



## CASE REPORT

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| 1. Complaint reference number | 511/09  |
| 2. Advertiser                 | Land Rover  |
| 3. Product                    | Vehicles  |
| 4. Type of advertisement      | TV  |
| 5. Nature of complaint        | FCAI - Driving practice that would breach the law<br>FCAI - Other |
| 6. Date of determination      | Wednesday, 14 April 2010  |
| 7. DETERMINATION              | Dismissed   |

## DESCRIPTION OF THE ADVERTISEMENT

This television advertisement from Land Rover for its Range Rover Sports vehicle opens showing rocky scenery which gradually changes to less rough terrain and then to a winding mountain road. A vehicle is then shown driving down a mountain pass on a road built into similar rocky terrain. A voiceover describes the features of the vehicle which is being driven by a man on the right hand side of the road, but does not cross the white painted line. The advertisement ends with the man walking into a building with the vehicle parked and a screenshot of the Land Rover logo.

## THE COMPLAINT

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

*The advertisement clearly breaches 2 sections of the General Provisions of the Code:*

*(a) Unsafe driving, including reckless and 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. [Examples: Vehicles travelling at excessive speed; 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.]*

AND

*(c) 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. [Examples: Illegal use of hand-held mobile phones or not wearing seatbelts in a moving motor vehicle. Motorcyclists or their passengers not wearing an approved safety helmet, while the motorcycle is in motion.]*

*1 The vehicle is being driven on the wrong side of the road: This is a serious driving offence which breaches the law in all jurisdictions. (There are no disclaimers).*

*2. The vehicle is being driven without a front number plate: This is a serious driving offence which breaches the law in all jurisdictions. In NSW this offence attracts a penalty of 3 Demerit Points and a \$300+ fine.*

*3. The vehicle is driven across the white, unbroken, centre line: This is a serious driving offence which breaches the law in all jurisdictions.*

4. It appears, when played in slow-motion, that the driver is not wearing a seat-belt. Although subliminal, this is a serious driving offence which breaches the law in all jurisdictions.

We ask that the broadcasting of this advertisement be banned without delay.

## **THE ADVERTISER'S RESPONSE**

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

*The aforementioned TV commercial features a left-hand-drive vehicle driving down a clear road in Italy on the right-hand-side - the standard driving side for the country in which this commercial was shot. In addition to that there is no requirement in Italy for the front number plate to be featured and at no point during this 30 second commercial does the vehicle cross the central white line onto the opposite side of the road. During filming of this commercial it was of utmost importance to us as the production agency but also to our Land Rover clients that at all times any legality and safety issues were adhered to. It is our belief that this complaint is not justified.*

*The TV commercial was adapted for local broadcast by Morris and Partners. Morris and Partners added a local voice over and changed the web address at the end. All filming (done in Italy) and visual editing was created by Tag, Design & Interactive in London.*

*We are aware of the provisions of the FCAI Motor Vehicle Advertising Code, and in particular have considered sections 2(a) and (c). We do not consider any other provisions of the FCAI Code or Advertising Code of Ethics could possibly relate to the above television commercial. In response to the specifics of the complaint, we respond as follows:*

*1) " The vehicle is being driven on the wrong side of the road" .The vehicle is an overseas vehicle which is clearly demonstrated as the driver is shown to be driving on the left hand side of the vehicle . The driving is taking place in perfect compliance with overseas driving practices and is neither dangerous nor aggressive. It is clear to viewers that the vehicle is an overseas vehicle and is being driven on the right side of the road in accordance with the driving practices and rules of that particular jurisdiction.*

