HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 11 Apr 2023 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	M17/2023
File Title:	Mitsubishi Motors Australia Ltd & Anor v. Begovic
Registry:	Melbourne
Document filed:	Form 27A - Appellants' submissions
Filing party:	Appellants
Date filed:	11 Apr 2023

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M17/2023

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

APPELLANTS' SUBMISSIONS

PART I: Certification

1. These submissions are in a form suitable for publication on the internet.

PART II: Issues

2. The appeal raises two issues:

(a) whether conduct that is required by the *Motor Vehicle Standards Act 1989* (Cth) (**MVSA**) and *Vehicle Standard (Australian Design Rule 81/02 — Fuel Consumption Labelling for Light Vehicles) 2008* (Cth) (**Standard**) can be prohibited by s 18 of the *Australian Consumer Law* (**ACL**); and

(b) whether the fuel consumption label prescribed by the Standard represents to consumers that the fuel consumption figures recorded on it will be substantially replicated if a vehicle to which the label is affixed is tested in accordance with the Standard (the **testing replicability representation**).

PART III: Section 78B notices

3. While the Appellants do not rely on s 109 of the *Constitution* {see [26] below}, by reason of the reference to that provision in argument {see [24]–[25] below} a notice under s 78B of the *Judiciary Act 1903* (Cth) has been served.

PART IV: Decision below

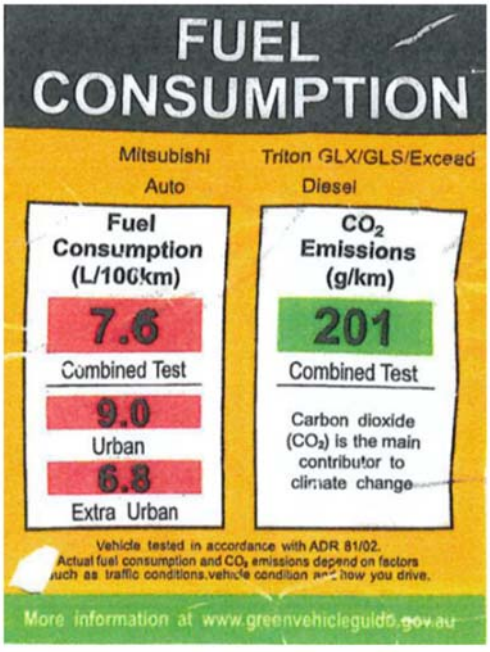
4. This is an appeal from the decision of the Court of Appeal of the Supreme Court of Victoria (Emerton P, McLeish and Macaulay JJA) in *Mitsubishi Motors Australia Pty Ltd v Begovic* (2022) 403 ALR 558 {**CA**}, affirming the judgment of the Supreme Court of Victoria

(Ginnane J) in *Mitsubishi Motors Australia Ltd v Begovic* [2021] VSC 252 {**J**}, affirming (in part) the judgement of the Victorian Civil and Administrative Tribunal (**VCAT**) (Senior Member Forde) in *Begovic v Northpark Berwick Investments Pty Ltd* [2019] VCAT 772 {**T**}.

PART V: Statement of facts

5. Mitsubishi Motors Australia Ltd (**Mitsubishi**) is the importer (and deemed manufacturer: {ACL ss 7(1)(e), 7(3)}) of the Mitsubishi Triton MQ model motor vehicle. The MVSA prohibited Mitsubishi from importing or supplying to the market that or any other new motor vehicle that did not comply with the Standard: {MVSA ss 14, 18}. The Standard required that every new vehicle have applied to its windscreen a fuel consumption label meeting the specifications in the Standard: {Standard cl 4}. The Standard prescribed every aspect of the form and contents of the fuel consumption label: {J[12]}. In full compliance with that Standard and the MVSA, Mitsubishi imported a 2016 model Mitsubishi MQ Triton 4x4 GLS motor vehicle, registration number 1JG6LD (the **Vehicle**) and supplied that vehicle to Northpark Berwick Investments Pty Ltd (**Northpark**), a new car dealer, with a fuel consumption label affixed to it (the **Label**).

6. The Label (below) relevantly stated:



FUEL CONSUMPTION
Mitsubishi Triton GLX/GLS/Exceed
Auto Diesel
Fuel Consumption (L/100km)
7.6 (Combined Test);
9.0 (Urban) and
6.8 (Extra Urban).
Vehicle tested in accordance with ADR 81/02. Actual fuel consumption… depend on factors such as traffic conditions, vehicle condition and how you drive.
More information at
www.greenvehicleguide.gov.au

7. The website www.greenvehicleguide.gov.au relevantly noted that all new light vehicles sold in Australia are required by law to display a fuel consumption label on the front windscreen; that the figures displayed on the fuel consumption label are based on specific tests conducted by manufacturers under standardised, carefully controlled conditions in specialised

vehicle emission laboratories to demonstrate a vehicle's compliance with the Australian Design Rules; that actual on-road fuel consumption will depend on factors such as traffic conditions, vehicle condition and load, and how the vehicle is driven; and that the primary aim of the fuel consumption label was to provide a common basis for comparison of individual vehicle models {J[9]–[10]}.

