HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, STEWARD, GLEESON AND JAGOT JJ

MITSUBISHI MOTORS AUSTRALIA LTD & ANOR APPELLANTS

AND

ZELKO BEGOVIC RESPONDENT

Mitsubishi Motors Australia Ltd v Begovic
[2023] HCA 43
Date of Hearing: 2 August 2023
Date of Judgment: 13 December 2023
M17/2023

ORDER

1. *Appeal allowed.*

2. *Set aside orders 2 and 3 made by the Court of Appeal of the Supreme Court of Victoria on 5 August 2022 and, in lieu thereof, order that:*

   (a) *the appeal be allowed; and*

   (b) *the respondent's application to the Victorian Civil and Administrative Tribunal be dismissed.*

3. *The appellants pay the respondent's costs of the application for special leave to appeal and the appeal to this Court.*

On appeal from the Supreme Court of Victoria

Representation

B W Walker SC with B M Gibson for the appellants (instructed by Thomson Geer Lawyers)

C A Moore SC with J T Gottschall for the respondent (instructed by Shine Lawyers)

CATCHWORDS

Mitsubishi Motors Australia Ltd v Begovic

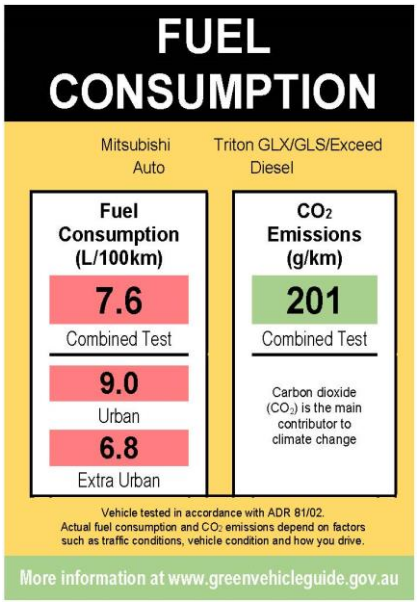
Trade practices – Consumer protection – Misleading or deceptive conduct – Where vehicle purchased with fuel consumption label applied in compliance with *Motor Vehicle Standards Act 1989* (Cth) and *Vehicle Standard (Australian Design Rule 81/02 – Fuel Consumption Labelling for Light Vehicles) 2008* (Cth) – Where specific contents of label prescribed by law – Where evidence of fuel consumption of vehicle substantially exceeding fuel consumption values on label – Where proceedings commenced claiming appellants engaged in misleading or deceptive conduct, contravening s 18 of *Australian Consumer Law* – Whether appellants engaged in misleading or deceptive conduct in circumstances where required by law to apply fuel consumption label.

Words and phrases – "apparent conflict", "apparent inconsistency", "compulsion", "conduct", "conduct in trade or commerce", "conduct required", "conflict", "contravention of s 18", "field of operation", "general prohibition", "general provision", "mandatory conduct", "misleading or deceptive", "national legislative scheme", "reconciliation of statutory provisions", "representations", "safety standard", "specific provision".

Competition and Consumer Act 2010 (Cth), Sch 2, ss 2, 18, 106.
Motor Vehicle Standards Act 1989 (Cth), ss 3, 5, 5A, 7, 9, 10, 10A, 10B, 13A, 14, 17, 18, 41.
Vehicle Standard (Australian Design Rule 81/02 – Fuel Consumption Labelling for Light Vehicles) 2008 (Cth), cll 1.1, 4.1, 4.5.1, 4.6.1, 5.1, 6.1, 6.1.1, Appendices A, B, C.
Australian Consumer Law and Fair Trading Act 2012 (Vic), ss 8, 224.

1 GAGELER CJ, GORDON, STEWARD, GLEESON AND JAGOT JJ. The first appellant, Mitsubishi Motors Australia Ltd ("Mitsubishi"), conducts a business in which it manufactures, imports, and supplies new Mitsubishi vehicles to Mitsubishi dealers within Australia. The second appellant, Northpark Berwick Investments Pty Ltd ("Northpark"), a Mitsubishi dealer, conducts a business in Australia selling new vehicles supplied to it by Mitsubishi to consumers.

2 In 2017, the respondent, Mr Begovic, purchased from Northpark a new 2016 Mitsubishi MQ Triton 4x4 GLS DID Auto DC-PU. That vehicle had applied to its windscreen a fuel consumption label in compliance with provisions of the *Motor Vehicle Standards Act 1989* (Cth) ("the MVS Act")[1] and a legislative instrument under that Act, the *Vehicle Standard (Australian Design Rule 81/02 – Fuel Consumption Labelling for Light Vehicles) 2008* (Cth) ("ADR 81/02"). The fuel consumption label appeared as follows:



3 Immediately following the purchase, Mr Begovic became dissatisfied with the fuel consumption of the vehicle exceeding the fuel consumption values on the label. When Mr Begovic's complaints about his vehicle's fuel consumption were not resolved by Mitsubishi and Northpark to his satisfaction he filed a claim in the

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1 Repealed by the *Road Vehicle Standards (Consequential and Transitional Provisions) Act 2018* (Cth), s 3 and Sch 2, item 1.

Victorian Civil and Administrative Tribunal ("VCAT") alleging that Mitsubishi and Northpark had contravened both s 18 and s 54 of the *Australian Consumer Law* ("the ACL")[2] in that, respectively, the fuel consumption label was misleading or deceptive, and the vehicle was defective and therefore not of acceptable quality as required by the consumer guarantee.

