



Case Report

1	Case Number	0494/10
2	Advertiser	Nissan Motor Co (Aust) Pty Ltd
3	Product	Vehicles
4	Type of Advertisement / media	Pay TV
5	Date of Determination	08/12/2010
6	DETERMINATION	Upheld - Modified or Discontinued

ISSUES RAISED

Motor vehicles - Driving practice that would breach the law

DESCRIPTION OF THE ADVERTISEMENT

Two families driving a Nissan X-TRAIL to their holiday destination. One family travels with surfboards to the beach, the other travels with a kayak and bikes to a campground.

THE COMPLAINT

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

A 4WD is shown being driven on a variety of roads and beaches. Several times the vehicle is shown being driven on public roads with the rear number-plate completely obstructed by several bicycles on a bike-rack. On other occasions when the bicycles are not there the rear plate "X-TRAIL" is clearly visible.

In NSW this is a serious offence. It is listed under DRIVING OFFENCES (NOT PARKING OFFENCES) in the NSW Fixed Penalty Handbook. It is such a serious offence it attracts a penalty exceeding \$250 plus 3 Demerit Points.

The bicycles also obstruct vision of the rear indicator and stop lights. This offence attracts the same penalties.

Under NSW law when bicycles are attached to the rear of a vehicle it is compulsory to attach a rear Bike-Plate:

<http://www.rta.nsw.gov.au/registration/numberplates/>

No such plate is visible throughout the commercial.

The importance of this offence should not be underestimated. Former Assistant Commissioner of Police (Vic) Ray Shuey has written a Policy Document on Obstructed Number Plates:

<http://www.walk.com.au/pedestriancouncil/Page.asp?PageID=1174>

This commercial therefore breaches 2 sections of your Code:

2 (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.

2 (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.]

If you intend to claim that this is not a ""driving practice"" or an ""unsafe driving practice"" then you will need to prove that driving a vehicle at night without lights is also not a driving practice or unsafe driving practice or failing to fasten a seat-belt or wear a crash helmet (particular passengers and pillion passengers) is not a driving practice or unsafe driving practice. They all come under the same Code.

We therefore ask that this commercial be immediately banned from broadcast.

THE ADVERTISER'S RESPONSE

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

1. The complaint

The subject of the complaint is Nissan's X-TRAIL 30 second TVC which features footage of the vehicle being driven with bicycles attached to the rear. This footage appears in both on-road and off-road vehicle usage. The complainant is concerned that the vehicle number plate is obscured when the bicycles are attached. The complainant is also concerned that the bicycles obstruct vision of the rear indicator and stop lights.

2. Nissan's response to the complaint

Purpose of the Advertisement

The TVC for the new Nissan X-TRAIL is a new commercial to promote the new model X-TRAIL. The commercial aims to show young families how they could live a similar adventurous lifestyle in a Nissan X-TRAIL.

All footage of the vehicle was filmed within a controlled environment – either on a closed public road with police escort, or on private property.

Compliance with the AANA Code

The nature of the complaint means that the relevant section of the AANA Code is section 2.6, which states that “advertising or marketing communications shall not depict material contrary to Prevailing Community Standards on health and safety.” However, as this is an advertisement for a motor vehicle, section 2.7 of the AANA Code provides that section 2.6 does not apply, and that alternately, the advertisement must comply with the FCAI Code. Therefore, to determine whether the advertisement complies with the AANA Code, it must be assessed against the relevant provisions of the FCAI Code. The relevant provisions of the FCAI Code were raised by the complainant. They are section 2(a) and section 2(c). These are discussed below.

Compliance with the FCAI Code

The complainant asserts that the advertisement breaches section 2(a) and section 2(c) of the FCAI Code. Relevantly, section 2 of the FCAI Code provides:

“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.]

Alleged breach of section 2(a)

The X-TRAIL vehicle depicted in the advertisement features ornamental number plates, marked “X-TRAIL” in white lettering on a black background. The X-TRAIL is depicted with a number of optional extra features and associated accessories, including bicycles. As outlined above, the purpose of the advertisement is to highlight the potential advantages to families using an X-TRAIL vehicle as part of their adventurous lives.

