

Case Report

1. Case Number :	0049-23
2. Advertiser :	Toyota Motor Corporation Australia Limited
3. Product :	Automotive
4. Type of Advertisement/Media :	Cinema
5. Date of Determination	22-Mar-2023
6. DETERMINATION :	Dismissed
7. IR Recommendation:	Reconfirm the Original Decision

ISSUES RAISED

FCAI Motor Vehicle Advertising Code\2(a) Unsafe driving

DESCRIPTION OF ADVERTISEMENT

This cinema advertisement opens with a disclaimer stating 'The video is filmed on a closed private race track and testing facility. All driving is filmed under controlled conditions with professional drivers. Do not attempt this at home.'

Words appear on screen 'Toyota Gazoo Racing Presents a film made by the all-new GR Corolla: Metalmorphosis'.

The Advertisement shows vehicles on the race track driven by professional drivers as they use the vehicles to record animations along the race track, including in zoetropes (cylinders with animations designed to move when spun).

The Advertisement ends with all 5 Toyota Gazoo Racing models driving on the race track in formation.



THE COMPLAINT

Comments which the complainant/s made regarding this advertisement included the following:

Showing reckless, dangerous driving.

THE ADVERTISER'S RESPONSE

Comments which the advertiser made in response to the complainant/s regarding this advertisement include the following:

Toyota takes its commitment to both the AANA Code of Ethics (AANA Code) and the FCAI Voluntary Code of Practice for Motor Vehicle Advertising (FCAI Code) seriously and is aware of the potential impact of its advertising on the community as a whole. Accordingly, all advertising, including the Advertisement, is carefully reviewed to ensure both legal compliance and that community standards are respected.

Toyota's intention is to ensure that its advertisements are created in accordance with the FCAI Code and the AANA Code. It is not Toyota's intention in this Advertisement or in any other advertisements to portray driving that could be characterised as unsafe or in contravention of the FCAI Code or AANA Code, or any road safety rules and regulations.

The Advertisement is intended as a branding ad for Toyota Gazoo Racing rather than an advertisement for a motor vehicle. The Advertisement aims to do something that has never been done before - to create a short film using a vehicle to film animation. This 2 minute version of the Advertisement will only appear in cinema and YouTube, and not on TV. However, there are shortened versions of the Advertisement on Kayo and YouTube. The Advertisement does not promote any particular vehicle model, nor does it include features or pricing of any vehicle. On this basis, the Advertisement may not be an advertisement for a motor vehicle to which the FCAI Code applies.

If the FCAI Code does apply to the Advertisement, under the FCAI Code, the use of simulated motor sport in Advertisements is permissible in instances where the activity is clearly identifiable as part of an organised activity of a type which would normally be permitted in Australia and that they also conform to general safety requirements associated with such activities.

Toyota ensured that the sequence is clearly identifiable as simulated motor sport, as this is a key feature of the Advertisement's storyline. The Advertisement shows multiple shots of the Calder Park Raceway to evoke a sense of nostalgia for Australia's racing legacy. Professional race drivers Harry and Lewis Bates appear in clearly identifiable racing livery and have taken relevant safety precautions (such as wearing helmets, livery and seat belts). Toyota included the disclaimer 'The video is filmed on a closed private race track and testing facility. All driving is filmed under controlled conditions with professional drivers. Do not attempt this at home.'

Safety was paramount during the filming activity. A dedicated stunt team was present at all times during filming, and the maximum speed reached by the vehicles was 80km/h, as this was the optimal speed for filming the animation sequences.

The Advertisement contains a brief segment where the vehicle is driven 'off-track' on an unsealed surface, but is still clearly identifiable as taking place at the race track. As the segment was filmed at the race track, no significant environmental damage was caused. The intent of this segment is for the vehicle to look like it is taking part in an off-road rally while it circles around the animation zoetrope. This segment was filmed at a safe speed in accordance with instructions from the stunt team. The GR Corolla is an AWD vehicle and has an AWD system designed off the championship winning GR Yaris World Rally Car. The maximum number of seating positions in the vehicle is 5.

