



CASE REPORT

1. Complaint reference number	289/08
2. Advertiser	Mitsubishi Motors Australia Ltd
3. Product	Vehicles
4. Type of advertisement	TV
5. Nature of complaint	FCAI - Driving practice that would breach the law
6. Date of determination	Wednesday, 13 August 2008
7. DETERMINATION	Dismissed

DESCRIPTION OF THE ADVERTISEMENT

This television advertisement depicts a group of adults in a suburban backyard wearing party hats and seemingly having a tea party. The hostess asks one young man, Mike, if he would like another cup of tea, and when he replies in the negative and indicates that he has to leave, she screams uncontrollably at him "But it's Daniel's birthday!" Daniel looks disappointed that Mike can't stay and repeats "Birthday." Mike jumps into his Pajero and drives off with the other guests in hot pursuit in cars and on motor bikes. The vehicles drive through various locations, building sites, warehouses, water courses and mud etc while the soundtrack voices emphasise it's "Daniel's birthday". The pursuers get frustrated that they cannot catch Mike in the Pajero. Finally having outrun them, Mike stops the Pajero and relaxes, smiling in victory, as a male voice-over announces "If you're in a hurry to get away, you'll love that Pajero 3-door." Suddenly, up from the backseat jumps Daniel, who has stowed-away, and Mike screams with fright.

THE COMPLAINT

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

The Mitsubishi Pajero television advertisement which breaches this Code is currently being aired. This advertisement shows a car chase after a family birthday party. Three vehicles, including a motorcycle, leave a suburban yard and drive erratically across a suburban street and private property. The driver of the second car appears to be manic in her attitude - concentrating only on seeking revenge on the driver of the first car. This is not acceptable behaviour on our roads. This advertisement clearly breaches the spirit of the Code by depicting dangerous, illegal and reckless driving behaviour. This is in direct conflict with accepted road safety messages.

Three motor vehicles (and a motor-bike) including the Mitsubishi Pajero, are seen being driven, carelessly furiously and recklessly in an attempt, apparently to get to a birthday party.

THE ADVERTISER'S RESPONSE

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

Mitsubishi Motors Australia Limited (MMAL) writes in response to the above complaint, which was referred to us on 30 July 2008.

The complaint relates to television commercial promoting the MMAL 3 door Pajero against the background of "Daniel's Birthday". It is therefore referred to as "the Daniel's Birthday TVC".

1. THE COMPLAINT

The complainant describes the Daniel's Birthday TVC in the following terms:

“Three motor vehicles (and a motor-bike) including the Mitsubishi Pajero, are seen being driven, carelessly, furiously and recklessly in an attempt, apparently to get to a Birthday party.”(sic) After quoting a portion of the Explanatory Notes to the FCAI Code and clauses 2(a), (c) and 4 of the operative part of the Code, the complainant continues:

“There are numerous examples of unsafe driving which would contravene the laws in all state and territory jurisdictions in which the advertisement was broadcast. We ask that the advertisement be removed immediately”.

2. RESPONSE TO COMPLAINT

2.1 General observations.

The complaint is expressed in general terms. The whole of the advertisement is complained of. Further (and unfortunately for the purposes of preparing this response) while the complainant asserts that there are “numerous examples” of unsafe driving that would contravene laws in all relevant jurisdictions, we are not assisted in dealing with this by being directed to any aspect of the driving actually depicted in the advertisement that is asserted to “portray” (in the words of the Code) a breach of any (and if so, which) law in any State or Territory.

As will be seen from what follows, MMAL submits that the reason for this lack of detail is that the Daniel’s Birthday TVC “portrays” no driving that would contravene the law of any State or Territory.

On that basis alone we submit that the complaint should be dismissed. However, there are other matters that we suggest should also lead to the complaint being dismissed and which we explain further below.