8. It is not in issue that, in this case, the Label complied with the Standard and MVSA or that the fuel consumption figures recorded in the Label were accurate: {J[77], [138]; CA[35(a)], [49], [97]–[98]}. It is not alleged that, save for any representation conveyed by the Label, the Appellants made any other representation, whether by way of advertisement, promotion or otherwise: {J[113]}.

9. Having received the Vehicle from Mitsubishi with the Label affixed, the MVSA prohibited Northpark from removing or modifying the Label prior to sale: {MVSA s 13A}. In full compliance with the Standard and MVSA, Northpark offered the Vehicle for sale and, on 3 January 2017, sold the Vehicle to the Respondent with the Label affixed: {T[81]}.

10. Non-compliance with the MVSA or Standard is prohibited and attracts a penalty: {MVSA ss 13A, 14, 18}.

11. After purchasing the Vehicle, the Respondent was dissatisfied with its fuel consumption and, on 6 April 2018, commenced proceedings in the VCAT alleging that the Appellants had contravened the ACL because the fuel consumption of the Vehicle was higher than that stated in the Label.

12. On 26 February 2019, more than two years and nearly 50,000 km after sale: {CA[26]}, the Vehicle was tested by an expert in accordance with the Standard. The fuel consumption of the Vehicle, as tested, was (in L/100km) 9.6 (Combined); 10.6 (Urban) and 9.3 (Extra Urban): {CA[30]}. This was materially higher than the fuel consumption figures in the Label.

13. The Tribunal found that Mitsubishi was responsible for the information on the Label and that, by affixing the Label to the Vehicle and selling the Vehicle with the Label affixed, Mitsubishi and Northpark had engaged in misleading or deceptive conduct in contravention of s 18 of the ACL: {T[53]} because "the label was misleading and deceptive for the vehicle" based on the expert evidence: {T[51]–[52]}. The Tribunal found the Respondent was entitled to reject the vehicle and obtain a refund of the purchase price: {T[85]}.

14. The Appellants appealed the decision to the Supreme Court of Victoria under s 148 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) on a question of law. In answer

to the question "can a manufacturer who is required by law to affix a fuel consumption label to a vehicle, the form and content of which are prescribed by law, be found to have engaged in conduct that is misleading or deceptive… by reason of having affixed the label as required by law?" Ginnane J found that the contents of a compulsory label could be misleading if the label inaccurately recorded information the law required to be described accurately: {J[123], [125]}.

15. While his Honour accepted that Mitsubishi was required by law to use the exact wording and layout of the label: {J[12], [127]} and that there was no dispute that the test results shown on the label were accurate: {J[77], [117], [138]}, his Honour nevertheless concluded that "the issue is not why [Mitsubishi] attached the label to the vehicle, but what the fuel consumption information it added, when read with the whole of the label, conveyed to a reasonable consumer": {J[127]}.

16. On that basis, his Honour affirmed the decision of the VCAT and found that, by affixing the fuel consumption label and selling the vehicle with the label affixed: {J[80]}, the Appellants had engaged in misleading or deceptive conduct: {J[141]}, as the label represented that the test results recorded on it could be substantially replicated under standard testing when the expert evidence established they could not be: {J[133], [137]}.

17. The Appellants appealed that decision to the Court of Appeal (Emerton P, McLeish and Macaulay JJA). The Court of Appeal dismissed the appeal. In doing so:

(a) The Court of Appeal rejected the submission that the Appellants' conduct was mandatory and that s 18 of the ACL cannot prohibit conduct that is in obedience of a legal requirement: {CA[114]–[116]} and that, because the Appellants were not the authors of the Label, and had no control over its contents, the Appellants did not make the representations conveyed by the Label: {CA[81]}.

(b) The Court of Appeal found that, because the Label recorded the results of testing conducted by Mitsubishi, and Mitsubishi and Northpark did not disclaim responsibility for the figures recorded in the label: {CA[86]}, by affixing the Label and presenting and selling the Vehicle with the Label affixed, Mitsubishi and Northpark had engaged in conduct that "extended to making any representation conveyed by the label": {CA[87]}.