Toyota takes the opinion of the complainant very seriously. However, it is our belief that:

- the Advertisement is as a branding ad for Toyota Gazoo Racing, and as such the FCAI Code does not apply; and*
- if the FCAI Code does apply, the Advertisement does not contravene the FCAI Code or the applicable laws and regulations that govern community roads and driving standards.*

Toyota maintains that the advertisement does not portray unsafe or dangerous driving under section 2 of the FCAI Code, and likewise, depicts motor sport activity in accordance with section 3 of the FCAI Code and off-road driving in a controlled manner under the appropriate safety requirements in accordance with section 4 of the FCAI Code.

It is understood that the Board will review the advertisement and ensure that it complies with the entirety of Section 2 of the AANA Code. However, the complaint seems to relate more closely to Section 2.6 of the AANA Code, concerning Health and Safety. This would suggest that the complainant believes our Advertisement to depict material that is in contravention of prevalent community standards on health and safety. Toyota maintains that this Advertisement does not breach any section of the AANA Code of Ethics, especially concerning Section 2 (specifically Section 2.6) of the AANA Code.

Toyota does not believe that any scene or image from the Advertisement violates Section 2.6 of the AANA Code. In particular, the Advertisement does not promote any unsafe behaviour whilst driving, nor is it contrary to the governing road rules and regulations.

As stated above, it is clear that the Toyota Gazoo Racing drivers are engaging in motor sport activities. They take the necessary safety precautions such as wearing helmets, livery and seatbelts, and at all times are in full control of the motor vehicles. Toyota confirms that the vehicles were being driven below 80km/h and were closely monitored by a stunt team at all times during filming. As such, we believe Toyota has not infringed any aspect of Section 2 of AANA Code, especially Section 2.6.

In summary, Toyota submits that:

I. This Advertisement does not portray, to any degree, unsafe driving and other dangerous driving practices (section 2 of the FCAI Code)

*II. This Advertisement depicts scenes of motor sport activity as one that is safe, maintained, and in compliance with the general safety requirements associated with the activity
(section 3 of the FCAI Code)*

III. This Advertisement depicts off road driving in vehicles that are suitable for such activity and that do not cause deliberate or significant environmental damage (section 4 of the FCAI Code)

IV. This Advertisement does not breach any section of the AANA Code of Ethics (specifically, Section 2.6 of the AANA Code)

V. Overall, this advertisement does not portray any unsafe, dangerous, or unethical practices or driving, and was created as a means of accentuating the technology featured in Toyota vehicles.

THE DETERMINATION

The Ad Standards Community Panel (Panel) was required to determine whether the material before it was in breach of the Federal Chamber of Automotive Industries Voluntary Code of Practice for Motor Vehicle Advertising (the FCAI Code).

The Panel noted the complainant's concern that the advertisement undermines road safety messaging.

The Panel viewed the advertisement and noted the advertiser's response.

Is this advertisement for a motor vehicle?

The Panel considered whether the 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 Panel noted that the advertisement features a promotion for Toyota Gazoo Racing, and for Toyota as a brand. However, the Panel considered that the super at the start of the video specifically mentions the "all-new GR Corolla" and that this vehicle is featured prominently in the advertisement.

As such, the Panel determined that the material before it was an advertisement for a motor vehicle and therefore that the FCAI Code applied.

Clause 2(a): '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 Panel first noted the scenes in the advertisement in which the vehicle was shown driving in circles with dust spraying into the air.

The Panel noted the advertiser's response that the advertisement shows that the beginning sequence of the advertisement is clearly identifiable as a testing or proving activity, including by showing the driver in full racing livery.

The Panel noted Clause 3 of the FCAI code provides:

"Without limiting the general application of clause 2, advertisers may make use of scenes of motor sport; simulated motor sport; and vehicle-testing or proving in advertising, subject to the following:

(a) Such scenes should be clearly identifiable as part of an organised motor sport activity, testing or proving activity, or vehicles being driven in a high-performance sports nature, provided that this activity is within an closed circuit environment (off public roads) of a type for which a permit would normally be available in Australia.

(b) Any racing or competing vehicles depicted in motor sport scenes should be in clearly identifiable racing livery."