2.2 Observations on the FCAI Code

The complainant has directed the attention of the ASB to what it refers to as the “preamble” to the FCAI Code. He is in fact referring to the “Explanatory Notes”.

We make two observations in relation to this:

- (a) the Explanatory Notes are not the operative provisions of the Code; and*
- (b) while the Explanatory Notes are obviously intended to assist advertisers in their understanding and application of the Code, regard should properly be had to the whole of the Notes for that purpose.*

Importantly in the case of the Daniel’s Birthday TVC (but also generally), the Explanatory Notes and the Code itself proceed on the basis that while the Code imposes an obligation on advertisers of motor vehicles to ensure that advertisements do not portray driving practices that are contrary to the law, it does not seek to totally stifle the creative talents of advertisers and their agencies. Thus the Explanatory Notes contain the express acknowledgement that:

“...advertisers may make legitimate use of fantasy, humour and self-evident exaggeration in creative ways in advertising for motor vehicles”. provided that that such fantasy, humour and self evident exaggeration is not used to “contradict, circumvent or undermine the provisions of the Code”.

2.3 Application of the Code to the Daniel’s Birthday TVC

As already noted, the advertisement relates to MMAL’s 3 door Pajero. That vehicle is one of the numerous examples of vehicles having both on road and off road capabilities that are currently offered for sale – and therefore advertised – in Australia by different motor vehicle manufacturers.

It was our intention that the advertisement depict aspects of the off road capabilities of the 3 door Pajero through the use of fantasy, humour and self-evident exaggeration. We believe we have achieved that.

At the same time, we were mindful of the provisions of the Code and have therefore ensured that none of the on road driving sequences included in the advertisement “portray” any driving that would breach any law of any Australian jurisdiction including in particular:

- (i) unsafe driving;*
- (ii) reckless driving;*
- (iii) menacing driving*

with the result that there is no contravention of clause 2(a) of the Code.

Similarly, we have been careful to ensure in our depiction of the off road capabilities of our

vehicle – those scenes in which the vehicle is depicted travelling over loose surfaces and uneven terrain that do not form part of a road or road related area – we did not “portray”:

(b) any unsafe driving;

(c) speed; or

(d) other driving that if it were to occur on a road or road related area would contravene the law of any State or Territory

In short, we were careful to ensure that notwithstanding the use of fantasy, humour and self-evident exaggeration, we complied with paragraphs 2(c) and 4 of the Code.

2.4 Observations on the use of fantasy, humour and self-evident exaggeration

We have already noted the reference in the Explanatory Notes to the use of fantasy, humour and self-evident exaggeration in “creative ways”.

In developing the Daniel’s Birthday TVC we were particularly conscious of the fact that whilst encouraging our agency to employ its creative talent in that way, we should also ensure that we did not inadvertently contradict, circumvent or undermine the Code.

We believe that when the Daniel’s Birthday TVC is viewed as a whole – or indeed, even by reference to each driving sequence that is in fact depicted – we have successfully created an advertisement which depicts the capabilities of the 3 door Pajero in contrast to a conventional 2WD vehicle – but in a way that is self-evidently exaggerated, fantastic and – we trust – humorous.

More particularly:

(a) There is very little “on road” driving depicted. Such that there is clearly not unsafe, reckless or menacing. It is also clearly not at a speed that would exceed any relevant speed limit.

(b) The vehicle’s off road capabilities are then demonstrated by a limited footage taken in an abandoned warehouse environment as follows:

- The vehicle is depicted passing over uneven and loose terrain. In contrast, the old model conventional sedan is shown “bottoming out” on the loose and uneven material.*

We have gone to some lengths to ensure that no speed, sudden extreme or unnecessary change of direction of the vehicle or any collision is depicted. The sedan simply comes to a halt on the loose material and we have then added the pyrotechnic effect (which is clearly exaggerated, there having been no collision or other impact to produce it).

