



CASE REPORT

1. Complaint reference number	231/09
2. Advertiser	BMW Z4 Coupe
3. Product	Vehicles
4. Type of advertisement	Pay TV
5. Nature of complaint	FCAI - Driving practice that would breach the law
6. Date of determination	Wednesday, 10 June 2009
7. DETERMINATION	Upheld – discontinued or modified

DESCRIPTION OF THE ADVERTISEMENT

This television advertisement shows a BMW Z4 coupe in a large warehouse. The floor of the area is a large white square. As the images commence the Z4 is shown to be driven around the open area. Different colours of paint are sprayed on the wheels of the car. As it moves around the area, the car leaves tyre marks in a range of patterns. Colours shown include green, blue, yellow and red. Several scenes show the car doing wheel spins and skidding in an apparent controlled manner. The advertisement concludes with a voice over and image “The New BMW Z4. The art of driving.”

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 over the weekend on Foxtel. 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 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 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 driving did not suggest unsafe driving or reckless and menacing driving that would breach any law. The Board noted that the driving was undertaken under 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 depicted the car being driven in a controlled and slow movement throughout, with no suggestion by sound or visual depiction of 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 formed the view that clause 2(c) had been breached. The Board noted that the advertisement does depict in a number of places the driver intentionally allowing the wheels of the car to lose traction and perform, as the complainant suggested, a four wheel drift. The Board noted that this depiction and the context in which the car was filmed and the driving undertaken was in a controlled environment and that there are no people in the area that the car is driving. The Board considered that the intentional skidding of a car, depicted a number of times in the advertisement, is a driving practice that would breach Commonwealth, State or Territory legislation were it to occur on a road or road related area.

The Board noted the advertiser's response that the advertisement depicts a car in an artistic setting. The Board noted that under the FCAI Code, the use of fantasy could not be used by an advertiser to justify the inclusion of material that otherwise does not comply with the formal provisions of the FCAI Code.

On the above basis, the Board determined that the material before it constituted an advertisement in breach of clause 2(c) of the FCAI Code. The Board therefore upheld the complaint. The Board noted that the advertisement could be modified relatively easily by removing the intentional skidding or four wheel drift that the Board considered to be problematic. **ADVERTISER'S RESPONSE TO THE DETERMINATION** Comments which the advertiser made in response to the determination regarding this advertisement included the following:

In response to the decision of the ASB regarding Advertisement Complaint Reference 231/09, BMW Australia can confirm that the advert has been removed from television with no intention to air again in the future.