



CASE REPORT

1. Complaint reference number	201/04
2. Advertiser	Mitsubishi Motots Australia Ltd (Magna)
3. Product	Vehicles
4. Type of advertisement	TV
5. Nature of complaint	FCAI - Other
6. Date of determination	Tuesday, 10 August 2004
7. DETERMINATION	Upheld – discontinued or modified

DESCRIPTION OF THE ADVERTISEMENT

The advertisement opens with a visual of two cars on a racing track. The voiceover states “These rear wheel drives are raced on tracks in predictable conditions.”

The visuals then cut to the same two cars alongside each other on an unmarked dirt surface with a Mitsubishi Magna production vehicle between them. The voiceover states “But what if the conditions were unpredictable? And they were tested against the Magna?”

A small fine print disclaimer in white appears in the top left hand corner of the screen “Filmed under controlled conditions”. The three cars are filmed driving down along the dirt surface and they are then filmed from above as they come towards a right hand turn corner. The voiceover states “With a rally built traction system called Quad Tec All Wheel Drive. How would the rear wheel drives go then?”

The two rear wheel drive vehicles are filmed skidding off the side of the dirt surface throwing up loose dirt and gravel into the air. A cloud of dirt and gravel fills the air and the cars cannot be seen for a second. The cars’ engines and tyre skidding noises can be heard. The voiceover states “Well they’d probably go as far as the first corner” as only the Magna is filmed coming out from around the corner. As the Mitsubishi Magna drives along the surface towards the camera, the voiceover states “The awesome Magna with all wheel quad tec drive. Makes every drive a gripping drive.”

THE COMPLAINT

Comments which the complainant/s made included the following:

“I must say that seeing ads like this does nothing for our quest to lower the road toll. Showing cars sliding sideways that are clearly out of control also does nothing to encourage safe driving and saying things like ‘gripping drive’ in a commercial could also be seen by young people as encouraging them to drive in an aggressive manner. I believe the messages in this ad threaten road safety and the health of all road users be they drivers or pedestrians.”

“The current advertisement for the Magna is encouraging an irresponsible attitude to driving – the advertisement features an apparent race to the first corner, at which point the implication is the two competitors (Ford and Commodore) will be travelling at an excessive speed which will cause them to run off the road whilst the Magna will not. Surely this breaches some sort of standard, it certainly does nothing to promote safe driving. Mitsubishi should focus on the safety aspects of all wheel drive instead of this boy racer stuff.”

THE ADVERTISER’S RESPONSE

Comments which the advertiser made in response to the complaint/s included the following:

“In response, its also important to state Section 3(a) of the code permits the use of testing or proving activities.”

“The advertisement does not encourage reckless or unsafe driving as the scenario is fictional and used to illustrate the greater control delivered by an AWD system in treacherous conditions, as opposed to speed or acceleration per se.”

“The voice over clearly states ‘But what if the track was unpredictable, and they were tested against a Magna with a rally bred traction system called QuadTec All Wheel Drive.’”

“The environment is one of testing and proving – evidenced by the safety suits and helmets of the drivers, supported by a graphic on screen stating ‘Filmed under controlled conditions’.”

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 which came into effect on 1 July 2004 (the “FCAI Code”).

To come within the FCAI Code, the material being considered must be an “advertisement”. The FCAI Code defines “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 other 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 Mitsubishi Magna “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 Mitsubishi Magna 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 identified that clauses 2(a), 2(c) and 3 were relevant in the circumstances. The Board had to consider whether those clauses of the Code had been breached.

Before looking at whether clauses 2(a) and 2(c) of the FCAI Code had been breached, the Board first considered whether clause 3 of the FCAI Code had been complied with. The Board determined that clause 3 of the FCAI Code was not a saving provision. Neither the express language of the clause nor the intention behind the FCAI Code allow clause 3 to operate as an exemption to a breach of any part of clause 2. The express language of clause 3 of the FCAI Code indicates that advertisers may make use of the scenes permitted under that clause “Without limiting the general application of clause 2”. As a result, clause 3 is intended to ensure advertisers can legitimately make use of the types of scenes permitted under clause 3 provided that the provisos in clause 3 are satisfied and the use of such material is consistent with the general application of clause 2 in the context of the activities permitted.

The Board noted that pursuant to clause 3 of the FCAI Code, advertisers are permitted to:

“make use of scenes of motor sport; simulated motor sport; and vehicle testing or proving in

advertising, subject to the following:

Such scenes should be clearly identifiable as part of an organised motor sport activity, or testing or proving activity of a type for which a permit would normally be available in Australia.

Any racing or competing vehicles depicted in motor sport scenes should be in clearly identifiable racing livery.”

The Board first gave consideration to whether the advertisement in question made use of scenes of “motor sport” in accordance with clause 3 of the FCAI Code. “Motor Sport” is defined in the FCAI Code as meaning:

“racing, rallying, or other competitive activities involving motor vehicles of a type for which a permit would normally be available under the National Competition Rules of the Confederation of Australian Motor Sport, or other recognised organising body.”

As the advertiser had not indicated in its response whether a permit was required and, if required, was obtained for the driving activities depicted in the advertisement, the Board made a determination on this point. The Board formed the view that although the driving practices depicted in the advertisement did involve competitive and racing activity, those activities were not of a type for which a permit would normally be available under the CAMS rules.