- The old model hatchback is similarly depicted as having been unable to negotiate or travel over the uneven terrain. It is seen having come to a halt in circumstances that are obviously well beyond the capability of the vehicle. Again, while the driver is clearly frustrated at the inability of her car to negotiate the same terrain as the Pajero, the scene is again self-evidently exaggerated and does not portray any unsafe or other inappropriate driving.*

- The 3 door Pajero is then shown passing through a puddle of water and mud. The driving is again controlled and obviously at a low speed.*

The capability of the vehicle in this scene is not illustrated by dramatic (let alone anything that might amount to unsafe or reckless) driving of the Pajero. Rather, it is illustrated by the (again self-evidently exaggerated and humorous) contrast arising from the inability of the underpowered old fashioned scooter (being driven by an obviously eccentric character) to negotiate the puddle and it coming to a halt and falling over.

All of these scenes – and especially that motor cycle scene, which captures the essence of the underlying theme - reminiscent of the humour of classic television such as “The Benny Hill Show”, “Laugh In” and indeed, the whole genre of the slap stick comedy that still entertains families around the world. That said, though, we again emphasise that we have insured that all of this slap stick humour does not inadvertently portray any driving that might undermine the Code.

3. SUMMARY

In contrast to the emotive, unspecific and sweeping nature of the complaint, MMAL and its agency Clemenger BBDO have taken every care in producing the Daniel’s Birthday TVC in order to ensure that it complies strictly with the Code.

There is no question that we have permitted the creative team licence to use fantasy, humour and self-evident exaggeration in order to depict the capabilities of our vehicle. A number of old model two wheel drive vehicles are thus depicted in situations in which they would, quite obviously, not normally find themselves. That is the very element that generates the exaggeration, fantasy and humour that results in the contrast between the Daniel’s Birthday TVC and advertisements for

other makes of 4WD vehicle presently on air.

We believe that the result is a very humorous TVC that is distinctive from conventional 4WD advertisements. At the same time, we have succeeded in ensuring that all driving actually depicted is quite controlled and does not portray any driving practice that would contravene any law of any State or Territory.

We therefore submit that there is no breach of the Code and request that the complaint be dismissed.

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 (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 went on to consider the substantive provisions of the FCAI Code. The Board first considered clause 2(a) of the FCAI Code. Clause 2(a) provides that advertisers should ensure that advertisements for motor vehicles do not portray any of the following 'unsafe driving, including reckless or menacing driving that 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, if such driving were to occur on a road or road-related area, regardless of where the driving is depicted in the advertisement.'

The Board carefully viewed the advertisement and noted that the advertised vehicle, the Pajero, was at no time seen to be driving in contravention of this clause.

The Board noted that the music, special effects and humorous characters lent drama to the advertisement and added an impression of the speed that did not actually occur.

The Board considered that clauses 2(b), (d), (e), and 3 and 4 of the FCAI Code were not relevant to the present advertisement.

The Board also considered clause 2(c) and whether the advertisement depicted 'driving practices or other actions which would, if they were to take place on a road or road-related area, 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.'

The Board considered that there was no suggestion of unlawful behaviour by the driver of the Pajero that would amount to a breach of clause 2(c).

The Board determined that the advertisement did not breach any of the clauses of the FCAI Code and accordingly dismissed the complaints.

The Board (“Board”) then considered whether this advertisement breaches Section 2 of the Advertiser Code of Ethics (the “Code”).

Finding that the advertisement did not breach the Code on any grounds, the Board dismissed the complaint.

INDEPENDENT REVIEWER'S RECOMMENDATION

The complainant requested a review of the determination of the Board made on 13 August 2008. In that determination, the Board dismissed the complaint by reference to the FCAI Code.

Two grounds for review were relied on by the complainant:

1. where new or additional relevant evidence which could have a significant bearing on the decision becomes available; and
2. where there was a substantial flaw in the Board's decision (decision clearly in error having regard to the provisions of the Code, or clearly made against the weight of evidence).