Nissan acknowledges that the rear number plate is obscured by the bicycles. However, as explained above, the number plates are used for ornamental purposes only, and the advertisement has been filmed under controlled conditions, with police escort used on public roads at all times. There is no other traffic featured on the roads in any section of the advertisement, and it is common practice in the industry to use ornamental number plates in the development of television commercials. Nissan takes its safety obligations very seriously and makes no attempt to undermine the legitimate objectives of the governments of any Australian State or Territory in relation to road safety.

FCAI provides examples of situations where section 2(a) of the FCAI Code may apply. These are set out above. Nissan submits that obstruction of number plates is in no way analogous to those scenarios. The overall construction of the advertisement sets out to show off the capability of the X-TRAIL vehicle in a lighthearted manner, and a key purpose of the

advertisement is to alert consumers to the vehicle's potential to transport items such as bicycles, kayaks and other adventure equipment. The advertisement does not in any way condone any form of unsafe, reckless or menacing driving. Nissan submits that the safety of the X-TRAIL passengers, and/or any other potential road users, is not compromised in any way in the depiction of the bicycles in the advertisement.

Alleged breach of section 2(c)

Section 2(c) is concerned to avoid situations where dangerous driving practices are demonstrated by a driver or vehicle passenger. Like section 2(a) discussed above, section 2(c) of the FCAI Code anticipates a number of situations that may be construed as dangerous driving, including use of hand held mobile phones while driving and failure to wear seatbelts/motorcycle helmets.

The intention of section 2(c) is plainly to avoid advertisers depicting unsafe behaviours in motor vehicles. Nissan has ensured that in each segment of the advertisement, the driver and passengers (and even the featured accessories) are properly restrained, that the driver is not distracted from the road, and that the driver is otherwise behaving in a safe manner. Nissan submits that the obstruction of the ornamental number plates is not a contravention of section 2(c).

As set out above, the focus of the advertisement is highlighting the potential of the X-TRAIL to enhance the lives of active, adventurous families. This is achieved through a lighthearted portrayal of the vehicle rapidly changing both the accessories it can carry, and the families who may benefit from using the Nissan X-TRAIL. At no point in the advertisement is the behaviour of the driver or any passenger shown to compromise any provision of the road laws and/or regulations in any Australian State or Territory.

3. Compliance with the FCAI Code

As outlined above, Nissan takes great care when developing television commercials to ensure that they do not encourage any form of unsafe, illegal or reckless driving. Nissan also takes great care to ensure that the commercials do not present any vehicle being driven in a manner that undermines the intent of the FCAI Code. In Nissan's opinion, the X-TRAIL advertisement fulfils these goals and obligations.

Nissan firmly believes that the advertisement in no way depicts, encourages or condones dangerous, aggressive or reckless driving and therefore fits within the requirements and the spirit of the FCAI Code.

4. Compliance with section 2 of the AANA Code

The relevant provision of section 2 of the AANA Code of Ethics is s 2.6 to which s 2.7 applies and requires that "advertisements for motor vehicles shall comply with [the FCAI Code]".

As outlined above, Nissan asserts that the advertisement complies with the FCAI Code.

As a result, Nissan believes that the complaint is not justified on the grounds referred to in this letter.

We look forward to receiving the results of the Board's determination.

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 decided that the material in question was published or broadcast in all of Australia or in a substantial section of Australia for payment or valuable consideration given that it was being broadcast on television in Australia.

The Board determined that the material draws the attention of the public or a segment of it to a product being a Nissan X-Trail in a manner calculated to promote that product. Having concluded that the material was an advertisement as defined by the FCAI Code, the Board then needed to determine whether that advertisement was for a motor vehicle. Motor vehicle is defined in the FCAI Code as meaning: "passenger vehicle; motorcycle; light commercial vehicle and off-road vehicle".

The Board determined that the Nissan X-Trail 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 noted the complainant's concern that the advertisement depicts a vehicle being driven with a bike rack so that the number plate is obscured, that there is no bike plate on the vehicle, and that the bike rack obscures vision of the rear indicator and stop lights.

