW i vehicle as a desirable feature for a prospective purchaser. As noted earlier, the vehicle is depicted passing a building that displays the word *'fast'*.

I recommend that the Community Panel review its determination as to whether the advertisement implicitly promotes the speed capability of the vehicle as a desirable feature, and if so whether that contravenes the requirement of the Code that an advertisement should not portray unsafe driving. In my view, the substantial flaw in the Panel's earlier determination was the Panel's failure to address whether the term *'unsafe driving'* can be construed more broadly to encompass concerns regarding speed and acceleration capability, as suggested in the FCAI Explanatory Notes.

I also recommend that Ad Standards consider whether, as suggested above, the terms of the Code are unclear and could be revised. In so recommending I note that the Community Panel's role is to interpret and uphold the FCAI Code provisions as they exist and it is not within Ad Standards power to change or rewrite the Code.

THE DETERMINATION ON REVIEW

The Ad Standards Community Panel (Panel) noted the request for review of its decision and the findings of the Independent Reviewer.

The Panel noted that the Independent Reviewer considered that there were substantial flaws in the Panel's determination. Specifically, the Independent Reviewer noted that:

- the reasoning of the Community Panel is open to question, having regard to the form of the advertisement, the reliance placed by the panel on the brevity of the lane change clip, and the fundamentally important obligation imposed by the Code upon advertisers not to portray unsafe driving [Change of lane scene]
- the Panel failed to address whether the term *'unsafe driving'* can be construed more broadly to encompass concerns regarding speed and acceleration capability, as suggested in the FCAI Explanatory Notes [Speed]

The Panel noted that it needed to reconsider the case under the Federal Chamber of Automotive Industries Voluntary Code of Practice for Motor Vehicle Advertising (the FCAI Code) taking into account the Independent Reviewer's recommendations and comments.



The Panel noted that the complainant's submission for review as well as the Independent Reviewer's comments include concerns about the structure and clarity of the FCAI Code. The Panel noted that the FCAI Code is written by the FCAI and its role is to consider the Code as written, and that the Explanatory Notes accompanying the FCAI Code are secondary guidance for industry and do not form part of the Code. The Panel noted that the complainant may wish to refer their concerns about the FCAI Code to the Federal Chamber of Automotive Industries directly.

Clause 2(a): 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.

Changing lanes

The Panel noted the comments of the Independent Reviewer relating to the interpretation of the Code - specifically, that Clause 2(a) may be understood to refer to both unsafe driving *and* driving that would breach road rules, rather than to mean that unsafe driving *is defined as* driving that would breach road rules. The Panel acknowledged this distinction and considered the advertisement with this in mind.

The Panel noted the evidence provided by the complainant, being a letter from Mr John Hardwick, Chief, Centres for Road Safety and Maritime Safety, Environment and Regulation, Transport for NSW. The Panel noted Mr Hardwick's comment that "Drivers are required to give a change of direction signal ... and stop giving the change of direction signal as soon as the driver completes the change of direction". It is not clear in what capacity Mr Hardwick gave his opinion.

The Panel acknowledged that the previous case report had quoted a superceded version of the rules. The current rules for a change of direction signal are set out in Rule 46 (left change) and Rule 47 (right change) of the current version of the model Australian Road Rules (as at 28 May 2021). The Panel noted these Rules, which use the same wording other than in their reference to left or right and provide:

"46 Giving a left change of direction signal

(1) Before a driver changes direction to the left, the driver must give a left change of direction signal in accordance with rule 47 for long enough to comply with subrule (2) and, if subrule (3) applies to the driver, that subrule. Offence provision. Note: Changes direction to the left is defined in rule 45 (2).

(2) The driver must give the change of direction signal for long enough to give sufficient warning to other drivers and pedestrians.

(3) If the driver is about to change direction by moving from a stationary position at the side of the road or in a median strip parking area, the driver must give the change



of direction signal for at least 5 seconds before the driver changes direction. Note: Median strip parking area is defined in the dictionary.

(4) The driver must stop giving the change of direction signal as soon as the driver completes the change of direction. Offence provision.

(5) This rule does not apply to a driver if the driver's vehicle is not fitted with direction indicator lights. Note: Driver's vehicle is defined in the dictionary."

The Panel specifically noted the comments from Mr Hardwick with reference to item 4 of Rules 46 and 47, and his interpretation that item 4 of the Rules is not simply a prohibition on continuing to signal when any change of direction is complete, but taken together with item 2 amounts to an obligation to continue to signal until the change of direction is complete.

The Panel noted however that the Rules are drafted without specific reference to continuing to signal and considered that Mr Hardwick's interpretation of this item 4 of the relevant Rules may not be shared by other law enforcement officials. The Panel considered that it could be interpreted to mean that maintaining a signal after completing a manoeuvre is prohibited, rather than that a signal must be maintained throughout the duration of a manoeuvre. That is, that failing to signal before a manoeuvre and failing to cease signalling after a manoeuvre is completed are two separate offences. The Panel further considered that Mr Hardwick's letter appears to be an individual viewpoint and is not representative of all law enforcement in all states and territories. It therefore does not bind the Panel.

