IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S ECI 2019 02790

MITSUBISHI MOTORS AUSTRALIA LTD (ACN 007 870 395) — First Applicant

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

v

ZELKO BEGOVIC — Respondent

JUDGE:	Ginnane J
WHERE HELD:	Melbourne
DATE OF HEARING:	14-15 September 2020
DATE OF JUDGMENT:	12 May 2021
CASE MAY BE CITED AS:	Mitsubishi Motors Australia Ltd v Begovic
MEDIUM NEUTRAL CITATION:	[2021] VSC 252

CONSUMER LAW – Decision of Victorian Civil and Administrative Tribunal – Application to appeal on questions of law – Sale of motor vehicle – Fuel Consumption Label attached to windscreen as required by law – Representations conveyed by label to reasonable consumer – Actual fuel consumption considered by consumer to be excessive – Whether label misleading or deceptive or likely to mislead or deceive – Whether breach of consumer guarantees – Whether breach of sale by description provisions – Appropriate remedies – *Competition and Consumer Act 2010* (Cth) sch 2, ss 18, 54, 56, 243, 259, 260, 262, 263.

APPEALS – Victorian Civil and Administrative Tribunal – Natural justice – Finding contravention of the *Australian Consumer Law* not argued by the parties – *Victorian Civil and Administrative Tribunal Act 1998* s 102.

APPEARANCES:	Counsel	Solicitors
For the Applicants	Mr C Caleo QC with Mr B Gibson	Thomson Geer
For the Respondent	Mr J Gottschall	SLF Lawyers

HIS HONOUR:

Background

1 Mr Zelko Begovic, the respondent, purchased a 2016 Mitsubishi Triton vehicle from the second applicant, Northpark Berwick Investments Pty Ltd, which traded as Mitsubishi Berwick ('*Northpark*'), in January 2017.[1] From the time he first drove it, he considered that it was consuming far more fuel than a Fuel Consumption Label had led him to believe and wanted his money back. He commenced proceedings in the Victorian Civil and Administrative Tribunal ('*Tribunal*' or '*VCAT*') against Northpark seeking an order that he be entitled to reject the Triton and receive a refund of the purchase price of $39,500 because of its excessive fuel consumption when compared with the consumption figures contained in the Fuel Consumption Label attached to its windscreen. Mitsubishi Motors Australia Ltd ('*Mitsubishi*') was joined as a party on Northpark's application. On 27 May 2019, VCAT ordered Northpark to pay Mr Begovic $39,500, and upon that payment, property in the Triton would revert to Northpark.[2]

2 The Tribunal found that Mr Begovic had proved that the applicants had breached ss 18, 54 and 56 of the *Australian Consumer Law*[3] in the sale of the Triton vehicle.

3 The applicants seek leave to appeal against VCAT's orders and that application was heard together with the arguments that the parties would make if leave were granted. The same counsel represented both Northpark and Mitsubishi. Despite the Tribunal making no order against Mitsubishi, Mr Begovic's counsel did not object to it being a party.[4]

Summary

4 In summary, I grant the applicants leave to appeal the Tribunal's orders on all of their questions of law and proposed grounds of appeal. I find that the Tribunal erred in its finding that the applicants had contravened ss 54 and 56 of the ACL in connection with the sale of the 2016 Triton to Mr Begovic, but not in respect of its finding that the applicants had contravened s 18. I will hear the parties further as to the appropriate orders to give effect to these findings, including in respect of costs.

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1 Transcript of Proceedings, *Begovic v Northpark Berwick Investments Pty Ltd* (Victorian Civil and Administrative Tribunal, C2473/2018, 17 April 2019) 14 ('VCAT T'); T 82.

2 *Begovic v Northpark Berwick Investments Pty Ltd* [2019] VCAT 772 [81] ('*VCAT Decision*').

3 *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*').

4 Transcript of Proceedings, *Mitsubishi Motors Australia Ltd v Begovic* (Supreme Court of Victoria, S ECI 2019 02790, Ginnane J, 14-15 September 2020) 137 ('T').

Mr Begovic's written application to VCAT

5 In his written application to VCAT, Mr Begovic stated that the vehicle was defective because of its excessive fuel consumption. He claimed that the vehicle was not of acceptable quality given its nature and price, and the statements made about it on the Fuel Consumption Label affixed to the front windscreen.[5] In a letter in response to Mr Begovic's claim, Northpark disputed his assertion that the vehicle used excessive fuel and said that its defence to its claim would be in the following terms:

> 1. The labelling is government prescribed labelling and the testing for the labelling is conducted in accordance with Australian Standards, understanding that there are variations in fuel consumption depending on how, when and where the vehicle is driven – noting the actual fuel stickers advise of this
>
> 2. Your vehicle has been fitted with parts – post the sale from the dealership. These parts include canopy, shade cloth style mesh to the front grille and "all terrain tyres'. You have been advised these will affect fuel consumption.[6]
>
> 3. I also understand that all relevant information regarding the vehicle was provided to you prior to purchase to allow you time for consideration on whether to proceed with the purchase and reject that our conduct has been misleading or deceptive.[7]

6 The VCAT decision described Mr Begovic's application as follows:

> The applicant, Mr Begovic, purchased a new Mitsubishi MQ Triton 4x4 GLS DID Auto DC-PU vehicle (**vehicle**) from the first respondent, Berwick Mitsubishi (**dealer**) in 2017. The second respondent is the manufacturer of the vehicle within the meaning of the Australian Consumer Law (**manufacturer**).
>
> A fuel consumption label ('label') was affixed to the front windscreen of the vehicle prior to purchase.
>
> Mr Begovic claimed that the vehicle's actual fuel consumption is significantly higher than the fuel consumption represented on the label and the label is misleading. He also claims that the vehicle is defective because of the excessive fuel consumption.
>
> The dealer did not attend the hearing. The manufacturer advised the Tribunal that it would 'be handling the matter' for the dealer and confirmed that the dealer would be abiding by the Tribunal's orders. Mr Miller [Mitsubishi's representative at the hearing] was not appearing on behalf of the dealer.
>
> The manufacturer's position is that the label is correct. It is not misleading or deceptive and the vehicle is not defective.
>
> Mr Begovic seeks an order that he reject the vehicle and be refunded the purchase price of $39,500.00.[8]

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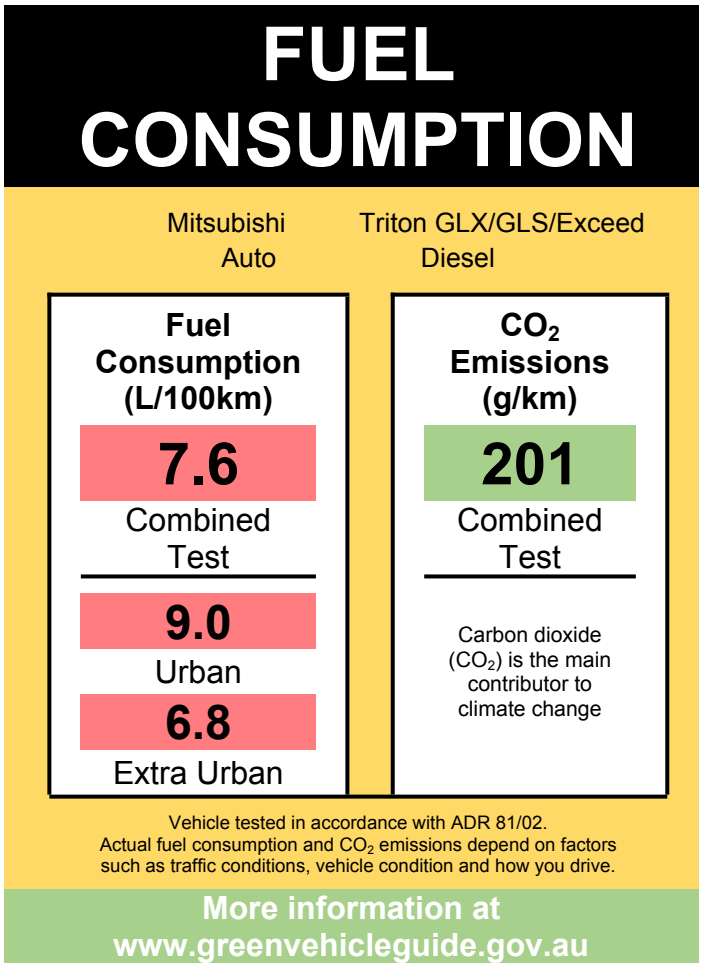
5 *VCAT Decision* (n 2) [54].

6 This contention was not pursued in this proceeding.

7 Joint Court Book, *Mitsubishi Motors Australia Ltd v Begovic* (Supreme Court of Victoria, S ECI 2019 02790, Ginnane J, 14-15 September 2020) 375 ('CB').

7 As mentioned, the proceeding arises from the contents of the Fuel Consumption Label affixed to the windscreen of the 2016 Triton when Mr Begovic was considering purchasing it and the conclusions that he drew from it. The label was in the following form:[9]



8 The Australian Government's Green Vehicle Guide, which can be accessed at the website detailed on the label, was not before the Tribunal, but was in the Court book before me. I informed the parties that I would take it into account.[10]

9 The Green Vehicle Guide states under the heading Fuel Consumption Label:

> All new light vehicles sold in Australia are required to display a Fuel Consumption Label on the front windscreen. This includes all passenger cars, four wheel drives and light commercial vehicles up to 3.5 tonnes gross vehicle mass. The label indicates the vehicle's fuel consumption in litres of fuel per 100 kilometres (L/100km) and its emissions of carbon dioxide (CO_2) in grams per kilometre (g/km). The results are based on a standard test procedure so consumers can reliably compare the performance of different models under the same test conditions.

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8 *VCAT Decision* (n 2) [1]-[6].

9 NB, these Fuel Consumption Labels have been recreated from the copies of the Fuel Consumption Labels in evidence, which are contained in Annexure A to this judgment.