(c) The Court of Appeal found that while there would be "much force" {CA[114]} in the argument that the performance of a statutory obligation, without more, cannot meaningfully be said to constitute misleading or deceptive conduct if the Appellants' conduct was confined to affixing a Label that made a representation about the past testing of a representative vehicle (the **test accuracy representation**):{CA[35(a)], [49], [97]}, the position was different where

the Label represented that the fuel consumption figures recorded on it could be substantially replicated if the vehicle to which the label was affixed was to be tested in accordance with the Standard (i.e. made the testing replicability representation): {CA[18(d)], [101], [110]}.

(d) The Court of Appeal found that while the manufacturer and dealer are required by law to affix the Label *if* offering a vehicle for sale, the Appellants were under no legal obligation *to* offer a vehicle for sale in the first place, particularly when the Label was misleading or deceptive in respect of that vehicle: {CA[115]}.

(e) The Court of Appeal found that because the Appellants' conduct as a whole included offering the vehicle for sale, which was not mandatory, it could not be said that any statutory obligation to engage in that conduct prevented the conduct as a whole from being relevantly, and actionably, misleading or deceptive: {CA[115]–[117]}.

(f) The Court concluded that because the Appellants had made the testing replicability representation contained in the Label: {CA[110]} and the fuel consumption results recorded in the label were not substantially replicated when the Vehicle was tested, the Appellants had engaged in misleading or deceptive conduct in contravention of s 18 of the ACL: {CA[119]}.

18. The Appellants appeal from that judgment to this Court, by special leave granted by Gageler, Edelman and Steward JJ on 17 February 2023.

PART VI: Argument

Issue 1: Whether conduct required by one law can be prohibited by another?

The effect of the decision below is to penalise compliance with the MVSA and Standard

19. The effect of the decision below is that a vehicle manufacturer who wishes to import or supply a new vehicle to the market, and a new car dealer who wishes to offer a new vehicle for sale, are compelled by the MVSA (now *Road Vehicle Standards Act 2018* (Cth)) and Standard to engage in conduct that the Court of Appeal has found is prohibited by s 18 of the ACL.

20. Specifically, the manufacturer must affix {MVSA ss 14, 18, Standard cl 4}, and the dealer must not modify or remove {MVSA s 13A}, a label in a prescribed form {Standard, Appendix A} that the Court of Appeal has found conveys a representation that is (or may be) misleading, in contravention of s 18 of the ACL: {CA[119]}.

21. The manufacturer and dealer cannot avoid this liability by not affixing a label in the prescribed form, or by removing or modifying that label prior to sale, as a failure to comply with the MVSA or Standard is prohibited and attracts a penalty: {MVSA ss 13A, 14, 18}.

22. This result, that a person is prohibited by one law (s 18 of the ACL) from complying with another (the MVSA and Standard), is contrary to the principle that a provision that imposes a duty to do a specified thing will ordinarily be construed as conferring on the person on whom the duty is imposed a power or authority to do that thing: *Commercial Radio Coffs Harbour Ltd v Fuller* (1986) 161 CLR 47, 50 (Gibbs CJ and Brennan J) (*Commercial Radio*), citing *Fenton v Hampton* (1858) 11 Moo PC 347, 361; 14 ER 727, 732.

23. It is also contrary to the principle that, where there is a conflict between a general provision of one statute and a specific provision of another, it will be assumed that the legislature did not intend to impinge upon its own comprehensive regime of a specific character: *The Ombudsman v Laughton* (2005) 64 NSWLR 114, 118 [19] (Spigelman CJ) and the specific provision will ordinarily prevail: *Smith v The Queen* (1994) 181 CLR 338, 348 (Mason CJ, Dawson, Gaudron, McHugh JJ).

24. Were that not the case, and on its proper construction ss 13A, 14, 18 of the MVSA and cl 4 of the Standard required a person to engage in conduct that involved the contravention of s 18 of the ACL, the provisions of the MVSA would prevail, in the case of the ACL (Vic), or the MVSA might impliedly repeal s 18 of the ACL pro tanto, in the case of the ACL (Cth): *Commercial Radio* at 50 (Gibbs CJ, Brennan J).

25. In either case, whether it be by construction, invalidity, or implied repeal, a person cannot be compelled by one law to engage in conduct and then prohibited and found liable by another law for having done so.

26. This conflict need not arise because, as set out below, on its proper construction, s 18 of the ACL is a general prohibition on unfair trade practices that does not prohibit conduct that is mandatory: *R v Credit Tribunal; Ex Parte General Motors Acceptance Corporation* (1977) 137 CLR 545, 561 (Mason J with whom Barwick CJ, Gibbs, Stephen and Jacobs JJ agreed) (the ***GMAC Case***).