The Panel noted that the advertisement featured professional drivers in full racing livery. The Panel noted the advertiser's response that the footage was of drivers at Calder Park raceway. The Panel considered that although the advertisement features well-known professional drivers in full racing livery, the footage in the advertisement is not a depiction of motor sport. As such, the Panel considered that the vehicle itself did not need to be in racing livery to comply with the code.

The Panel considered that the behaviour in the advertisement would be illegal if performed on a road or road related area, however, in the context of the advertisement the driving behaviour is within a closed environment and undertaken to demonstrate the vehicle's capabilities.

The Panel noted that towards the end of the advertisement, there was a scene which showed a vehicle travelling through a tunnel before completing a handbrake turn and heading back towards the tunnel. The Panel noted that it is not immediately clear from this scene that the vehicle is still within the racetrack, as there is a house and buildings in the background. However, the Panel noted that the building with a 'merchandise' sign and the oil drums in the middle of the road did indicate that this scene did take place within the closed-circuit environment.

The Panel considered that the advertisement was in line with the requirements of Clause 3 of the FCAI Code, and was not in breach of Section 2a of the FCAI Code.

Clause 2(a) conclusion

The Panel determined that the advertisement did not breach Clause 2 (a) of the FCAI Code.

Conclusion

Finding that the advertisement did not breach any other section of the FCAI Code, the Panel dismissed the complaint.

INDEPENDENT REVIEW REQUEST

As the complainant in Case Number 0049-23, I wish to exercise my right to an appeal on the grounds of a substantial flaw in the Community Panel's decision.

I start by thanking the Panel for its initial review, and to Toyota for its engagement in the process.

In making my case, I will refer to the original decision, the FCAI Code and also the following information:

1. Off Road Standing Regulations, an appendix of 2023 Motorsport Australia Manual.

Focus of Appeal

First Ground - Clause 3's interaction with Clause 2(a) does not give a 'carte blanche' exception for unsafe driving in Motorsport-type Advertising.

I agree with The Panel and Toyota that the ad was a simulated motor sport ad and, as such, Clause 3 is the most relevant element of the Code in making a determination. However an objective reading of the Code reveals that Clause 3 does not sit in isolation providing a carte blanche exception to Clause 2(a) allowing motor advertisers to disregard rules disallowing the depiction of 'unsafe driving'. This is spelt out in the very first words of Clause 3.

“Without limiting the general application of clause 2, advertisers may make use of scenes of motor sport; simulated motorsport...”

The key words here are “Without limiting the general application of clause 2”. From a grammatical reading of this sub-clause, one must conclude that the Code’s author intended for Clause 3 to be subservient to Clause 2 and an instruction for advertisers using motorsports scenes not to entirely ignore the Clause 2 safety rules, undoubtedly to discourage egregious portrayal of reckless driving behaviour in motorsport-type ads.

If the author did not intend this meaning but instead was conveying a meaning that Clause 2 applies generally to car ads except for motor-sport-type ads, then those words add no value to the sentence and could be deleted. The author must have meant for the words ‘Without limiting the general application of clause 2’ to place a limit on the motorsport exception, an intent which would be consistent with contemporary public expectations.

It is very unfortunate that to date, the Panel has misunderstood the Code and allowed a situation to persist where some car advertisers have wrongly carved out for themselves a limitless opt-out from the ban on portraying unsafe driving.

Second Ground - Ad veers beyond genuine motor sport simulation and evokes on-road use.

The Panel notes in its original determination the scene where a car leaves the oval through a tunnel, does a handbrake turn and returns to the tunnel. The Panel is clearly troubled that this scene might appear to portray the vehicle going onto public roads. The Panel satisfies itself that the action takes place on a closed circuit.

This is not the threshold it should have applied. The General Guidance of the Code asks advertisers to “consider both the explicit and implicit messages conveyed by the advertisement.” By extension, so must the Panel. The implicit message of this scene was breaking free from the confines of the race track and getting onto the open road where you can do handbrake turns in suburbia. This is the unsafe and reckless message that resonates with the viewers (and appalled this one enough to complain).