10 T 176-7.

> The label is designed to help Australian motorists make informed choices about the environmental impact of their new car and the cost of running their vehicle. Raising awareness about the relative greenhouse impacts of different technologies and fuel types, and encouraging consumers to purchase vehicles with better fuel economy, can help reduce Australia's greenhouse gas emissions. However, while the label enables you to compare vehicles with confidence, no single test can simulate all 'real world' driving conditions. Actual on-road fuel consumption will depend on factors such as traffic conditions, vehicle condition and load, and how you drive. The fuel consumption and CO_2 figures listed on the label are also displayed on the Green Vehicle Guide. The Guide also includes a calculator enabling consumers to calculate annual fuel consumption costs and CO_2 emissions.
>
> Since April 2009, an improved fuel consumption label has been required on showroom vehicles. The label displays three fuel consumption numbers – 'combined', 'urban' and 'extra-urban' - as well as the combined CO_2 value. The label highlights the higher fuel consumption of many vehicles operating in urban driving conditions (a factor that tends to be masked in the single 'combined' number displayed on the current label). Data from the UK indicates that that urban fuel consumption values can be 20-50% higher than the combined value. Whilst the 'extra urban' component is not a traditional 'highway' cycle, it is a high speed test that may provide a better indication of freeway or highway driving. Of course, as noted above, no test can simulate all 'real world' conditions and the primary aim of the new label is still to provide a common basis for comparison of individual vehicle models. A more detailed explanation of the test cycle used by manufacturers to determine the values for the label is below.
>
> …
>
> The figures displayed on the fuel consumption label are based on specific tests conducted by vehicle manufacturers to demonstrate a vehicle's compliance with the Australian Design Rules (ADRs). All vehicles are tested under standardised, carefully controlled conditions in specialised vehicle emission laboratories. To ensure the quality and consistency of test results, laboratories and their facilities are subject to audit by the Australian Government.[11]

10 Under the heading 'I have bought one of the models listed in the guide, but I am not getting the same fuel consumption as stated in the Guide. Why?' the guide states:

> The results displayed in the Green Vehicle Guide are based on a laboratory test involving a standardised drive cycle to allow different vehicle models to be compared equally. However, no laboratory test can simulate all possible combinations of conditions experienced on the road. Real world emissions and fuel consumption may vary from results provided in the GVG depending upon a number of factors including driving and road conditions, driver behaviour and the condition of the vehicle.[12]

11 At the time of his purchase, Mr Begovic owned a 2008 Mitsubishi Triton and had kept the fuel consumption label that had been affixed to its windscreen when he purchased it. That label was in the following form:

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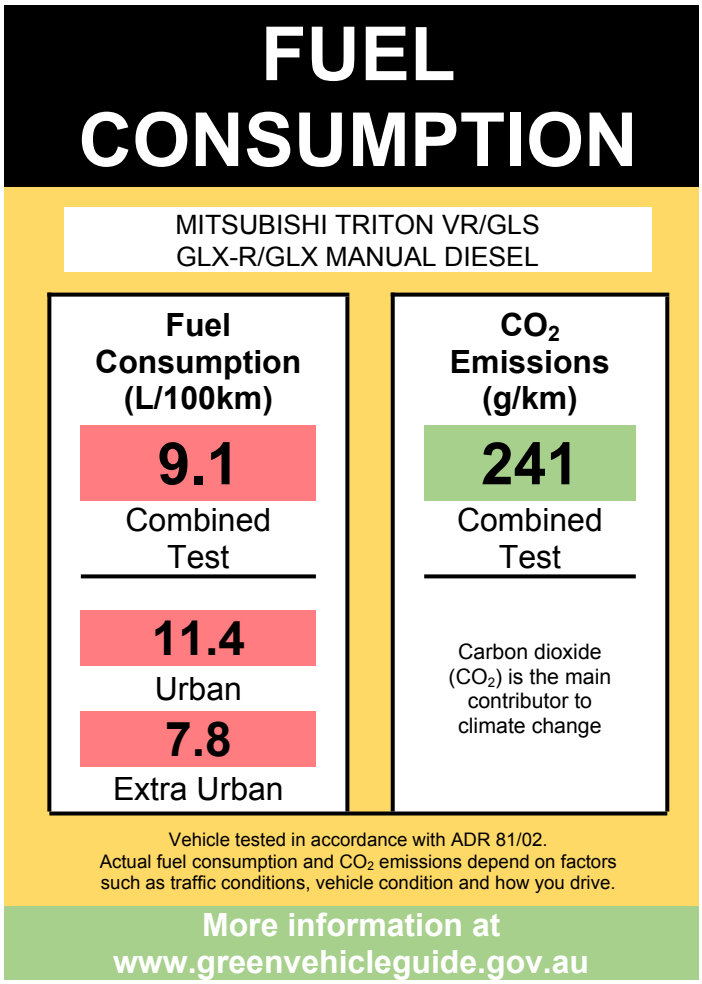
11 CB 346-347.

12 CB 339.



The statutory requirements for fuel consumption labels

12 Vehicle manufacturers are required by the *Vehicle Standard (Australian Rule 81/02 – Fuel Consumption Labelling for Light Vehicles) 2008* (Cth) ('*ADR 81/02*') to affix a fuel consumption notice in the form of the notice contained in paragraph 7 above. These Design Rules were made under s 7 of the *Motor Vehicle Standards Act 1989* (Cth). Appendix A of ADR 81/02 prescribes every aspect of the form and the contents of the Fuel Consumption Label. Failure to comply with the Standard by affixing the label attracts a monetary penalty.[13] In the second reading speech for that Act the Minister stated:

> The principal objective of this Bill, then, is to enable the Federal Government to establish and apply nationally uniform standards for motor vehicle safety and environmental quality expected by the community.[14]

13 The label must contain the vehicle model's combined urban and extra urban fuel consumption. The testing procedure is detailed in ADR 81/02 and is conducted over a

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13 *Motor Vehicle Standards Act 1989* (Cth) s 14.

14 Commonwealth, *Parliamentary Debates*, House of Representatives, 23 May 1989, 2687 (Robert Brown, Minister for Land, Transport and Shipping Support).

continuous period of 20 minutes and is split into an urban and extra urban cycle. Urban cycle testing accounts for around two-thirds of the test and the extra urban cycle accounts for the remaining one-third. Extra urban is the portion of the test that is higher speed, representing rural and highway driving. Urban is the portion of the test that is lower speed, representing city driving. Combined is the average results of both urban and extra urban portions of the test.

14 The testing regime requires that a vehicle representative of the vehicle type to be approved shall be submitted to the technical services responsible for conducting approval tests.

15 The following details of the ADR and of the testing of the Triton vehicle to obtain approval were not in any detail before the Tribunal, but were part of additional evidence from the applicants at the hearing in this Court. I treated the additional evidence as material that, in the case of the ADR, was similar to regulations to which the Court was entitled to have regard and, in the case of documents about the testing of the Triton model of vehicle for approval, could be considered by the Court to assist its in understanding the evidence before the Tribunal.[15]

16 The scope of the ADR 81/02 is:

> 1 SCOPE
>
> 1.1 This vehicle standard prescribes the requirements for the measurement of vehicle fuel consumption, carbon dioxide emissions, energy consumption and range, and the design and application of fuel consumption and labels and energy consumption labels to vehicles.[16]

17 The Standard contained requirements for the fuel consumption label to be placed in a bottom corner of the inside of the front windscreen.[17]

18 The Standard also permits alternative standards for fuel consumption values obtained under other uniform provisions to be deemed to be equivalent to the values for fuel consumption and carbon dioxide emissions, energy consumption and range required under clause 4.5. This deeming applies to the values for fuel consumption, carbon dioxide emissions, energy

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15 T 175-6.

16 *Vehicle Standard (Australian Design Rule 81/02 – Fuel Consumption Labelling for Light Vehicles) 2008* (Cth) cl 1 ('*ADR 81/02*').

17 Ibid cl 4.

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*

19 The Standard contains Appendix A headed 'Fuel Consumption Label Specifications', which has sixteen sub-paragraphs containing requirements for the label. Attached to that appendix are examples of the form of the label, including matters such as the colours to be used on the label, where wording must appear, the form of wording, and the size of borders of the label.

20 Also attached to the Standard as Appendices B and C is the text of the *United Nations – Economic Commission for Europe Regulation No. 101*.[18] That Regulation contains Clause 3 which is headed 'APPLICATION FOR APPROVAL' and states:

> 3.1 The application for approval of a vehicle type with regard to the measurement of the emission of carbon dioxide and fuel consumption and/or to the measurement of electric energy consumption and electric range shall be submitted by the vehicle manufacturer or by his duly accredited representative.

21 The Regulation then provides that the application must be accompanied by documents describing the essential characteristics and features of the vehicles.

22 Clauses 3.3, 3.4 and 4.1 provide:

> 3.3 A vehicle, representative of the vehicle type to be approved, shall be submitted to the technical services responsible for conducting approval tests. For M_1 and N_1 vehicles, type-approved with respect to their emissions according to Regulation No.83, the technical service will check during the test that this vehicle, if powered by an internal combustion engine only or by a hybrid electric power train, conforms to the limit values applicable to that type, as described in Regulation No.83.
>
> 3.4 The competent authority shall verify the existence of satisfactory provisions to ensure an effective check of conformity of production before approval of the vehicle type is granted.
>
> 4. APPROVAL
>
> 4.1 If the emissions of CO_2 and fuel consumption and/or the electric energy consumption and electric range 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.

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[18] Economic Commission for Europe of the United Nations, *Uniform provisions concerning the approval of passenger cars powered by an internal combustion engine only, or powered by a hybrid electric power train with regard to the measurement of the emission of carbon dioxide and fuel consumption and/or the measurement of electric energy consumption and electric range, and of categories M1 and N1 vehicles powered by an electric power train only with regard to the measurement of electric energy consumption and electric range (Addendum 100: Regulation No. 101)*, E/ECE/TRANS/505/Rev.2/Add.100/Rev.3 (12 April 2013).

23 Clause 5.2.1 provides that the emissions of CO_2 and fuel consumptions shall be measured according to the test procedure described in Annex 6.

24 Clause 9 of the Regulation is headed 'CONFORMITY OF PRODUCTS' and provides in part that vehicles approved to this Regulation should be so manufactured as to conform to the type approved vehicle. Appropriate production checks should be carried out so as to verify that this occurs. If the authority is not satisfied with the standard of the manufacturer's auditing procedure, they may require the verification test be carried out on vehicles in production.

25 Annex 6 is headed:

> METHOD OF MEASURING EMISSIONS OF CARBON DIOXIDE AND FUEL CONSUMPTION OF VEHICLES POWERED BY AN INTERNAL COMBUSTION ENGINE ONLY.

That Annex contains the following provisions:

> 1. SPECIFICATION OF THE TEST
>
> 1.1 Emissions of carbon dioxide (CO_2) and fuel consumption of vehicles powered by an internal combustion engine only shall be determined according to the procedure for the Type I test as defined in Annexe 4a of Regulation No.83 enforced at the time of the approval of the vehicle.
>
> 1.2 Emissions of carbon dioxide (CO_2) and fuel consumption shall be determined separately for the Part One (urban driving) and the Part Two (extra urban driving) of the specified driving circle.
>
> …
>
> 1.4.2 The fuel consumption value shall be calculated from the emissions of hydrocarbons, carbon monoxide, and carbon dioxide determined from the measurement results using the provisions defined in paragraph 6.6 of Annex 4a of Regulation No.83 enforced at the time of the approval of the vehicle.