Reasoning that led to the result of prohibiting mandatory conduct

27. The conclusion that, by affixing the mandatory label and offering a vehicle for sale with that mandatory label affixed, the Appellants had engaged in misleading or deceptive conduct in contravention of s 18 of the ACL rests on three findings, each of which is addressed below:

(a) first, that the fuel consumption label in the form prescribed by the Standard, makes the "testing replicability representation": {CA[110]} (see Issue 2, below);

(b) second, that by making that representation, the label is "misleading" within the meaning of s 18 of the ACL, if a vehicle to which the label is affixed does not perform as stated in the label when tested after purchase: {CA[101], [113], [119]}; and

(c) third, that by affixing the label, or offering a vehicle for sale with the label affixed, in full compliance with the MVSA and Standard, a manufacturer and dealer will be liable for any misrepresentation conveyed by that label: {CA[87]}.

28. For the reasons set out below, it is submitted that each of these findings was in error.

The Label does not make the "testing replicability representation"

29. The question whether s 18 of the ACL prohibits mandatory conduct only arises if the mandatory label makes the "testing replicability representation" {CA[18(d)]}, being the representation found to be misleading: {CA[101], [119]}.

30. As set out in Issue 2 below, the Label makes no representation about the fuel consumption of the particular vehicle to which it is affixed: {CA[18(b)], [19(b)]}. The Label does not represent that the fuel consumption results recorded on it will be replicated, substantially or otherwise, if a vehicle to which the Label is affixed is tested in accordance with the Standard {cf CA[18(d), [101], [110], [119]}, much less at some indeterminate point in time after sale: {CA[47], [103], [105]}.

31. The only representation made by the Label is that the fuel consumption figures recorded on it are the results of past testing of a test vehicle of the relevant type in accordance with the Standard (i.e. the test accuracy representation). It having been found that the Label *accurately* recorded those results {CA[35(a)], [49], [97]–[98]}, the Respondent's claim under s 18 of the ACL ought to have been dismissed.

Affixing the label cannot be "misleading" within the meaning of s 18 of the ACL

32. Even if, contrary to these submissions, the Label did make the "testing replicability representation", and that representation was false "for the Respondent's vehicle" as found {CA[101]}, it does *not* follow {cf CA[113]–[117]} that an inaccurate statement made in a mandatory label or notice is "misleading" within the meaning of s 18 of the ACL (i.e. is 'actionably misleading': {cf CA[63], [96], [112]–[113], [116]}).

33. To the contrary, as Mason J (with whom Barwick CJ, Gibbs, Stephen and Jacobs JJ agreed) noted in the *GMAC Case* at 561: the meaning of the word "misleading" is "apt to be influenced, indeed decisively influenced, by the context in which it is found." In its context,

the prohibition now in s 18 is: "an important general prohibition against a corporation in the course of trade or commence engaged in a form of conduct, a trade practice, which is unfair."

34. Mandatory conduct, in compliance with a law enacted in the interests of consumers, is not by its nature an "unfair" trade practice nor is it "misleading or deceptive" conduct of the kind prohibited by s 18 of the ACL. As Mason J (with whom Barwick CJ, Gibbs, Stephen and Jacobs JJ agreed) said in the *GMAC Case* at 561:

> "The unexpressed assumption which underlies the prohibition [then in s 52 of the *Trade Practices Act 1974* (Cth) (**TPA**)] is that *the conduct so enjoined is not conduct in which the corporation is required to engage by, or under the compulsion of, some other law* enacted in the interests of consumers" (emphasis added).

35. It was for this reason that this Court in the *GMAC Case*:

(a) found (at 561) that the 13th Schedule Notice in issue in that case was not misleading within the meaning of s 52 of the TPA, notwithstanding that it incorrectly represented that the *Consumer Transactions Act 1972-1973* (SA) did not apply to second-hand motor vehicles; and

(b) ordered (at 565) that GMAC's summons seeking a declaration that it not be required to serve the prescribed notice be dismissed.

36. The Court in the *GMAC Case* would not have dismissed GMAC's summons, with the effect of compelling GMAC to serve a 13th Schedule Notice, had that conduct been actionably misleading.

37. The *GMAC Case* is not distinguishable on the basis that, while a manufacturer and dealer are required by law to ensure the Label is affixed to a vehicle *if* offered for sale, there was nothing in the Act or the Standard that obliged the Appellants to offer a vehicle for sale *in the first place*: {CA[115], [117]}. The same was true in the *GMAC Case*, where the credit provider was required by law to serve upon a consumer a copy of the 13th Schedule Notice only *if* the credit provider entered into a credit contract of the relevant kind. GMAC was under no legal obligation to provide credit or to enter into any such credit contract *in the first place*.

