HIGH COURT OF AUSTRALIA

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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' REPLY

PART I: Certification

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

PART II: Reply Argument

Relevant facts

2. The Tribunal did not find that there was a serious technical issue with the Respondent's vehicle {cf RS[7]}. The evidence was that it was "possible" the vehicle had a serious technical issue "of some kind" when tested, but that Ms Winkelmann did not investigate or determine what that issue might be {T[56]:**CAB21**}. The Tribunal found that it was *not* satisfied the vehicle was defective {T[57]:**CAB21**}. That finding was not appealed.

3. It is not open to the Respondent to submit that the fuel consumption figures recorded in the Label were inaccurate {RS[8]} or that the Appellants' conduct was *not* in compliance with the Standard {RS[14]}. It was not in issue below that the label *accurately* recorded the results of the testing that Mitsubishi had conducted in accordance with the Standard to obtain approval for the vehicle model {T[41]:**CAB19**; J[77]:**CAB68**,[138]:**CAB88**; CA[35(a)]:**CAB119**, [49]: **CAB122**, [97]-[98]:**CAB133**}.

4. The finding that the Label was not true "for the vehicle" {RS[8];T[43]:**CAB19**, [52]:**CAB20**;J[72]:**CAB66**,[77]:**CAB68**} mischaracterises the fact that the fuel consumption figures on the label were not replicated when the Respondent's vehicle was tested {T[43]:**CAB19**,[51]:**CAB20**;J[77]:**CAB68**;CA[26]-[27]:**CAB118**,[101]:**CAB133**} two years and 50,000km after sale {CA[26]:**CAB118**}, as an inaccuracy in the label itself. By "inaccurate" {T[40]:**CAB18**} the Tribunal meant the Label was *misleading* {T[51]:**CAB20**}

because it misled Mr Begovic to believe that if his vehicle was tested in accordance with the Standard that testing would yield substantially the same results as recorded on the label {T[51]-[52]:**CAB20**; J[77]:**CAB68**,[110]:**CAB79**}. Implicit in that finding was that the Label made the testing replicability representation {J[133]:**CAB87**;CA[101]:**CAB133**} (Ground 2 below) and that the Appellants' conduct in displaying the label, in compliance with the Standard, can be misleading within the meaning of s 18 of the ACL (Ground 1 below): {CA[101]:**CAB133**}.

5. The Tribunal made no finding about the fuel consumption of the Respondent's vehicle as tested "at the time of purchase" {cf RS[13];T[51]-[52]:**CAB20**}. The Respondent's vehicle was not tested at that time {CA[26]:**CAB118**} and Ms Winkelmann did not express any opinion about the fuel consumption of the vehicle at that time {cf RS[9]-[12]}. The evidence cannot be improved by submissions {cf RS[9]-[10]}. The Appellants did not concede that if the label represented that the Respondent's vehicle would produce the results stated in the label, if tested at the time of purchase {CA[109]:**CAB135**}, that representation was falsified by the evidence {cf CA[47]:**CAB121**,[73]:**CAB126**,[103]:**CAB134**,[113]:**CAB136**}. It should not be surprising that fuel consumption may deteriorate over time {cf RS[10]}. The label itself states that fuel consumption depends on factors including "vehicle condition" {CA[15]:**CAB116**}.

Ground 1 - Mandatory conduct

6. The Respondent does not address the central proposition in the appeal that the Appellants' conduct in *displaying* (ie affixing and not modifying or removing) the fuel consumption label, in the prescribed form, in compliance with the Standard and MVSA, was *mandatory*, and therefore cannot be misleading or deceptive conduct within the meaning of s 18 of the ACL, whatever representation that label may convey.

7. The Respondent accepts that s 18 of the ACL does *not* prohibit mandatory conduct and does not contend that the *GMAC Case* was wrongly decided {RS[24]-[28]}. The Respondent also accepts that Mitsubishi was *required* by law to affix the fuel consumption label to his vehicle and that Northpark was *prohibited* from modifying or removing that label before sale.