The Board noted relevant provisions of the Road Rules which provide: 'Number plate basics: All vehicles registered in NSW must have official number plates mounted and clearly displayed at the front and rear. Bike rack plates: If the rear number plate of your vehicle is obscured by a bike or bike rack, you must either: (i) mount the number plate elsewhere, or (ii) purchase a special bike rack plate.'

The Board then analysed specific sections of the FCAI Code and their application to the advertisement.

The Board identified that clause 2(a) was relevant in the circumstances. The Board had to consider whether this clause of the Code had been breached.

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 depictions of driving in the advertisement and determined that the advertisement does not depict any unsafe driving or any reckless or menacing driving. The Board determined that the advertisement does not depict unsafe driving nor reckless or menacing driving that would breach any law and does not breach clause 2(a) of the FCAI Code.

The Board then considered whether the advertisement breached section 2(c) of the FCAI Code. Section 2(c) of the FCAI Code provides that advertisers should not portray “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 directly with road safety or traffic regulation”.

Examples are given in the FCAI Code of illegal use of hand-held mobile phones or not wearing seatbelts in moving motor vehicles.

The Board considered that the examples that accompany clause 2(c) give a clear indication of the types of breaches that are considered to be an infringement of clause 2(c). The Board considered the Explanatory Notes to the FCAI Code which state:

“Vehicle occupant protection and road safety are primary concerns for the automotive industry in the design and operation of all motor vehicles supplied to the Australian market. FCAI endorses the National Road Safety Strategy and acknowledges the importance of increased road safety awareness in the Australian community...”

The Board noted the decision of the Independent Reviewer in case 0182/10 Hyundai regarding the interpretation of clause 2(c) of the FCAI Code. The Board considered that use of a bike rack and obscuring of number plates is a driving practice or other action that comes within clause 2(c) of the FCAI Code.

The Board carefully viewed the advertisement and noted that the use of the bike rack does obscure the number plate of the vehicle in a number of scenes in the advertisement. The Board also considered that the use of the bike rack does not obscure the turning or stop lights of the vehicle as they are set high on the rear of the vehicle.

The Board noted the advertiser’s response that the vehicle is depicted with ornamental plates only and that the advertisement was shot on a closed public road with police escort or on private property. The Board accepted that ornamental plates can be used in advertisements but considered that there is also a clear requirement to display a bike plate on a vehicle where the original plate (ornamental or not) is obscured. The Board considered that a similar bike plate could easily have been used in the advertisement.

The Board considered the issue around the advertisement being filmed under police supervision or on private property. The Board noted that clause 2(c) of the FCAI Code clearly requires the Board to consider the depicted action ‘if it were to take place on a road or road-related area’. This has the effect that even if the driving practice or other action is depicted on private property, the Board must consider whether such action would breach any relevant law

dealing with road safety or traffic regulation. The Board determined that the failure to display a bike plate, were that to occur on a road, would be a breach of the Australian Road Rules (as adopted into various jurisdictions' legislation) and that therefore there is a breach of clause 2(c) of the FCAI Code.

On the above basis, the Board determined that the advertisement's depiction of the Nissan with obscured number plates and no bike plate is a breach of section 2(c) of the FCAI Code.

Finding that the advertisement breached the FCAI Code the Board upheld the complaint.

ADVERTISER RESPONSE TO DETERMINATION

As a display of Nissan's good faith in this matter, Nissan is currently investigating the options to modify this TVC with a view to returning to the air in 2011. Subject to the determination of the Board following the Independent Review, Nissan will ensure that, if necessary, the modified TVC does not include any infringing material.

Further, Nissan has taken steps to ensure that all scheduled spots and bonus spots already booked for this TVC have been replaced with an alternate X-TRAIL TVC that does not feature the infringing footage. Nissan takes its responsibility as an advertiser very seriously, and all parties concerned with the development and production of this TVC have been briefed regarding the Board's decision to ensure that future Nissan advertising is designed within the bounds of all the Australian State/ Territory road rules.

We look forward to addressing the Board further on this issue at a later date.

30th March 2011: On the basis that Nissan's request for an Independent Review was not accepted, Nissan have now amended the relevant TVCs to ensure that bike plates are incorporated as required. Nissan intends to start using the revised TVC in the market by 1 April 2011.