Even though the Board took the view that the advertisement had not made use of a “motor sport” scene as defined under the FCAI Code, it noted that if the advertisement had portrayed “motor sport” as defined in the FCAI Code, the provisos in clauses 3(a) and (b) would not have been satisfied.

Clause 3(a) of the FCAI Code requires the use of the “motor sport” scene to be:

“clearly identifiable as part of an organised motor sport activity....of a type for which a permit would normally be available in Australia.”

For the reasons stated above, the Board was of the view that the depictions involved racing and/or competitive activity of a type for which a permit under the CAMS rules would not normally be available in Australia.

Clause 3(b) of the FCAI Code requires that in any use of a “motor sport” scene:

“any racing or competing vehicle depicted.....should be in clearly identifiable racing livery.”

The Board noted that the Mitsubishi Magna was a competing vehicle and did not have any racing livery adorned on its exterior.

The Board noted the advertiser’s submission that the advertisement made legitimate use of “testing” in advertising in accordance with clause 3 of the FCAI Code. The Board therefore considered whether the advertisement had made use of testing or proving activity in accordance with clause 3 of the FCAI Code.

Clause 3(b) of the FCAI Code relates only to scenes of motor sport or simulated motor sport and is irrelevant to scenes of testing or proving activity. The Board therefore only had to consider whether a testing or proving activity took place in the advertisement and, if so, whether clause 3(a) of the FCAI Code was satisfied i.e. whether any testing or proving activities in the advertisement were:

“clearly identifiable as part of.....a testing or proving activity.....”

To determine what testing or proving activity means in the context of clause 3, the Board looked at surrounding content in the clause as regards motor sport. As motor sport typically involves racing or competitive activity and is dealt with specifically in clause 3, the Board determined that testing or proving was another form of activity and needed to be “clearly identifiable” as such.

The Board took the view that the testing or proving activity, which the advertiser submits was being depicted in the advertisement, was not “clearly identifiable” as such an activity as required under clause 3(a) of the FCAI Code, for the following reasons:

Although the voiceover in the advertisement states that the vehicles are being “tested” against the Mitsubishi Magna, this reference was only used once during the advertisement. The Board formed the view that the use of this word was not enough to satisfy the requirement to clearly identify to viewers that the activity was one of testing and proving.

Although the advertiser referred to the use of the disclaimer “Filmed under controlled conditions” in support of its argument that the activity was one of testing and proving, the Board noted that the disclaimer used was in small white print in the top left hand corner of the screen for only a short amount of time in comparison to the length of the advertisement and was barely legible to viewers.

The Board also noted that the first reference in the advertisement to the other two vehicles was to those cars being “raced” on tracks. The Board took the view that this detracted from the force, if any, of the second reference in the advertisement to those vehicles being “tested” as a clear identification that the activity being depicted was one of testing and proving activity.

The Board noted that the surface along which the vehicles drove was just a dirt surface and there was nothing else on or around the surface to clearly indicate that it was a testing track or proving ground.

For the above reasons, the Board formed the view that it would not have been clear to the ordinary viewer that the activity being depicted was “clearly identifiable” as a testing or proving activity and therefore the advertisement did not satisfy clause 3 of the FCAI Code. The Board then had to consider the general application of clause 2. Having already determined that clauses 2(a) and 2(c) were relevant in the circumstances, the Board first considered whether clause 2(a) of the FCAI Code had been breached.

In order to breach clause 2(a) of the FCAI Code, the driving practices depicted must be:

“unsafe driving, including reckless and menacing driving that would breach any Commonwealth law...if such driving were to occur on a road or road related area...”

Having determined that the driving practices depicted were not a legitimate use of “motor sport” or “vehicle-testing or proving” activities under clause 3 of the FCAI Code, the Board was not required to consider whether the driving practices depicted were in breach of clauses 2(a) and/or 2(c) in the context of such activities. The Board was required to determine whether clauses 2(a) and/or 2(c) had been breached in the context of whether the driving practices depicted would be illegal were they to occur on a road or road related area.

The Board formed the view that clause 2(a) had been breached. The Board was of the opinion that the driving practice of three cars racing alongside one another and all attempting to turn the corner at the same time was reckless and menacing driving that would be illegal under Commonwealth, State and/or Territory law were it to occur on a road or road related area. Furthermore, the driving practices depicted showing the two vehicles skidding off the side of the road and throwing up dirt and loose gravel would also be unsafe and reckless driving in breach of the relevant laws were they to occur on a road or road related area.

The Board then considered whether clause 2(c) of the FCAI Code had been breached. In order to breach clause 2(c), the driving practices depicted must:

“...if they were to take place on a road or road related area, breach any Commonwealth law....”

Having determined that the driving practices depicted in the advertisement were in breach of clause 2(a) of the FCAI Code on the basis of their illegality were they to occur on a road or road related area, the Board subsequently determined that such driving practices would also be in breach of clause 2(c) of the FCAI Code.

On the above basis, the Board confirmed its prima facie view and held that the material before it constituted an advertisement in breach of clauses 2(a), 2(c) and 3 of the FCAI Code. The Board therefore upheld the complaint.