



Case Report

1	Case Number	0339/13
2	Advertiser	Holden Ltd
3	Product	Vehicle
4	Type of Advertisement / media	Pay TV
5	Date of Determination	25/09/2013
6	DETERMINATION	Dismissed

ISSUES RAISED

FCAI Motor Vehicles 2(a) Unsafe driving
FCAI Motor Vehicles 2(c) Driving practice that would breach the law

DESCRIPTION OF THE ADVERTISEMENT

The Holden Malibu TV commercial launches the all new Holden Malibu as an exciting mid-size car in a beige world.

Everything in Beigeville is dull and boring – the buildings, the people, their clothing. We follow our hero couple jump as they hurry to escape this boring world. They drive through the town, looking for the way out, while the Beigeville residents can't help but stare at the all new Malibu – a car unlike any they've seen before. Eventually they escape Beigeville and head towards a more exciting place, better suited to the all new Malibu.

THE COMPLAINT

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

The driver of the motor vehicle is seen driving dangerously and breaking several Australian Road Rules including:

- 1 Exiting a narrow alley, without stopping and nearly hitting several pedestrians. An old man is so narrowly missed and scared, he holds his hands up to protect other pedestrians.*
- 2 The vehicle is seen exiting the alley and turning left without the indicator light showing.*
- 3 The vehicle narrowly misses a young man standing next to his barrow. It's so close he has to jump up onto the barrow to avoid being hit.*
- 4. The vehicle is seen making a sudden and extreme change in direction, twice, around the barrow.*

5. The vehicle then passes what appears to be 2 police officers sitting in a vehicle with an orange flashing light on the roof.

6. The driver of the Holden is then seen parked and hiding in a side alley, while the police drive along behind them not seeing them.

The advertisement breaches 2 sections of the FCAI Code:

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.]

(c) Driving practices or other actions which would, if they were to take place on a road or road-related area, breach any Commonwealth law or the law of any State or Territory in the relevant jurisdiction in which the advertisement is published or broadcast directly dealing with road safety or traffic regulation.

[Examples: Illegal use of hand-held mobile phones or not wearing seatbelts in a moving motor vehicle. Motorcyclists or their passengers not wearing an approved safety helmet, while the motorcycle is in motion.]

The advertisement depicts driving behaviour which breaches several Australian Road Rules
1 Fail to exit road related area with care (the driver comes through a blind intersection at speed without slowing down or taking care to ensure there are no pedestrians on the footpath).

2 Fail to give way to pedestrians on a footpath

3 Fail to use indicator when turning left

4 Drive dangerously towards a pedestrian on a road in a reckless manner

5 Make sudden and extreme turns

The fact that the Police chase the motorist is proof in itself that the driver has broken the road rules.

The agency may argue that this is supposed to be humorous. It's not. Dangerous driving, risking the lives and limbs of pedestrians and other road-users is not a joke. And that's why there's a Code to try to prevent advertisers promote this sort of behaviour.

What is a joke (an utter farce) is that there is no screening of advertisements such as these, to ensure they are never broadcast, which are so clearly in breach of your Code.

THE ADVERTISER'S RESPONSE

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

As discussed Holden wishes to submit its original response (complaint numbers 0296/13 and 0299/13) in response to the further Malibu TVC complaint 0339/13.

In our view the issues raised in complaint 0339/13 have been addressed in our original response. That said the only issue raised not captured in our response is the claim that the vehicle fails to indicate when exiting the alley way and turning left.

We have reviewed and believe the car is not shown long enough to depict indication.

As noted in prior correspondence Holden takes its legal responsibilities under the Competition and Consumer Act very seriously, as well as the provisions of the AANA Advertiser Code of Ethics and the Federal Chamber of Automotive Industries Voluntary Code of Practice for Motor Vehicle Advertising.

The Advertisement

The Advertisement is a parody in which Holden uses humour to tell a story about the new and exciting Holden Malibu driving through “Beigeville”, a fictional town where everything is boring and beige.

At the beginning of the Advertisement two pseudo “Beigeville” detectives patrol the streets ensuring order is maintained in the boring “Beigeville” town. A man and woman who are secretly not from “Beigeville” walk through the streets disguising their colourful clothes with beige overcoats. The man and woman enter an indoor car park where they have hidden their Holden Malibu. Inside the car park the man and woman remove their beige disguises and take the beige cover off their colourful Holden Malibu.

When the colourful and exciting Holden Malibu pulls out of the car park and onto the streets of “Beigeville” the boring people of “Beigeville” are shocked and disapprove, an old man staggers backwards at the sight of it and a woman shields her child’s eyes.