Further, the Panel is clearly watching and rewatching the ad before making its decision, which is perfectly understandable. It is through this process that it spots the merchandise sign on the building and the oil drums, upon which information it concludes the ad takes place on a closed circuit. This does not reflect how ads are consumed by the public. Few viewers would have spotted these supposed clues. In a fast moving ad, the implicit message of leaving the track and getting onto the open road drowns out these modest safeguards. And I’m afraid some advertisers cynically abuse this.

Whilst there was a close circuit disclaimer message at the start of the ad, the Panel has to weigh how effective this is at inoculating the viewer from the powerful implicit message contained in the movie-quality (in terms of vision and soundtrack) and emotive depiction of a car leaving a stadia and doing a handbrake turn. The return to the stadia suggests a ‘cheeky getting away with it’ attitude and outcome rather than the claimed never leaving the safety of the circuit.

Third Ground - unrealistic and unsafe depiction of motor sport simulation.

There is a scene where a car drives onto the field and does burnouts on a roundabout. Toyota assert that the scene was meant to 'look' like an off-road rally. I agree this was the 'look' they were going for.

There are strict rules on signage for off-road rallies, as set out in Section 10 (Course Markings) of the Off Road Standing Regulations, an appendix of 2023 Motorsport Australia Manual.

This portrayal does not match the rules. If car advertisers are going to use motor-sport simulation as a shield for driving in a manner that would be illegal on public roads, they must at least show that the driving would meet the safety rules of the sport they are emulating (note that Clause 1(e) of the Code refers to this manual).

INDEPENDENT REVIEWER'S RECOMMENDATION

I have been tasked with reviewing a video clip by Toyota Motor Corporation Australia. A determination of the Community Panel on 22 March 2023 dismissed the complaint about the advertisements as in breach of clause 2(a) of the Code of the Federal Chamber of Automotives (FCAI).

Background

The video features Toyota Gazoo racing described by Toyota as follows: "TOYOTA GAZOO Racing is the name that unites all of Toyota's motorsports. It's a spirit underpinned by a four-tier philosophy that continuously inspires us to hit the racetrack to create ever-better cars'. The principle and philosophy is illustrated in the videoclip by the 'all-new GR Corolla: Metamorphosis'.

The video clip shows a GR Corolla going through its paces. The location, Toyota advised, is the Calder motorsport racetrack. The stadium is empty. Toyota advised that the drivers are well known motor sport drivers. They are helmeted and are wearing motor sports livery.

The video commences with a disclaimer: 'The view is filmed on a closed private racetrack and testing facility. All driving is filmed under controlled conditions with professional drivers. Do not attempt this at home'. The significance of the warning is highlighted by the words in white in the centre of the page against a black background. Nothing else is shown.

Complaint

The single complaint was that the advertisement showed 'reckless, dangerous driving' as the video depicted 'vehicles racing around track doing hand brake turns etc for 2 minutes.' The appeal was on the basis of a substantial flaw in the reasoning and findings of the Community Panel.

Role of Reviewer

The independent reviewer has a limited but important role. Having decided to accept the complaint for review, the reviewer reviews the decision based on the relevant standards. The outcome may be to uphold the Panel's decision or, if the independent reviewer identifies a substantial flaw, the complaint is remitted to the Panel for reconsideration.

In this case, the principal standards which apply are the FCAI Code and related material. That is the result of the terms of the FCAI Code which states in the FCAI Practice Note – Ad Standards Community Panel in clause 2:

Advertisements for motor vehicles, which raise issues or complaints concerning safety, are to be determined according to the FCAI Code as opposed to the AANA Advertiser Code of Ethics (AANA Code).

FCAI related material relied on by the complainant is also the 2023 Motorsport Australia Manual Off Road Appendix and Off Road Standing Regulations (Off Road Rules).

The reviewer decided to undertake a review on the grounds that the findings were in error having regard to the provisions of the relevant Code in the failure by the Community Panel to deal adequately with the issues arising from the introductory words qualifying the exemption in Clause 3 of the FCAI Code, and whether the FCAI Off Road Rules were applicable.

