HIGH COURT OF AUSTRALIA

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Details of Filing

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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

RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. This document responds to the Appellants Submissions dated 11 April 2023 (**AS**) and adopts the terms it defines.

3. On a proper understanding of the conduct that amounts to misleading and deceptive conduct, the issue identified in AS [2(a)] does not arise, because the conduct in question is not required by the MVSA.

4. The issue identified in AS [2(b)] does arise, but is more simply expressed as whether the fuel consumption label prescribed by the Standard represents to consumers that the fuel consumption of the particular vehicle in question is substantially in accordance with the figures stated in the label.

Part III: Section 78B

5. It does not appear that the Appellants are pursuing a constitutional point and therefore no notices are required.

Part IV: Relevant facts

6. Before the Tribunal, the Respondent called expert evidence from an expert (Ms Winklemann) whose expertise was not challenged: CA[26].[1] She tested the Vehicle in question in accordance with the standardised test used for the Standard. That test was known as the NEDC test, or Type 1 test. That produced consumption results of 9.6 Combined Test, 10.6 Urban and 9.3 Extra Urban, being some 26.6%, 17.8% and 36.8% higher than the figures on the label: CA[30];[2] J[46];[3] and T[13.vi].[4]

7. Ms Winklemann concluded that the label information was not true for the particular vehicle (CA[27][5]), and indeed the departure was so extreme that it suggested a "serious technical issue" with the particular vehicle: CA[32].[6] The Tribunal accepted her evidence, and preferred it over the Appellants' Vipac report (T[19, 39, 48][7]), in circumstances where the applicants called no suitably qualified expert: T[47],[8] [14]-[15][9].

8. The statement at AS[8] that "[i]t is not in issue that… the fuel consumption figures recorded in the Label were accurate" is not correct, when expressed in that form. The fuel consumption figures recorded in the Label were certainly not accurate for the Vehicle to which the Label was affixed. Likewise, in relation to the statement at AS[9] that there was "full compliance with the Standard", that fact is unknown (noting that the Standard has many requirements). The Appellants are presumably referring to only that part of the Standard the relates to the contents of the Label.

9. Commencing at AS[12], and in other paragraphs ([50], [74], [77]), the Appellants raise an issue about the testing being performed more than two years and nearly 50,000 km after sale, and whether a representation in the Label could be shown to be false with such a test. That is not open to the Appellants to raise, having regard to how the case was run in the Tribunal. In the Tribunal, both parties adduced evidence of testing that was conducted 2 years after the event as relevant to the question of whether the label was

[1] Core appeal book (**CAB**) 116.
[2] CAB 118-119.
[3] CAB 57.
[4] CAB 12.
[5] CAB 118.
[6] CAB 119.
[7] CAB 15, 18 and 19-20.
[8] CAB 19.
[9] CAB 13.

accurate. Mitsubishi said that the label was accurate (i.e. at the time of sale, when it was displayed) because of, inter alia, a test conducted by Vipac some 2 years later: T [19].[10]

10. No challenge was made to the evidence of Ms Winkelmann on the basis that she was testing a vehicle 2 years later. That was not put to her, and she might well have had a pertinent response if it was. No such suggestion was made before the Tribunal. Mitsubishi could have adduced evidence on that topic – if they wanted to support the (perhaps surprising) proposition that fuel consumption could be 37% worse after 2 years.

11. On the contrary, as is recorded at T[44],[11] the representative for the Appellants submitted that the difference between Ms Winkelmann's fuel consumption results and the Label information was due to the different testing methodologies used (being some very slight differences which the Tribunal discounted as not affecting the result), and that this was "the only reason put forward for the difference".

12. Having run the case in that way – i.e. that the only reason why Ms Winkelmann's testing would not reflect the fuel consumption of the vehicle at the time of sale was because of different methodologies – the Appellants cannot now seek to advance their case on the entirely speculative basis that perhaps the passage of time makes some difference, or such difference as would explain the very substantial discrepancy.

13. The Tribunal found that the fuel consumption figures stated on the label were false at the time that the Respondent purchased the Vehicle (i.e. at the time he relied on the representation, being the time of sale): T[52].[12] There was no finding that the fuel consumption of the Vehicle changed over time.

14. The Appellants assert that their conduct is in "full compliance" or that they have "complied" with the Standard (AS[5], [8], [9], [42], [43], [63]). VCAT made no such finding nor has any Court, including having regard to the width of the concept of "compliance". Rather, the factual material before the Tribunal was focussed on whether the Vehicle had the fuel economy stated on the Label.