4 Mr Begovic succeeded on both claims before VCAT and VCAT ordered Northpark to pay Mr Begovic the purchase price of the vehicle on payment of which the vehicle would become the property of Northpark. Before VCAT, the key evidence of the fuel consumption of the vehicle substantially exceeding the fuel consumption values on the label applied to the vehicle was results of tests carried out in 2019 in accordance with the testing protocols in ADR 81/02 by which time the vehicle had been driven for nearly 50,000 km ("the 2019 test results"). The results showed that the vehicle's fuel consumption was 26.6 per cent higher for "Combined", 17.8 per cent higher for "Urban", and 36.8 per cent or 56.3 per cent higher for "Extra Urban" (the difference in the "Extra Urban" results being attributable to the different testing protocols applied) than the fuel consumption values disclosed on the label.

5 The appellants sought and obtained leave to appeal to the Supreme Court of Victoria on questions of law, including whether a manufacturer required by law to apply a fuel consumption label to a vehicle, "the form and content of which are prescribed by law", could thereby be found to have engaged in misleading or deceptive conduct contravening s 18 of the ACL. This question raised the "mandatory conduct ground", which was the main issue in this Court. The primary judge allowed the appeal in respect of the appellants' contraventions of s 54 of the ACL but dismissed the appeal in respect of the appellants' contraventions of s 18 of the ACL. The primary judge concluded that: (1) the fuel consumption label represented that, if the vehicle was tested in accordance with the prescribed testing protocols, the results for fuel consumption would be similar to or substantially the same as the values on the label; (2) the 2019 test results proved that the results for fuel consumption were not similar to or substantially the same as the values on the label; and (3) compulsory labelling can be misleading or deceptive if it

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2 Sections 18 and 54 of the ACL are given effect as a law of the Commonwealth by s 131(1) of the *Competition and Consumer Act 2010* (Cth) and as a law of Victoria by s 8(1) of the *Australian Consumer Law and Fair Trading Act 2012* (Vic).

inaccurately records information about the goods which it is obliged by law to describe accurately.[3]

6 The appellants again applied for and obtained leave to appeal to the Court of Appeal of the Supreme Court of Victoria on questions of law, including whether, on its proper construction, s 18 of the ACL prohibits conduct that is required by ADR 81/02. This question related to a ground of appeal which contended that "[t]he primary judge erred in finding that by accurately recording the fuel consumption of a model as tested in the mandatory fuel consumption label, affixing that fuel consumption label to a vehicle, and selling that vehicle with the fuel consumption label affixed, as required by ADR 81/02, the [appellants] had engaged in misleading or deceptive conduct in contravention of s 18 of the ACL".

7 The Court of Appeal concluded that the fuel consumption label represented that the fuel consumption values on the label applied to the vehicle "are substantially correct, under standardised testing, for the vehicle at the time of purchase, so that comparisons can be drawn and decisions made on that basis".[4] The Court of Appeal also said that the label represented that the fuel consumption values "were substantially the results which would have been obtained by standardised testing of the vehicle to which that label was affixed".[5] Whichever the precise characterisation intended, this was referred to as "the testing replicability representation". The Court of Appeal concluded that, as the appellants had not directly challenged the primary judge's finding that the 2019 test results disproved the testing replicability representation, that representation was misleading or deceptive.[6] The Court of Appeal also rejected the mandatory conduct ground on the basis that the MVS Act and ADR 81/02 did not require Mitsubishi or Northpark to "offer such a vehicle for sale in the first place", still less "require that a vehicle be offered for sale in circumstances where the representation in the label is misleading or deceptive in respect of that vehicle".[7]

8 The appellants obtained a grant of special leave to appeal to this Court on two grounds, being: (1) the mandatory conduct ground; and (2) that the testing

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3 *Mitsubishi Motors Australia Ltd v Begovic* [2021] VSC 252 at [117], [125], [137].

4 *Mitsubishi Motors Australia Pty Ltd v Begovic* (2022) 403 ALR 558 at 581 [109].

5 *Mitsubishi Motors Australia Pty Ltd v Begovic* (2022) 403 ALR 558 at 581 [110].

6 *Mitsubishi Motors Australia Pty Ltd v Begovic* (2022) 403 ALR 558 at 581 [113].

7 *Mitsubishi Motors Australia Pty Ltd v Begovic* (2022) 403 ALR 558 at 582 [115].

replicability representation was not made, the only representation conveyed by the label being that the label accurately records the results of testing of a test vehicle of the relevant type in accordance with ADR 81/02 (referred to as "the test accuracy representation").

9 The mandatory conduct ground suffices to determine the appeal in the appellants' favour.

10 Accordingly, the appeal is to be decided consistently with the reasoning in *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* ("*GMAC*").[8] *GMAC* involved the simultaneous operation of the predecessor provision to s 18 of the ACL[9] and a State law requiring (an inaccurate) notice to be given by a credit provider to consumers. It was held that "[t]he unexpressed assumption which underlies the prohibition [in the predecessor provision to s 18] is that the conduct ... 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".[10] In this case, as in *GMAC*, "the very general language" of s 18 is not to be taken as demanding that "other statutory protection given to consumers [here, by the statutory scheme of the MVS Act relating to fuel consumption labels] shall not be afforded".[11]

11 VCAT and the courts below therefore erred in finding that Mitsubishi and Northpark contravened s 18 of the ACL. The appeal must be allowed.