38. In both this case and the *GMAC Case*, affixing or serving the prescribed notice was under the compulsion of some other law enacted in the interests of consumers. In both cases, that other law only applied *if* the person engaged in some form of trade or commerce that was not itself prohibited. In both cases, the mandatory notice was found to contain a representation

that was inaccurate or misleading within the ordinary meaning of that term: *Henjo Investments Pty Ltd v Marrickville Pty Ltd (No 1)* (1988) 39 FCR 546, 554–5 (Lockhart J).

39. It follows that this Court's conclusion in the *GMAC Case*, that the conduct was nevertheless *not* misleading, within the meaning of s 52, because that provision did not prohibit conduct in which a corporation is required to engage by some other law, applies with equal force in this case: {cf CA[115], [117]}. The Court of Appeal was wrong to distinguish it: {CA[115], [117]}. It has not been suggested that the *GMAC Case* was wrongly decided.

The relevant conduct was mandatory

40. Both the Tribunal and Ginnane J identified the relevant conduct as the Appellants affixing the Label to the Vehicle and selling the Vehicle with the Label affixed (i.e. not removing or qualifying the Label): {T[53], J[80]}. This conduct was mandatory: {MVSA ss 13A, 14, 18}.

41. Having found that there would be "much force" in the argument that the performance of a statutory obligation, without more, cannot be said to constitute misleading or deceptive conduct {CA[114]}, the Court of Appeal found that the Appellants' conduct went beyond the mandatory conduct found by the Tribunal and Ginnane J as it included "offering" or "presenting" the Vehicle for sale {CA[78]–[79], [115]–[117]}, which conduct the Court of Appeal found was not mandatory: {CA[115]}. That distinction is, respectfully, illusory.

42. As set out above, clause 4.1 of the Standard required a label in the form prescribed by Appendix A to be applied to the windscreen of every new light vehicle. Sections 14 and 18 of the MVSA prohibited the importation and supply of any vehicle that did not comply with that standard ("nonstandard"). In full compliance with those provisions, Mitsubishi applied the Label to the Vehicle and imported and supplied it to Northpark. Mitsubishi did not offer or present the Vehicle for sale.

43. Having received the Vehicle from Mitsubishi with the Label affixed, s 13A of the MVSA prohibited Northpark from doing any act that would make the vehicle "nonstandard". This included removing or modifying the Label before sale. In full compliance with the MVSA, Northpark offered the Vehicle for sale and sold it to the Respondent *with the Label affixed*.

44. It was not found, nor could it have been, that "presenting" or "offering" to sell the vehicle was, by itself and without more, misleading or deceptive. It was only by offering the vehicle for sale "with the Label affixed" {CA[87], [89]} (which was mandatory), in

circumstances where the prescribed label was found to convey a misrepresentation about the vehicle {CA[101]}, that this conduct was found to be misleading: {CA[115]}.

45. In the circumstances, to characterise the Appellants' conduct "as a whole" as discretionary, notwithstanding the only operative part of that conduct was mandatory, on the basis that a manufacturer and dealer could choose not to sell vehicles in the *first place* and still less "in circumstances where the representation *in the label* is misleading or deceptive in respect of that vehicle" (emphasis added) {CA[115]–[117]} is artificial.

46. Section 18 of the ACL only operates where a person first engages in trade or commerce and the Standard only operates where a person first chooses to import or supply a vehicle to the market for sale. Neither the ACL, the MVSA, nor the Standard are intended to prohibit trade and commerce in compliance with laws or standards enacted for the benefit of consumers.

47. Where compliance with the law subjects a person to penalty for contravention of the ACL, it is no answer to that inconsistency to say that the person may choose not to engage in trade or commerce *at all*. Corporations ought to be free to engage in trade or commerce, in compliance with applicable standards, without that compliance subjecting them to liability for contravention of s 18 of the ACL.

48. The suggestion that a dealer should be liable for any misrepresentation conveyed by a mandatory label because that dealer could choose not to present or offer a vehicle for sale "in circumstances where the representation *in the label* is misleading in respect of that vehicle" (emphasis added) is unrealistic.

49. To avoid such liability, a dealer would presumably have to test every new vehicle supplied to it to ensure that it consumed fuel at the same or substantially the same rate as that stated in the Label, something the Court of Appeal itself described as "extraordinarily extensive and unnecessary": {CA[100]}.

50. Even then, no test could be performed that would guarantee a vehicle would continue to consume fuel at the same or substantially the same as stated in the Label for an indefinite period {CA[47], [103], [105]}, in this case more than 2 years and almost 50,000 km after sale: {CA[26]}.

51. In any event, whether the conduct of the Appellants is mandatory cannot depend on what representation is made by the Label: {cf CA[114]}. Whatever representation the Label conveys, the conduct of affixing that label to a vehicle for sale and offering or selling that vehicle *with the Label affixed* was mandatory.