Initial response by advertiser

The initial response by Toyota was:

The video did not portray, to any degree, unsafe and other dangerous driving practices under clause 2 of the FCAI Code. It depicts motor sport activity exempted from clause 2 by clause 3 as it was 'off-road driving in a controlled manner under the appropriate safety requirements' in clause 4 of the FCAI Code.

The video showed scenes of motor sport activity that were safe, maintained, and in compliance with the general safety requirements associated with the activity (clause 3 of the FCAI Code)

The video depicted off road driving in suitable vehicles which did not cause deliberate or significant environmental damage (clause 4 of the FCAI Code).

Panel's findings

The Panel, having found that the video referred to a 'motor vehicle', a pre-requisite to the application of the FCAI Code, dismissed the complaint, finding:

'[T]he beginning sequence of the advertisement is clearly identifiable as a testing or proving activity, including by showing the driver in full racing livery'. That meant the video did not breach Clause 2 of the FCAI Code prohibiting unsafe, reckless or menacing driving that would breach road rules relating to road safety or traffic regulation 'if it occurred on a road or road-related area'.

The advertisement was not a depiction of motor sport, so that the vehicle and the drivers 'did not need to be in racing livery to comply with the code'.

The driving would be illegal if performed on a road or road related area, however, in the context of the advertisement, the driving behaviour is within a closed environment and undertaken to demonstrate the vehicle's capabilities'. On that basis, it fell within the exemption from clause 2 which is contained in clause 3 of the FCAI Code.

The complainant's response

The complainant rejected the findings for the following reasons:

The clause 3 exemption is expressed in the FCAI Code as being subject to 'the general application of clause 2'. That meant, it was argued, that the exemption did not apply to 'egregious portrayal of reckless driving behaviour in motorsport-type ads'.

The advertisement 'veers beyond genuine motor sport simulation and evokes on-road use'.

The video in depicting the vehicle driving onto the adjacent field on the track and doing burnouts on the roundabout in the centre, was meant to look like an off-road rally and should therefore comply with clause 10 (Course Markings) of the Off Road Standing Regulations. The failure of compliance created an 'unrealistic and unsafe depiction of motor sport simulation'.

Applicable rules

Relevant provisions of the FCAI Code:

General provisions

Clause 2: Advertisers should ensure that advertisements for motor vehicles do not portray any of the following:

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 or a moving motor vehicle.]

Use of motor sport in advertising

Clause 3: Without limiting the general application of clause 2, advertisers may 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 organized motor sport activity, texting or proving activity, or vehicles being driven in a high-performance sport nature, provided that this activity is within a closed circuit environment (off public roads) 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.

Depiction of off-road vehicles

Clause 4: An advertisement may legitimately depict the capabilities and performance of an off-road vehicle travelling over loose or unsealed surfaces, or uneven terrain, not forming part of a road or road related area. Such advertisements should not portray unsafe driving and vehicles must not travel at a speed which would contravene the laws of the State or Territory in which the advertisement is published or broadcast, were such driving to occur on a road or road related area.

The FCAI Code of Practice defines:

Off-road vehicle: means a passenger vehicle with up to nine seating positions including that of the driver and designed with special features for off-road operation, consistent with the requirements of the definition of such a vehicle as provided in the Australian Design Rules (MC category). An off-road vehicle will normally have four-wheel drive;

Motor sport; means 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 recognized organizing body.

Motor vehicle: means passenger vehicle; motorcycle; light commercial vehicle and off-road vehicle.

Road: means an area that is open to or used by the public and is developed for, or has as one of its main uses, the driving or riding of motor vehicles.

Road-related area: means an area that divides a road; a footpath or nature strip adjacent to a road; an area that is not a road and is open to the public and designated for use by cyclists or animals; an area that is not a road and that is open to or used by the public for driving, riding or parking motor vehicles.

FCAI Guidance to Advertisers

Clause 2(a): Unsafe driving [Only relevant paragraphs are shown.]

Advertisers should ensure that advertisements do not depict, encourage or condone dangerous, illegal, aggressive or reckless driving. Advertisers need to be mindful that

excessive speed is a major cause of death and injury in road crashes and accordingly should avoid explicitly or implicitly drawing attention to the acceleration or speed capabilities of a vehicle ...