Australian Consumer Law

12 Section 131(1) of the *Competition and Consumer Act 2010* (Cth) provides that Sch 2 to the Act applies as a law of the Commonwealth to the conduct of corporations. Schedule 2 to the Act is the ACL. Pursuant to the *Intergovernmental Agreement for the Australian Consumer Law*,[12] the Commonwealth, the States and

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8 (1977) 137 CLR 545.

9 Section 52 of the *Trade Practices Act 1974* (Cth).

10 *GMAC* (1977) 137 CLR 545 at 561.

11 *GMAC* (1977) 137 CLR 545 at 561.

12 An agreement between the Commonwealth, the States and the Territories dated 2 July 2009, which was replaced by a second *Intergovernmental Agreement for the Australian Consumer Law* dated 30 August 2019.

the Territories agreed to implement legislative schemes in which the ACL would be enacted as a law of the Commonwealth, and of each State and Territory. In accordance with this agreement, the *Australian Consumer Law and Fair Trading Act 2012* (Vic), by s 8(1), gives effect to the ACL as a law of Victoria and, by s 224, confers jurisdiction on VCAT in this case.

13 Section 18(1) of the ACL provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

14 Because s 41 of the MVS Act deemed ADR 81/02 to be a safety standard under the ACL, it is also relevant to note here that s 106(1) of the ACL provides that a person must not, in trade or commerce, supply consumer goods of a particular kind if a safety standard for consumer goods of that kind is in force and those goods do not comply with the standard. "[C]onsumer goods" is defined in s 2(1) of the ACL to mean "goods that are intended to be used, or are of a kind likely to be used, for personal, domestic or household use or consumption". Cars for personal use are a consumer good.

MVS Act

15 The MVS Act, by s 3, contained two main objects: (1) "to achieve uniform vehicle standards to apply to new vehicles when they begin to be used in transport in Australia"; and (2) "to regulate the first supply to the market of used imported vehicles". This accords with the Second Reading Speech for the *Motor Vehicle Standards Bill 1989* (Cth) in which the proposed legislative scheme's object of achieving both national and international uniformity through national motor vehicle regulatory standards was identified.[13] Consistently with this, the Explanatory Memorandum for the Bill said it was "intended to underpin national uniformity".[14]

16 Section 5(1) of the MVS Act defined: (1) "new vehicle" to mean, relevantly, a new imported vehicle, that had been neither supplied to the market nor used in transport in Australia by its manufacturer or importer; (2) "standard vehicle" to mean "a new vehicle that complies with the national standards, or which is taken to comply with the national standards by virtue of an approval given under

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13 Australia, Senate, *Parliamentary Debates* (Hansard), 26 May 1989 at 2797-2798.

14 Australia, House of Representatives, *Motor Vehicle Standards Bill 1989* (Cth), Explanatory Memorandum at 1.

subsection 10A(2)"; (3) "nonstandard, in relation to a road vehicle or a vehicle component" to mean "not complying with the national standards and not taken to comply with the national standards by virtue of an approval given under subsection 10A(2)"; (4) "vehicle standard" to mean a standard for road vehicles or vehicle components that was designed to achieve specified aims, including to "promote the saving of energy"; (5) "national standard" to mean a vehicle standard determined under s 7; and (6) "identification plate" to mean "a plate declaring the status of a road vehicle in relation to the national standards and approved to be placed on vehicles of that type or description under procedures and arrangements provided for in subsection 10(1)".

17 Section 5A of the MVS Act provided that "[a] reference in this Act to a *vehicle* is to be taken as including a type or class of vehicles, unless otherwise specified".

18 By s 7 of the MVS Act, the Minister could, by legislative instrument, determine vehicle standards for road vehicles or vehicle components. In so doing, s 7A enabled the Minister to incorporate documents that set out standards, relevantly, produced by the Economic Commission for Europe (being the United Nations Economic Commission for Europe, referred to as "the UNECE").

19 Section 9 of the MVS Act provided that the Minister could, by legislative instrument, determine procedures and arrangements for determining whether road vehicles or vehicle components complied with the Act including, for example, the inspection of steps in the manufacture of road vehicles or vehicle components.

20 Section 10 of the MVS Act enabled the Minister to determine "procedures and arrangements for the placement of plates on road vehicles or vehicle components if approval has been given under subsection 10A(1), (2) or (3) for plates to be placed on the vehicles or vehicle components". Section 10A(1) provided that "[i]f new vehicles of a particular type, or vehicle components of a particular type, comply with the national standards, the Minister must give written approval for identification plates to be placed on vehicles or components of that type". Section 10A(2) enabled the Minister to approve new vehicles of a particular type, or vehicle components of a particular type, that do not comply with the national standards if satisfied that the "noncompliance is only in minor and inconsequential respects". Section 10B required the Minister to notify the person to whom the approval under s 10A was given of any conditions of the approval to be met.

21 Section 13A(1) of the MVS Act provided that a person must not do an act that results in the modification of a standard vehicle in a way that makes it

nonstandard, although s 13A(3) permitted a person to modify a standard vehicle in a way that makes it nonstandard in prescribed circumstances or with the approval of the Minister.

22 Section 14(1) of the MVS Act provided that a person must not supply to the market a new vehicle that is nonstandard or does not have an identification plate.

23 By s 17(1)(d) and (e) of the MVS Act, the importation of a road vehicle that complies with the national standards and has an identification plate was subject to conditions that "the importer will not modify the vehicle in a way that makes it nonstandard" and "the importer will not hand over the vehicle to another person for modification, whether by that other person or otherwise, in a way that makes it nonstandard".

24 Section 18 of the MVS Act prohibited a person from importing a road vehicle that was nonstandard or did not have an identification plate. Sections 19 and 20 enabled the Minister to approve the importation of a nonstandard vehicle.

