



CASE REPORT

1. Complaint reference number	281/04
2. Advertiser	Holden Ltd (ute)
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 begins with a voiceover stating “Awesome Power. Frightening Beauty. And a bad attitude” as the camera travels through a forest area at nighttime marked with a private property sign. As the camera travels through, the night time mist gets thicker and the sounds of a car engine and tyres screeching are heard getting louder and closer. The advertisement is accompanied by the soundtrack of “Highway to Hell”. A huge cloud of mist and smoke reaches up into the sky and lifts to reveal the new Holden Ute. The voiceover states “The new Holden Ute. Power to burn.”

THE COMPLAINT

Comments which the complainant/s made included the following:

“This obviously represented a car doing “heli’s/doughnuts/burnouts. This practice is illegal on the streets, and is dangerous.”

“I find this so irresponsible and offensive considering we are losing young drivers on our roads in the thousands. I feel Holden are promoting bad attitudes and very reckless handling of a motor vehicle.”

“The advertisement incites drivers to break current traffic laws (“Hooning”) in the states of Queensland, Western Australia and Tasmania where such an offence may incur a penalty of permanent confiscation of the vehicle.”

THE ADVERTISER’S RESPONSE

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

“Firstly, all required permits were sought and granted and Holden also advised the local police of the activity.”

“In accordance with the general provisions, at no time is the motor vehicle portrayed performing any unsafe, reckless or menacing driving and is not depicted driving in excess of the speed limits.”

“We believe that the television advertisement demonstrates the driving characteristics of the new Holden Ute in a responsible and entertaining way.”

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 Holden Ute “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 Holden Ute 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 disagreed with the advertiser’s assertion that at no time was the Holden Ute portrayed performing any unsafe, reckless or menacing driving. The Board was of the view that the Holden Ute did engage in driving practices and that such driving practices were reckless and unsafe and in breach of applicable traffic legislation.

The Board formed the view that driving practices of the Holden Ute were depicted because:

As the camera approaches the scene where the Holden Ute is ultimately revealed, very clear sounds of a car’s engine running and being revved and of a car’s tyres screeching on a surface are heard;

An image of a vehicle’s wheels spinning is included; and

Vehicle headlights are seen flashing and moving in a circular movement.

Given that the only car revealed at the end of the advertisement is the Holden Ute, the Board was of the view that such sounds and images could only have been of the Holden Ute engaging in driving practices.

The Board also noted that all of these images were coming from behind what the advertiser describes as a cloud of mist. The Board was of the view that what the advertiser described as a cloud of mist was actually a combination of both nighttime mist and smoke caused by the Holden Ute’s driving practices. The Board saw a visual distinction between the thin white coloured mist approaching the vehicle and the darker grey thick clouds of smoke rising into the air. In any event, the fact that it is clear in the advertisement that such a cloud was caused by the Holden Ute is the relevant fact. The reason that the Board formed the view that the Holden Ute’s driving practices caused the cloud of

smoke and/or mist was due to the fact that the images and sounds of the vehicles motion all came from behind the cloud and the Holden Ute was the only vehicle revealed under such a cloud. There was also mist and/or smoke coming out from underneath the body and wheels of the Holden Ute as the cloud lifted.

Having decided that the Holden Ute was the vehicle engaged in the driving practices being depicted, the Board then decided whether such driving practices would be illegal were they to occur on a road or road related area. The Board noted that applicable traffic legislation makes it an offence to operate a motor vehicle in such a manner as to cause the vehicle to undergo sustained loss of traction by one or more of the driving wheels of the vehicle. The Roads and Traffic Authority of NSW list such an offence as the law for the offence of a “burnout” and “aggravated burnout.” Such driving practices would also be considered negligent, reckless or furious driving in breach of applicable traffic legislation.

The Board formed the view that the driving practices depicted were engaged in by the Holden Ute and such driving practices were portrayals of unsafe, reckless and menacing driving that would be in breach of Australian law.

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 car was driven at excess speeds during 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).

The Board noted that it did not matter that the advertisement was portrayed as being filmed on private property. The relevant provisions of the FCAI Code are breached if the driving practices depicted would be in breach of the law “were they to occur on a road or road related area.” Therefore if the driving practices depicted in this advertisement were to occur on a road or road related area (as opposed to on private property) and would be illegal on such a road or road related area then the provisions of the FCAI Code have been breached regardless of where they are depicted as occurring in the advertisement.

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.