The Holden Malibu continues to drive down the streets of “Beigeville.” When a cyclist, turns to see the exciting Holden Malibu driving at a distance behind him, he is so shocked and distracted by its colour and distinction that he loses concentration and comically cycles off the road and into a fruit stand. The crash is humorous and clearly over exaggerated; the rider is clearly unhurt by his accident and stands facing the car in awe as it drives past him. The Holden Malibu swerves to avoid the fruit which has spilt onto the road.

The Holden Malibu then proceeds around the corner to where the “Beigeville” detectives are sitting eating donuts in their car. When the detectives see the chaos created by the “non-Beigeville” residents driving their exciting Holden Malibu they turn their lights on in pursuit. The driver of the Holden Malibu sees the ‘pseudo detective’s’ car following behind so pulls into an indoor car park. The detectives drive past unaware.

In the final scene of the advertisement the Holden Malibu pulls out of the car park, drives past the disapproving people of “Beigeville”, and into the countryside leaving boring and beige “Beigeville” behind them.

The concerns raised in relation to the Advertisement include:

- 1. ‘Driving too close to the cyclist’;*
- 2. ‘Car knocks cyclist off bike’;*
- 3. ‘Causing the cyclist to come off his bike’;*
- 4. ‘Failing to stop when the cyclist came off the bike’;*
- 5. ‘Cyclist is pushed off the road’;*
- 6. ‘Driving fast in a narrow street’;*
- 7. ‘Car driven illegally’; and*
- 8. ‘Hiding from the police’.*

Relevant legislation and regulations

The relevant laws and standards relating to the depiction of unsafe driving in advertising include:

- 1. The FCAI Code of Practice for Motor Vehicle Advertising (Code); and*
- 2. The Explanatory Notes of the Voluntary Code of Practice for Motor Vehicle Advertising*

(Explanatory Notes).

The Complaints are made pursuant to Clauses 2(a) and 2(c) of the Code.

Clause 2(a) requires that advertisers ensure that advertisements for motor vehicles do not portray any of the following:

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.]

Clause 2(c) requires that advertisers ensure that advertisements for motor vehicles do not portray any of the following:

Driving practices or other actions which would, if they were to take place on a road or road-related area, breach any Commonwealth law or the law of any State or Territory in the relevant jurisdiction in which the advertisement is published or broadcast directly dealing with road safety or traffic regulation.

[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

Applying Clauses 2(a) and 2(c) of the Code to the Advertisement

In Holden's view the Advertisement does not breach either Clause 2(a) or 2(c) of the Code.

a) The Complaints concern unsafe driving which they suggest causes the cyclist to crash into the fruit stand, including claims that the "car knocks cyclist off bike" and that the cyclist was "pushed off the road".

The Holden Malibu did not cause the bike rider to crash and the Advertisement contains no "reckless or menacing driving" as prohibited by the Code. In the Advertisement the Holden Malibu is never shown to be driving close to the cyclist. In fact, the only time the Malibu is shown driving near to the cyclist is after the cyclist crashes into the fruit stand. Further, on no reasonable view can the Holden Malibu be said to have "pushed the cyclist off the road." From the Advertisement, the cyclist accident clearly results when the cyclist turned to see the colourful and exciting Holden Malibu, such that he was so surprised and distracted that he comically cycled off the road and into a fruit stand. The cyclist then stands in awe and watches the car drive past.

The Advertisement does not otherwise contain driving which is unsafe, reckless or menacing that is in breach of any applicable law. The Holden Malibu is at all times driving under applicable speed limits and never displays a loss of control.

b) The Explanatory Notes to Clause 2(a) of the Code provides examples of driving behaviour that would constitute a breach of Clause 2(a), including sudden "extreme and unnecessary changes in direction". Two complaints reference the Malibu swerving around the cyclist and driving fast on a narrow street. The driver of the Holden Malibu necessarily drives around the fruit spilled onto the road, not the cyclist, in a controlled manner.

c) One complaint claims that the Advertisement features "driving fast in a narrow street with many pedestrians". At no time during the Advertisement does the vehicle travel at excessive speed.

d) Clause 2(c) of the Code prohibits driving practices that would breach any Commonwealth, State or Territory law. Some of the complaints refer to the driver of the Holden Malibu not stopping to render assistance to the rider after the crash. In Holden's view this does not

breach the Code as the crash was not caused by the Holden Malibu and was comical and over exaggerated. By the time the Holden Malibu drove past the fruit stand the cyclist is clearly unhurt and is standing and looking at the vehicle in awe, overwhelmed by its distinctiveness and appeal, as it drives past him.