*I note that clause 2(c) is only concerned with driving practices or other actions "directly dealing with road safety or traffic regulation". While driving on the wrong side of the road is clearly a breach of road safety rules and a breach of the rules relating to traffic regulation, driving safely and on the correct side of the road, which is clearly being portrayed in the above television commercial, is not a road safety issue or a breach of any traffic regulations. There is nothing in clause 2(c) to suggest that the driving of vehicles in overseas situations is prohibited, unless of course that driving was seen to be dangerous, aggressive or otherwise reckless. In that case, the broadcasting of that type of driving in Australia would be a breach of clause 2(c). Simply showing a vehicle driving appropriately and in accordance with overseas rules and within speed limits however is not a breach of clause 2(c) in our submission. The examples given in the Code under clause 2(c) demonstrate this point further. They refer to the "illegal use of handheld mobile phones or not wearing seat belts in a moving motor vehicle". Clause 2(c) is suggesting that just because such conduct would be lawful in an overseas jurisdiction that would not make it acceptable to broadcast that scene in Australia. As the Range Rover Sport is seen to be driving in a proper and safe manner and is obviously an overseas vehicle, we submit that the portrayal of the vehicle being driven appropriately on the right side of the road is not a breach of clause 2(c) .*

*2) " The vehicle is being driven without a front number plate " .*

*Driving without a front number plate is not a matter dealing with road safety or traffic regulation. It is a matter dealing with registration and identification of vehicles. However laws in the location in which the vehicle is driving do not require a front licence plate.*

*3) - The vehicle is driven across the white, unbroken centre line " .*

*We have reviewed the television commercial many times and cannot see anywhere that the vehicle crosses the centre line. The advertising agency (TAG) responsible for the production has assured us that the vehicle does not cross the centre line in any event, and it was the intention to only show the vehicle in total control and driving legally. As the vehicle has not crossed the centre line and is not seen to be crossing the centre line, there is no more to say in response to this particular item of*

*the complaint.*

4) " *It appears, when played in slow motion, that the driver is not wearing a seat belt*".

*We have been assured by the TAG (see attached letter) that the driver was indeed wearing a seatbelt. However, it is impossible to see from the footage whether the driver was wearing a seatbelt or not. As we have confirmed, the driver was wearing a seat belt, but it is impossible to determine whether he was or wasn't in any event. Therefore , I submit that neither clause 2(a) nor (c) has been infringed in this regard.*

#### *Summary*

*In summary , we do not accept that the complaints are justified for the reasons expressed above. In addition, we submit that the vehicle is portrayed to be driven in a controlled, safe and unaggressive manner at all times, and in accordance with all of the relevant rules of the road regarding road safety and traffic regulation. We ask that the Board dismiss the complaint and allow us to continue to run the commercial in Australia*

#### **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).

To come within the FCAI Code, the material being considered must be an advertisement. The FCAI Code defines an 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 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 Range Rover Sports 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 Range Rover 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) and 2(c) were relevant in the circumstances. The Board had to consider whether these clauses of the Code had been breached.

Before looking at whether clause 2(a) and 2(c) of the FCAI Code had been breached, the Board first considered whether clause 4 of the FCAI Code had been complied with. The Board noted that there are no depictions of the vehicle driving off road or over loose or unsealed surfaces and that clause 4 of the FCAI Code was not relevant.

The Board then considered clause 2(a) of the FCAI Code. Clause 2(a) requires that: Advertisements for motor vehicles do not portray ...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 noted that the advertisement is filmed overseas and that by arrangement with the FCAI the issues of the vehicle being driven on the right hand side of the road (in a safe manner) and the issue of driving without a number plate are not issues to be considered by the Board.

The Board noted the complainant's concern that the advertisement depicted the vehicle crossing the centre line. The Board considered that the images from afar of the vehicle driving did not depict the vehicle crossing the centre lines of the road. The Board noted that there is one image which shows the driver's view from inside the vehicle where the vehicle is driving close to the centre line. In the Board's view this was not a clear depiction or even a strong suggestion that the vehicle was driving across the centre line. The Board considered that the advertisement did not depict unsafe driving.

The Board then had to consider whether the advertisement breached clause 2(c) of the FCAI Code.

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 noted the complainant's concern that the man is driving the vehicle without wearing a seatbelt. The Board noted the advertiser's response that the actor is wearing a seatbelt. The Board viewed the advertisement and considered that there is no image in the advertisement which shows whether or not the man is wearing a seatbelt. The Board considered that there should not be an assumption that the person is NOT wearing a seatbelt and determined that the advertisement did not depict driving practices that would breach any law.