25 Section 41 of the MVS Act provided that for the purposes of, relevantly, s 106 of the ACL, a national standard is taken to be a safety standard under the ACL.

26 Failure to comply with provisions of the MVS Act exposed a person to potential criminal and civil sanctions and the grant of other remedies.[15]

ADR 81/02

ADR 81/02 – main provisions

27 ADR 81/02 is a vehicle standard made under s 7 of the MVS Act. It was common ground that ADR 81/02 applied to Mr Begovic's vehicle.

28 ADR 81/02 contained six main parts. Clause 1.1 in Pt 1 ("Scope") of ADR 81/02 provided that:

> "This vehicle standard prescribes the requirements for the measurement of vehicle fuel consumption ... and the design and application of fuel consumption labels ... to vehicles."

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15 See, eg, ss 13A, 14, 17(2), 18, 35.

29 Clause 2.1 in Pt 2 ("Applicability and Implementation") of ADR 81/02 provided that it applied "to all M and N category vehicles with a gross vehicle mass not exceeding 3.5 tonnes".

30 Part 4 ("Requirements") of ADR 81/02 included these provisions:

> "4.1 Every vehicle shall have applied to its windscreen a fuel consumption label or energy consumption label meeting the specifications of the appropriate label illustrated in Appendix A.
>
> 4.2 The fuel consumption label or energy consumption label shall be placed in a bottom corner of the front windscreen on the inside of the windscreen.
>
> 4.3 The fuel consumption label shall be applied to vehicles powered by an internal combustion engine only and to hybrid electric vehicles which are not externally chargeable.
>
> ...
>
> 4.5 Subject to the requirements of paragraph 5.5 of Appendix B or Appendix C, the manufacturer shall report:
>
> 4.5.1 for vehicles specified in clause 4.3, the three fuel consumption results and three carbon dioxide emissions results for the vehicle from Part One (urban) and Part Two (extra-urban) of the Type I test and from the full (combined) Type I test, as determined in accordance with Annex 6 or Annex 8 of Appendix B or Appendix C; and
>
> ...
>
> 4.6 The values displayed on the fuel consumption label shall be:
>
> 4.6.1 for fuel consumption, the urban, extra-urban and combined values reported for the vehicle under clause 4.5.1 ...".

31 Part 5 ("Exemptions and Alternative Procedures") of ADR 81/02 provided in cl 5.1 that "[t]he following provisions of Appendix B and Appendix C are not applicable". The listed inapplicable provisions included ss 3 ("Application for Approval"), 4 ("Approval"), 6 ("Modification and extension of approval of the approved type"), 9 ("Conformity of Production"), and 10 ("Penalties for

non-conformity of production"), as well as Annex 1 ("Essential characteristics of the vehicle powered by an internal combustion engine only and information concerning the conduct of tests").

32 Part 6 ("Alternative Standards") of ADR 81/02 included cl 6.1 in these terms:

> "Subject to clause 6.1.1, the values for fuel consumption, carbon dioxide emissions, energy consumption and range declared for the vehicle by the manufacturer in accordance with the requirements of *United Nations Economic Commission for Europe Regulation No 101* ... are deemed to be equivalent to the values for fuel consumption and carbon dioxide emissions, energy consumption and range required under clause 4.5 of this vehicle standard."

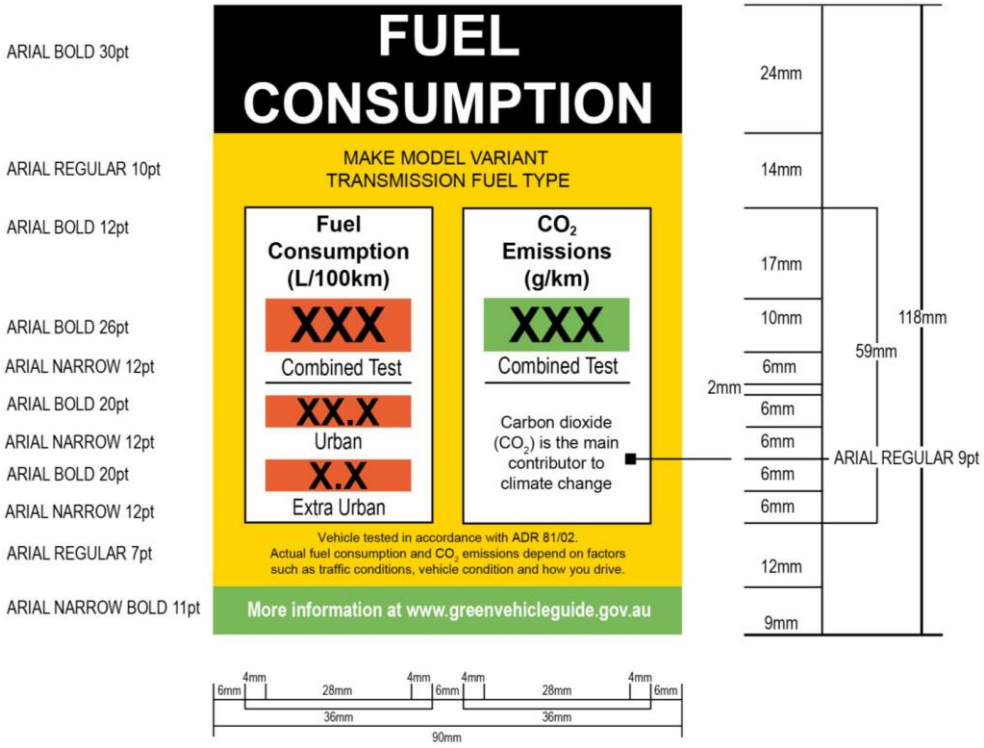
33 Clause 6.1.1 of ADR 81/02 provided that "[t]he versions of UN ECE Regulation 101 deemed acceptable under clause 6.1 are UN ECE Regulation 101 Revision 2". UN ECE Regulation 101 was entitled, relevantly, "Uniform provisions concerning the approval of passenger cars powered by an internal combustion engine only ... with regard to the measurement of the emission of carbon dioxide and fuel consumption ... ".