The Appellants did not make the representations conveyed by the Label

52. Even if, contrary to these submissions, the Label did make the "testing replicability representation", and even if a representation contained in a mandatory label or notice could be actionably misleading, it does not follow that, by affixing the label, or presenting or offering a vehicle for sale with that label affixed, the Appellants' conduct extended to making every representation contained in that label: {cf CA[87]}.

53. To the contrary, the Label was in the form of Appendix A to the Standard. Every aspect of the form and content of that Label, including the words used in it, were prescribed by the Standard: {J[12]; CA[12]; Standard cl 4, Appendix A}. It was not authored by the Appellants.

10 54. While the model description and the fuel consumption results recorded in the Label {CA[98]} were supplied by Mitsubishi, in full compliance with the Standard {CA[13]; Standard cl 4.6.1; Appendix A, cl 1.13}, this information was accurate and was found not to be misleading: {CA[35(a)], [49], [97]–[98]; cf CA[86]}.

55. It was "the whole of the label", including the words "Fuel Consumption" and "tested in accordance with ADR 81/02", that was found to convey the "testing replicability representation": {J[127]}. The Appellants did not choose, or have any control over, the words in the Label. Those words were chosen by parliamentary drafters, and adopted by Parliament, having regard to considerations of a kind that are ordinarily not justiciable: *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 37–8 (Brennan J).

20 56. It should have been apparent to an ordinary member of the relevant class reading the Label, and the website referred to in it, that the Appellants were not the authors of the Label and did not "create the message" contained in it: *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435, 483 (Heydon J) (*Google Inc*). The Label included the words "More information at www.greenvehicleguide.gov.au", which directed the consumer to a Commonwealth Government website that explained the mandatory nature of the Label and its purpose. The Label was not in the form of an advertisement by the manufacturer or dealer. Save for the mandatory description of the vehicle {Standard cl 1.10–1.12} it did not include the Mitsubishi brand, logo, or trademarks; nor did it purport include any statement by Mitsubishi or Northpark.

30 57. In determining whether, by affixing the Label and offering the Vehicle for sale with the Label affixed, the Appellants would be regarded as adopting or endorsing the words used in the Label itself, the Appellants' conduct must be viewed "as a whole" and not divorced from

other circumstances, such as the mandatory nature of the Appellants' conduct, that might qualify its character: *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592, 605 [39] (Gleeson CJ, Hayne and Heydon JJ) (*Butcher*).

58. As set out above, Mitsubishi was required by law to affix a label in the prescribed form to any new vehicle imported or supplied to the market: {MVSA ss 14, 18}. Northpark was prohibited from removing, modifying, or qualifying that label once it had been affixed: {MVSA s 13A}. By complying with the MVSA and Standard, the Appellants were discharging their legal obligation to *pass on* to consumers that information the MVSA and Standard required them to convey, and no more: *Yorke v Lucas* (1985) 158 CLR 661, 666 (Mason ACJ, Wilson, Deane, Dawson JJ). The Appellants were not making, adopting, or endorsing the words of the Label itself: *Google Inc* at 446 (French CJ, Crennan, Kiefel JJ); *Butcher* at 605 [39]–[40] (Gleeson CJ, Hayne and Heydon JJ); cf *Gardam v George Wills & Co Ltd* (1988) 82 ALR 415, 427 (French J).

59. In concluding, to the contrary, that an ordinary and reasonable prospective purchaser would conclude that both Mitsubishi and Northpark had adopted and endorsed the Label, and any representation conveyed by it, the Court of Appeal relied on the fact that the Label contained no disclaimer, and included test results that had been supplied by Mitsubishi which Mitsubishi did not disavow responsibility for: {CA[85]–[86]}. This finding ignored the compulsory nature of the Appellants' conduct.

60. Given the prohibition in s 13A of the MVSA, the Appellants were not free to amend or qualify the Label or to include in it a disclaimer: {cf CA[85]}. In the circumstances, the absence of a disclaimer cannot be taken as adoption or endorsement of the Label.

61. That Mitsubishi tested the model, and reported the results of that testing, and included those results in the Label, as it was required to do by the MVSA and Standard: {CA[9]–[13]}, cannot amount to an endorsement or adoption of the Label itself.

62. That Mitsubishi did not (and does not) disavow responsibility for the accuracy of the test results included in the Label likewise cannot be taken as an endorsement or adoption of the Label itself. It is not in issue that those figures were accurate and not misleading: {CA[35(a)], [49], [97]–[98]}. As stated above, it is the Label "as a whole", and not the figures reported by Mitsubishi, that was found to convey the misleading representation: {J[127]}; CA[110]}.