Part V: Argument

15. The relevant Vehicle Standard requires that every vehicle shall have applied to its windscreen a fuel consumption label containing, inter alia, "three fuel consumption

[10] CAB 15.
[11] CAB 19.
[12] CAB 20.

results… for the vehicle" (i.e. the vehicle being sold) "from… the Type 1 test" (clause 4.5.1). The Type 1 test is a standardised test.

16. On the label on the vehicle in question, the appellants provided information obtained from a Type 1 test of a vehicle put forward for testing as a representative sample of that model of vehicle. The label which was affixed contained a statement of the fuel consumption of the relevant model (i.e. a Mitsubishi Triton Auto Diesel), and indicated that the consumption figures were applicable to three variants of specification or trim (i.e. GLX, GLS and Exceed).

17. The label also stated: "Vehicle tested in accordance with ADR 81/02. Actual fuel consumption and CO_2 emissions depend on factors such as traffic conditions, vehicle condition and how you drive".

18. The purpose of the regulatory scheme is to provide potential purchasers with fuel consumption information about a vehicle they are considering purchasing in a standardised format and pursuant to a standardised test to enable ready comparison between different vehicles. It is an important piece of consumer protection.

19. It is not correct to suggest that the label makes no representation about the fuel consumption of the particular vehicle to which it is affixed: c.f. AS [30]. First, that is not consistent with the regulatory scheme, which requires a statement of the fuel consumption result "for the vehicle". Secondly, as a matter of language and context, a label prominently affixed to a vehicle headed "Fuel Consumption" is making a statement about the fuel consumption of the vehicle. Indeed, that is the whole point of the scheme.

20. It may be accepted that the label is making a statement about the fuel consumption of the vehicle when tested in accordance with a standardised test, and not in general. That is made clear by the words at the foot of the label.

21. In the present case, the particular vehicle in question was tested in accordance with the standardised test, i.e. the Type 1 test. It failed – not by a minor amount, but very substantially. It did not have the fuel consumption stated on the label.

22. The language of the Court of Appeal (the "testing replicability representation") is perhaps a slightly ungainly way of expressing the simple concept that the vehicle has the fuel consumption stated on the label. Or more specifically, that it has the fuel consumption stated on the label when tested in accordance with the standardised test.

23. The label identified the Standard as the basis on which the fuel consumption representation was made. The standardised testing specified in the Standard makes the label information useful to consumers by making the label information for one type of vehicle comparable to the label information for another. It also provides the basis on which the fuel consumption representation in the label is made and the basis on which the truth of the representation stands to be determined. Ms Winkelman followed the instructions for testing set out in the Standard and the Vehicle did not have the fuel consumption stated on the label – the fuel economy was substantially inferior (T48, 51, 52]).[13]

10 24. In the ordinary course, the conduct in promoting and selling the vehicle with a prominently displayed, but incorrect, statement about its fuel consumption would amount to misleading and deceptive conduct in contravention of s 18 of the ACL. However, the appellants seek to avoid that consequence on the ground that the affixing of the label is compulsory conduct under the MVSA, and that conduct that is compelled cannot amount to a contravention of s 18.

25. The difficulty with that proposition is that the conduct in question that amounts to a contravention of s 18 was not compulsory. The singular focus by the Applicants on the obligation "that the manufacturer must affix… and the dealer must not modify or remove" the label in question (e.g. AS[20], [40], [58]) sidesteps the context of the "conduct" for
20 the purpose of s 18.

26. "Conduct" for the purposes of s 18 is not limited to the making of representations. In the present case, the "conduct" in question is not limited to the making of a representation conveyed by the label. Rather, the conduct included the promotion and sale of a vehicle that had a fuel consumption that was not in accordance with the label and was much greater than the fuel consumption stated on the label. It is the combination of acts that amounts to the relevant conduct. That conduct was not required by the MVSA. The appellants could have sold a vehicle that had a fuel consumption that matched the label. The conduct in promoting and selling a vehicle that had fuel economy much worse than that stated on the label was not conduct that was required by anything.