The use of fantasy, humour and over exaggeration in the Advertisement is in accordance with the Explanatory Notes and does not in any way prevent the Advertisement from complying with the Code or relevant Commonwealth, State or Territory laws.

e) The complaints allege that the Advertisement breached the Code by depicting the driver of the Holden Malibu evading police in relation to the bike crash. The characters identified as "police" by the complainants are in fact pseudo "Beigeville" detectives who are employed to keep order in the boring town. This is apparent from the 'old school' setting, old fashioned car, plain unmarked car and plain clothes of the detectives. When the detectives see the shock caused by the Holden Malibu and its cool owners they turn their lights on in order to run the Malibu out of town. The detectives' pursuit is unrelated to the cyclist's crash and they are pursued because they are not "Beigeville" compliant. As discussed above, the Advertisement uses humour in accordance with the Code.

Holden has supported the cycling community for many years, including the Holden Woman's Cycling Team, and takes the depiction of safe driving in our advertising very seriously.

Holden believes that most viewers will enjoy the Advertisement and understand that it is a parody using humor to tell a story. In creating the Advertisement Holden was conscious of avoiding associations with normal on road use.

In Holden's view the Advertisement is in full compliance with the Code and the Explanatory Notes and the driving practices adopted were at all times conducted in a safe manner.

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 Holden Malibu 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 Holden Malibu 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 failing to indicate when exiting an alleyway, almost hitting some pedestrians and a cyclist, making sudden and extreme changes in direction and then hiding from the police.

The Board noted that it had recently considered this advertisement on both TV (0299/13) and Internet (0296/13) and dismissed the complaints on both of those occasions.

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 the advertisement features a Holden Malibu driving through a town and attracting the attention of the inhabitants due to its colour: the car is maroon whereas the environment and the people are depicted as beige.

The Board noted the complainant's concerns that the vehicle does not indicate when it turns out of an alleyway. The Board noted the advertiser's response that that the vehicle is not shown long enough to depict indication or suggest a lack of indication. The Board considered that the scenes featuring the car leaving the alleyway are edited in a way which does not show the continuous motion of the vehicle and considered that each scene which depicts the vehicle is too brief to establish whether an indicator is or is not being used.

The Board noted the complainant's concerns that when the vehicle exits the alleyway it nearly hits several pedestrians and causes one man to hold his hands up to protect other pedestrians. The Board noted that when the car leaves the alleyway it is driving in a controlled manner and there is no indication that a pedestrian had to move out of the way of the vehicle in order to avoid being hurt. The Board noted that we see an elderly man raise his left arm to touch the wall and establish his balance but considered that the most likely interpretation of this scene is that he is so surprised to see a maroon coloured vehicle in Beigeville that he is having trouble standing up. The Board noted that there are no pedestrians close to the elderly man and considered that the man does not appear to be trying to protect any other pedestrians.

The Board noted the complainant's concerns that the vehicle drives too close to a cyclist causing the cyclist to swerve and fall off his bike. The Board noted that the cyclist is shown looking over his shoulder at the vehicle before losing control of his bike and considered that the gap in time between the cyclist falling off and the car swerving to avoid the debris from the road-side stall the cyclist has collided with suggests that the vehicle was not driving too close to the cyclist. The Board noted that it was necessary for the vehicle to swerve in order

to avoid the fruit on the road and considered that the vehicle is driven in a safe and controlled manner. The Board noted that there are no other vehicles in view during this scene. The Board considered that the most likely interpretation of this scenario is that the cyclist was too busy looking at the vehicle and not paying attention to where he was going and that the cyclist clearly did not require any help and was unhurt.

The Board considered that the vehicle is depicted as driving in a safe and controlled manner consistent with the environment and road conditions.

The Board noted the complainant's concerns that the Holden Malibu driver is hiding from the police following the cyclist incident and considered that there is no indication in the advertisement that the police saw the cyclist fall off as the vehicle had turned a corner before the police saw them. The Board considered that the most likely interpretation for the police being interested in the Holden Malibu is because of its colour. The Board noted that it is not an offence to move your vehicle out of the way of a police car and considered that the advertisement is not suggesting inappropriate, unsafe or illegal behaviour.

The Board noted the complainant had raised concerns that the advertisement depicted material which was in breach of Clause 2(c) of the FCAI Code and considered that in this instance the concerns raised fell under Clause 2(a) only.

Based on the above, the Board determined that the advertisement does not depict reckless or unsafe driving and does not breach clause 2(a) of the FCAI Code.

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