26 Although it was not the subject of submissions, exhibits to the affidavit of the applicants' solicitor before the Court suggests that the 2016 Mitsubishi Triton obtained approval as follows. The CO_2 and fuel consumption for the 2016 Triton's combustion engine were tested between 25 August and 25 September 2014 at the Mitsubishi Technical Centre Aichi in Japan. That testing included tests that led to the fuel consumption figures similar to those contained on the label affixed to the 2016 Triton windscreen that Mr Begovic purchased.[19] A Mitsubishi Triton manufactured by Mitsubishi Motors (Thailand) Co Ltd was approved by

[19] CB 278.

the Federal Public Service Mobility and Transport Authority in Brussels on 31 October 2014. The testing appears to have involved road coast down data provided to the adjustable road curve dynamometer.[20]

27 In any event, on 31 October 2014 Mitsubishi submitted to the Commonwealth Department of Infrastructure and Regional Development a form being an application of vehicle approval under the Australian Design Rule submitting the ECE's approval.[21] In section 5 of that form, it stated the emission and fuel consumption values that had resulted from the testing in Aichi, Japan and which came to be displayed on the label attached to the vehicle which Mr Begovic purchased. Approval was apparently given and the label with those fuel consumption details was affixed to the 2016 Triton that Mr Begovic purchased at Mitsubishi Berwick.

The Australian Consumer Law

28 The Australian Consumer Law ('*ACL*') is set out in sch 2 of the *Competition and Consumer Act 2010* (Cth). It prohibits misleading or deceptive conduct:

> **18 Misleading or deceptive conduct**
>
> (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.[22]

29 The ACL contains a consumer guarantee as to the acceptable quality of goods:

> **54 Guarantee as to acceptable quality**
>
> (1) If:
>
> (a) a person supplies, in trade or commerce, goods to a consumer; and
>
> (b) the supply does not occur by way of sale by auction;
>
> there is a guarantee that the goods are of acceptable quality.
>
> (2) Goods are of acceptable quality if they are as:
>
> (a) fit for all the purposes for which goods of that kind are commonly supplied; and
>
> (b) acceptable in appearance and finish; and
>
> (c) free from defects; and
>
> (d) safe; and

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20 CB 324.
21 CB 330.
22 See also *Australian Consumer Law* s 29.

(e) durable;

as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard as acceptable having regard to the matters in subsection (3).

(3) The matters for the purposes of subsection (2) are:

(a) the nature of the goods; and

(b) the price of the goods (if relevant); and

(c) any statements made about the goods on any packaging or label on the goods; and

(d) any representation made about the goods by the supplier or manufacturer of the goods; and

(e) any other relevant circumstances relating to the supply of the goods.

(4) If:

(a) goods supplied to a consumer are not of acceptable quality; and

(b) the only reason or reasons why they are not of acceptable quality were specifically drawn to the consumer's attention before the consumer agreed to the supply;

the goods are taken to be of acceptable quality.

(5) If:

(a) goods are displayed for sale or hire; and

(b) the goods would not be of acceptable quality if they were supplied to a consumer;

the reason or reasons why they are not of acceptable quality are taken, for the purposes of subsection (4), to have been specifically drawn to a consumer's attention if those reasons were disclosed on a written notice that was displayed with the goods and that was transparent.

30 The ACL also contains a consumer guarantee for goods supplied by description:

56 Guarantee relating to the supply of goods by description

(1) If:

(a) a person supplies, in trade or commerce, goods by description to a consumer; and

(b) the supply does not occur by way of sale by auction;

there is a guarantee that the goods correspond with the description.

259 Action against suppliers of goods

(1) A consumer may take action under this section if:

(a) a person (the *supplier*) supplies, in trade or commerce, goods to the consumer; and

(b) a guarantee that applies to the supply under Subdivision A of Division 1 of Part 3-2 (other than sections 58 and 59(1)) is not complied with.

(2) If the failure to comply with the guarantee can be remedied and is not a major failure:

(a) the consumer may require the supplier to remedy the failure within a reasonable time; or

(b) if such a requirement is made of the supplier but the supplier refuses or fails to comply with the requirement, or fails to comply with the requirement within a reasonable time—the consumer may:

(i) otherwise have the failure remedied and, by action against the supplier, recover all reasonable costs incurred by the consumer in having the failure so remedied; or

(ii) subject to section 262, notify the supplier that the consumer rejects the goods and of the ground or grounds for the rejection.

(3) If the failure to comply with the guarantee cannot be remedied or is a major failure, the consumer may:

(a) subject to section 262, notify the supplier that the consumer rejects the goods and of the ground or grounds for the rejection; or

(b) by action against the supplier, recover compensation for any reduction in the value of the goods below the price paid or payable by the consumer for the goods.

(4) The consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.

(5) Subsection (4) does not apply if the failure to comply with the guarantee occurred only because of a cause independent of human control that occurred after the goods left the control of the supplier.

(6) To avoid doubt, subsection (4) applies in addition to subsections (2) and (3).

(7) The consumer may take action under this section whether or not the goods are in their original packaging.

31 The ACL defines a major failure to comply with a consumer guarantee as follows:

260 When a failure to comply with a guarantee is a major failure

(1) A failure to comply with a guarantee referred to in section 259(1)(b) that applies to a supply of goods is a major failure if:

(a) the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure; or

(b) the goods depart in one or more significant respects:

(i) if they were supplied by description—from that description; or

(ii) if they were supplied by reference to a sample or demonstration model—from that sample or demonstration model; or

(c) the goods are substantially unfit for a purpose for which goods of the same kind are commonly supplied and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose; or

(d) the goods are unfit for a disclosed purpose that was made known to:

(i) the supplier of the goods; or

(ii) a person by whom any prior negotiations or arrangements in relation to the acquisition of the goods were conducted or made;

and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose; or

(e) the goods are not of acceptable quality because they are unsafe.

(2) A failure to comply with a guarantee referred to in section 259(1)(b) that applies to a supply of goods is also a major failure if:

(a) the failure is one of 2 or more failures to comply with a guarantee referred to in section 259(1)(b) that apply to the supply; and

(b) the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of those failures, taken as a whole.

Note: The multiple failures do not need to relate to the same guarantee.

(3) Subsection (2) applies regardless of whether the consumer has taken action under section 259 in relation to any of the failures.

The Law

32 The Senior Member described the legal principles to be applied in the following passage of her reasons:

> The following principles, which were helpfully set out by Gleeson J in *Reckitt Benckiser (Australia) Pty Limited v Procter & Gamble Australia Pty Ltd* are relevant to an assessment of the manufacturer's conduct in this case:
>
> [34] The applicable legal principles in respect of misleading or deceptive conduct in advertising are well-established. They are summarised in the recent decisions of Allsop CJ in *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 634; (2014) 317 ALR 73 ('*ACCC v Coles*') at [35]-[47] and Nicholas J in *Samsung Electronics Australia Pty Ltd v LG Electronics Australia Pty Ltd* [2015] FCA 227 ('*Samsung v LG*') at [60]-[76].
>
> [35] A two-step analysis is required, addressing the following issues:

(1) whether each or any of the pleaded representations is conveyed by the advertisement; and

(2) whether each of the representations conveyed is false, misleading or deceptive or likely to mislead or deceive: *Novartis Pharmaceuticals Australia Pty Ltd v Bayer Australia Ltd* [2015] FCA 35 at [200].

[36] The causing of confusion or questioning is insufficient; it is necessary to establish that the ordinary or reasonable consumer is likely to be led into error: *ACCC v Coles* at [39].

[37] It is necessary to view the conduct as a whole and in its proper context (*ACCC v Coles* at [41]). The question whether conduct is misleading or deceptive or likely to mislead or deceive is a question of fact that must be determined in light of the relevant surrounding circumstances: *Samsung v LG* per Nicholas J at [61], applying *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; (2004) 218 CLR 592 at [109] per McHugh J. The dominant message will be of crucial importance: *ACCC v Coles* at [42], citing *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; (2013) 250 CLR 640 ("TPG") at [45].[23]

33 In the High Court's judgment in *Australian Competition and Consumer Commission v TPG Internet Pty Ltd*,[24] the plurality stated that:

> Conduct is misleading or deceptive, or likely to mislead or deceive, if it has a tendency to lead into error. That is to say there must be a sufficient causal link between the conduct and error on the part of persons exposed to it. It is in that sense that it can be said that the prohibitions in ss 52 and 18 were not enacted for the benefit of people who failed to take reasonable care of their own interests.[25]

The VCAT hearing

34 Mr Begovic submitted that the dispute before the Tribunal was essentially a factual one – whether he had established that the vehicle used excessive fuel when compared with the label's fuel consumption figures or whether, as the dealer and manufacturer had submitted, that the vehicle performed as claimed. Mr Begovic's case before the Court was that the label represented that the vehicle's fuel consumption when it was tested, or if it were to be tested again under relevant conditions, was or would be substantially as shown on the label. He was entitled to expect lower fuel costs from his 2016 Triton, but in fact, the reverse occurred.

35 Mr Begovic contended that at the Tribunal hearing the parties had not made submissions about the legal classification of his claims, meaning which provisions of the ACL applied to them. But the applicants' originating motion and proposed notice of appeal contained

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23 *VCAT Decision* (n 2) [28].
24 (2013) 250 CLR 640.
25 Ibid 651 [39].

questions of law and proposed grounds that concerned the appropriate legal classification of the representations made by the label. Mr Begovic argued that those questions and grounds were not valid matters for appeal as the applicants did not ask the Tribunal to decide any issue other than his claim that the label contained misleading representations. In the Tribunal, the present applicants argued that the vehicle's fuel consumption was as stated on the label and therefore Mr Begovic's case should be rejected.

36 At the commencement of the Tribunal hearing, counsel sought leave to appear for Mr Begovic. Mitsubishi's National Manager Field Services, Mr M Miller objected. The Senior Member gave leave but stated:

> I note that as a matter of law, the respondent's not going to be disadvantaged. Because I'll ensure that if there's anything that needs explaining to you – because Mr Gottschall might know it, or from a legal perspective, then I'll make sure that you are aware of that and have an opportunity to consider things.
>
> So I'm comfortable that you're not going to suffer a disadvantage by reason of having Mr Gottschall appear, and I'm satisfied that the tribunal in the circumstances will probably be assisted.[26]

37 Counsel for Mr Begovic opened his case in the Tribunal contending that the label made representations as to the vehicle's fuel economy with the crux of his complaint being the vehicle's fuel consumption.[27] He had suffered loss or damage by purchasing a vehicle with a much higher fuel consumption than he wanted and, by using more fuel, it was more expensive to run. His unchallenged evidence was, that based on his adjustment of the label's fuel consumption figures for real world driving conditions, he expected the vehicle to use 8.5 L/100km driving extra urban whereas he used 12.44 L/100km, which was about 4 litres more for every 100km.

38 In addition to Mr Begovic's evidence, he called the expert evidence of Ms A Winkelmann. Mr Miller and Mr C Carpenter, Technical Services Manager, Victoria and Tasmania, gave evidence in Mitsubishi and Northpark's case.