30 27. There are many contexts in which there are compulsory labelling requirements, including where information is required to be provided in a mandatory format. Such requirements

[13] CAB 19 and 20.

are quite commonplace as an aspect of various consumer protection regimes. For example, packaged foods for sale must display a label that lists various things including the ingredients, the country and origin, and a nutritional information label that discloses the amount of sugars, carbohydrates, sodium (and so on) that is in the foodstuff.[14] If a person selling a fruit juice drink stated in a prescribed nutritional information panel that the product contains 3g of sugars per 100ml, when it actually contains 30g per 100ml, then the person will likely engage in misleading and deceptive conduct. It is not an answer to such an allegation to say that the form of label is "mandatory". It is certainly not mandatory to have 30g of sugar instead of 3g. Section 18 is perfectly general in form, as the Court of Appeal recognised: CA[80], [84].[15] A material misdescription of a product by label, where the product offered for sale and sold does not conform to the label, may amount to misleading and deceptive conduct regardless of whether the form of the label is prescribed.

28. The evidence before the Tribunal was straightforward. Mitsubishi offered for sale and sold the Vehicle carrying a label stating that its fuel consumption, when tested in accordance with the Standard, was (L/100km) 7.6 Combined Test, 9.0 Urban and 6.8 Extra Urban. The Vehicle Mitsubishi instead sold had fuel consumption, when tested in accordance with the Type 1 test applied by the Standard, that was much higher on all three tests, likely because of a "serious technical issue" with the car (T[56][16]). That particular combination of conduct – stating one thing and selling a vehicle that did another thing – was misleading and deceptive conduct. There is nothing in the Standard that required Mitsubishi to engage in this conduct. In that respect, the present case is distinguishable from the *GMAC Case*.[17]

29. On the contrary, the Standard assumes that a manufacturing process for a standardised type of vehicle would produce replicable results. Clause 4.5 of the Standard relevantly refers to three fuel consumption results (urban, extra-urban and combined) for "the vehicle" from the Type 1 test "as determined in accordance with Annex 6... of Appendix B or Appendix C". Clause 4.6 provides that the results displayed on the label shall be the fuel consumption values for "the vehicle" under clause 4.5.1, which may be the figures

[14] *Australia New Zealand Food Standards Code*, Standards 1.2.1, 1.2.4, 1.2.8; *Country of Origin Food Labelling Information Standard 2016*.
[15] CAB 129 and 130.
[16] CAB 21.
[17] *R v Credit Tribunal; Ex Parte General Motors Acceptance Corporation* (1977) 137 CLR 545.

declared for the "the vehicle" under the corresponding European standard (clause 6). Annex 6 refers to fuel consumption of vehicles being determined in accordance with the procedure for the Type 1 test as defined in Annex 4 (for Appendix B) or 4a (for Appendix C) of Regulation 83 in force at the time of the approval of the vehicle. In other sections of Appendices B and C there is reference to a "vehicle type". In Section 2 of Appendices B and C, "Approval of a vehicle" is defined as approval of a "vehicle type", and "Vehicle type" is defined as "a category of power driven vehicles which do not differ in such essential respects as body, power train, transmission, traction battery (if applicable), tyres and unladen mass".[18] The regulatory scheme and the testing procedure thus assumes a uniform type of vehicle, such that a test for that type provides relevant fuel consumption results not just for a test vehicle, or some other member of the "model", but (in accordance with the express terms of clauses 4.5 and 4.6) for "the vehicle" to which the label is affixed. Section 3.3 calls for the testing of a "vehicle representative of the vehicle type to be approved" and section 9 required that vehicles be "so manufactured as to as to conform to the type approved vehicle". Section 9 provides for the auditing of vehicles for compliance with the requirements for conformity of production and section 10 provides a penalty for failing to comply with the requirement for conformity of production in section 9 in terms that the approval of the vehicle type may be "withdrawn".

Counterfactuals

30. AS[40-51] invite the Court to understand the decision of the Court of Appeal as having concluded that the conduct in question was not mandatory because the Appellants may have chosen not to trade at all (AS[45-8]). The Appellants use this as the counterfactual against which to challenge the decision.

31. The Appellants arrive at their interpretation of the Court of Appeal's reasons by fixing on the terms "offering" and "presenting" the vehicle for sale as the voluntary part of the conduct said to have infringed s 18 of the ACL (AS[41]). They erroneously conclude that the only available choice to avoid s 18 contravention is to "choose not to sell" (CA[45][19]). This is not what the Court of Appeal decided. The Court of Appeal made it clear that the conduct obliged by the Standard did not extend to making the label's representation in relation to "the specific vehicle… any given vehicle… such a vehicle"

[18] Appendix B, Clauses 2.1 and 2.2; Appendix C, Clauses 2.1 and 2.2
[19] CAB 121.