In particular, it is noted that use of disclaimers indicating that a particular scene or advertisement was produced under controlled conditions; using expert drivers; that viewers should not attempt to emulate the driving depicted; or expressed in other similar terms, should be avoided. Such disclaimers cannot in any way be used to justify the inclusion of material which otherwise does not comply with the provisions of the FCAI Code.

Consideration

The complaint refers to the advertisement depicting 'reckless, dangerous driving'. Driving in this manner would be 'reckless' and 'dangerous' and hence 'unsafe'. Accordingly, the FCAI Code which provides that complaints about advertisements relating to safety are to be determined according to the FCAI Code, not the AANA Code of Ethics (AANA Code), applies.

No issue was raised that the advertisement, although ostensibly about Toyota Gazoo racing, featured a motor vehicle, namely, the Corolla Metamorphosis (GR Corolla).

The claim by Toyota that the advertisement 'does not promote any particular vehicle model' and that as a consequence the advertisement 'may not be an advertisement for a motor vehicle to which the FCAI Code applies' is disingenuous.

The Corolla is one of Toyota's best-known vehicles. The GR Corolla is a new model, the Metamorphosis. It is one of Toyota's GR high-performance vehicles with an All-Wheel Drive (AWD) system but is not a four-wheel drive (4WD) vehicle. That does not mean it is not used as an 'off-road vehicle' as Toyota's GR vehicles are used in rally-driving. The GR Corolla is designed to be both an 'on road' and an 'off-road vehicle'. The argument that it is not a 'motor vehicle' was rightly not accepted.

The advertisement is one of a series in Toyota's market for those who want a sporty version of the Corolla, namely, a vehicle with enhanced performance which is capable of being handled at higher than normal speeds and can be used on roads as well as in Gazoo or other racing.

The Toyota high-performance fleet demonstrates Toyota's commitment to push new limits to make ever-better cars, tested by racing in motorsports, such as Toyota Gazoo racing. Ultimately the resultant technologies are intended to be incorporated in normal road-user vehicles.

The FCAI Code acknowledges that 'motor sport plays a critical role in brand promotion and the development and testing of crucial technologies, many of which result in safer vehicles'. In so saying the Code acknowledges that testing of vehicles performing at an

enhanced level is acceptable and necessary if improvements to the performance of vehicles generally is to occur.

The Calder motor racing circuit is a privately owned space, entry for which normally requires a fee. It is not a 'road' and is not for general use by the public. That is illustrated by the stands, empty during the filming of his video clip by Toyota. The racetrack is designed for motor sports, and can be used, as illustrated in the advertisement, for testing and proving of vehicles. The depiction of the driving on the racetrack falls within clause 3.

Permissible testing may involve higher than normal speeds. Performance testing may also demonstrate the capacity of the vehicle if it veered off a road onto the dirt or, for example, became involved in a spin due to water or oil on a road. The advertisement illustrates testing for such road conditions with its depictions of the vehicle's performance on the dirt adjacent to the racetrack, and the driving in a tight circle around the animation zoetrope.

Nonetheless an issue for the reviewer was whether the Panel, in the circumstances of this Toyota advertisement, had given sufficient consideration to the prohibition on 'unsafe driving' in clause 2 of the FCAI Code which are applied to clause 3 by its introductory words, 'Without limiting the general application of clause 2'.

The Panel did find, correctly, that the driving occurred in a testing or proving activity as it was shown on a racetrack which was clearly not a 'road'.

However, simply finding, as the Panel did, that as the driving occurred on what is 'clearly identifiable as a testing or proving activity', or a 'closed environment ... undertaken to demonstrate the vehicle's capabilities' and that this meant that the video did not breach 'Clause 2 of the FCAI Code', did not grapple adequately with how Clause 2 and clause 3 interacted.

At first sight, the prohibition in the introductory words of clause 3 significantly limits the testing and proving permitted under the FCAI Code. In other words, driving at speeds higher than may be acceptable on a road, veering off the track on to the dirt, or doing tight spins in a manner which would also not be acceptable as ordinary road user behaviour could breach normal road rules and fall within the prohibition on 'unsafe driving'.