ADR 81/02 – Appendices

34 Appendix A to ADR 81/02 prescribed "Fuel Consumption Label Specifications". The specifications include cl 1.1 ("[t]he label shall be of the form, dimensions and fonts illustrated in Figure 1 of this Appendix A") and cl 1.13 ("[t]he three fuel consumption values in L/100km specified in clause 4.6.1 of this vehicle standard shall be centred in the red areas on the label indicated by the letters 'XX.X' in Figure 1").

Gageler *CJ*
Gordon *J*
Steward *J*
Gleeson *J*
Jagot *J*

35 Figure 1 in Appendix A to ADR 81/02 appeared as follows:



36 Appendix C to ADR 81/02 is a reproduction of UN ECE Regulation 101 described as "Revision 2 (including all amendments up to and including the 01 series of amendments)". The parties proceeded on the basis that Appendix C was the relevant Appendix. It suffices to record the following provisions of Appendix C.

37 Section 2 ("Definitions") of Appendix C contained these definitions:

> "2.1 '<u>Approval of a vehicle</u>' means the approval of a vehicle type with regard to the measurement of energy consumption (fuel or electric energy);
>
> 2.2 '<u>Vehicle type</u>' means 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".

38 Section 3 ("Application for Approval") of Appendix C contained these provisions:

> "3.1 The application for approval of a vehicle type with regard to the measurement of ... fuel consumption ... shall be submitted by the vehicle manufacturer or by his duly accredited representative.
>
> 3.2 It shall be accompanied by the under-mentioned documents in triplicate and the following particulars:
>
> 3.2.1 A description of the essential characteristics of the vehicle comprising all the particulars referred to in Annex 1, Annex 2 or Annex 3, depending on the power train type. ...
>
> ...
>
> 3.3 A vehicle, representative of the vehicle type to be approved, shall be submitted to the technical services responsible for conducting approval tests ... ".

39 Section 4 ("Approval") of Appendix C contained these provisions:

> "4.1 If the ... fuel consumption ... of the vehicle type submitted for approval pursuant to this Regulation have been measured according to the conditions specified in paragraph 5 below, approval of that vehicle type shall be granted.
>
> 4.2 An approval number shall be assigned to each type approved. ...
>
> ...
>
> 4.4 There shall be affixed, conspicuously and in a readily accessible place specified on the approval form, to every vehicle conforming to a vehicle type approved under this Regulation, an international approval mark ... ".

40 Section 5 ("Specifications and Tests") of Appendix C contained these provisions:

> "5.1 General
>
> The components liable to affect ... fuel consumption ... shall be so designed, constructed and assembled as to enable the vehicle, in normal use, despite the vibrations to which it may be subjected, to comply with the provisions of this Regulation.
>
> 5.2 Description of tests for vehicles powered by an internal combustion engine only
>
> 5.2.1 The ... fuel consumption shall be measured according to the test procedure described in Annex 6. ...
>
> ...
>
> 5.2.3 Fuel consumption values must be expressed in litres per 100 km ... The results will be rounded to the first decimal place."

The facts

41 The parties agreed a chronology recording certain facts.

42 The agreed facts include that, between 25 August and 25 September 2014, the relevant "vehicle type" was tested at the Mitsubishi Technical Centre in Japan, including fuel consumption tests for the vehicle type certified as having been carried out in accordance with UN ECE Regulation 101, incorporating supplement 02 to 01 series of amendments.

43 On 31 October 2014, the Belgian Transport Authority issued a "type approval" for the relevant vehicle type under UN ECE Regulation 101 ("the Belgian type approval"). This approval contained a heading "Communication Concerning the Approval of a Vehicle Type Pursuant to Regulation No 101". It identifies the "Approval No" as E6-101R-010557, the vehicle type as "Mitsubishi L200" and "Mitsubishi Triton", and the vehicle category as "N1" and "N1G". The approval also contained sections (excluding footnotes), the item numbers for which correspond to a subsequent approval process, described below, for the vehicle type in Australia.

44 Annexed to the Belgian type approval is a report of two series of tests, one for manual transmission and one for automatic transmission vehicles, as well as an annexure headed "CO_2 Emissions/Fuel consumption (manufacturer's declared value)". The annexure includes four tables. Relevantly, the table relating to the automatic transmission 4WD (wheel-drive) vehicle (recalling that the vehicle Mr Begovic purchased was a 4x4 automatic transmission vehicle of this vehicle type) identifies fuel consumption in litres/100km as "Urban conditions 9.0", "Extra-urban conditions 6.8", and "Combined 7.6" (the fuel consumption values on the label applied to Mr Begovic's vehicle).