63. Other than reporting the test results and accurately including them in the Label, in full compliance with the MVSA and Standard, Mitsubishi had no input into the form or content of

the Label itself or into the words that conveyed the testing replicability representation. Northpark had no input into the Label whatsoever: {cf CA[85]}

64. In the result, where the conduct of testing the model, reporting the test results, including those results in the label and affixing the Label was mandatory, and removing or qualifying the Label was prohibited, the Court of Appeal was wrong to find that, by their conduct, Mitsubishi and Northpark had adopted or endorsed the Label and had engaged in conduct that extended to making any representation conveyed by the Label: {CA[87]}.

Issue 2: Whether the Label makes the "testing replicability representation"?

The label makes the "test accuracy representation" which is not misleading.

65. A person reading the Label including the words "Mitsubishi Triton GLX/GLS/Exceed Auto Diesel", "Vehicle *tested* in accordance with ADR 81/02" (emphasis added), together with the test results recorded in the Label and the information on the Green Vehicle Guide website, could not fail to conclude, just as the Tribunal {CA[35(a)]}, Ginnane J {CA[49]} and the Court of Appeal {CA[97]–[98]} did, that the Label represents that a test vehicle of that model was tested in accordance with the Standard and that the results of that testing were as recorded in the label (i.e. the test accuracy representation). The Tribunal was right to find that the Label was not representing anything other than this: {T[42]}.

66. It is not in issue that this representation was accurate and not misleading: {CA[35(a)], [49], [97]–[98]}. As a result, the Respondent's claim should have been dismissed.

The label does not make the "testing replicability representation" found to be misleading

67. The Court of Appeal was right to find that the Label made no representation about the fuel consumption of the vehicle to which the Label was affixed {CA[18(b)], [19(b)]} and that a reasonable consumer would *not* take the reference to "Vehicle tested" to be a reference to the specific vehicle to which the label is affixed: {CA[100]}.

68. Not only does the Label not refer to any specific vehicle but it refers to three different variants of the Mitsubishi Triton model: "Mitsubishi Triton GLX/GLS/Exceed". That the Label records the results of past testing, conducted under standardised, controlled, conditions in a laboratory, to demonstrate a model's compliance with the Australian Design Rules and to allow models to be compared, is also evident from the Green Vehicle Guide: {J[10]}.

69. Just as the Label makes no representation about the actual or past performance of the vehicle to which it is affixed: {CA[19(b)], [100]}, the Label makes no representation about the future performance of any vehicle to which it may be affixed.

70. To the contrary, the Label expressly disclaims that the vehicle to which the Label is affixed will consume fuel at the same rate as that reported for the model and recorded in the Label. The Label states: "*Actual* fuel consumption and CO_2 emissions depend on factors such as traffic conditions, vehicle condition and how you drive" (emphasis added). The Court of Appeal was right to find that this disclaimer "alerts the consumer to the danger of taking the figures [in the Label] too literally": {CA[108]}.

10 71. Moreover, the disclaimer notifies the prospective consumer that the "actual" fuel consumption of a vehicle, as distinct from the reported fuel consumption for the model stated on the label, may differ, to an unspecified degree, from the figures in the Label, depending on other factors including "vehicle condition". A reasonable consumer reading the Label would appreciate that vehicle condition may affect the fuel consumption a vehicle whether on-road or when tested in a laboratory in accordance with the Standard.

72. The Court of Appeal was right to find that a reasonable consumer would *not* take the Label to be saying anything as to what would happen if a vehicle to which the label was affixed were to be tested at some later point in time, after manufacture: {CA[109]}.

73. As the Label makes no representation about the actual or past performance of the
20 vehicle to which it is affixed: {CA[18(b)], [19(b)], [100]} or about the future performance of the vehicle: {CA[109]} and expressly disclaims that the "actual" fuel consumption of the vehicle will necessarily replicate that recorded in the Label, because fuel consumption depends on numerous factors including vehicle condition: {CA[15]}, no reasonable consumer would conclude that the Label represented that the vehicle to which it is affixed would achieve the same or substantially the same fuel consumption as stated in the Label: {cf CA[101], [110]}.

74. That is particularly so if a vehicle was to be tested, as here, more than two years and around 50,000 km after sale, when the vehicle's condition would inevitably have changed: {CA[26]}.

75. It is no part of the judicial function to read into the Label a representation not made by
30 it so as to give efficacy to labelling laws: {J[127]; CA[107]} *Marshall v Watson* (1972) 124 CLR 640, 649 (Stephen J, Menzies J agreeing at 646).

76. As the Label purported to be (and was) no more than an accurate record of the fuel consumption results achieved and reported by the manufacturer when the model was tested to prove compliance with the Australian Design Rules and did not pretend to be a promise about the future performance of the Vehicle to which the Label was affixed, the Label was not misleading within the meaning of s 18 of the ACL.