(CA[115]).[20] The Court of Appeal rejected the argument that the impugned conduct was mandatory because the Appellants were not obliged to sell a car having the inferior fuel economy of the Vehicle. Affixing the label was only part of that conduct and did not make the conduct "as a whole" mandatory (CA[116][21]).

32. A further counterfactual is proposed: that a dealer (such as the Second Appellant) "would have to test every new vehicle supplied to it" to avoid liability (AS[49]). That is not correct, and nor is it relevant. It is commonplace that downstream companies in the course of trade may deal in goods that come with labels making representations. Many retailers sell goods with labels stating ingredients, properties or features. It is entirely unremarkable that they could be liable for misleading and deceptive conduct if the representations on the labels are false. That is a conventional aspect of the operation of consumer protection legislation. Retailers or other downstream dealers in goods may wish to protect themselves in their contractual dealings with suppliers by seeking indemnities or other protections. It is certainly not a reason for concluding that s 18 has no application to the offering for sale or sale by a retailer of a product containing a misleading label.

33. Rather, it is the consequence of the appellants' argument that would be remarkable. On the appellants' approach, a manufacturer could provide a vehicle for testing of fuel economy, and then manufacture and sell entirely different vehicles that had fuel economy radically greater than the test vehicle, and pass them to the public under cover of a label indicating fuel economy that bore no relationship to the fuel economy of the vehicles being sold, but immunised from any liability for misleading and deceptive conduct. That would certainly not assist consumers to "make informed choices" or "purchase vehicles with better fuel economy" (Green Vehicle Guide, extracted at J[9][22]).

34. The appellants are also not mere intermediaries: c.f. *Google Inc. v Australian Competition and Consumer Commission* (2013) 249 CLR 435. Whilst the appellants did not devise the format of the label, it contains important product information about the very product they are selling. Again, the "conduct" that is misleading is not just affixing the label. It is the sale of a vehicle that does not comply with the label. That is not conduct that is immunised by some principle derived from *Google Inc.*.

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[20] CAB 136.
[21] CAB 136.
[22] CAB 41-42.

35. In relation to the complaint about the label representing testing replicability up to 2 years after sale, this point is not now open to the appellants for the reasons identified above. In a subsequent case, if there is testing after some delay Mitsubishi would be free to deal with that at a level of fact: i.e. as to whether it could inform some conclusion as to the fuel consumption of the vehicle at the time it was sold. That was not done in the present case, as set out above, and it cannot be raised now having regard to how the case was run in the Tribunal.

36. The evidence the Respondent relied upon to show that the Vehicle did not have the fuel economy described on the label was testing in accordance with the Standard (CA[28][23]). The Green Vehicle Guide describes the testing in the Standard as having the purpose to "simulate" "'real world' driving conditions" (Green Vehicle Guide, extracted at J[9][24]). Nevertheless, the evidence relied upon to show that the label information was false was testing according to the Standard. The totality of evidence was accepted by the Tribunal (T[50][25]) to conclude that the label information was false at and from the time of purchase (T[52][26]).

Conclusion

37. The label made an ordinary representation about the fuel economy of the vehicle. The Vehicle that the appellants chose to sell did not conform with the label. While the MVSA and the Standard prescribe a standardised form of testing and require a standard form of label, it does not require the conduct that constituted the contravention in the present case.

38. The regulatory scheme in question provides for useful and accurate information to be provided in respect of the fuel economy of vehicles for sale in Australia. Nothing in that scheme ousts the application of s 18: on the contrary, it is entirely consonant with the scheme that manufacturers and dealers of motor vehicles may not present into trade vehicles that have a radically different fuel economy from that which is supplied by the manufacturer as the fuel economy for the type or model of vehicle in question.

Part VI: Contentions or cross-appeal

39. None.

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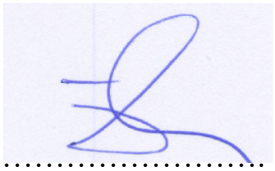
[23] CAB 118.
[24] CAB 41-42.
[25] CAB 20.
[26] CAB 20.

