



Case Report

1	Case Number	0493/17
2	Advertiser	BMW Group Australia
3	Product	Vehicle
4	Type of Advertisement / media	TV - Pay
5	Date of Determination	08/11/2017
6	DETERMINATION	Dismissed
7	IR Recommendation	Reconfirm original decision

ISSUES RAISED

FCAI Motor Vehicles 2(a) Unsafe driving

DESCRIPTION OF THE ADVERTISEMENT

This television advertisement focuses on the features of the BMW 5 Series. The interior shots then transition to the BMW 5 Series being driving on a closed circuit raceway.

THE COMPLAINT

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

The first ad is in breach of the FCAI Motor Vehicle Code specifically prohibits such advertising (quote): Advertisers should avoid references to the speed or acceleration capabilities of a motor vehicle (for example, "0-100 km/h in 6.5 seconds").

(QUOTE): 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.]

THE ADVERTISER'S RESPONSE

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

The following issue was raised under the Code of practice for motor vehicle advertising: FCAI Motor Vehicles 2(a) Unsafe driving

In preparing our response below we have also been conscious of Section 2 of the AANA Advertiser Code of Ethics, in particular section 2.6 'Advertising or Marketing Communications shall not depict material contrary to Prevailing Community Standards on health and safety', but not limited to the following sections:

2.1 Discrimination or vilification

2.2 Exploitative and degrading

2.3 Violence

2.4 Sex, sexuality and nudity

2.5 Language

2.6 Health and Safety

The specific complaint made is 'the claim made "going from 0 to 100km/h in 5.1 seconds" is a breach of the FCAI Motor Vehicle Code for the automotive industry.'

Our response is that the commercial is not in breach of FCAI Motor Vehicles code; 2(a) unsafe driving based on the following:

The Voice Over is the only reference to the speed time, and is placed over footage of the vehicle remaining stationary in a warehouse.

The purpose of the video is to demonstrate the performance capability of the BMW 5 Series by showing how it drives on a closed course. The commercial was filmed under controlled conditions with no spectators and all content was captured on a closed course and the vehicle was driven by a professional driver (as noted in the disclaimer).

Whilst this is an actual feature of the BMW 5 Series, at no time does the footage depict a standing vehicle reaching 100km/per hour in 5.1 seconds, nor does it encourage drivers to trial this. The speed reference in the Voice Over was a recommendation from our creative agency to showcase the mere capabilities of the vehicle and differentiate itself from the previous model and its features and capabilities. The video does not at any stage suggest to the viewer that these vehicles should be driven in this manner on a normal traffic road. At no point throughout the film does the vehicle demonstrate unsafe driving or reckless and menacing driving. The vehicle does not travel at excessive speeds and does not partake in any sudden, extreme or unnecessary changes in direction.

As this commercial was run online and on Subscription TV only, it was not necessary to obtain CAD substantiation as this is not a requirement for those respective media channels.

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).

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 then considered 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 BMW 5 series 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 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 Board noted the examples given in the FCAI Code include: 'Vehicles travelling at excessive speed; sudden, extreme and unnecessary changes in direction and speed of a motor vehicle...or the apparent and deliberate loss of control of a moving motor vehicle.'

The Board noted the advertisement features a female voiceover talking about the features of the vehicle and the images are of the interior of the car. The final feature she refers to is the capacity to go 0-100km in 5.1 seconds. The car is then driven out of a warehouse and onto a closed course.

The Board noted the complainant's concerns that the advertisement depicts unsafe driving and refers to the acceleration capacity of 0-100km in 5.1 seconds.

The Board noted the advertiser's response that the advertisement was filmed on a closed course under controlled conditions and a professional driver was driving.

The Board noted that the FCAI Explanatory notes states that: "Advertisers should avoid references to the speed or acceleration capabilities of a motor vehicle (for example, "0-100 km/h in 6.5 seconds")."