45 On 31 October 2014, Mitsubishi reported the fuel consumption values for the relevant vehicle type to the Commonwealth Department of Infrastructure and Regional Development, Australia ("the Department") in a departmental form headed "Summary of Evidence – Fuel Consumption Labelling for Light Vehicles Australian Design Rule 81/02". Amongst other things, this form identifies the vehicle make as "Mitsubishi", the vehicle model as "Triton KK/KL", and the marketing variant as "GLX/GLS/Exceed". The form contains a section, section 4, headed "ECE Approval Details", under which appears "ECE Approval E6 101R-010557". This reference corresponds with the Belgian type approval.

46 Within section 4 of the form is a sub-heading "CO_2 Emissions, Fuel Consumption ... as shown on approval note". Two tables follow in this section, the first headed "CO_2 Emissions (g/km)" and the second headed "Fuel Consumption (l/100km)". The fuel consumption values are shown as "Combined: [Item 7.1.2.3] 7.6", "Urban: [Item 7.1.2.1] 9.0", and "Extra-Urban: [Item 7.1.2.2] 6.8". The item numbers cross-refer to the item numbers in the Belgian type approval.

47 The next section in the form, section 5, is headed "CO_2 Emissions and Fuel Consumption Values as declared by the manufacturer and displayed on the Fuel Consumption Label (Cl 4.6)". The reference to "as declared by the manufacturer" is to the manufacturer's declared values for fuel consumption, being the values in the four tables annexed to the Belgian type approval. Under the heading "Fuel Consumption l/100km" in section 5 a table appears reporting fuel consumption values in accordance with the values Mitsubishi declared under the Belgian type approval. The reference to "Cl 4.6" in the heading is a reference to cl 4.6 of ADR 81/02.

48 The agreed chronology records that the Department approved the reported fuel consumption values on 15 December 2014. For reasons known only to the parties, and despite the primary judge in the Supreme Court of Victoria permitting

Mitsubishi to adduce further evidence in the appeal,[16] the evidence of this approval is confined to the agreed chronology.

49 The agreed chronology also records that the vehicle Mr Begovic purchased was manufactured and the prescribed fuel consumption label was applied to its windscreen in August 2016. Mitsubishi then imported the vehicle into Australia in September 2016. Mitsubishi supplied the vehicle to Northpark in December 2016. Northpark sold the vehicle to Mr Begovic in January 2017.

Two potential problems

Respondent's shift in position

50 It was a common assumption of the parties before the primary judge and the Court of Appeal that cll 3, 4, 4.5, 9 and Appendix C to ADR 81/02 applied to the import and supply of the vehicle purchased by Mr Begovic and that ADR 81/02, by cl 4.6.1 and Appendix C, required the label, in both form and content, to be applied to the vehicle as in fact applied. The respondent's answer to the appellants' case in the appeals below was never that the label, in that form and with that content, was not required to be applied to the vehicle, but that the label misleadingly conveyed the testing replicability representation in contravention of s 18 of the ACL in any event.[17]

51 This assumed common framework between the parties caused the Court of Appeal both to observe that it was "not necessary to describe [the] test protocols in any detail"[18] and to identify the relevant conduct as not merely the application of the label to the vehicle, but also "presenting the vehicle for sale, and selling the vehicle with the label affixed", neither of which was mandated by law.[19] This conclusion set the conceptual framework for the grant of special leave to appeal

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16 *Mitsubishi Motors Australia Ltd v Begovic* [2021] VSC 252 at [15].

17 *Mitsubishi Motors Australia Ltd v Begovic* [2021] VSC 252 at [12]-[27], [80], [89], [101], [117], [125], [127], [137], [138]; *Mitsubishi Motors Australia Pty Ltd v Begovic* (2022) 403 ALR 558 at 562 [2]-[3], 563-564 [9]-[13], 564 [14], 565 [28], 569 [50], 571 [65(c)], 573-574 [75(c)], 574 [75(e)], 576 [86] (see fn 62), 579 [98], 582 [114].

18 *Mitsubishi Motors Australia Pty Ltd v Begovic* (2022) 403 ALR 558 at 563 [11].

19 *Mitsubishi Motors Australia Pty Ltd v Begovic* (2022) 403 ALR 558 at 577 [87], 582 [115].

and must continue to set the boundaries within which the appeal to this Court is to be resolved.

52 In oral submissions before this Court, the position of the respondent shifted. Reduced to its essence, until the filing of the respondent's oral outline of argument and the making of the respondent's oral submissions, the respondent's case was that Northpark could (and should) have sold him a vehicle the fuel consumption of which matched the values shown on the label. It had never been suggested for the respondent that Northpark could have sold him the same vehicle with a different (accurate) fuel consumption label for that vehicle. In oral submissions, however, it was submitted for the respondent that while ADR 81/02 is highly prescriptive, it did not prescribe the vehicle to be tested and, taken to an extreme, a manufacturer could test every vehicle before import and supply.

53 The appellants, in answer, submitted that it had been common ground between the parties that the test vehicle was required to be a representative of a vehicle type and there could be no case to the contrary, as the label "is in binding and closed fashion to be regarded as correct", it having been accepted by the respondent that if the appellants were to import and sell this vehicle, the label as applied to the vehicle had to be so applied.

54 These submissions for the appellants must be accepted. The issues on which the parties had joined below, and which were the bases on which special leave to appeal was granted, were confined to, first, the Court of Appeal's reasoning that the relevant conduct for the purposes of s 18 of the ACL was not the mere application of the label to the vehicle (which was mandatory in form and content) but included the presentation of the vehicle for sale and its sale to Mr Begovic (which was not mandatory)[20] and, second, the content of the representation that the label conveyed in context.[21]

Clauses 5.1 and 6.1 of ADR 81/02 overlooked

55 Regrettably, it appears that neither the primary judge nor the Court of Appeal had their attention drawn to Pts 5 and 6 of ADR 81/02. As noted, cl 5.1 in Pt 5 disapplied certain provisions of, relevantly, Appendix C to ADR 81/02 and

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20 *Mitsubishi Motors Australia Pty Ltd v Begovic* (2022) 403 ALR 558 at 577 [87], 581-582 [113]-[118].