Part VII: Time estimate

40. The Respondent estimates 2 hours for oral argument.

Dated: 9 May 2023



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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

M17/2023

Between

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

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

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and

ZELKO BEGOVIC
Respondent

RESPONDENT'S AMENDED APPELLANTS' CHRONOLOGY

No.	**Date**	**Event**	**Reference**
1.	25.08.2014, 05.09.2014	Vehicle type tested at Mitsubishi Technical Centre in Aichi Japan by AIB-Vincotte International n.v.	CA[3], CAB I 14 J[26], CAB 47 Applicants' further materials (**AFM**) 21
2.	30.09.2014	Fuel consumption tests for the vehicle type certified as having been carried out in accordance with IJNECE Regulation No. 101 incorporating supplement 02 to 0 I series of amendments by AIB-Vincotte International n.v.	AFM 21
3.	31.10.2014	Type approval for the vehicle type issued by Belgian Transport Authority under UN ECE IOI	J[26], CAB 47 AFM6
4.	03.11.2014	Fuel consumption values reported to Australian Department of Infrastructure and Regional Development	J[27], CAB 47 AFM 76-82
5.	15.12.2014	Fuel consumption values approved by Australian Department of Infrastructure and Regional Development	J[27], CAB 47
6.	August 2016	Vehicle manufactured and fuel consumption label affixed	CA[1], CAB 114 CA[J],CAB 114 AFM 98

7.	28.09.2016	Vehicle imported by the First Appellant	
8.	August 2016	Vehicle given approval for identification plates	AFM 98
9.	December 2016	Vehicle supplied to the Second Appellant	
10.	03.01.2017	Vehicle sold to the Respondent. The fuel consumption label affixed to the Vehicle was false for the Vehicle and misled Mr Begovic to believe that the vehicle had fuel consumption characteristics it did not have at the time of purchase.	CA[1], CAB 114 J[l], CAB 38, T[51-2]{CAB20}, J[133]{CAB87}, CA[108-9, 115-7] {CAB135-6}
11.	06.04.2018	Respondent commences proceedings in the Victorian Civil and Administrative Tribunal (VCAT).	CA[4], CAB 114 J[l], CAB 38
11.1	09.08.2018	The parties undertake a joint test of the vehicle driving on the Princess Freeway from Berwick to Drouin with a metering device fitted to the Vehicle. The parties agree that if the fuel consumption is below 7.3 l/100km no further action is required. The Vehicle consumed fuel at 8.5 l/100km.	T[11.xii-xiii, 18]{CAB9}, T[16.iv]{CAB14}, T[40]{CAB18}
11.2	06.09.2018	Vehicle tested by Vipac on behalf of Appellants. The Vipac test was not based on the test requirements of the Standard.	T[19-20]{CAB15}, [39]{CAB18}
12.	14.02.2019 – 15.02.2019	Vehicle tested by Ms A Winklemann of ABMARC.	CA[26], CAB 118
13.	17.04.2019	Hearing of the proceeding by VCAT.	T[19-20]{CAB15}, T[36, 39]{CAB18}, T[52]{CAB20}
14.	21.06.2019	Notice of Appeal from the VCAT decision.	{CAB25-6}

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ANNEXURE TO THE RESPONDENT'S SUBMISSIONS
(Practice Direction No 1 of 2019, cl 3)

Constitutional provisions, statutes and statutory instruments referred to in the Respondent's submissions.

No.	Title	Provision(s)	Version
	Constitutional Provisions		
1	*Commonwealth of Australia Constitution Act*	Nil	
	Statutory Provisions		
2	*Australian Consumer Law* (Cth)	s18	Historical version (26 October 2018 to 12 March 2019)
	Statutory Instruments		
3	*Australia New Zealand Foods Standards – Code Standard 1.2.1 – Requirements to have labels or otherwise provide information (Cth)*	ss 1.2.1-6 and 1.2.1-7	Current (12 August 2022 – present)
4	*Australia New Zealand Foods Standards – Code Standard 1.2.4 – Information requirements – statement of ingredients (Cth)*	ss 1.2.4-2 to 1.2.4-5	Current (25 February 2021 – present)

5	*Australia New Zealand Foods Standards – Code Standard 1.2.8 – Nutrition information requirements (Cth)*	ss 1.2.8-5 to 1.2.8-9	Current (3 June 2021 – present)
6	*Vehicle Standard (Australian Design Rule 81/02 – Fuel Consumption Labelling for Light Vehicles) 2008 (Cth)*	cl 4 and 6, Appendix B ss 2, 3, 5, 9 and 10 and Annex 6, Appendix C ss 2, 3, 5, 9 and 10 and Annex 6	Historical (16 May 2012 – 29 November 2021)