



CASE REPORT

1. Complaint reference number	230/09
2. Advertiser	BMW
3. Product	Vehicle
4. Type of advertisement	Print
5. Nature of complaint	FCAI - Driving practice that would breach the law
6. Date of determination	Wednesday, 10 June 2009
7. DETERMINATION	Dismissed

DESCRIPTION OF THE ADVERTISEMENT

This full page print advertisement for the BMW Z4 includes a number of photographs and a lot of text. The largest photograph is of a blue Roadster which is parked on a floor containing red, blue, yellow and green tyre marks in a stylised composition. The two wheels that are shown in the photograph have respectively yellow and red paint on them. The text of the photograph reads "The art of driving. The new BMW Z4". Three other, smaller photographs show: coloured tyre marks on the floor; a person drawing similar marks on a large sheet of paper; and a group of people in a large empty auditorium gathered around the car. The large body of text starts with a quote from the director who is documenting the process of creating a huge 30x60 metre abstract painting using the BMW Z4: "What we are attempting is nearly impossible. We are trying to capture the art of driving". The text then goes on to detail some of the qualities of the car, how the artist attempted to capture "the spontaneous emotion and freedom of a beautiful drive", and how the painting was documented. The text closes with a reference to the BMW website.

THE COMPLAINT

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

This is a formal complaint regarding the BMW Z4. It appeared on the home-page of the Sydney Morning Herald this morning.

The vehicle is shown doing 4-wheel drifts (sustained loss of traction). You can see the tyre marks in red in the second image.

This is a very serious driVing offence in all Australian jurisdictions. The offence attracts heavy penalties and Demerit Points.

The FCAI Code clearly states:

2. CODE OF PRACTICE

(a) Obviously unsafe driving, inclUding reckless and menacing driVing to the extent that such practices 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, were they to occur on a road or road-related area.

[Example: 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 which clearly take place on a road or road-related area and which 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.

[Example: Illegal use of hand-held mobile phones or not wearing seatbelts in a moving motor vehicle.]

This is clearly in breach of your "Code of Practice".

We ask that the ad be withdrawn immediately.

THE ADVERTISER'S RESPONSE

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

We believe our TV and Online commercial fully comply with the FCAI Voluntary Code of Practice for Motor Vehicle Advertising and can be clearly distinguished by the viewer as an artistic performance and not reality.

The performance takes place in a controlled environment (a studio warehouse) which is clearly shown at the beginning of the TVC. The car drives across the canvas creating patterns with paint – it does not suggest a real-life driving situation. It is clear from the driver's expression that he is concentrating creating a specific result and not driving recklessly. There is no sign of the driver being out of control. The smooth tone and lyrics of the music further reinforce this position.

The TVC is an international TVC adapted for the Australian market (we just changed the music). The footage and story behind the art can be accessed through international BMW websites, news sites and social mediums. There are many opportunities for the general public to understand that art is the context of the TVC and the campaign.

The concept behind the art was created by international artist Robin Rhode and had been planned for 12 months prior. The 'event' was documented by film director Jake Scott and the TV commercial represents a 30s summary of what happened. The whole film is available to watch from the BMW Z4 website (www.expressionofjoy.com.au) and further supports the position that this is a creation of art.

Furthermore, the painted tyre tracks seen across all marketing materials including Outdoor, Print, Online and at the Dealerships further reinforce the art story behind the campaign.

The Online commercial referenced in complaint 230/09 is purely an animated impression of the TVC. We believe the audience can distinguish between fantasy and reality. Clicking on the ad takes the user directly to bmw.com.au/z4 where they can discover more about the art.

BMW has a colourful history with art including the infamous BMW Art Car Collection which toured in Australia in 2007. The BMW Z4 commercial reinforces BMW's artistic nature and associates the brand as being creative rather than irresponsible.

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.

The Board determined that the material draws the attention of the public or a segment of it to a "product" being a BMW Z4 '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 BMW Z4 depicted 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(b), 2(c) were relevant in the circumstances. The Board had to consider whether those clauses of the Code had been breached.

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...”

The Board formed the view that clause 2(a) had not been breached. The Board considered that the depiction of the car in the advertisement did not suggest unsafe driving or reckless and menacing driving that would breach any law. The Board noted that the image of the car was in controlled circumstances, that there were no pedestrians around the car, that the driving was obviously undertaken by a skilled driver and that there were no indications, such as revving engines or skidding tyres, that the car was being driven unsafely. The Board considered that the advertisement did not depict driving that would be unsafe were it conducted on a road or road related area.

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

“people driving at speeds in excess of the speed limits in the relevant jurisdiction in Australia in which the advertisement is published or broadcast.”

The Board formed the view that clause 2(b) had not been breached and that the advertisement did not depict the car in a manner that would suggest excessive speed.

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....”

The Board noted that the advertisement does not depict the car being driven and that the depiction of the car beside painted tyre marks did not indicate or really suggest that the vehicle was being driven in a manner that would breach any Commonwealth or other law if it were driven on a road or road related area. The Board noted that the text of this advertisement makes no reference to any improper, unsafe or illegal driving practices and that there is nothing in the still image to suggest a breach of section 2(3c). On the above basis, the Board determined that the material before it did not constitute an advertisement in breach of clause 2(c) of the FCAI Code. The Board therefore dismissed the complaints.

Finding that the advertisement did not breach the Code of Ethics or FCAI Code on other grounds, the Board dismissed the complaint.