The Board noted that at the beginning of the advertisement, the voiceover and the images are very slow moving and restful. The Board noted that at the time that the acceleration capacity is mentioned, the vehicle is not moving. The Board noted that immediately following the acceleration statement, the vehicle is shown being driven out of the warehouse. The Board noted that the engine is heard revving and the music and overall tone of the advertisement increases.

The Board noted that the vehicle appears to leave the warehouse quickly and the driver is seen placing his foot firmly on the accelerator suggesting the car would accelerate quickly.

The Board noted that while the reference in the explanatory note is to 'avoid' the use of references to speed or accelerations, in the Board's view, this is a suggestion only. The Board considered that the use of this type of terminology in this advertisement to describe the vehicle's capacity is on the border of what is acceptable in an advertisement for a vehicle of this nature.

A minority of the Board considered that the advertisement was intended to create an impression of power and speed and considered that it was not appropriate even for a high end passenger vehicle.

The majority of the board felt that the overall tone of the advertisement was to demonstrate the features of the vehicle including its acceleration capabilities but that the vehicle is not shown to be driven in an unsafe way.

In the Board's view the accumulative effect gives the impression that the vehicle was travelling at a fast speed but there was nothing to suggest it was speeding and it was not seen driving recklessly or in a menacing way.

The Board acknowledged that there is a level of community concern around unsafe driving practices but in this case determined that the advertisement did not breach Clause 2(a) of the FCAI Code.

Finding that the advertisement did not breach the FCAI Code on the above grounds, the Board dismissed the complaint.

INDEPENDENT REVIEWER'S RECOMMENDATION

The appellant has requested a review of the above determination of the Board regarding a Pay TV advertisement for BMW Group Australia. Although the appellant does not nominate one of the above grounds for review it appears that it is ground one which is relied upon. The determination was a majority decision.

The Appellant's request for appeal centres on the Board's consideration of the Explanatory Notes which precede the substantive provisions of the FCAI Code and the interaction of those Notes with the substantive Code. In particular, the appeal request focusses on the Board's consideration of the claim in the voice over of the advertisement that the BMW could accelerate from "0 to 100 km in 5.1 seconds".

The Appellant refers to the Explanatory Notes as 'guidelines' and states:
". Why have a Code with unequivocal and irrefutable Guidelines and then allow BMW to openly flout them.

Your Guidelines state: Moreover, 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 avoid references to the speed or acceleration capabilities of a motor vehicle (for example, “0-100 km/h in 6.5 seconds”).

The Board then claims: "The Board noted that while the reference in the explanatory note is to ‘avoid’ the use of references to speed or accelerations, in the Board’s view, this is a suggestion only."

This is not a suggestion. It is a statement made by BMW in total and absolute contravention of the Guidelines”.

The Appellant, echoing the opinion of a minority of the Board, then states:

“The entire ad is about speed and acceleration promoted subliminally in an attempt to get around the Code.”

The FCAI Explanatory Notes, inter alia, state:

“Advertisers should ensure that advertisements do not depict, encourage or condone dangerous, illegal, aggressive or reckless driving. Moreover, 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...”

In particular, it is noted that use of disclaimers indicating that a particular scene or advertisement was produced under controlled conditions; using expert drivers; that viewers should not attempt to emulate the driving depicted; or expressed in other similar terms, should be avoided. Such disclaimers cannot in any way be used to justify the inclusion of material which otherwise does not comply with the provisions of the Code.

Advertisers should avoid references to the speed or acceleration capabilities of a motor vehicle (for example, “0-100km/h in 6.5 seconds” (emphasis added).

The FCAI Explanatory Notes also state:

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

There are significant observations to be made regarding the Appellant’s comments above and the nature of the FCAI Code and its accompanying Explanatory Notes.

Firstly, the FCAI Code, including its Explanatory Notes, is not a Code which belongs to the ASB as the Appellant suggests when referring to “Your Guidelines”. The Code is drawn up and operated by the FCAI and the role of the ASB is to receive and determine appropriate complaints made on the basis of provisions of the Code. The ASB is not responsible for the content of the Code nor for deciding the status of the Explanatory Notes which accompany the Code.