Mr Begovic's evidence

39 The Senior Member accepted Mr Begovic's evidence stating that he presented as an honest

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26 VCAT T 4.
27 T 11.

witness who gave his evidence unguardedly and without exaggeration.[28] She summarised that evidence as follows:

> i At the time of purchase, he was looking to improve the fuel consumption he was achieving on his 2008 Mitsubishi Triton. He expected the vehicle to achieve 8.5 litres per 100 km on Extra Urban considering the driving conditions. The label stated 6.8 L/100 km Extra Urban. Consumption varies depending on factors such as weight in the vehicle, use of air-conditioning and the like. He knew this from his experience with his 2008 vehicle;
>
> ii He compared the fuel consumption on the vehicle's label with the fuel consumption on his 2008 vehicle's label. It was better. The vehicle was to be driven under the same conditions as his 2008 vehicle;
>
> iii He relied upon the information in the label;
>
> iv Fuel consumption was one reason he purchased the vehicle. He does a lot of country driving which is referred to on the label as "Extra Urban". His 2008 vehicle under the same condition for Extra Urban used about 10 L/100 km. In the same conditions the vehicle used 12.44 L/100 km. He expected the vehicle to do 8.5 L/100 km on Extra Urban;
>
> v From the outset after he purchased the vehicle, fuel consumption was much higher than the label information. He knew it would be higher given he was driving in varied conditions, but he expected it to be around 8.5 L/100 km and not 12.44 L/100 km. On the first trip he realised the vehicle used a lot more fuel. If he had known this, he would not have purchased the vehicle; …[29]

40 Mr Begovic adjusted the label's fuel consumption figures because of his experience of the 2008 Triton's fuel consumption. Because of that, and the fact that on extra urban driving, he would usually have the vehicle loaded with equipment,[30] he expected his 2016 Triton to consume 8.5 L/100km for extra urban driving.[31] That was lower than his 2008 Triton's fuel consumption of about 10 L/100km for extra urban driving because the 2016 label contained lower fuel consumption figures than the 2008 label. But, in fact, on extra urban driving, his 2016 Triton consumed 11-12 L/100 km.

41 Mr Begovic's 2008 Triton consumed petrol at a rate halfway between the figures for extra urban and combined shown on its fuel consumption label and he expected the same rate to apply in respect of the figures shown on the label of his 2016 Triton.[32] But, he said that the fuel consumption figures on the label for his 2016 Triton were 'totally wrong'.[33] On his first

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28 *VCAT Decision* (n 2) [67 c].
29 Ibid [11](i)-(v).
30 CB 36.
31 VCAT T 11.
32 CB 16.
33 VCAT T 12.

trip in his new Triton, he realised it was using 'way more for fuel' than his old vehicle.' His new Triton was consuming 3 litres per 100 kilometres more than he expected.[34] He said 'If I knew that was the case, I never would've bought [the vehicle].' [35] The real problem was with fuel consumption on extra urban driving, which was his main use of the vehicle. He kept 19 fuel receipts for his fuel purchases between January 2017 and May 2018 and recorded his kilometre readings based on filling the fuel tank when nearly empty. He would fill the tank to full and then restart the vehicle's tripmeter from zero. The receipts included one for 14 January 2017, eleven days after he received the Triton, which reflected fuel consumption of 9.72 L/100 km. The others were for fuel purchases made between 15 September 2017 and 10 May 2018 which all reflected fuel consumption of over 10 L/ 100km. Based on this information, the vehicle's fuel consumption compared with the label was:[36]

Consumption	Label	Actual Consumption
Combined	7.6 1/100 km	11.39 1/100 km
Urban	9.0 1/100 km	11.01 1/100 km
Extra Urban	6.8 1/100 km	12.44 1/100 km

42 He took the vehicle to the dealer on three occasions and asked for the fuel consumption to be checked. He took the vehicle to another Mitsubishi dealer as well. On each occasion, no faults were found.

Testing results

43 In addition to Mr Begovic's evidence concerning fuel consumption, the Tribunal had the evidence of the joint testing, the Vipac testing and Ms Winkelmann's testing.

Joint Test 9 August 2018

44 After a compulsory conference, the Tribunal by agreement, made directions for the parties to conduct a joint test of the vehicle's fuel consumption. The parties agreed that if the fuel usage for Extra Urban was below 7.3 L/100km over the specified drive route, the case would be

34 VCAT T 14.
35 VCAT T 12.
36 *VCAT Decision* (n 2) [11](vi).

finalised with no further action required. There was no agreement about what would happen if the fuel usage was higher than 7.3 L/100km. The test took place on 9 August 2018. Three test drives were undertaken to determine extra urban fuel consumption. Mitsubishi's technician drove for tests one and three and Mr Begovic drove for test two. Mr Begovic recorded an average result of 8.58 L /100km and the manufacturer an average result of 8.5 L/100km, both of which were considerably higher than the fuel consumption recorded on the label.[37] The results of the joint 9 August 2018 on-road tests on the vehicle for extra urban driving taken from the manufacturer's testing equipment, which the Tribunal accepted, were:[38]

Test	Fuel	Litre/100 km
1	9.2	8.63
2	9.1	8.54
3	8.9	8.35

(The average of these results is 8.5 1/100 km Extra Urban.)

Ms Winkelmann's evidence

45 As part of Mr Begovic's case at VCAT, Ms Andrea Winkelmann of ABMARC Pty Ltd gave expert evidence. She holds a Bachelor of Engineering (Automotive) degree, has 25 years' experience in tests of automotive engines, calibration and fuel systems and development. She has conducted and supervised hundreds of real world and laboratory tests for fuel consumption, diagnostic and emissions purposes. She worked as the Assistant Manager and Verification and Validation Program Lead for the Global Zeta Platform at GM-Holden, where she was responsible for the project management of vehicle/engine testing and vehicle system verification to ensure that worldwide emissions standards, diagnostic functions and fail safe features conformed to the relevant regulatory requirements. She also worked in the United Kingdom for three years as a research engineer on diesel engine designs to improve fuel efficiency and emissions. She has also worked for original equipment manufacturers, suppliers and oil companies. She emigrated to Australia in 2005 to take up a position with Ford as the Senior Quality Engineer. She gave evidence about the fuel consumption label regime required of vehicle manufacturers by ADR 81/02.

46 For the purposes of preparing her report, she tested Mr Begovic's 2016 Triton fuel efficiency

37 CB 107; VCAT T 24.
38 *VCAT Decision* (n 2) [16](iv).

twice under different conditions. Test one was the standard New European Driving Cycle ('NEDC') test in accordance with ADR 81/02. NEDC testing is a driving cycle designed to assess the emission levels of car engines and fuel economy in passenger cars. The second test involved a heavy high-speed drive cycle and increased load to simulate customer in-use driving conditions. The results were as follows:[39]

Test Configuration	Drive Cycle	Fuel Consumption (L/100 km)	Type of Fuel Consumption	Difference between actual and claimed FC
Standard (Manufacturer Claims)	NEDC	7.6	Combined	N/A
		9.0	Urban	N/A
		6.8	Extra urban	N/A
Standard (Test Vehicle)	NEDC	9.6	Combined	26.6%
		10.6	Urban	17.8%
		9.3	Extra urban	36.8%
Heavy	High Speed	10.6	Extra urban	56.30%

47 Ms Winkelmann's testing produced fuel consumption of 26.6% higher for combined, 17.8% higher for urban and 36.8% higher for extra-urban driving.

48 The applicants submitted that Ms Winkelmann's testing was not strictly in accordance with ADR 81/02,[40] because she used PEMS testing,[41]but she gave evidence that it was now a requirement of compliance testing in Europe, although not required when the vehicle was tested and has a higher accuracy than laboratory testing.

49 The NEDC test results for the vehicle were significantly higher than the fuel consumption results on the label, a difference that Ms Winkelmann described as unusual and excessive. She said that typically, the discrepancy between NEDC testing results conducted by different test organisations on the same vehicle was small. In her opinion, it was unusual to see such a large discrepancy, and particularly unusual to see a discrepancy of 36.8% on an extra urban test. She said that:

> However, I note excessive fuel consumption in the extra urban segment is highly unusual and leads me to believe that it is possible that this vehicle has a serious technical issue of some kind. It was beyond the scope of work for this project to

39 Ibid [13](vi).
40 T 189.
41 Portable Emissions System measuring parts per million hydrocarbons.

investigate and determine what that issue might be.[42]

50 The Tribunal summarised Ms Winkelmann's evidence as follows:

> Based on previous ABMARK test programs, real world fuel consumption of Euro 5 vehicles is on average 19% higher than the NEDC fuel consumption figures claimed by manufacturers. ABMARK conducted a heavy high speed drive cycle test on the vehicle in order to compare the results to previous real-world measurements. In this case the test was performed in a laboratory rather than on the road due to budgetary constraints. The vehicle has a significantly higher fuel consumption than expected on the heavy high speed test which far exceeds the average previously measured for Euro 5 vehicles -56.3%. The highest she has seen before was 35% and this was a case where the manufacturer (not Mitsubishi) later admitted that having falsified their NEDC tests. In her opinion it is unusual to see such a large discrepancy but particularly very unusual to see such a discrepancy on an Extra Urban test.[43]

51 The Tribunal accepted Ms Winkelmann's evidence and preferred it to Mr Miller's.[44] It noted that Ms Winkelmann's evidence was that the label information was not true for the vehicle.[45] It accepted her evidence that the NEDC results that she obtained for the vehicle were significantly higher than the label information, 26.7% combined. It accepted her conclusion that the difference was unusual and excessive, and that any difference was usually small, less than one or two per cent and did not account for the significant variation seen in Mr Begovic's 2016 Triton.[46]

52 The Tribunal also described the following aspects of Ms Winkelmann's evidence. She adopted a multiplier of 1.3 in her road load coefficient testing. She agreed with Mr Miller that manufacturers have a choice under ADR of testing methodology. Manufacturers can use actual known figures, not available publicly, whereas she had to adopt the book values specified in the ADR in the absence of the manufacturer's information. She has undertaken testing using a manufacturer's book value as opposed to the 1.3 multiplier for road load coefficient and the results came very close to the values achieved by the book value multiplier with a 1% or 2% variance. The difference between the manufacturer's testing within ADR 81/02 using the road load curve or coast down testing, upon which the Triton's Fuel Consumption Label figures were said to be based and the testing adopted by her book values might give a slight percentage change or small difference to the results, but not the

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42 *VCAT Decision* (n 2) [56].
43 Ibid [13 ix].
44 Ibid [48].
45 Ibid [43].
46 Ibid.

percentage difference seen in the 2016 Triton. The adoption of the manufacturer's figures would not make a 20 or 30% difference to the results.[47]

53 Ms Winkelmann said that she and Vipac both used the same road load coefficient as found in ADR 79/04, which is applied or incorporated into ADR 81/02. Even if Mitsubishi had used a manufacturer's undisclosed coefficient, Ms Winkelmann's experience of similar situations was that it made little difference – less than 1% in the test results.