On the above basis, the Board determined that the advertisement did not breach clauses 2(a) or 2(c) of the FCAI Code. Finding that the advertisement did not breach any other provisions of the Code, the Board therefore dismissed the complaint.

#### **INDEPENDENT REVIEWER'S RECOMMENDATION**

Mr Harold Scruby, Chairman and Chief Executive Officer of the Pedestrian Council of Australia Limited, (the complainant), sought a review of the Board's decision. The Board's decision and additional information provided by Mr Scruby and the Advertiser were considered by the Independent Reviewer. The Independent Reviewer determined as follows:

*'Mr Harold Scruby, Chairman and Chief Executive Officer of the Pedestrian Council of Australia Limited, (the complainant), has sought a review of Determination 511/09 made by the Advertising Standards Board (the Board) on Wednesday 20 January 2010.*

*Whilst the request for review was made 'out of time,' I considered the reasons advanced by the complainant and determined that it was fair and reasonable, under Section 7.6 of the ASB Procedures Manual, that I waive the normal limit of 10 business days for the receipt of requests for review. I accepted the request and advised of my acceptance in a formal letter of advice on 10 March 2010.*

*Having accepted the 'out of time' request I then decided to formally accept the request to review and advised of this decision in a letter of 21 March 2010.*

*In reaching this decision, the grounds that I found the complainant had relied upon in his request were:*

- 1. Where new or additional evidence which could have significant bearing on the decision, becomes available;*
- 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);*
- 3. Where there was a substantial flaw in the process by which the decision was made.*

#### *Ground for Review 1 – Additional Relevant Evidence*

*In regard to ground 1, the complainant relies upon evidence, which I accepted as 'new' additional and 'expert' evidence that could potentially have a significant bearing on the decision. This evidence was provided by:*

- Dr Soames Job, Director for NSW Centre for Road Safety; and

- Assistant Commissioner John Hartley, NSW Police Traffic Services Branch.

*I am of the opinion that the vehicle does not carry a front number plate and that this is clear from a careful viewing of the advertisement. I also agree with the complainant and Dr Soames Job, an 'expert' witness for the complainant, that the absence of a front number plate is a driving safety, or driving practice issue and not simply a motor vehicle registration or identification issue.*

*I find that there is new or additional relevant evidence which could have a significant bearing on the decision of the Board and that the Board should reconsider its decision taking into account this information.*

*Grounds for Review 2 and 3 – Flaw in decision and flaw in process*

*In regard to grounds 2 and 3, the complainant referred to the following quote from the Board's decision:*

*"The Board noted that the advertisement is filmed overseas and that by arrangement with the FCAI the issues of the vehicle being driven on the right hand side of the road (in a safe manner) and the issues of driving without a number plate are not issues to be considered by the Board"*

*In his submission the complainant also stated: "as these arrangements do not appear anywhere in the Code or on the ASB's guidelines on How to Complain, we believe it is incumbent upon the Appeal Judges to not take them into consideration" (Page 2 of the complainant's submission for review, emailed Monday 15 March, 2010.)*

*The specific questions asked by the complainant were;*

- 1. "Is it against the law to drive on the wrong side of the road in every jurisdiction in Australia? The answer is yes." And,*
- 2. Is it against the law to drive a vehicle without a front number plate? The answer is yes."*

*In response to the allegations of the complainant the Advertiser, essentially, argues:*

- "Our argument is that the vehicle is clearly displayed as a left hand drive vehicle, which means that the vehicle must be driven on the right hand side of the road in the country of filming. This is a fact appreciated by virtually every person who is a driver"*
- "Our argument is that in the context of this driving scene and this particular vehicle, the driving was not careless, reckless or illegal and would be appreciated as such by all viewers"*
- "The lack of a number plate is a matter to do with vehicle registration and identification and is only peripherally concerned with traffic regulation"*
- "It is also unclear from a review of the television commercial whether the vehicle does or does not have a front number plate" and,*
- "We do not agree that the failure to display a front number plate should be considered a breach of the Code, and we argue that it is not even a technical breach of a strict interpretation of the wording of the Code."*

*Under the second ground for review my role is not to remake the determination of the Board but to determine if 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 the evidence).*