8. Instead, the Respondent seeks to distinguish the *GMAC Case* by redefining the Appellants' conduct as selling a vehicle that did not "have" (ie did not produce, when tested {RS[22]}) the fuel consumption stated in the label {cf CA[18(d)]:**CAB117**,[42]:**CAB120**, [48]:**CAB121**,[101]:**CAB133**,[110]:**CAB135**}. The Respondent submits that this conduct was not mandatory and is actionably misleading {RS[26],[28],[34]}.

9. The difficulty with this submission is that the voluntary conduct of selling a vehicle {RS[24]} cannot be misleading or deceptive, whatever that vehicle's fuel consumption may be, *without more*. What converts the otherwise lawful act of selling a vehicle into misleading or deceptive conduct, in contravention of s 18 of the ACL, is the making of some representation about the fuel consumption of that vehicle that proves to be misleading.

10. In this case, the Respondent submits that it is the misrepresentation conveyed by the fuel consumption label, that the Respondent's vehicle had fuel consumption characteristics it did not have, that makes selling the vehicle with the label affixed misleading {RS [28]}. The finding below was that the label misrepresented that the fuel consumption figures recorded on it could be substantially replicated if the purchased vehicle to which it was affixed was to be tested in accordance with the Standard {CA[18(d)]:**CAB117**,[42]:**CAB120**,[48]:**CAB121**, [101]:**CAB133**,[110]:**CAB135**}.

11. Whatever misrepresentation may have been conveyed by the label, the Appellants were *not* the authors of that label and did nothing to affirm, endorse or adopt it, save for displaying the label, as required by the Standard and MVSA: {cf *Google* at 446 [15] (French CJ, Crennan and Kiefel JJ), 482-3 [148]-[149] (Heydon J)}. It was not, and is not, alleged that the Appellants made any other representation, whether by way of advertisement, promotion or otherwise, save for that found to have been conveyed by the label {J[113]:**CAB80**}.

12. Nevertheless, the Respondent submits that it is the *combination* {RS[28]} of making the representation *conveyed by the label*, and selling a vehicle that does not accord with that representation, that is actionably misleading {RS[26],[28]}. The Court of Appeal found that it was "offering" a vehicle for sale when the label makes a representation that is misleading in respect of that vehicle that was not mandatory {CA[78]-[79]:**CAB128**, [87]:**CAB130**,[115]-[117]:**CAB136**}. In either case, the label is both the source of the misrepresentation and the comparator by reason of which the otherwise lawful conduct is taken to be misleading.

13. In the premises, a more accurate description of the Appellants' conduct is supplying or selling a vehicle that displays a misleading label {RS[24],[32]}. As displaying that label was mandatory, that conduct cannot be misleading conduct within the meaning of s 18 of the ACL: *GMAC Case* at 561. Absent that mandatory conduct, the Appellants' *voluntary* conduct is no more than supplying or selling a vehicle {CA[26]: **CAB118**}. That conduct is not misleading.

14. By conflating the *voluntary* but lawful conduct of offering, presenting, or selling a vehicle, with the *mandatory* conduct of displaying a misleading label, the Respondent seeks to

mischaracterise the Appellants' conduct "as a whole" as voluntary {RS[28];CA[115]-[117]: **CAB136**} with the effect that conduct undertaken in performance of statutory obligations imposed by the Standard would be penalised under s 18 of the ACL: cf *GMAC Case* at 561.

15. As the only *voluntary* conduct of the Appellants is to supply and sell vehicles, the only means to avoid liability would be to not engage in trade or commerce *at all* {cf RS[30]-[33]}, contrary to the objects of the MVSA and ACL, which are intended to promote, and not prohibit, trade in accordance with laws enacted for the protection of consumers. The alternatives proposed by the Respondent, that manufacturers can avoid liability by supplying vehicles whose fuel consumption "*matche[s] the label*" {RS[26]}, and downstream retailers can avoid liability by negotiating indemnities or protections from manufacturers {RS[32]}, are specious.

