



## **CASE REPORT**

1. Complaint reference number	355/04
2. Advertiser	Honda Australia Pty Ltd
3. Product	Vehicles
4. Type of advertisement	TV
5. Nature of complaint	FCAI - Other
6. Date of determination	Tuesday, 8 February 2005
7. DETERMINATION	Dismissed

## **DESCRIPTION OF THE ADVERTISEMENT**

The advertisement describes Honda's stock clearance sale and features various footage of different Honda vehicles driving over different surfaces including roads and dirt tracks. The advertisement ends with an animated vehicle driving across the screen and the sound of its engine is heard.

## **THE COMPLAINT**

Comments which the complainant/s made included the following:

*"The current Honda sale advertisement shows a car travelling on winding roads at high speed, and apparently travelling around corners on the wrong side of the road. There is the sound of a high-pitched racing car during the advertisement. It is irresponsible to suggest that this car travels at high speed on dangerous roads and to suggest a connotation with racing cars."*

## **THE ADVERTISER'S RESPONSE**

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

*"The depiction of the racing car and accompanying audio at the very beginning and end of the television commercial falls within the ambit of clause 3 and is permissible under the Code. The imagery clearly portrays a motor sport vehicle and this is consistently used in other Honda advertising to reinforce Honda's involvement in motor sports and the influence this technology has had on the safety and quality of its motor vehicles."*

*"The sound of the race car is used only at the very beginning and end of the commercial in connection with the image of the race car and does not carry over into the footage of the Honda vehicles driving."*

*"The driving is on open roads rather than on suburban or city streets and there is no indication that the cars are driving in excess of the speed limit which would be applicable on those roads."*

*"It is therefore lawful for the driver to change lanes and to drive in the lanes as shown in the commercial. The driving is not unsafe, menacing, reckless or unlawful and there are no scenes in which the car appears to be out of control or going at unnecessary speed."*

*"The commercial has now completed its broadcast schedule and we do not have current plans to continue broadcast of this commercial."*

## **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 Honda motor vehicle “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 Honda motor vehicle 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) and 3 were relevant in the circumstances. The Board had to consider whether those clauses of the Code had been breached.

Before looking at whether clauses 2(a), 2(b) and 2(c) of the FCAI Code had been breached, the Board first considered whether clause 3 of the FCAI Code had been complied with. The Board determined that clause 3 of the FCAI Code was not a saving provision. Neither the express language of the clause nor the intention behind the FCAI Code allow clause 3 to operate as an exemption to a breach of any part of clause 2. The express language of clause 3 of the FCAI Code indicates that advertisers may make use of the scenes permitted under that clause “Without limiting the general application of clause 2”. As a result, clause 3 is intended to ensure advertisers can legitimately make use of the types of scenes permitted under clause 3 provided that the provisos in clause 3 are satisfied and the use of such material is consistent with the general application of clause 2 in the context of the activities permitted.

The Board noted that pursuant to clause 3 of the FCAI Code, advertisers are permitted to:

*“make use of scenes of motor sport; simulated motor sport; and vehicle testing or proving in advertising, subject to the following:*

*Such scenes should be clearly identifiable as part of an organised motor sport activity, or testing or proving activity of a type for which a permit would normally be available in Australia.*

*Any racing or competing vehicles depicted in motor sport scenes should be in clearly identifiable racing livery.”*

The Board first gave consideration to whether the advertisement in question made use of scenes of “motor sport” in accordance with clause 3 of the FCAI Code. “Motor Sport” is defined in the FCAI Code as meaning:

*“racing, rallying, or other competitive activities involving motor vehicles of a type for which a permit would normally be available under the National Competition Rules of the Confederation of Australian Motor Sport, or other recognised organising body.”*

The Board noted that one of the depictions complained about was actually the use of an animated

image at the end of the advertisement which involved an animated motor vehicle being driven across the screen against a black background with the sound of the engine as the accompanying audio soundtrack. The Board determined that the animated vehicle is a formula one racing car which is specifically designed for racing and cannot be used for any other purpose. As such, it can only be driven in a racing, rallying or competitive activity of a type for which a permit would normally be given under the relevant rules.

The Board therefore formed the view that the driving practices depicted in the advertisement did involve racing activities of a type for which a permit would normally be available under the CAMS rules and therefore the advertisement had made use of “motor sport” scenes as defined under the FCAI Code.