*I note that the Board did not consider whether the lack of number plate or the car driving on the right hand side of the road breached the Code. The Board did not get to this point because of a flaw in the process by which the decision was made (see below in relation to Ground for Review 3). I cannot therefore say that there was a flaw in the Board's decision.*

*The third ground upon which an appeal may be based is: 'Where there was a substantial flaw in the process by which the decision was made.'*

*In regard to the issue of the arrangement with the FCAI, the Board in its Determination of 20 January 2010, expressly stated: "The Board noted that the advertisement is filmed overseas and that by arrangement with the FCAI the issues of the vehicle being driven on the right hand side of*

*the road (in a safe manner) and the issues of the driving without a number plate are not issues to be considered by the Board.” The Board, by this specific reference to the arrangement in its formal Determination, clearly makes the issue relevant to the final decision of the Board and to the independent review process. Having decided not to consider the right hand side driving or alleged missing front number plate, the Board determined:*

- *“the advertisement did not depict unsafe driving,*
- *“did not depict driving practices that would breach any law”*
- *“did not breach clauses 2(a) or 2(c) of the FCAI Code” and,*
- *“Finding that the advertisement did not breach any other provisions of the Code, the Board therefore dismissed the complaint”.*

*I determine that, there was a substantial flaw in the process by which the decision was made. I base my decision on the following:*

*In its Explanatory Notes the FCAI Code makes it clear that “Assessment of compliance with the Code is to be administered by the Advertising Standards Board (ASB)” and that “(T)he ASB will review all public complaints made against advertisements for motor vehicles under the terms of the Code”.*

*No mention is made, either in the Code or in the Explanatory Notes to the Code, of any arrangement between the Board and the FCAI which might operate to limit or modify the issues open to and able to be considered by the Board in determining a complaint.*

*Within my responsibilities, it is not open to me to take account of matters not expressly or by clear implication, covered by the Code.*

*Under the provisions of the FCAI Code I do not believe that the Board could make a Determination as to whether there had been a breach of the FCAI Code, without considering the driving practices of driving on the right hand side of the road and the vehicle not having a front number plate. To do so was to cause a substantial flaw in the process by which the Board made its decision.*

*This finding is not to suggest, that the Board, if it decides to do so, having considered these additional matters, could not, upon review, reach the same decision that it reached on 20 January 2010.*

*The transparency and integrity of the Board decision-making process is integral to the reputation of the ASB and public confidence in its process. If an arrangement between the FCAI and the Board is intended to have capacity to influence or limit Board considerations this should be made expressly clear in the Code or its Explanatory Notes or in some other way made publicly available.*

#### **FINDING:**

*In regard to the 20 January 2010 decision of the Board, I find that, in accordance with the provisions of the FCAI Code, there was a substantial flaw in the process by which the Board made its decision to dismiss the complaint and that there is new or additional evidence that has been provided by the complainant that the Board should take into consideration.*

#### **RECOMMENDATION:**

*I recommend that the original determination of the Board to dismiss the complaint be reviewed:*

- *without reference to the arrangement between the Board and the FCAI; and,*
- *that the Board, taking account of all the information available to it, including the fact of the right hand side driving and the missing front number plate, determine whether there has been a breach of the FCAI Code; and*
- *that the Board take account of the new relevant evidence provided by the complainant.*

#### **DETERMINATION ON REVIEW**

The Board accepted the recommendation of the Independent Reviewer and agreed to reconsider its earlier determination.

The Board noted the new evidence from the Complainant regarding the 'safety' status of the issues of

not displaying a number plate and of driving on the wrong side of the road. The Board noted that in the complainant's evidence the issue of not displaying a front number plate is an offence (punishable only if a Police Officer witnesses the vehicle being driven) and that, in the complainant's view, driving on the wrong side of the road is a serious issue of road safety and vehicle occupant protection.

The Board considered the provisions of the FCAI Code. The Board noted section 2(a) which provides that: *Advertisers should ensure that advertisements for motor vehicles do not portray ...unsafe driving, including reckless and 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, regardless of where the driving is depicted in the advertisement.*' The Board also noted the examples in the Code which refer to vehicles driving at excessive speed; 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.