However, reconciliation of the apparent restriction on clause 3 is provided by the Examples to clause 2. These suggest that the introductory words would only prohibit, for example, 'excessive speed; sudden, extreme and unnecessary changes in direction and speed'.

The Panel's finding that the test driving would be illegal if performed on a road or road related area but was protected as it fell within the testing exemption in clause 3,

did not grapple adequately with the limits of the prohibition in the covering words and the subtleties of the interaction between the two clauses.

Was the depiction of the driving on the race-track 'reckless, dangerous driving' because it amounted to 'excessive' or 'unsafe' speed contrary to the FCAI Code. Clause 3 requires that the driving not be 'unsafe' if conducted on a road.

The advertisement did not show the vehicle's speedometer so there is little evidence of the actual speeds at which the Corolla was travelling. In my opinion, to have such an indicator would be helpful. Assertions by Toyota that the 'maximum speed reached by the vehicles was 80kpm/h, as this was the optimal speed for filming the animation sequences' is no substitute for evidence of the speed.

The final shot of the five vehicles in formation certainly depicts them being driven at what does not appear to be 'excessive speed'.

On balance, my opinion is that the visual image of the speed of the individual GR Corolla, or of the five GR Corollas in formation does not indicate the driving speed was 'excessive' and hence 'unsafe'. Nor do the vehicles undertake any manoeuvres that would not be appropriate in ordinary road driving: Case Number 0022-21. The Panel's findings did not provide reasons akin to these.

There is also no evidence that the vehicle at any stage got out of control, during the spins and the dirt sequence even though these could have indicated 'extreme... changes in direction'. The dirt segment was also a natural consequence of driving on unsealed ground and does not indicate that the vehicle was being driven at excessive speeds: see Case number 0022-21. Again this was not a finding of the Panel.

The advertisement does not 'depict, encourage or condone dangerous, illegal, aggressive or reckless driving': Guidance to Advertisers relating to clause 2(a). The driving, accordingly, does not appear to be 'unsafe' or 'reckless'. Consequently, the driving shown in the advertisement is protected as legitimate vehicle testing within clause 3. That also supports the ultimate finding of the Panel but was not adverted to by it.

The prominent disclaimer at the start of the advertisement can also be justified since the advertisement does not breach clauses 2 and 3 of the FCAI Code. That means the warning can be recognized as appropriate as it does not fall within the second quoted paragraph of the Guidance to Advertisers for Clause 2(a) noted earlier.

Although there is no finding of the Panel on this issue, the argument by the complainant that the advertisement should have complied with the 2023 Motorsport Australia Manual Off Road Appendix and Off Road Standing Regulations (the Off Road Rules) was also inapplicable.

Although the driving simulated tight spins and driving on dirt that might arise in an off road competition, as the racetrack was not an 'off road' environment, the Off Road Rules do not apply.

Nor were the Supplementary Regulations applicable since they apply to the 'automobile classes' specified in clause 5.2. These are listed as: 'Performance 2WD, Extreme 2WD, Production 4WD and Extreme 4WD classes' of vehicle. The GR Corolla is an All-Wheel Drive vehicle, not a 2/4 Wheel Drive vehicle. As Toyota submitted the dirt sequence was simply to show 'that the Vehicles all-wheel drive capabilities have been tested in off-road settings'. For that reason, the complainant's suggestion that there were breaches of the Off Road Rules is misplaced.

The Panel did not refer to the AANA Code of Ethics. In my view nor should it have done so. The FCAI Code explicitly states that for complaints about advertisements depicting what is claimed to be 'unsafe' driving, the AANA Code does not apply and the complaint should be tested against the FCAI Code only.

Conclusion

Accordingly, although in my opinion, errors have been made by both the Panel in its findings and the complainant in submissions to AdStandards, the error of the Panel was not 'substantial'. As the driving depicted was not 'reckless' or 'dangerous' and hence was not 'unsafe' under Clause 2(a) of the FCAI Code, the Panel's dismissal of the complaint was correct.

I uphold the determination of the Community Panel.