54 Ms Winkelmann gave evidence that ADR 81/02 incorporated ADR 79/04 which allowed for the vehicle to be tested either following the standard procedure provided by the NEDC, or through the coast down method. The Type I Test provided for in ADR 79/04 requires that the chassis dynamometer used to test be set 'so that the total inertia of the rotating masses will simulate the inertia and other road load forces acting on the vehicle when driving on the road'.[48]

55 Appendix 7 of Annex A of ADR 79/04 provides for the methods used 'to measure the resistance to progress of a vehicle at stabilized speeds on the road and to simulate this resistance of a dynamometer, in accordance with the conditions set out in paragraph 6.2.1 of Annex 4a. Paragraph 5.1 of Appendix 7 then refers to performing a coast down method on the road to determine the vehicle road load for the purpose of the test to be performed on the chassis dynamometer. When the vehicle to be tested is then installed in the stained by performing the tests and calculations in Appendix 7.

The Vipac Test

56 The Vipac (Vipac Engineers & Scientists Ltd) Test, which was commissioned by Northpark tested the vehicle in accordance with NEDC testing at Vipac's Melbourne laboratory on 6 September 2018. The combined results of three tests conducted by Vipac was an average of 7.67 L/100 km. The author of the report was not called to give evidence or his qualifications established.[49] The Tribunal found that the Vipac test was not conducted in accordance with the requirements of ADR 81/02 and therefore it did not rely on it.

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47 Ibid [13].

48 See *Vehicle Standard (Australian Design Rule 79/04 - Emission Control for Light Vehicles) 2011* Annex 4a, cl 6.2.1.

49 *VCAT Decision* (n 2) [20].

Mitsubishi's evidence

57 In addition to relying on the Vipac report, the applicants' Mr M Miller, Mitsubishi's National Manager Field Services, and Mr C Carpenter, Mitsubishi's Technical Service Manager, Victoria and Tasmania, gave evidence as part of their case. Mr Miller's evidence was that there was no defect in the vehicle. Vipac was engaged to undertake a fuel consumption test on the vehicle, but it was not an NEDC report. He was not a technical expert and did not reject or comment on Ms Winkelmann's evidence about the percentage difference in testing that used the coast down method and testing relying upon book values provided for in ADR 81/02 or 79/04.[50]

58 Mr Miller said that the label's fuel consumption figures were from coast down testing method, which is permitted under ADR 81/02 and not from the Standard level or the 'book value'. The coast down method calculates the coefficient or load number to be used in the dynamometer rather than relying on the book value coefficient contained in the ADR. It may produce significantly different numbers as a result. Ms Winkelmann, when recalled to give further evidence, said that in her experience the coast down method made little difference to the results she had obtained taking a coefficient of 1.33 obtained from the ADR 81/02. The Tribunal noted that Mr Miller did not reject or comment on Ms Winkelmann's evidence in that regard. The applicants did not call expert evidence.

59 I do not accept that the applicants were unaware that they were attending the final hearing of Mr Begovic's application. A number of directions hearings and conferences in the proceeding had occurred prior to the hearing date being fixed. Mr Miller should have known that 17 April 2019 was the day of the final hearing. On 8 November 2018, a Registrar sent a letter to the parties notifying them that a further directions hearing date had been set for 3 December 2018. On that date, a Senior Member ordered that where experts were retained their reports must be sent to the Tribunal and other parties by 4 February 2019. On 7 December 2018, a Registrar wrote to the parties that a hearing date for hearing had been set for 27 February 2019. That letter outlined that the parties needed to *immediately* serve the other party documents that they wished to rely on. Furthermore, under the heading 'What happens on the day', it is plainly apparent that the hearing was to allow a VCAT member to make a final

50 Ibid [17].

decision, that was echoed under the hearing 'When will I get a decision?' where the letter states that '[y]ou will get VCAT's final legal decision on the day or in writing several weeks later'.[51] In light of that, a reasonable person would have or should have known that the hearing, scheduled for 27 February 2019, was the final hearing in which all evidence was to be presented. On 4 February 2019, the Tribunal made orders adjourning the hearing to 17 April 2019.

60 Mr C Carpenter gave evidence about the joint testing conducted on 9 August 2018 at which he was present. He disputed that the results were accurate. He said that Mr Begovic spilt petrol on the ground when filling the car after each test and this made the fuel consumption look higher. But the spillage was no more than half a cup of fuel.[52]

Submissions made to VCAT

61 Prior to the commencement of submissions at the Tribunal hearing, the Senior Member identified the issues as being what the manufacturer needed to do to be able to say that the vehicle had been tested in accordance with ADR 81/02.[53] She considered that the label would be misleading and deceptive if the vehicle when tested under ADR 81/02 did not produce the fuel consumption results recorded on the label.[54]

62 The Senior Member permitted Mr Begovic to describe his case when he thought that the discussion had 'gone off topic'. The following exchange occurred:

> Mr Begovic: The issue is the fact I bought a vehicle with a certain label, I compared it to the vehicle prior to purchase with the label I had on my old vehicle and I expected the difference. How much more - - -
>
> Senior Member: I can tell you that unless you went and spoke to the salesperson and says, "This is what I'm doing" and they confirmed that was the right thing to do, what you did in comparing it with a previous vehicle is neither here nor there for what the respondent is responsible for. So what the manufacture is responsible for is the sticker it puts on its vehicle telling you what the fuel consumption is for that vehicle based on its testing. The fact you might have had another vehicle with another sticker and you compared the two, that's a matter for you. The manufacturer can't be held responsible for what you do with information and how you compare your hire car.

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51 CB 389-390.
52 *VCAT Decision* (n 2) [18].
53 VCAT T 79.
54 VCAT T 80.

Mr Begovic: I totally understand that.

Senior Member: So what this case is all about is whether or not the representation made on the sticker on the vehicle was accurate or not.

Mr Begovic: I'm comparing the same manufacturers, the same information on both vehicle. Both vehicles were identical with the exception of different models.

Senior Member: And that earlier vehicle, that's not something – so the way your case has been presented … I'm not interested in that earlier vehicle. …[55]

Senior Member's statements to Mr Miller

63 After those discussions with Mr Begovic and his counsel, the Senior Member informed Mr Miller that this was not a situation where the Tribunal was considering a minor or major failure or defect in the vehicle, but was a case of a potential misrepresentation.[56] When Mr Miller asked if that was similar to an implied warranty under the ACL, the Senior Member replied that it was not and that it was simply about whether or not something that was represented was found not to have been the case:

Senior Member: So to explain to you, Mr Miller, if I find there is misleading and deceptive conduct, then the damages that we assess is to put the party in the position as if the conduct had not occurred. Usually that's then to put them in apposition as if they hadn't bought the car. So this is not a situation where we're talking about minor or major failure of a defect in a vehicle, this is simply if I find that there was a misrepresentation, if I find the applicant relied upon it in purchasing the vehicle, then the usual order would be that the applicant be put back in the position as if he hadn't purchased the vehicle.

Mr Miller: that's similar to an implied warranty under the ACL, is that a similar sort of thing you're talking about?

Senior Member: No, actually it's quite - - -

Mr Miller: A bit different?

Senior Member: Yes, this is just about whether or not something was represented that was found not to be the case. I mean there doesn't have to be an intention to deceive or anything like that, it's completely separate to whether or not it's said to have anything wrong with the vehicle or false with the vehicle that would require repair or remedy or anything like that so you could have a representation that might cost $5 to fix but if it's a representation that was wrong and misleading and someone relied upon it, then you can undo the whole situation that arose from that representation notwithstanding

55 VCAT T 80–81.
56 VCAT T 95.

> the monetary amount to fix it is so minor. So it's quite different to the idea of, you know, whether or not there's something that needs to be sort of fixed up, whether it's fit for purpose, for any of those sorts of things, just don't come into it.[57]

64 This exchange is important because the applicants' case is that, as a result, they understood that they were not facing a case based on alleged contraventions of ss 54 or 56.

65 Mr Begovic's counsel then submitted that the manufacturer of the 2008 and 2016 Tritons had made a representation by the label, that the 2016 Triton was more fuel efficient.[58] He argued that the purpose of the labels was to enable consumers to compare vehicles when considering which to purchase.[59]

66 Following that submission, the Senior Member said that she understood Mr Begovic's case as follows:

> So you're saying basically your client has – yes, if the way the tests were done were going to be - that a consumer's entitled to have the same type of vehicle with some differences but it doesn't really matter what the engine size is, it doesn't matter all these things, the test that is done that would lead to that sticker, it's reasonable to expect would be the same from the manufacturer so if your client was thinking by purchasing this new vehicle the combined test was going to be 7.6 instead of his old 9.1 and that's reasonable to do regardless of how the testing was done because the stickers would suggest it should be like for like.[60]

67 The Senior Member noted that the case had been pleaded as a s 18 misleading and deceptive conduct case and that there was no suggestion or evidence that the Triton contained a defect.[61] This accorded with the directions given the previous year by a Deputy President:

> [T]hat the legal issue raised by the Applicant in his claim that the advertised fuel consumption of the motor vehicle purchased from the Respondents was inaccurate, is that the Respondents engaged in misleading and deceptive conduct in trade or commerce contrary to s 18 of the Australian Consumer Law.[62]

68 Mr Begovic submitted that the representations on the vehicle's label were unreliable and misleading, particularly to a consumer purchasing a new model of their existing vehicle and relying on the label.[63]

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57 VCAT T 95-96.
58 VCAT T 86–87.
59 VCAT T 87.
60 VCAT T 84.
61 VCAT T 86-87.
62 CB 404.
63 VCAT T 94.

69 The applicants submitted that the vehicle did what was represented on the label and that its accuracy had been proved by the Vipac test.[64] The applicants contended that the label made no representation about the vehicle – it was either a statement of historical fact or a non-binding opinion about the future.

The Senior Member's conclusions about the evidence

70 The Senior Member in her reasons made the following statements about the representations that a reasonable consumer would take from the label, whether they were misleading or deceptive and evidence about them.

> The representation, which is not in dispute, is that the vehicle's fuel consumption is tested in accordance with ADR 81/02 was (L/100km) 7.6 combined tests, 9.0 urban and 6.8 extra urban. The representation is qualified by the words the 'actual fuel consumption and CO_2 emissions depend on factors such as traffic conditions, vehicle conditions and how you drive'.[65]

71 However, the Senior Member also stated in respect of the joint tests:

> In relation to the test results for the 9 August 2018 jointly conducted tests, I prefer the results recorded by the manufacturer as they were taken directly from the vehicle and are likely to be more accurate. In any event, the difference between Mr Begovic's results and the manufacturer's results are minuscule. Those tests are not determinative that the label information is false. They support Mr Begovic's argument that the label is inaccurate. The test demonstrated that the label results could not be reproduced in an "on-road" test and the vehicle could not reach a fuel consumption rate below 7.3 l/100 km as the parties had hoped to achieve prior to the testing.
>
> This does not of itself mean the label information was inaccurate.
>
> I accept that Mr Begovic's actual experience of fuel consumption, based on 19 fuel receipts, for the vehicle was an average of 12.44 l/100 km on Extra Urban driving. This finding does not however mean that the information in the label was wrong. The label is not representing anything other than that, based on testing conducted in accordance with ADR 81/02, the fuel consumption figures are as stated in the label.
>
> Ms Winklemann's evidence is that the label information is not true for the vehicle.
>
> …
>
> I prefer the evidence of Ms Winkelmann to that of Mr Miller where they differ for the following reasons:
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> i. Ms Winkelmann is a qualified engineer and an expert in automotive engineering;
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> ii. There was no evidence that Mr Miller has any technical qualifications;
>
> iii. Ms Winklemann gave her expert opinion based on testing she arranged and

64 VCAT T 93.
65 *VCAT Decision* (n 2) [36].

from her personal experience conducting fuel consumption tests based on both the coast down method and the book value method;

iv. Ms Winklemann explained the basis of her conclusions and had personal knowledge of the variances to be expected in test results using the different methodologies allowed for under the ADR.

v. Mr Miller personally undertook no testing. He did not provide any evidence to support his statements. He relayed technical information to the Tribunal sourced from unidentified technicians. The technicians did not give evidence;

vi. The test results in Ms Winkelmann's report were not challenged.