21 *Mitsubishi Motors Australia Pty Ltd v Begovic* (2022) 403 ALR 558 at 577-581 [89]-[110].

cl 6.1 in Pt 6 deemed fuel consumption values declared by a manufacturer under UN ECE Regulation 101 to be equivalent to the values for fuel consumption required under cl 4.5 of ADR 81/02. This oversight continued throughout the hearing of the appeal to this Court, during which neither party mentioned the fact that cl 5.1 in Pt 5 of ADR 81/02 disapplied the provisions of Appendix C to which the parties both referred, or suggested that the operative provision of ADR 81/02 (which required the fuel consumption label to contain the manufacturer's declared values for fuel consumption under the Belgian type approval) was cl 6.1 in Pt 6 of ADR 81/02.

56 It is not possible to reconcile the documents underlying the agreed chronology with the common assumption of the parties that the fuel consumption values on the fuel consumption label applied to the vehicle were approved in Australia as a result of an application for approval and testing in accordance with Appendix C. On their face, the documents are reconcilable only with the application of cl 6.1 of ADR 81/02. Even if this is incorrect, the parties also did not explain how ss 3 and 4 of Appendix C to ADR 81/02 were relevant if, as appears to be the case, cl 5.1 of ADR 81/02 disapplied ss 3 and 4 of Appendix B and Appendix C.

57 As noted, cl 6.1 provided that the values for fuel consumption declared for the vehicle by the manufacturer in accordance with the requirements of UN ECE Regulation 101 (Revision 2) are deemed to be equivalent to the values for fuel consumption "required under clause 4.5 of this vehicle standard". As such, the details of the applicable testing protocols and the extent of any discretion they provided a manufacturer in respect of vehicle selection for testing could not be relevant.

58 This confusion causes considerable disquiet. No court wishes to decide matters on a wrong understanding of the applicable law. The following matters, however, mean that the confusion cannot be permitted to deny the appellants a favourable outcome in the appeal.

59 First, and determinatively, it is only the impermissible attempt on behalf of the respondent to introduce a new issue (that the form of the label is prescribed, but not its content) that makes the details of the testing protocols relevant. But for the attempted introduction of this new issue, it would have remained common ground that the fuel consumption label as applied to the vehicle sold to Mr Begovic had to be so applied.

60 Second, although the respondent referred to cl 6.1 of ADR 81/02 in oral submissions, the respondent did not suggest that the appellants were wrong in their

position that the fuel consumption testing Mitsubishi conducted was as required by Appendix C to ADR 81/02.

61 Third, in oral submissions in this Court, the only argument the respondent made about the testing protocol in Appendix C all went to the same point – that ADR 81/02 left it to Mitsubishi to decide which vehicle and how many vehicles to test to obtain the fuel consumption values for Mr Begovic's type of vehicle, including that Mitsubishi could have tested the fuel consumption of Mr Begovic's vehicle itself. Apart from the fact that it was not open to the respondent to make this argument in this Court, the contention is inconsistent with the entirety of the statutory scheme, no matter what subordinate legislation governed the approval of the fuel consumption testing (UN ECE Regulation 101 (Revision 2), Appendix B of ADR 81/02, or Appendix C of ADR 81/02).

62 As noted, s 5A of the MVS Act provided that "[a] reference in this Act to a *vehicle* is to be taken as including a type or class of vehicles, unless otherwise specified" and s 13(1)(b) of the *Legislation Act 2003* (Cth) provides that expressions used in any legislative instrument have the same meaning as in the enabling legislation, so references to "vehicle type" and "vehicle" in ADR 81/02 cannot be determinative. More importantly, however, by s 13(1)(a) of the *Legislation Act*, the *Acts Interpretation Act 1901* (Cth) applies to any instrument so made as if it were an Act and as if each provision of the instrument were a section of an Act. Accordingly, ADR 81/02 is to be construed in accordance with s 15AA of the *Acts Interpretation Act* the effect of which, read with s 13(1)(b), is that the interpretation that would best achieve the purpose or object of ADR 81/02 is to be preferred to each other interpretation.

63 The subordinate regulatory schemes, no matter which version in fact applied (UN ECE Regulation 101 (Revision 2), Appendix B of ADR 81/02 or Appendix C of ADR 81/02), assume a single set of fuel consumption values for a single vehicle type. Vehicle types are no more within the discretion of a manufacturer than the selection of a vehicle to determine the fuel consumption values for that vehicle type. A "vehicle type" is not whatever a manufacturer wishes to be a vehicle type; it is "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". A manufacturer does not choose if the vehicle does or does not have the same specified essential characteristics. The vehicle either does or does not have those same specified essential characteristics.

64 This accords with the obvious fact that the MVS Act imposes standardisation requirements. Nothing could undermine a standardisation scheme of this nature more than the non-standardisation which the respondent's new

argument suggested would have been open to Mitsubishi if it had chosen a different test vehicle to test, or chosen to test more vehicles, or chosen to test every vehicle's fuel consumption and applied individualised fuel consumption labels to each vehicle tested. Further, the argument the respondent made below and continues to make in this appeal, that ADR 81/02 assumed that a manufacturing process for standard vehicles would produce vehicles that, if tested, would produce substantially the same fuel consumption test results for every vehicle of the relevant type, is substantively correct but inconsistent with its new and impermissible argument. The statutory scheme does assume and require that vehicles of a vehicle type conform to the requirements for the vehicles of that type. The requirement for type conformity, however, is itself irreconcilable with the notion of manufacturer choice or discretion as to the typing of vehicles and their testing for fuel consumption in order to enable the manufacturer to declare fuel consumption values.