The Board considered the depiction of the left hand drive vehicle driving on the right hand side of the road and the complainant's concern that the vehicle is depicted being driven on the 'wrong' side of the road. The Board noted the complainant's concern that this depiction is a depiction of material that would breach a law dealing with road safety or traffic regulation.

The Board noted that under clause 2(a) of the FCAI Code, it must first consider whether there is a depiction of 'unsafe driving'. The Board noted that what is the 'correct' side of the road will vary in different countries. The Board considered the depiction of the car driving in this advertisement. The Board considered that in this advertisement the car is clearly shown as a left-hand drive vehicle and that in the context of this advertisement it is not unreasonable for a consumer to consider that the advertisement is depicting a left-hand drive vehicle being driven on the 'correct' side of the road. The Board noted that there are no other vehicles or driving signs that would indicate that the vehicle is being driven on the 'wrong' side of the road. As there is no suggestion that the vehicle is being driven on the 'wrong' side of the road, the Board considered that the advertisement did not depict unsafe driving. The Board also considered that the advertisement did not depict reckless or menacing driving. Having determined that the advertisement does not depict reckless or menacing driving the Board did not need to consider whether the driving would breach 'any ...law of the 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 then considered the complainant's concern that the advertisement depicts a vehicle being driven without a number plate. The Board noted the complainant's assertion and evidence that driving without a number plate is a safety issue. The Board also noted the Independent Reviewer's comment that 'the absence of a front number plate is a driving safety or driving practice issue and not simply a motor vehicle registration or identification issue.'

In the Board's view, while the legislation in jurisdictions in Australia does require that a registered vehicle have a number plate and that this is for reasons of safety, the depiction in this advertisement of a car without a front number plate is not a depiction, of itself, of 'unsafe driving' or of 'reckless and menacing driving'. The Board determined that the absence of a number plate in this advertisement did not breach section 2(a) of the Code.

Although considering that the issue of number plates is more likely to be an issue relevant to section 2 (a) of the FCAI Code, the Board also considered whether the advertisement breached section 2(c) of the Code. Section 2(c) of the FCAI Code provides that advertisers should not portray driving practices which clearly take place on a road:

*“ ... 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 dealing directly with road safety or traffic regulation”.*

Examples are given in the FCAI Code of illegal use of hand-held mobile phones or not wearing seatbelts in moving motor vehicles.

The Board considered that the examples that accompany clause 2(c) give a clear indication of the types of breaches that are considered to be an infringement of clause 2(c). The Board considered the Explanatory Notes to the FCAI Code which state:

*“Vehicle occupant protection and road safety are primary concerns for the automotive industry in the design and operation of all motor vehicles supplied to the Australian market. FCAI endorses the National Road Safety Strategy and acknowledges the importance of increased road safety awareness in the Australian community...”*

Applying the sui generis rule, and reading it in conjunction with the Explanatory Notes, the Board considered that failure to display a number-plate is unlikely to be the type of breach contemplated by clause 2(c). The Board determined that an occupant of a vehicle is unlikely to suffer harm from not having a number plate on his or her vehicle in the same way that he or she may suffer harm if driving whilst holding a mobile phone or not wearing a seat belt.

The Board considered that members of the public viewing the advertisement were unlikely to see the advertisement as being an endorsement for removing number plates, but would rather be likely to view this as an omission during filming of the advertisement due to the newness of the vehicle, because the advertisement is from overseas or because the vehicle used for filming was not yet registered and therefore not fitted with a number plate. The Board further considered it unlikely that vehicle owners will misinterpret the advertisement as discouraging the need for number-plates.

On the above basis, the Board determined that the advertisement's depiction of a vehicle being driven without a number plate is not a breach of section 2(c) of the FCAI Code.

The Board determined that the advertisement did not breach the FCAI Code and dismissed the complaint.

The Board noted the Independent Reviewer's recommendation that the Board decision was flawed because it took into account a direction that was not made publicly available. The Board noted that this procedural issue has been rectified by the Advertising Standards Bureau.