HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

MITSUBISHI MOTORS AUSTRALIA LTD (ACN 007 870 395)
First Appellant

NORTHPARK BERWICK INVESTMENTS PTY LTD (ACN 075 238 121)
Second Appellant

AND

ZELKO BEGOVIC
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

PART I: Certification

This outline is in a form suitable for publication on the internet.

PART II: Outline of Propositions

Ground 1 – section 18 of the ACL does not prohibit mandatory conduct

1. Section 18 of the ACL prohibits conduct in trade or commerce that is misleading or deceptive not conduct in performance of a statutory obligation: *GMAC Case* at 561: JBA3 p567 {cf. CA[119]:CAB137}. Compliance with laws enacted for the benefit of consumers is the antithesis of an 'unfair trade practice' to which s 18 is directed: {AS[32]-[51]; ASR[6]-[10]}.

2. Mitsubishi applied a fuel consumption label, in the prescribed form {Standard, Appendix A}, to the Respondent's vehicle, before supplying that vehicle to Northpark, in compliance with its statutory obligations {MVSA ss 14: JBA1 p133, 18: JBA1 p139; Standard cl 4: JBA3 p177, CA[2],[3]:CAB114}. Northpark sold that vehicle to the Respondent, with the label affixed, as removing or modifying the label before sale was prohibited {cf CA[77]: CAB128; MVSA, s 13A: JBA1 p127; ACL s 106; cf CA[85]: CAB130: {AS[5]}.

3. The Court of Appeal was wrong to find that the Appellants' conduct went beyond the performance of their statutory obligations because, while the Appellants were obliged to affix (or leave affixed) a label in the prescribed form *if* they offered a vehicle for sale, the Appellants were under no legal obligation *to* offer a vehicle for sale in the *first place,* if the label was misleading for the vehicle {CA[115]:CAB136}: {AS[19]-[28]}.

4. It was affixing a label {J[80]: CAB69; CA[87]:CAB130} found to convey a misrepresentation {CA[102]: CAB134, [113]: CAB136}, and selling the vehicle with that label

affixed {J[80]: CAB69; CA[79]: CAB128, [87]: CAB130}, that was found to be misleading conduct. That label was affixed in performance of a statutory obligation: {AS[5], [27]}.

5. The distinction between 'selling the vehicle' and 'presenting' or 'offering' the vehicle for sale *with the label affixed* {CA[78],[79]: CAB128, [115],[116]: CAB136} is illusory. The MVSA required the label to be applied *before* the vehicle was imported or supplied {ss 14: JBA1 p133, 18: JBA1 p139} and prohibited the removal or modification of the label *after* it was applied {s 13A: JBA1 p127}. It was not, and is not, alleged that the Appellants made any representation other than that conveyed by the label {J[113]: CAB80}: {AS[19]-[21]}.

6. The Court of Appeal was wrong to find that because the figures on the label were supplied by Mitsubishi, and the label contained no disclaimer {CA[85]: CAB130 cf [11] below}, the Appellants made "*any* representation conveyed by the label" {CA[87]: CAB130}. In testing the model and accurately {CA[3]: CAB114} displaying the test results on the label, Mitsubishi was performing its statutory obligations {Standard cl 4.5: JBA1 p177, CA[2],[3]: CAB114, [10]: CAB115} not making, adopting, or endorsing any representation made by the label itself: *Google Inc.* at 446: JBA3 p504, 482-483: JBA3 p540-541. Modifying the label, to include a disclaimer, was prohibited {s 13A: JBA1 p127}: {AS[52]-[64]; ASR[11]}.

7. It is no answer to the conflict that arises if performance of a statutory obligation attracts liability under s 18 of the ACL to say that the statutory obligation, and therefore liability, could be avoided by not engaging in trade or commerce *at all* {CA[115]: CAB136}. The MVSA contemplates (and implicitly authorises) the importation and supply of vehicles that comply with the MVSA and Australian Design Rules. Section 18 of the ACL is intended to prohibit *unfair* trade practices, not trade in compliance with the MVSA and Standard: {AS[32]-[39]}.

8. It is also no answer to that conflict to say that liability could be avoided if manufacturers only supplied vehicles whose fuel consumption "*matched the label*" {RS[26]} when tested (in this case several years and almost 50,000km after sale {CA[26]: CAB118}) or if retailers negotiated contractual indemnities from suppliers {RS[32]}. Even if this were possible, which must be doubted, that is not what the MVSA or Standard or ACL require: {ASR[12]-[20]}.

9. As a provision of general application, s 18 of the ACL is not intended to convert a labelling standard {Standard, cl 4: JBA1 p177}, the purpose of which is to inform consumers {J[9]: CAB41-42}, into a manufacturing standard, which Parliament did not itself see fit to enact. *A fortiori* where vehicle design is highly regulated by specific Australian Design Rules (including the Standard): {AS[79]-[84]; ASR[18]}.

Ground 2 – the label does not make the testing replicability representation

10. The Tribunal, single judge, and Court of Appeal, each found that the prescribed label represents that "*the fuel consumption figures recorded on [it] accurately recorded the results of testing of a test vehicle of the relevant type in accordance with the Standard*" (the test accuracy representation) {CA[18(a),[19(a)]: CAB117} and that this representation was not misleading or deceptive {CA[35(a)]: CAB119, [49]: CAB122, [97]-[98]: CAB133}. This ought to have been determinative of the Respondent's claim {AS[31], [65]-[66], [76]-[78]}.

11. The label does not also represent that "*the fuel consumption figures [in it] [will] be substantially replicated if the purchased vehicle [is] tested in accordance with the [Standard]*" {cf CA[107]-[110]: CAB135}. Save for the disclaimer that '*actual* fuel consumption depends on factors such as vehicle condition', the label says nothing about whether (or to what extent) the test results displayed in the label might be replicated by any vehicle to which the label may be affixed, if tested after sale {AS[29]-[31], [67]-[78]; ASR[21]}.

12. That a consumer may believe the label to be of "limited utility" {CA[107]: CAB135, J[127]: CAB85} unless it represents that the results displayed on it will be replicated, does not empower the court to read into the label a representation not made by it, so as to give the label efficacy. *A fortiori* where this would create a *de facto* manufacturing standard and impose liability based on vague notions of "substantial" replicability over an unspecified period {CA[47]: CAB121, cf [105]: CAB134, cf [108]-[109]: CAB135}{AS[19]-[26], [79]-[84]}.

13. The efficacy of the Standard (and label) is a matter for Parliament. If Parliament considers the 'test accuracy representation' made by the label to be insufficient or the label to be of "limited utility" to consumers and wishes to regulate the fuel consumption of motor vehicles, it can do so by amending the Standard or the Australian Design Rules. That is not the role of the court or of section 18 of the ACL: {AS[75]}.

14. If, contrary to [11] above, the mandatory label makes a representation that is misleading, or the disclaimer on the label is inadequate, that is an issue for Parliament. It is not to be remedied by imposing on manufacturers and dealers liability under s 18 of the ACL for conduct in compliance with their statutory obligations {AS[75]}.

1 August 2023

Bret Walker