65 These matters expose why there can be no unfairness to the respondent in this Court proceeding to decide the appeal on the basis of the submissions as put.

Determination of the appeal

66 As a part of a national legislative scheme, whether the ACL applies as a law of the Commonwealth, a law of the Commonwealth enacted as a law of the State, or as a law of the State, it is necessary to construe s 18 of the ACL consistently with the provisions of the MVS Act (a Commonwealth Act) which give effect to ADR 81/02 as a safety standard under s 106 of the ACL (as a Commonwealth law and a State or Territory law).

67 The resolution in *GMAC* was an outworking of the interpretative principle that, in the event of apparent inconsistency of statutory requirements relating to the same subject matter (relevantly, consumer protection) and enacted by the same legislature, the general provision may need to be subordinated to the specific provision in order to alleviate the apparent conflict. In *GMAC*, the relevant conduct was the sending of the required notice to consumers on providing consumer credit, not the conduct in providing consumer credit. The expression of the reasoning in *GMAC* assumed it to be understood that the field of operation of the general prohibition on misleading or deceptive conduct in trade or commerce now embodied in s 18 of the ACL, of its nature, will always involve at least an initial choice to engage in a kind of trade or commerce. The existence of that initial choice, to engage in trade or commerce, may or may not be the proper focus of the inquiry into potential inconsistency of or conflict between the statutory provisions. Consideration of the detail of the statutory provisions in the specific factual context will be required to decide the proper focus of the inquiry in each case.

68 Where the conduct in trade or commerce said to contravene s 18 of the ACL is the same conduct which is required by another consumer protection law to be carried out only in a prescribed manner, the need to reconcile s 18 of the ACL with that other law cannot be avoided by characterising the conduct (such as presentation and supply) as voluntary. "[T]rade or commerce" is defined in s 2(1) of the ACL to include "any business or professional activity (whether or not carried on for profit)". It may be doubted that any person is required by law to conduct any "business" or "professional activity". In that sense, s 18 assumes that conduct "in trade or commerce" involves a choice to engage in that kind of trade or commerce. In this case, the choice of Mitsubishi and Northpark to engage in a certain kind of trade or commerce (manufacture, import and supply of new Mitsubishi vehicles, as applicable), given the statutory provisions in issue, does not enable the required reconciliation of the statutory provisions to be avoided.

69 There may have been no difficulty in reconciling the two Acts where the MVS Act required that the vehicle be sold with the label applied and the ACL prevented a supplier representing that the actual vehicle sold conformed to the relevant type of vehicle if it did not. Whether that latter representation was made may depend, for example, on what a vehicle importer or dealer does and says before and at the time of sale. In those circumstances, consistent with *GMAC*, the two provisions may well operate together. Here, however, there was no evidence that either Mitsubishi or Northpark engaged in any conduct, save for applying the label in trade or commerce (that is, in importing, presenting and supplying the vehicle).

70 In the present case, Mitsubishi, by s 18(1) of the MVS Act, could not import the vehicle without the fuel consumption label being applied to it. Sections 13A(1) and 17(1)(d) of the MVS Act prohibited Mitsubishi from supplying the vehicle to any person, including Northpark, without that fuel consumption label remaining applied to it. Under s 14(1) of the MVS Act, Northpark could not supply the vehicle to Mr Begovic without that fuel consumption label remaining applied to it. By s 41 of the MVS Act, the presence of that fuel consumption label on the vehicle supplied to Mr Begovic, as a requirement of a national standard, was also mandated by s 106 of the ACL as a safety standard. That is, in Mitsubishi supplying the vehicle to Northpark and in Northpark supplying the vehicle to Mr Begovic, Mitsubishi was bound to apply and Mitsubishi and Northpark were bound to maintain that fuel consumption label on the vehicle, in order not to contravene s 106 of the ACL. Further, the form and content of the fuel consumption label as applied were dictated by ADR 81/02. Clause 4.1 of ADR 81/02 required every vehicle to have applied to its windscreen a fuel consumption label meeting the specifications of the appropriate label illustrated in Appendix A. Clause 4.6.1 of ADR 81/02 required the values for fuel consumption

displayed on the label to be the urban, extra-urban and combined values reported for the vehicle under cl 4.5.1. If, as evidently is the case, Mitsubishi declared the values for fuel consumption in accordance with the requirements of UN ECE Regulation 101 (Revision 2), then cl 6.1 of ADR 81/02 operated to deem those declared values to be the values required to be reported under cl 4.5.1.

71 For these reasons, the appellants' first ground of appeal must succeed. There is no need to consider the appellants' second ground of appeal to the effect that the fuel consumption label did not, in any event, make the testing replicability representation.

72 The orders to be made are:

(1) Appeal allowed.

(2) Set aside orders 2 and 3 of the orders of the Court of Appeal of the Supreme Court of Victoria made on 5 August 2022 and, in lieu thereof, order that:

(a) appeal allowed; and

(b) the respondent's application to the Victorian Civil and Administrative Tribunal be dismissed.

(3) The appellants pay the respondent's costs of the application for special leave to appeal and the appeal.