The Board was then required to consider whether the provisos in clauses 3(a) and (b) had been satisfied.

Clause 3(a) of the FCAI Code requires the use of the “motor sport” scene to be:

*“clearly identifiable as part of an organised motor sport activity....of a type for which a permit would normally be available in Australia.”*

The Board was of the view that the depictions involving racing activity were clearly identifiable as such an activity as required under clause 3(a) of the FCAI Code, for the following reasons:

As previously noted, the animated vehicle was a formula one racing car which is specifically designed for racing and cannot be used for any other purpose. As such, it can only be driven in a racing, rallying or competitive activity of a type for which a permit would normally be given under the relevant rules; and

Although the image was animated and appeared only quickly on the screen, the Board was of the view that the colours and shape of the animated vehicle made it clear that the vehicle was a formula one racing vehicle; and

The Board was also of the view that the sound of the engine that was played as part of the advertisement’s audio as the animated motor vehicle crossed the screen was quite obviously the unique sound of a formula one racing car and not a normal on road vehicle.

Clause 3(b) of the FCAI Code requires that in any use of a “motor sport” scene:

*“any racing or competing vehicle depicted.....should be in clearly identifiable racing livery.”*

Although the image was animated and appeared only quickly on the screen, the Board was of the view that the colours and shape of the animated vehicle made it undoubtedly clear that the vehicle was a formula one racing vehicle.

For the above reasons, the Board formed the view that it would have been clear to the ordinary viewer that the activity being depicted was “clearly identifiable” as a racing activity and therefore the advertisement did satisfy clause 3 of the FCAI Code.

The Board then had to consider the general application of clause 2. Having already determined that clauses 2(a), 2(b) and 2(c) were relevant in the circumstances, the Board first considered whether clause 2(a) of the FCAI Code had been breached. The Board had two different sets of driving practices to examine under clause 2. The Board first had to consider the driving practices depicted in the animated footage involving the racing car (the “animated footage”) and secondly had to consider the other driving practices depicted in the advertisement which involved footage of real on road Honda motor vehicles being driven over various surfaces (the “real footage”).

In relation to the animated footage, having determined that the driving practices depicted were a legitimate use of “motor sport” under clause 3 of the FCAI Code, the Board was required to consider whether the driving practices depicted in the animated footage were in breach of clauses 2(a), 2(b) and/or 2(c) in the context of such activities. The Board was not required to determine whether clauses 2(a), 2(b) and/or 2(c) had been breached in the context of whether the driving practices depicted would be illegal were they to occur on a road or road related area.

In relation to the real footage, the Board was required to determine whether clauses 2(a), 2(b) and/or 2(c) had been breached in the context of whether the driving practices depicted would be illegal were they to occur on a road or road related area.

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...”*

In relation to the animated footage, the Board formed the view that clause 2(a) had not been breached. Given that the driving practices depicted involved a formula one racing car and that such vehicles are only driven in circumstances where permits have been obtained, the Board was of the opinion that the driving practices would not be illegal under Commonwealth, State and/or Territory law in the context of the racing activities.

In relation to the real footage, the Board formed the view that clause 2(a) had not been breached. The Board noted the advertiser’s confirmation that all footage used was shot using vehicle indicators where a lane change occurs. The Board was of the view that the driving practices depicted were safe and normal every day driving practices involving controlled driving. There were no overt indications that the driving practices depicted were in any way unsafe, reckless or menacing. The driving practices depicted involved no sudden changes of direction or loss of control or any driving practices that would be in breach of the relevant road rules.

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.”*

In relation to the animated footage, the Board formed the view that clause 2(b) had not been breached. Given that the driving practices depicted, including the speed of the vehicle, for the reasons stated above could only have involved driving practices that form part of a permit authorised racing event, the Board was of the opinion that the speed limits in the relevant jurisdiction in Australia would not apply in the context of such racing activities.

In relation to the real footage, 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 being 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....”*

In relation to the animated footage, having determined that the driving practices depicted in the advertisement were not in breach of clause 2(a) of the FCAI Code on the basis of their legality in the context of racing activities, the Board determined that such driving practices would also not be in breach of clause 2(c) of the FCAI Code.

In relation to the real footage, 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 did not constitute an advertisement in breach of clauses 2(a), 2(b), 2(c) or 3 of the FCAI Code. The Board therefore dismissed the complaint.