The complainant principally relied upon expert advice concerning the advertisement. This advice was sought by the complainant and provided by:

- (a) Dr Soames Job, A/Director, NSW Centre for Road Safety; and
- (b) Commander John Hartley, NSW Police Traffic Services Branch.

The Independent Reviewer was of the view that this expert advice is new additional evidence which could have a significant bearing on the decision. The Independent Reviewer accepted the complainant's explanation of the lateness of the material ie it was not sought until an appeal was necessary.

The advertiser made comprehensive submissions to the Board in relation to the initial complaint and for the purposes of the review. The Independent Reviewer agreed with the advertiser's submission that reliance on the explanatory material as a breach of the Code was to misuse it. However, this material gives a context for the interpretation of the actual sections of the Code, particularly Section 2(a) which, if the complainant's evidence is accepted, has been breached by this advertisement. These are matters for the Board to decide. The Independent Reviewer considered that the Board should review its interpretation of Section 2(a) in the light of the new evidence provided by the complainant.

It is not clear from the determination whether the Board considered that the driving act did not contravene the Code or whether Section 2(a) did not apply to off-road driving. In my view the section, in its terms, and in the context of the explanatory material of the Code, does apply to all depictions of driving.

The Board therefore must determine, in the light of the evidence and expert opinion provided, whether this driving breaches the Code.

The Independent Reviewer recommended that the determination dismissing the complaint should be reviewed by the Board, taking into account the new material and the provisions in Section 2(a) of the FCAI Code.

DETERMINATION ON REVIEW

The Board accepted the recommendation of the Independent Reviewer and agreed to reconsider its earlier determination. In reconsidering the earlier determination, the Board had regard to the comments provided by the Independent Reviewer as well as the additional material provided by the complainant in its request for review and the advertiser's response.

The Board considered the new evidence and accepted that it should consider the application of the Code and the FCAI Code to all vehicles depicted in the advertisement, rather than just the vehicle being advertised.

The Board considered whether the driving portrayed in the advertisement contravened any law, having regard to Section 2(a) of the FCAI Code and the NSW Police evidence. The Board then noted the advertiser's response that what is actually portrayed, rather than what might have been portrayed, should be considered. The Board concluded that the actual depiction in the advertisement did not appear to be clearly in contravention of any law.

The Board considered the issue of whether the drivers of vehicles shown in the advertisement were portrayed as being in control of the vehicles, or otherwise. The Board considered that all drivers depicted were clearly in control of the vehicles, but the vehicles following the Pajero were not suitable for the driving conditions.

The Board also considered the application of Section 4 of the FCAI Code in the advertisement's depiction of an off-road vehicle (the Pajero), and considered whether the driving could be seen as unsafe if it occurred on the road. The Board noted that the Pajero was not depicted as travelling at excess speeds or in an unsafe manner which would contravene any law.

The Board considered each vehicle individually against the provisions of the Code. Looking at each vehicle in turn, the Board concluded that:

- (1) the depiction of the Pajero did not involve any breach of Sections 2(a) or 4 of the FCAI Code;

- (2) the depiction of the blue car did not involve any breach of Section 2(a) of the FCAI Code; and
- (3) the depiction of the bike/scooter did not involve any breach of Section 2(a) of the FCAI Code.

As an additional issue, the Board considered whether the scenes of the Pajero being pursued by the other vehicles involved menacing behaviour or could be seen as irresponsible or unsafe. The Board did not agree with the complainant in this regard. The Board noted that the advertisement depicted a humorous family interaction and the driver of the Pajero did not appear to be frightened while his relatives pursued his vehicle, but rather was depicted as cheerful and relaxed whilst driving.

In conclusion, the Board found that none of the vehicles were driven in a manner in breach of the FCAI Code. Finding also that the advertisement did not breach the Code on any grounds, the Board reaffirmed its earlier decision and dismissed the complaint.