The Panel noted the Independent Reviewer's comment that there is nothing in the advertisement to indicate that the vehicle has provided sufficient warning to other drivers, however the Panel considered that there is also nothing in the advertisement to indicate that the vehicle has *not* provided sufficient warning to other drivers.

The Panel acknowledged the Independent Reviewer's comment that it had given too much weight to the brevity of the scene. The Panel noted that it had historically taken the duration of a scene into consideration when assessing an advertisement and considered that the duration of the scene is relevant as it affects the overall impression of the advertisement as seen by a regular viewer. The Panel noted that the FCAI Code states that advertisements must "not portray" material in breach of the Code and considered that the short scene could not with certainty be said to portray a breach.

The Panel considered that finding a breach of the FCAI Code in this instance may set an unfortunate precedent and place an unreasonable onus on all future vehicle advertisements in which very brief transitional scenes are frequently used.

Nevertheless, the Panel considered that it would be wise for advertisers to carefully consider the impact of even very brief scenes such as this one, and emphasised that it would have been preferable to show footage of the vehicle indicating.



The Panel noted the Independent Reviewer's comments that even if not a technical breach of road rules, the material shown may still be a depiction of unsafe driving, and noted that there is no guideline in the FCAI Code or the Explanatory Notes for the basis on which such determinations might be assessed.

The Panel noted that its role is to uphold broad community standards. The Panel therefore assessed the scene with broad community standards in mind. The Panel considered that most viewers of the advertisement, being members of the general public, would be unlikely to find such a brief and inconclusive scene to be a depiction of unsafe driving that would warrant a finding of breach of the FCAI Code.

Overall, the Panel considered that in the context of a one second scene in which it is not clear that unsafe driving is depicted, the advertisement did not breach the FCAI Code.

Speed

The Panel acknowledged that there has historically been some contention about the FCAI Code and the Explanatory Notes, as detailed by both the complainant and the Independent Reviewer in their comments.

The Panel reiterated that its role is to assess advertisements against the provisions of the FCAI Code as it is written.

The Panel considered the Independent Reviewer's comments that it may be open to the Panel to have regard to the guidance provided by the FCAI (the author of the Code) to industry as to what may come within the meaning of unsafe driving (notably excessive speed and rapid acceleration).

The Panel noted that Clause 2(b) of the FCAI Code refers specifically to speed, stating:

"Advertisers should ensure that advertisements for motor vehicles do not portray ... people driving at speeds in excess of speed limits in the relevant jurisdiction in Australia in which the advertisement is published or broadcast."

The Panel considered that the drafting of the separate provisions in the FCAI Code indicates an intention that the matter of "speed" is to be considered separately from "unsafe driving", and that the focus of Clause 2(b) is on the portrayal of excess speeding.

The Panel considered that while there is some disparity between the FCAI and the Explanatory Notes, given that Objectives of the Code include the provision that:

"In the event of ambiguity, the provisions of the Code will prevail"



it is not open to the Panel to broaden the scope of the FCAI Code and consider separate guidance in a manner which has the effect of superseding the provisions of the Code. The Panel respectfully disagreed with the Independent Reviewer's suggestion that it apply the Explanatory Notes, which appear to include more onerous requirements than the FCAI Code itself.

The Panel considered that it is not open to it to construe the term "unsafe driving" to more broadly encompass concerns regarding an overall theme of speed in an advertisement.

The Panel agreed with the Independent Reviewer that the Code would be improved by the removal of any disparity between the Code and the Explanatory Notes, and that this may be achieved by the inclusion in the Code of the broader meaning of "unsafe" contained in the Explanatory Notes.

Clause 2(a) conclusion

On review, the Panel determined that the advertisement did not breach Clause 2(a) of the FCAI Code.

Clause 2(b): Advertisements for motor vehicles do not portray ... people driving at speeds in excess of speed limits in the relevant jurisdiction in Australia in which the advertisement is published or broadcast.

For completeness, the Panel considered the theme of speed under Clause 2(b).

The Panel considered that the FCAI Code specifically states that advertisements should not "portray" people driving at speeds in excess of speed limits. The Panel noted that the advertisement itself does not portray speeding (nor was this a concern of the complainant), and any impression of speed is a result of camera techniques.

In regards to whether an overall theme of speed can be considered under this clause, the Panel reiterated its comments above and considered that this concern would not be considered under Clause 2(b).

Clause 2(b) conclusion

The Panel determined that the advertisement did not breach Clause 2(b) of the FCAI Code.

Conclusion

Finding that the advertisement did not breach any other section of the FCAI Code the Panel dismissed the complaint.