The Appellant has misunderstood what the Board is saying in its determination when he states:

“This is not a suggestion. It is a statement made by BMW in total and absolute contravention

of the Guidelines”.

This misunderstanding by the Appellant illuminates the issue at the heart of this Review. The Board is saying in its determination that the reference (noted above) in the Explanatory Notes about avoiding referring to the acceleration or speed capacity is itself a suggestion only (emphasis added) and more significantly, that the Explanatory Notes are only suggestive and not binding. It is not making a comment about what BMW is saying in the advertisement.

This review has come about because the Applicant has not appreciated the way the Board interprets the Explanatory Notes which precede the FCAI Code. The Appellant refers to “unequivocal and irrefutable Guidelines” and regards the determination of the Board as overruling the Code which includes those ‘guidelines’.

The actual situation is, and has been for some years, that the Board does not interpret the Explanatory Notes as a part of the substantive FCAI Code and, accordingly, takes the view that it can only find a breach of the substantive Code provisions and not of the Explanatory Notes. However, it would be most difficult for a prospective complainant to have knowledge of the practice of the Board, unless they were familiar with previous relevant cases.

The Board has consistently taken this view regarding the FCAI Code in a number of cases: In 0215/10 (Lexus) the Board considered that:

“... the reference to the speed capability of the vehicle is a clear breach of the spirit and intent of the Code. Regardless of the type of vehicle being advertised the intent of the Code, as articulated in the Explanatory Notes, demands that advertisers not refer to speed capabilities - particularly high speed capabilities. The Board noted that it, the Board, is not able to determine that there is a breach of the FCAI Code solely on the basis of the speed reference as mention of the speed capability is not a breach of a substantive provision of the FCAI Code. The Board asked that this issue be brought to the attention of the FCAI for discussion with the advertiser”.

There had been a number of references to the speed capability of the vehicle in this advertisement, which took place on a racetrack.

This case subsequently was the subject of a Review by the Independent Reviewer who, in confirming the decision of the Board, stated:

“As the Board pointed out very clearly in its determination, advertisers creating advertisements of this kind are exhorted by the “Guidance to Advertisers” in the Explanatory Notes to the Code, not to refer to the speed capability of the vehicle being tested or proved. This advertisement ignores that guidance and makes a clear breach of the spirit and intent of the Code.

Not surprisingly, ALL complainants refer to this, but fail to acknowledge that this spirit and intent is not included in the Code but appears in the Explanatory Notes to the Code.

The consequence of this, is that ignoring this advice does not amount to a breach of the Code (emphasis added).

I note that, not unexpectedly, this has been brought to the attention of the relevant industry body. The Board made no legal error in its determination but has, in my view, highlighted a

possible weakness in the Code. If the advertisement had been within the ambit of the General Clause 2, it would be clearly in breach because of the excessive speed shown.”

In 0298/10 (Porsche), in reference to a still image, the Board stated:

“The Board noted that the advertisement refers to the vehicle as ‘clocking 0-100km in a jaw-dropping 3.4 seconds’. The Board considered that the reference to the acceleration capabilities of the vehicle is clearly contrary to the Explanatory Notes that accompany the FCAI Code but is not a breach of clause 2(b) of the FCAI Code (emphasis added). The Board noted that the advertiser has agreed to ensure that future advertisements do not contain reference to the acceleration capabilities of the vehicle. The Board noted that the FCAI Code has been in operation for more than five years and that advertisers should be well aware of its requirements.”

In 0311/12 (Nissan) in reference to a TV advertisement, the Board stated:

“The Board noted that there is no verification of the actual speed of the vehicle but that the voice over is heard saying ‘What if you could go from 0-100 in 2.8 seconds?’

...The Board considered that the promotion of the acceleration capabilities of a vehicle does not of itself amount to “excessive speed or sudden extreme and unnecessary changes in direction and speed of a motor vehicle”.

