



## **CASE REPORT**

1. Complaint reference number	280/04
2. Advertiser	Daimler Chrysler Aust/Pacific P/L (Mercedes Benz)
3. Product	Vehicles
4. Type of advertisement	TV
5. Nature of complaint	FCAI - Other
6. Date of determination	Tuesday, 9 November 2004
7. DETERMINATION	Upheld – discontinued or modified

## **DESCRIPTION OF THE ADVERTISEMENT**

The material reviewed by the Board features the Dalai Lama look-alike (the “Monk”) asking a businessman whether the Monk can drive the businessman’s Mercedes Benz. The Monk proceeds to drive the businessman’s car behind a motorcycle and the businessman drives behind the Monk in the Monk’s Mercedes Benz. All three vehicles drive along a two way unmarked road. The Monk makes several sudden vehicle movements and the passengers in his car and the driver and passengers in the car behind him cannot understand why he is driving that way. When they all pull over, the Monk is asked by the businessman why he was driving that way and the Monk points to the businessman’s car which has insects caught in the Mercedes badge. The Monk’s car does not have any insects caught in its badge. The tagline is “Be at one with the road.”

## **THE COMPLAINT**

Comments which the complainant/s made included the following:

*“The advertisement breaches the Code in the following ways by depicting these driving behaviours which are offences in all Australian states and territories:*

*Sudden turns*

*Tailgating*

*Overtaking suddenly and in an aggressive, jerking manner, without using an indicator*

*Speeding.”*

*“The key focus of the advertisement is a vehicle travelling with sudden, extreme and unnecessary changes in direction.”*

*“The advertisement directly contradicts RTA road safety campaigns, which highlight the need to be prepared for the unexpected and to drive responsibly, especially on country roads.”*

*“Safer driving, such as driving responsibly and not avoiding insects, would be a more appropriate course of action than swerving erratically across both sides of the road, which in reality could be into the line of oncoming traffic and or result in loss of control of the vehicle.”*

## **THE ADVERTISER’S RESPONSE**

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

*“There is no:*

*overtaking;*

*aggressive driving;*

*driving in a “jerking manner”;*

*driving that requires the use of an indicator; nor*

*speeding*

*depicted in the advertisement.”*

*“The driving depicted in the advertisement is not unsafe, reckless or menacing.”*

*“Furthermore, the vehicles are not travelling at an excessive speed nor are involved in any sudden, extreme or unnecessary changes in direction. The direction and speed of all vehicles in the advertisement is constant.”*

*“All speeds travelled by vehicles in the advertisement during production did not exceed 60km/h. This is clearly within the speed limits applicable to open-road driving in any relevant jurisdiction in Australia.”*

*“We are keenly aware that road safety provides for the avoidance of evasive action concerning animals blocking the path of a vehicle where such avoidance is unsafe and may cause injury, loss of life or damage to other property. However, this issue is not relevant. The advertisement depicts an impossible and absurd situation (the avoidance of insects) and in this context, portrays a small number of slight swerves. To put the portrayal of the swerving into context, more evasive action would be required to avoid potholes on country roads.”*

## **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 Mercedes Benz “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 Mercedes Benz 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 been breached. The Board formed this view based upon the scene in the advertisement which depicted the Mercedes Benz which the Monk was driving engaging in a series of sudden, erratic, jerking vehicle movements which viewers later learn was for the purpose of avoiding collision with insects. The Board was of the view that the driving practices depicted in this scene were reckless and unsafe and noted that such driving practices would be in breach of the Australian Road Rules and other applicable traffic legislation. The Australian Road Rules make it an offence to drive other than to the left of the centre of the road unless exempted due to the need to avoid an obstacle. The provisions in the Australian Road Rules that deal with exemptions relevant to this advertisement make it clear that a driver is only permitted to drive to the right of the centre of the road to avoid an obstruction if, amongst other things, it is necessary and reasonable, in all the circumstances. The Board took the view that it would not be considered necessary or reasonable for the driver of the Mercedes Benz to drive in the manner depicted in order to avoid an insect.

Furthermore, other applicable traffic legislation makes it an offence to drive negligently, furiously or recklessly in a manner dangerous to the public on a road or road related area. Having regard to the driving practices depicted in the advertisement, the Board formed the view that they represented portrayals of unsafe and reckless driving in breach of Australian laws.

The Board did not agree with the advertiser’s descriptions of the vehicle’s movements as “slight” and constant in direction or that they were not jerking or sudden. The Board noted that the movements of the Monk’s vehicle were visually sudden, jerking and unpredictable. The vehicle did not travel in a straight line to the left of the centre of the road as required and did in fact make sudden and quick changes in the direction it was facing as it moved. The fact that the movements were sudden and jerking was further confirmed by the looks on the passengers’ faces and the fact that the front seat passenger was holding on to the side of his seat with a look of concern of his face. The passengers in the vehicle behind the Monk also had concerned expressions on their faces and wondered what the Monk was doing. The businessman in fact asked the Monk at the close of the advertisement why the Monk was driving that way, which suggests he was not driving in a normal manner.

The Board also disagreed with the advertiser’s assertion that there were no unnecessary movements undertaken by the Mercedes Benz. The advertiser itself noted that the average viewer would be aware that moving your vehicle out of the line of flight of an insect would not avoid collision with that insect. The Board noted that the advertiser is not permitted to rely on that part of the Explanatory Notes that discusses an advertiser’s use of fantasy, humour and self-evident exaggeration in creative ways if such use would contradict, circumvent or undermine the provisions of the FCAI Code. Therefore the Board confirmed that the advertiser was not entitled to rely on the use of an unreal fantasy situation to justify driving practices that are in breach of the formal provisions of the Code.

The Board did not consider that there were any depictions of illegal tailgating in the advertisement. The Australian Road Rules do make it an offence not to leave a sufficient distance behind a vehicle travelling in front of a driver, however, the Board did not form the view that the driving practices depicted in the advertisement breached such a rule. There appeared to be sufficient distance between the vehicles during this advertisement.

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. The Board noted that there was no overt indication that the cars were driven at excess speeds during the advertisement and noted the advertiser’s written representation that the actual speed of the vehicle did not breach applicable speed limits during the filming of the advertisement.

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 also been breached. Given that the Board had found that the advertisement did breach clause 2(a), the Board made a similar determination in relation to the driving practices depicted for the purposes of analysing clause 2(c).

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) and 2(c) of the FCAI Code. The Board therefore upheld the complaint.