77. That the fuel consumption results reported for the model, and accurately recorded in the Label, were not substantially replicated when the Vehicle was tested, more than two years and nearly 50,000km after sale: {CA[26]}, did not mean that by affixing the Label and selling the Vehicle with the Label affixed, the Appellants had engaged in misleading or deceptive conduct in contravention of s 18 of the ACL: {CA[111], [119]}.

78. The Court of Appeal erred in finding otherwise.

Conclusion

79. The finding that Mitsubishi and Northpark engaged in misleading or deceptive conduct in contravention of s 18 of the ACL, ultimately rests on four uncontested facts which are likely to arise frequently:

(a) Mitsubishi affixed a fuel consumption label in the prescribed form to the Respondent's vehicle as required by the MVSA and Standard: {MVSA ss 14, 18};

(b) Northpark then sold the Vehicle with that label affixed (as removing or modifying it was prohibited): {MVSA s 13A};

(c) the information Mitsubishi included in the label was accurate and not by itself misleading: {J[77], [138]; CA[35(a)], [49], [97]–[98]}; and

(d) the fuel consumption of the Respondent's vehicle, when tested more than two years and almost 50,000 km after sale, was materially higher than that recorded in the label: {CA[26]–[27], [30]}.

80. The effect of the decision below is to convert a statutory obligation to provide accurate information to consumers, in the form of a prescribed label affixed to any new light vehicle sold in Australia, into an actionable guarantee by manufacturers and dealers that any vehicle to which that label may be affixed will perform as stated, or substantially as stated, in the label after sale.

81. The Appellants gave no such guarantee nor is that what Parliament intended when enacting the MVSA, Standard and ACL.

82. If the decision below was to stand it would force every vehicle manufacturer and dealer to choose between either assuming liability for contravening s 18 of the ACL in the event that the fuel consumption of any vehicle imported, supplied, or sold, in Australia departs materially from that recorded and reported when the model was certified (as it inevitably will over time) or not importing, supplying, or selling vehicles *at all*.

83. Where Mitsubishi and Northpark have done no more and no less than what the MVSA and Standard required of them, it would be unjust to permit a decision that penalises them for complying with the law to stand.

84. Section 18 of the ACL was not intended to, and on its proper construction does not, prohibit or penalise trade or commerce undertaken in compliance with legislation and standards enacted for the benefit of consumers: *GMAC Case* at 561 (Mason J, with whom Barwick CJ, Gibbs, Stephen and Jacobs JJ agreed).

PART VII: Orders sought

85. The Appellants seek the orders set out in the Notice of Appeal.

PART VIII: Time estimate

86. The Appellants estimate that 2.5 hours will be required for their oral argument.

Dated: 11 April 2023

Bret Walker
02 8257 2527
caroline.davoren@stjames.net.au

Ben Gibson
03 9225 7965
ben.gibson@vicbar.com.au

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M17/2023

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

ANNEXURE TO THE APPELLANTS' SUBMISSIONS

Pursuant to paragraph 3 of the *practice Direction No 1 of 2019*, the Appellants set out below a list of constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Title	Provision(s)	Version
	Constitutional Provisions		
1	*Commonwealth of Australia Constitution Act*	s 109	Current (29 July 1977 – present)
	Statutory Provisions		
2	*Australian Consumer Law* (Cth)	ss7(1)(e), 7(3) and 18	Historical version (26 October 2018 to 12 March 2019)
3	*Australian Consumer Law* (Vic)	ss7(1)(e), 7(3) and 18	Historical version (26 October 2018 to 12 March 2019)
4	*Consumer Transaction Act 1972-1973* (SA)	N/A	Act no longer in force (3 September 1973 to 1 January 2011)
5	*Judiciary Act 1903* (Cth)	s 78B	Current (28 February 2022 to present)
6	*Motor Vehicle Standards Act 1989* (Cth)	ss 13A, 14 and 18	Act no longer in force (1 July 2016 to 1 July 2021)

7	*Road Vehicle Standards Act 2018* (Cth)	N/A	Current (1 September 2021 – present)
8	*Trade Practices Act 1974* (Cth)	s 52	Historical version (1 October 1974 to 30 June 1977)
9	*Victorian Civil and Administrative Tribunal Act 1998* (Vic)	s 148	Historical (29 March 2019 – 1 July 2019)
	Statutory Instruments		
10	*Vehicle Standard (Australian Design Rule 81/02 — Fuel Consumption Labelling for Light Vehicles) 2008* (Cth)	cl 4, 4.6.1, Appendix A and Appendix A cl 1.13	Historical (16 May 2012 – 29 November 2021