16. Dealing with these in turn. It is not realistic to treat the results of testing of one vehicle, even a representative vehicle, as a description, feature, or *fixed* characteristic of another vehicle, or to require manufacturers to produce vehicles that produce the same results when tested {cf RS[22],[24],[26]-[27]}, in this case two years and 50,000km after purchase {CA[26]: **CAB118**}. Even if it were possible {CA[107]:**CAB135**}, manufacturers would need to test every new vehicle supplied to ensure compliance, something the Court of Appeal described as "extraordinarily extensive and unnecessary"{CA[100]:**CAB133**}. This is not what the Standard or MVSA require. The results of testing at certification are at most indicative of the fuel consumption of other vehicles of the same type, subject to *many* variables including, as the label states, "vehicle condition" {CA[15]:**CAB116**,[18(c)]:**CAB117**}.

17. The submission that it is unremarkable for retailers to be liable for the representations of others (in this case, the Parliamentary drafters who authored the mandatory label), but that retailers can protect themselves by obtaining indemnities from manufacturers {RS[27]}, is unrealistic. It should not be assumed that retailers can negotiate indemnities from manufacturers, especially against liability for representations made in labels not authored by them. Absent an indemnity, retailers would also have to test every single product.

18. In any event, had Parliament intended to impose on manufacturers an obligation to produce vehicles whose fuel consumption "matched" that reported at certification, or to subject manufacturers and dealers to penalty if the fuel consumption of a new vehicle departed from that recorded in the fuel consumption label, after sale, it could have done so in the MVSA and Standard. The general provision in s 18 of the ACL ought not be deployed to convert what is an obligation to accurately report past test results, to aid consumer decision making, into a

manufacturing standard, which Parliament could have included, but did not include, in the more specific provisions of the MVSA and Standard.

19. The submission {RS[33]} that unless s 18 of the ACL prohibits and penalises the sale of a vehicle whose fuel consumption differs from that recorded in the fuel consumption label, when tested after sale, manufacturers could test one vehicle for approval, and then sell an entirely different vehicle with radically different qualities, is misconceived. The Standard and MVSA prescribe how vehicles are to be tested and what vehicles may be sold. Manufacturers and dealers *are* liable for compliance with the Standard {MVSA ss 9,10A,11,13A,14,18,27,41; cf RS[29], Standard cl 5.1}. They are also liable for the accuracy of statements made *by them* about the qualities of vehicles, including the accuracy of test results submitted at certification and recorded on the label: *ACCC v Volkswagen Aktiengesellschaft* [2019] FCA 2166.

20. Compliance with the MVSA and Standard {CA[3]:**CAB114**,[97]-[98]:**CAB133**} and conformity of production {CA[97]:**CAB133**} are not in issue in this case.

Ground 2 - the representations made by the label

21. The Respondent disavows the testing replicability representation {RS[22]} and submits that the label describes the fuel economy of *his* vehicle {RS[19],[24],[27],[37]; cf CA[19(b)]: **CAB117**} and represents that *his* vehicle will have substantially the fuel economy stated in the label {RS[4],[22],[24],[37]} when tested {RS[20],[22]}. This construction, which treats the results of testing of a test vehicle of the same type in accordance with the Standard {CA[18(a):**CAB117**, RS[16]} as a description or fixed characteristic of the Respondent's own vehicle, without regard to the variability of testing or the disclaimer that fuel consumption depends on factors such as "vehicle condition" {CA[15]: **CAB116**}, should be rejected {J[178]:**CAB101**}. The label makes no such representation {AS[65]-[78]}. If it did, and the label is misleading or the disclaimer is inadequate, that is an issue for Parliament.

Dated: 30 May 2023

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ANNEXURE TO THE APPELLANTS' REPLY SUBMISSIONS

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

No.	Title	Provision(s)	Version
	Statutory Provisions		
1.	*Australian Consumer Law* (Cth)	s 18	Historical version (26 October 2018 to 12 March 2019)
2.	*Australian Consumer Law* (Vic)	s 18	Historical version (26 October 2018 to 12 March 2019)
3.	*Motor Vehicle Standards Act 1989* (Cth)	ss 9, 10A, 11, 13A, 14, 18, 27 and 41	Act no longer in force (1 July 2016 to 1 July 2021)
	Statutory Instruments		
4.	*Vehicle Standard (Australian Design Rule 81/02 — Fuel Consumption Labelling for Light Vehicles) 2008 (Cth)*	N/A	Historical (16 May 2012 – 29 November 2021