For the reasons stated, I accept Ms Winkelmann's evidence, it being the only expert evidence in this case, that the NEDC results she obtained for the vehicle are significantly higher than the label information (26.7% combined). I accept her conclusion that the difference is unusual and excessive. I also accept her evidence that the variation expected in the results from different testing methodologies within ADR 81/02 is small, less than 1 or 2% and does not account for the significant variation seen in this vehicle.

…

I accept the uncontradicted evidence of Mr Begovic that the fuel consumption he experienced from the vehicle under the same driving conditions to his 2008 vehicle was much higher. I accept his reliance, again unchallenged, that the vehicle would have a better fuel consumption than his 2008 vehicle (6.8 L/100 km compared with 7.8 L/100 km) based on the label. I accept the, again unchallenged, evidence that his experience was that the vehicle used more fuel than the 2008 vehicle in the same driving conditions. The label represented that it was more fuel efficient than the 2008 model.[66]

72 The Senior Member found that the applicants had breached s 18 of the ACL. Her path of reasoning, as is apparent from the above passages, was as follows. She concluded that the label was not representing anything other than that, based on testing conducted under ADR 81/02 that the fuel consumption figures were as stated on the label.[67] However, she accepted Ms Winkelmann's evidence, who was the only expert called in the case, that her NEDC testing results from the Triton were significantly higher than the label information, 26.7% combined higher, and that the difference was 'unusual and excessive'. Ms Winkelmann's evidence was that the variation expected in the results from different testing methodologies permitted under ADR 81/02 was small, less than 1 or 2% and did not account for the significant variation seen in Mr Begovic's vehicle.[68] The Senior Member stated that Ms Winkelmann's evidence was that the label information was not true for the vehicle.[69]

66 Ibid [40]-[43], [47]-[48], [50].
67 Ibid [42].
68 Ibid [48].
69 Ibid [43].

The Senior Member's conclusions about the Fuel Consumption Label

73 The Senior Member expressed the following conclusions about the label:

> **ISSUE 1 – IS THE LABEL MISLEADING OR DECEPTIVE?**
>
> Based upon my findings set out above, I conclude that the label was misleading and deceptive for the vehicle. My finding is limited to the vehicle subject of these proceedings.
>
> The label information was false based on the expert evidence. It misled Mr Begovic to believe the vehicle had certain fuel consumption characteristics it did not have. He relied upon the representation in the label in making his decision to purchase the vehicle. He wanted a vehicle with a better fuel consumption than his 2008 vehicle. In purchasing the vehicle, he did not get what was represented to him by the fuel label. He suffered a loss by reason of increased fuel costs which he did not bargain for when purchasing the vehicle.
>
> …
>
> As set out previously, I found that the label contained representations about the vehicle which were untrue. … A reasonable consumer in Mr Begovic's position would not have found the vehicle to be of acceptable quality in circumstances where its fuel consumption was substantially more than represented by the label.
>
> …
>
> The fuel consumption of the vehicle departed in a material sense from the description of fuel consumption in the label.[70]

74 I take the Senior Member's reference to the vehicle's characteristics to refer to its fuel consumption, which was a feature of the vehicle. I accept that that feature was particularly important for Mr Begovic and would be for many purchasers.

75 The Senior Member limited her findings to the vehicle the subject of the proceeding. In summary of the passages quoted, she concluded that 'the label was misleading and deceptive for the vehicle' and the information was false based on the expert evidence. She concluded that the label misled Mr Begovic to believe that the vehicle had certain fuel consumption characteristics that it did not have. He relied upon the representations on the label in deciding to purchase the vehicle; he wanted a vehicle with a better fuel consumption than his 2008 Triton. Therefore, in purchasing the vehicle, he did not get what the label represented to him. He suffered a loss because of increased fuel costs which he did not bargain for when purchasing the vehicle.[71]

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70 Ibid [51]-[52], [61]-[62].
71 Ibid [51]-[52].

The representations contained on the label

76 Having set out a number of passages from the Senior Member's reasons, it is appropriate at this point to identify her findings about the representations contained on the label. In doing so it has to be kept in mind that the applicants' case at the Tribunal was that the 2016 Triton could achieve the fuel consumption figures stated on the label.

77 As mentioned, at one point in her reasons the Senior Member stated that the label was not representing anything other than that, based on testing conducted in accordance with ADR 81/02, the fuel consumption figures were as stated on the label.[72] But when her reasons are read as a whole, it is clear that the Senior Member found, based on the expert evidence, that the Fuel Consumption Label contained representations that were misleading and deceptive and false or untrue for the vehicle.[73] There being no dispute that the test results shown on the label were accurate as to the testing that Mitsubishi had relied on to obtain approval for the vehicle model, the Senior Member's finding appears clearly enough to have been that the label information was misleading and deceptive because the test results contained on it were not reflected in the fuel consumption that Mr Begovic experienced with his 2016 Triton from the time he took delivery of it after he had made an adjustment for real world driving conditions. In addition, the test results were not repeated by the testing conducted by Ms Winkelmann or by the joint testing. In my opinion, the Senior Member therefore found that the label represented that the Fuel Consumption figures contained on it, were not only test results obtained in the past under ADR 81/02 testing, but could be substantially replicated under further ADR 81/02 testing. This was the primary representation upon which Mr Begovic ultimately relied before this Court.

78 The Senior Member found that Mr Begovic relied on the label's fuel consumption information to purchase the 2016 Triton. He compared the 2008 and 2016 labels and made appropriate adjustments to the figures on the 2016 label to reflect his driving and fuel consumption experience in his 2008 Triton.

79 The Senior Member also stated that 'the label represented that it [the 2016 Triton] was more fuel efficient than the 2008 model'.[74] For reasons that I give later in the judgment,[75] I do not

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72 Ibid [42].
73 See ibid [52].

consider that, when read in context, the Senior Member found that the label contained a representation in those terms.

80 The Senior Member found that both Northpark and Mitsubishi had engaged in misleading and deceptive conduct. Mitsubishi was responsible for the label information and affixing the label to the vehicle knowing that the vehicle was to be sold by the dealer, or at least a dealer in Australia. The dealer sold the vehicle with the label affixed to the front windscreen.[76]

Finding that the applicants breached ss 54 and 56 of the ACL

81 The Senior Member found that the applicants had breached s 54 in connection with the 2016 Triton sale. She found that the label could be read as a statement made on packaging or a label under s 54(3)(c) and that the label information was also a representation under s 54(3)(d). Given the matters set out in s 54(3)(c) and (d), the Senior Member found that the vehicle was not of acceptable quality and its failure to contain features required by s 54 was a 'major failure' within the meaning of s 260. A reasonable consumer in Mr Begovic's position would not have found the vehicle to be of acceptable quality in circumstances where its fuel consumption was substantially more than the label represented.[77]

82 The Senior Member also found that the applicants had breached s 56, the sale by description provision, which is part of the consumer guarantees contained in the ACL. She found that the vehicle's fuel consumption departed in a material sense from the description of fuel consumption contained on the label. Although s 56 had not been raised by the parties, the Senior Member raised it for 'completeness', and said that consideration of s 56 did not change the outcome of the proceeding.[78]

83 The Senior Member found that the breaches of the guarantees in s 54 and s 56 amounted to a 'major failure' for the purposes of the ACL.[79] She found that Mr Begovic, having relied upon the label and having been misled by it, was entitled to a remedy under the ACL.[80] The dealer

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74 Ibid [50].
75 See infra [135].
76 Ibid [53].
77 Ibid [61].
78 Ibid [62].
79 Ibid [65].
80 Ibid [68].

was taken to have misrepresented the fuel consumption of the vehicle by selling it with the misleading label.[81] Mr Begovic did not seek loss or damage nor compensation for paying more for fuel but claimed an entitlement to reject the goods and recover his purchase price.[82] The Senior Member concluded that Mr Begovic was entitled to take action against the supplier, ie, the dealer, if there had been a failure to comply with the consumer guarantees.[83] Because the contraventions of the consumer guarantees were 'a major failure based upon the reasonable consumer test',[84] Mr Begovic was entitled to reject the vehicle and obtain a refund of his purchase price from the dealer.[85] The Senior Member found that the trade in value of the 2008 vehicle and the increased fuel costs were a fair exchange for Mr Begovic's use of the vehicle since acquisition, a period of two years and four months. The Senior Member noted her understanding that there was likely to be an indemnity arrangement between the dealer and the manufacturer. If that was not the case, the dealer was not prevented by her decision from making a claim against the manufacturer.[86]

The applicants' proposed notice of appeal

84 By their proposed notice of appeal, the applicants seek to challenge each of the Tribunal's principal conclusions concerning breaches of ss 18, 54 and 56 of the ACL. The proposed notice of appeal is 10 pages in length and includes 28 questions of law and 17 proposed grounds of appeal.

85 Mr Begovic argued that a number of the questions of law and grounds of appeal relied on by the applicants had not been argued at VCAT and did not arise from VCAT's decision. These included arguments about whether the representations contained in the fuel label was about a present fact or a future matter, the proper construction of ss 54 and 56 of the ACL, whether those sections applied to manufacturers, and whether there had been a major failure of the vehicle.

86 I consider that all of the questions of law raised by the applicants arise from the Tribunal's

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81 Ibid [69].
82 Ibid [74], [83].
83 See *Australian Consumer Law* s 259.
84 *VCAT Decision* [77].
85 Ibid [82], [84]-[85]; see also *Australian Consumer Law* s 262.
86 Ibid [86].

findings. The Tribunal found breaches of ss 18, 54 and 56 of the ACL. Whether a representation has been established is a question of fact, its construction is a question of law.[87] The arguments on which the applicants rely in this proceeding directly relate to whether those sections were contravened. It is true that very little legal argument was put at VCAT and none was put about the application of ss 54 and 56. That, no doubt, is in part because the Tribunal indicated that the only section being considered was s 18. Its findings about ss 54 and 56 were new in the sense they had not been argued before it. So faced with those new findings, there is nothing unorthodox in the applicants seeking to challenge orders made on the basis of them. The Tribunal's findings about breaches of ss 18, 54 and 56 give rise to questions of law as required by s 148 of the *Victorian Civil and Administrative Tribunal Act 199*8. As Ashley JA stated:

> It is often enough the case that arguments of a purely legal character, though founded on the same bedrock, are shaped in different ways as a matter progresses from trial through appeal. Provided, in an appeal comprehended by s 148(1) of the VCAT Act, that the question of law arose before the Tribunal, the variant argument must be addressed on the appeal.[88]

87 A number of the questions and grounds overlap or are repetitive. For the purposes of identifying the issues that I need to decide in this proceeding, it is sufficient to say that if leave were granted on all grounds of appeal, the following issues would arise for determination:

(a) In respect of s 18, the misleading and deceptive conduct claim:

(i) What were the content of the representations made by the label?