The Board were concerned about the inclusion of references to the acceleration capabilities of any vehicle and noted that the explanatory notes of the FCAI Code provides “Advertisers should avoid references to the speed acceleration capabilities of a motor vehicle...” but did not state that advertisers “shall not” include these statements (emphasis added).

The Appellant also states, regarding his claims above, that the determination of the Board: “... now also opens the door for all Motor Vehicle manufacturers and suppliers to start stating the acceleration potential of their vehicles”.

In this regard, it is clear from the above cases that advertisements for various motor vehicles have stated the acceleration potential of their vehicles in their advertisements and over the years, a number of those advertisements have come before the Board for its determination. It is fair to say that the determinations of the Board in these cases reveal an ongoing frustration and concern with the misalignment between the exhortations of the Explanatory Notes regarding acceleration potential and the substantive provisions of the Code.

The Appellant makes a further point about the provision in the Explanatory Notes relating to the use of disclaimers which states:

“In particular, it is noted that the use of disclaimers indicating that a particular scene or advertisement was produced under controlled conditions; using expert drivers; that viewers should not attempt to emulate the driving depicted; or expressed in other similar terms, should be avoided. Such disclaimers cannot in any way be used to justify the inclusion of material which otherwise does not comply with the provisions of the Code.”

The advertisement contains such a disclaimer, and this was relied upon by the Advertiser in its response to the original complaint. The Appellant’s view is that this response regarding the disclaimer was evidence that the Appellant ‘was admitting that they thought it was OK to

breach the Code because of the Disclaimer’.

The Appellant comments that the Board did not specifically consider this disclaimer issue in its determination. The fact that the Board did not engage in a specific consideration of the use of the disclaimer is irrelevant, given that the complaint alleged a breach of the Explanatory Notes rather than of a substantive provision of the Code.

As the Board’s longstanding position is that it can only find a breach of a substantive provision of the FCAI Code, the contention that there is a substantial flaw in the Board’s determination because it did not find a breach on the basis of an Explanatory Note cannot be sustained.

However, I echo the sentiments of my predecessor in 0215/10 (Lexus) in observing that this BMW advertisement clearly ignores the exhortation in the Explanatory Notes to “avoid explicitly or implicitly drawing attention to the acceleration or speed capabilities of a vehicle ... Advertisers should avoid references to the speed or acceleration capabilities of a motor vehicle (for example, ‘0-100 km/h in 6.5 seconds)’.

It is difficult to imagine words which could make clearer the intention of the framers of the Explanatory Notes, which go on to state:

“Advertisers should make every effort to ensure that advertisements not only comply with the formal provisions of the Code but are consistent with the objectives and guidelines expressed in these Explanatory Notes which accompany the Code”.

To ignore the guidance of the Explanatory Notes, in my view, constitutes a clear disregard of the spirit and intention of the Code as expressed in the Explanatory Notes. I share this view with my predecessor in 0215/10. In the Reviewer’s recommendation in that case, seven years ago, it was noted that the above situation had been brought to the attention of the relevant industry body. In the same year, the ASB, in its Fact Sheet “Issues to consider -the FCAI motor vehicle advertising code” highlighted, inter alia, that:

“Advertisers must be aware of the need to meet the intent and spirit of the FCAI Code as expressed in the Explanatory Notes, not just the substantive provisions”.

In November 2012, the ASB pointedly again raised this issue with the FCAI in a submission to the FCAI Code Review, which cited cases 0215/10 (Lexus), 0298/10 (Porsche) and 0311/12 (Nissan) and requested more direct guidance from the FCAI on the intended application of the Explanatory Notes. The submission also recommended a consequent revision of the substantive provisions of the Code.

No response to these requests has been forthcoming from the FCAI over the years which have intervened. This failure to resolve the misalignment between the Explanatory Notes and the substantive provisions of the Code continues to be as problematic in 2017 as it was in 2010 and it is to be hoped that the FCAI will speedily act to resolve the issue.

There was no substantial flaw in the determination of the Board that there was no breach of a substantive provision, in this case clause 2(a), of the FCAI Code.

I recommend that the determination of the Board in 0493/17 be confirmed.