(ii) What were the nature of the representations and were they of a present fact or future matter?

(b) In respect of s 54, the consumer guarantee of acceptable quality:

(iii) was there a need to identify non-compliance with s 54(2) and if so was any non-compliance established?

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87 *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* (2016) 260 CLR 1, 40 [131] (Keane J).

88 *Ovidio Carrideo Nominees Pty Ltd v The Dog Depot Pty Ltd* [2006] VSCA 6 [80].

(iv) what was the operation of s 54(3)(c) and (d)?

(v) what characteristics of the reasonable consumer applied and did the Tribunal err in applying the reasonable consumer test contained in ss 54 and 260?

(vi) at what time was the compliance of the vehicle with the consumer guarantees to be considered?

(vii) did the Tribunal fail to consider or apply s 54(4)(b)?

(viii) could s 54 apply to Mitsubishi as a manufacturer?

(c) In respect of s 56, the consumer guarantee of sale by description:

(ix) was the Tribunal's finding that the applicants breached s 56 a denial of procedural fairness?

(x) was the fuel consumption of the 2016 Triton a description of it for the purposes of s 56?

(xi) did s 56 apply to Mitsubishi as a manufacturer?

The s 18 proposed grounds of appeal - what were the content and nature of the representations made by the label? - the misleading and deceptive conduct case[89]

The applicants' submissions about the s 18 grounds

88 The applicants contended that s 18 of the ACL should be read as not prohibiting conduct otherwise required under ADR 81/02, including the act of affixing a Fuel Consumption Label to a vehicle when there was no evidence that the label did not comply with that obligation. The label was required by law.

89 In **ground 1**, the applicants contended that in determining the content of the representations made by the label, the Tribunal erred in failing to have regard to the whole of it, including the statement 'More information at www.greenvehicleguide.gov.au' and the information at that site which it was said was incorporated by reference. The Tribunal also failed to have regard to the statutory regime that mandated the affixing of the label to the vehicle and prescribed

89 Questions of Law 1, 2, 3, 7-11; Grounds 5-7.

the information to be contained in it.

90 The label represented only that the model of the vehicle had been tested in accordance with ADR81/02 at the time of certification and that the results of this testing had been reported to the Government and were displayed as required by law. There being no evidence before the Tribunal as to the test results at certification, it was not open to it to find that the representation was false or that Mitsubishi or Northpark had breached s 18.

91 The label made no representation as to the Triton's fuel consumption and did not tell consumers what fuel consumption they would obtain when driving it.[90] The label expressly stated that the actual fuel consumption of the vehicle could vary from that contained on the label, including by reason of the condition of the vehicle and that the actual fuel consumption and CO_2 emissions depended on factors such as traffic conditions, vehicle condition and 'how you drive'. The applicants submitted that a reasonable consumer could not use their own experience driving other vehicles to read representations into the label that the fuel consumption of the 2016 Triton would be similar to a previous Triton.[91]

92 The label contained no representation of the comparative fuel consumption of the 2016 and 2008 Triton models and it was not open to the Tribunal to find that it did.

93 It is convenient to note at this point that the applicants made three responses to Mr Begovic's primary submission made in this Court and which is discussed below that the label represented that if the vehicle was retested, it would produce similar fuel consumption figures to those contained on the label. First, that this argument was not put to the Tribunal. Secondly, the Tribunal's reasons did not contain such a finding. Thirdly, if the Court was prepared to entertain such a submission, as the vehicle was not tested at the time that it left the showroom, no basis existed on which the conclusion could be drawn that the label information was false.[92] For reasons which I later give, I do not accept these submissions.

94 In **ground 3,** the applicants submitted that the Tribunal erred in finding that the fuel consumption was false based on evidence as to the fuel consumption of Mr Begovic's own

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90 T 182.
91 T 180.
92 T 191-192.

vehicle in 2019.[93] It was not alleged that the label did not accurately record the results of testing at the time of certification and as there was no evidence of underlying certification test data before the Tribunal, the Tribunal ought to have dismissed Mr Begovic's claim that the label was misleading or deceptive. Mr Begovic knew that the figures on the label were not fuel consumption figures that the Triton would achieve when he drove it. He was therefore not misled by the label.

95 The label had a purpose, it could be used to compare the vehicle's fuel consumption with another vehicle's label showing its fuel consumption under ADR 81/02 testing.

96 The applicants' contention in **ground 4** was that the Tribunal erred in finding that the label represented that the 2017 model was 'more fuel efficient than the 2008 model' and that the label was misleading or deceptive on the basis that Mr Begovic's evidence that his 2017 vehicle 'used more fuel than [his] 2008 vehicle in the same driving conditions'. In the absence of the test data at certification for either the 2008 or 2017 model, the Tribunal ought to have dismissed Mr Begovic's claim that the label was misleading or deceptive.

97 In **ground 5**, the applicants contend that the Tribunal erred in having regard to the actual performance of Mr Begovic's vehicle in 2019 in assessing the truth of the representations contained in the label. The Tribunal ought to have found that the label contained no representation as to the fuel consumption of Mr Begovic's vehicle either at the time of sale or in the future, either alone or vis-à-vis his 2008 vehicle, being a representation with respect to a future matter.

98 In **grounds 2, 6-7**, the applicants also contend about whether representations contained in the label were about a present fact or a future matter. They argued that the Tribunal erred in not considering whether any representation contained on the label was of a present fact or a future matter and should have found that it was only of a present fact being the results of testing conducted by the manufacturer at the time of certification.[94] Alternatively, if the label did contain any representation of a future matter, the Tribunal erred in finding that it was misleading or deceptive without first determining whether the dealer or manufacturer had

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93 Ibid [80].
94 Ibid [73].

reasonable grounds for making it in accordance with s 4(1)(b) of the ACL and giving the applicants the opportunity to file the test data that supported the information on the label. If it was open to the Tribunal to find that the label contained any representation of the future fuel consumption of Mr Begovic's vehicle, it ought to have found that selling it with the label affixed in compliance with the statutory rules constituted reasonable grounds for making any representation contained on the label.

99 The Tribunal granted Mr Begovic leave to be represented by counsel on the basis that the present applicants would not be disadvantaged by being unrepresented. They allege that they should have been given the opportunity to provide supporting data for the test results shown on the label and evidence about the testing method used by the manufacturer, which Mr Miller did not know would be required for the hearing on 17 April 2019.

Mr Begovic's submissions

100 Mr Begovic said his case was not complicated and was an ordinary product claim based on representations or statements contained on the label. He was entitled to take the label as containing a representation about the Triton's fuel consumption. There was no error in the Tribunal's conclusion that the fuel consumption figures on the label were incorrect or false. The issue for the Tribunal to decide was whether he had been misled by the representation.[95] A reasonable consumer would take the label as representing that the fuel consumption figures were obtained from testing under the conditions of ADR 81/02.[96] Mr Begovic argued that the label did not invite him to consult the Green Vehicle Guide, but even if he had, it would have made no difference.

101 The statutory requirement to affix the Fuel Consumption Label to the vehicle's windscreen did not absolve the manufacturer from the responsibility of inserting fuel consumption figures which would not mislead or deceive the reasonable consumer. Mr Begovic's ultimate submission to the Court was that the label contained the following representation:

> That the label provided a representation of the [fuel] consumption of the vehicle when it was tested, or if it were to be tested under relevant ADR 81/02 conditions. So a consumer seeing this label ought to appreciate from this label if the car to which it was affixed were to be tested in accordance with ADR 81/02, as the label states, [t]hat

95 T 68.
96 T 76.

the result of that testing would be substantially as shown on this label.[97]

102 This representation was false or misleading because the vehicle was tested under ADR 81/02 conditions by Ms Winkelmann and the results significantly diverged from those contained on the label. Ms Winkelmann's evidence of her testing of the vehicle in 2019 was relevant as no reason was suggested as to why at that time it would not achieve the same fuel consumption figures as when tested under ADR 81/02 as shown on the label. The parties' agreement to conduct joint testing in 2018 and the Vipac testing in the same year suggested that relevant test results could still be obtained after the vehicle had been driven for a substantial period of time.

103 The evidence clearly supported the Tribunal's finding that the label's representations were misleading at the time that Mr Begovic purchased the 2016 Triton. There was Ms Winkelmann's testing under ADR 81/02 conditions, the agreed testing results and Mr Begovic's records of fuel consumption and his driving experience in the Triton.

104 Mr Begovic submitted that the label represented that the fuel consumption was as stated when the vehicle was tested under ADR 81/02, but also would be substantially the same if it were to be so tested again. This was a representation about an existing state of affairs and not a representation of the future. The consumer would use the contents of the label to decide if the Triton was a vehicle with good fuel economy or, colloquially speaking, a 'gas guzzler'.[98] A reasonable consumer would not expect the fuel consumption of the vehicle to change significantly in its first few years.[99] In any event, the question of whether the label contained representations about a present fact or a future matter was not a matter in dispute before the Tribunal. The Tribunal found that the representations made by the label were not true at the time the vehicle was purchased and it was not required to decide whether the label made any statement concerning the vehicle's fuel consumption in the future. Furthermore, the fact that the representations were expected to remain true into the future did not make them representations with respect to a future matter. A representation as to a present fact can also have effects as to the future. In any event, if the representation had related to a future matter,

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97 T 81, see also T 93.31-94.3.
98 T 142.
99 T 110.

the applicants led no evidence as to what reasons or grounds they might have had for making the representations on the label. A reasonable consumer would not treat the label as representing a future matter, a mere opinion or forecast about the future fuel consumption of the vehicle and that interpretation of the label would not achieve the purpose of the *Motor Vehicle Standards Act 1989* of enabling informed comparisons between vehicles. The Tribunal assumed in the applicants' favour that the fuel consumption figures contained on the label conformed to the underlying test data.

105 The qualifying words on the label assumed that consumers would treat the label as representing the attributes of the vehicle, otherwise the fuel consumption figures would be unnecessary. They were contained on a label titled 'Fuel Consumption' which was prominently displayed on the windscreen of the vehicle. Most reasonable consumers would be unaware of the testing and certification process and would take the label according to its terms.

106 Mr Begovic put his case in a second way, submitting that a comparison of the 2008 and 2016 labels would lead the reasonable consumer to believe that the 2016 Triton operated with better fuel economy and lower fuel consumption under extra urban driving conditions than the 2008 Triton.[100] He formed that belief in reliance on the label. His counsel put that argument as follows:

> So if you use the new car under the same conditions as you use the old car, you may not get exactly what the label's telling you but the new car, if the label is correct, ought to be giving you better fuel economy than the old car.[101]

107 Mr Begovic did not assume that the 2016 Triton's fuel consumption would be exactly as claimed on the label, irrespective of its use, and he adjusted his expected fuel consumption for real world driving conditions. With this adjustment, he expected the vehicle to use about 8.5 L/100kms in extra-urban conditions, not 6.8 L/100kms as stated on the label. The evidence established that the vehicle did not achieve anything like that, but a substantially higher fuel consumption level. Under whatever conditions Mr Begovic drove his 2016 Triton, it consumed more fuel than the label represented - about 36% more fuel.[102]

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100 T 86-7.
101 T 100.
102 T 135.

108 Mr Begovic submitted that the representations contained on the label operated as a form of relative representation. By this, he meant that if a consumer purchased a vehicle with lower fuel consumption figures shown on its label than another vehicle, they were entitled to expect that the fuel consumption of the vehicle they purchased would be less than another vehicle they might have purchased.[103] It was open to the Tribunal to find that the label represented that the vehicle was 'more fuel efficient than the 2008 model' and that Mr Begovic had relied on that representation.

109 Mr Begovic also argued, in essence, that the label represented a form of what I would describe as a 'base line figure' from which a reasonable consumer could, employing their knowledge of fuel consumption of a previous vehicle of the same model, calculate an approximate fuel consumption level.[104] He adopted the estimate of 8.5 L/100kms in extra-urban conditions because the 2016 label represented lower fuel consumption than his 2008 Triton's label. But, the fuel consumption of the 2016 Triton was higher than his 2008 vehicle.

Analysis

The Tribunal's finding of contravention of s 18 - the content and nature of the representations contained on the label (Questions of law 1-11 and grounds of appeal 1-7)

110 The Tribunal's task was to decide whether Mr Begovic had proved that the label conveyed to a reasonable consumer the representations for which he contends. He also had to prove that the representations were misleading or deceptive or likely to mislead or deceive and that he relied on them.

111 Each of the questions of law and proposed grounds concerning the Tribunal's finding that the applicants had contravened s 18 of the ACL challenge in different ways the Tribunal's findings about the representation or representations contained in the Fuel Consumption Label and the matters that it considered or should have considered in making those findings. I have previously set out the passages of the Tribunal's reasons in which it made those findings.

112 As mentioned, Mr Begovic's ultimate argument made in this Court was that label represented that the attributes of the specific vehicle model were such that if tested again in accordance

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103 T 143.

104 See, eg, T 85.28-88.9; 91.18-23.

with ADR 81/02, the fuel consumption results would produce substantially the results stated on the label.[105] This argument was not specifically put to the Tribunal, but the essence of Mr Begovic's case was that the label's fuel consumption figures were 'totally wrong' from the time that he first drove the 2016 Triton.[106] The issue of whether, if retested under ADR 81/02, the Triton could replicate the label's fuel consumption figures was in dispute before the Tribunal as the provision of the joint testing evidence, Ms Winkelmann's evidence and the Vipac test results demonstrated. Mr Begovic also argued that the fuel consumption figures shown on the label could be used as the basis for a reliable and repeatable calculation as to actual fuel consumption. They provided a form of reference point for comparison, from which he could reliably predict actual fuel consumption.

113 The Tribunal had to decide the content and nature of representations contained on the label by reference to the terms and form of the Fuel Consumption Label as they would be read and perceived by a reasonable consumer. This task had to be completed first and separately from the expert evidence and Mr Begovic's evidence of the Triton's actual fuel consumption. There was no suggestion that the applicants made any other statement or representation about the Triton's fuel consumption, whether by way of advertisement, promotion or otherwise.

114 As mentioned, the Tribunal found that the label represented and misled Mr Begovic to believe that the Triton had 'certain' fuel characteristics that it did not have. Those characteristics were its fuel consumption figures adjusted for real world driving conditions. The Senior Member did have regard to the requirements imposed on the applicants to display the Fuel Consumption Label.[107]

The grounds of appeal

115 Turning to **ground 1**, I do accept that in determining the content of the representation made, the Tribunal was required to have regard to the whole of the label, including the statement 'More information at www.greenvehicleguide.gov.au'. But I consider that the Senior Member did take the content of the label into account as she referred to the label's qualifying words in paragraph 36 of her reasons. She did not refer to the 'more information' available at the web

105 T 93.31-94.3.
106 VCAT T 12.
107 *VCAT Decision* (n 2) [13].

site, but neither she nor a reasonable consumer was obliged to. Decisions to purchase a vehicle may often be made in the dealer's showroom without the opportunity to consult information available on a website. I do not see how that information was incorporated by reference into the label. It did no more than tell consumers where they could obtain further information if they so wished. In any event, it is unclear what additional information the reasonable consumer would have gained from the website other than to learn that the label could be used to make comparisons of fuel economy with other vehicles. The Green Vehicle Guide emphasises that the label did not contain actual fuel consumption figures, but the qualifying words on the label themselves convey that message.

116 I do not accept the applicants' contention that the contents of a fuel consumption label affixed to a vehicle as required by ADR 81/02 only represented that the model of the vehicle had been tested in accordance with that standard at the time of certification, that the results of this testing had been reported to the Government and were displayed on the vehicle as required by law (**ground 1 (a)**).

117 I accept the applicants' submission that the label represented that the 2016 Triton had been tested in accordance with ADR 81/02 and that the results of those tests were as stated on the label.[108] The label contained no representation about the Triton's actual fuel consumption (**ground 1(b)).** But, I consider that a reasonable consumer reading the label would consider that it indicated information about the vehicle's fuel consumption and that they would take it to represent that, if the vehicle was retested under ADR 81/02, it would produce similar results. After all, the label was intended to be read by consumers and was titled 'Fuel Consumption'. The reasonable consumer would be entitled to regard the fuel consumption details as an accurate base on which to make comparisons with other vehicles' fuel economy and on which to make adjustments for the real world driving conditions that the consumer was likely to encounter. Although that necessary adjustment process meant that the label did not tell the consumer what the vehicle's actual fuel consumption would be, it provided key information to enable the consumer to make an informed estimate of what the actual fuel consumption would be.

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108 CB 493.

118 The label's purpose was to assist and not mislead consumers by enabling comparison with fuel consumption figures shown on other vehicles and to learn what they achieved under laboratory testing in accordance with ADR 81/02. This would enable consumers to form a view as to which vehicle was more likely to be fuel efficient in a general sense. The Vehicle Green Guide described that comparison as one of the label's purposes. Mr Begovic carried out such a comparison with his 2008 Triton's label. Ms Winkelmann's evidence established that the fuel consumption figures on the label could not be repeated under further ADR testing. Therefore, the label's display of those figures would mislead or deceive or be likely to mislead or deceive a reasonable consumer who was comparing the 2016 Triton with another vehicle. It may lead the consumer to an incorrect decision about which vehicle was more fuel efficient. Whatever adjustments the consumer made to take account of the label's qualifying words, the reasonable consumer was likely to end up being misled about the Triton's fuel economy when comparing its label with that affixed to another vehicle. Mitsubishi bore the responsibility of ensuring that the testing conducted on the 2016 Triton would produce fuel consumption figures that could be replicated.

119 A reasonable consumer would also expect to be able to rely on the fuel consumption figures as a form of baseline from which an adjustment could be made to reflect real world driving conditions. But if the 'baseline figures' were inaccurate and not capable of replication, any such adjustment would be likely to be inaccurate. As mentioned, I accept that the Label did not contain a representation that under real world driving conditions the vehicle would achieve the actual fuel consumption figures contained on the Label.[109] Fuel consumption under those conditions would be at a higher level, probably approximating the consumption that Mr Begovic had experienced with his 2008 Triton, about 17% higher than the figures on the Label. Ms Winkelmann's evidence was that based on previous ABMARC test programs, real world fuel consumption of Euro 5 vehicles was on average 19% higher than the NEDC fuel consumption figures claimed by manufacturers.[110]

120 The parties agreed that a purpose of the Fuel Consumption Label was to enable comparison between one vehicle and another. I accept that the label could be used to make a comparison

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109 T 109.6-14, 122.20-123.1-10.

110 *VCAT Decision* (n 2) [13 ix].

of fuel consumption between the same model of vehicle from different years, subject of course, to consideration of the qualifying words. In any event, the Label would have misled a reasonable consumer comparing the 2016 Triton's fuel consumption with the fuel consumption of any other vehicle. The Label was intended to compare the fuel efficiency of one vehicle with another by comparing their labels. That use of the Label was envisaged by the Green Vehicle Guide and Mr Begovic used it in that manner.

121 When the qualifying words on the Label are taken into account, I do not consider that a reasonable consumer would read the Label as stating or representing that he or she would achieve the fuel consumption stated when driving the Triton. A reasonable consumer would expect that the fuel consumption figures would vary from person to person and would not be the figures contained on the Label. The actual fuel consumption might depend on how many passengers and luggage the vehicle carried, whether a trailer or caravan was being towed and whether air conditioning was being used. But, one purpose of the Label was to enable comparisons about fuel efficiency to be made between vehicles so that consumers could reliably compare the performance of different models under the same testing process. I consider that a comparison between two vehicles of the same type, although models of different years, ie, 2008 and 2016 Tritons, would be a reasonable use of the label information. While the label contained no representation as to the comparative actual fuel consumption of the 2008 and 2016 Triton models, the representation that the fuel consumption figures could be replicated under ADR 81/02 testing enabled a comparison of the two models' fuel economy to be made.

122 But, that comparison is a different use of the label than to suggest that it represented that the 2016 Triton was more fuel efficient than the 2008 Triton. That is because the Label expressly stated that fuel consumption depended on how and in what conditions the vehicle was used. As Mr Begovic knew from experience, he would not obtain the fuel consumption stated on the Label when driving his 2016 Triton. I do not consider that the label contained the representation that the 2016 Triton was more fuel efficient than the 2008 Triton. **(Ground 1(c))**

123 I do not accept that the contents of a compulsory label could never be misleading or deceptive

conduct or conduct likely to mislead or deceive, for example if the results of the testing were incorrectly recorded, the label would have that effect. A reasonable consumer may rely on its contents, which of course includes the qualifying words:

> 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.[111]

124 The need for those qualifying words recognises that some consumers are likely to rely on the contents of the label. As the Tribunal stated:

> Where manufacturers engage in contravening conduct by providing incorrect information, with an awareness that the information is likely to be passed to a third party a manufacturer will be liable for any loss flowing from the latter's reliance upon the information. That is the case here. The fuel label contained information relevant to both the performance and running costs of the car. The manufacturer would certainly know that the information contained on the label would be scrutinised and, no doubt, relied upon by prospective purchasers.[112]

125 Compulsory labelling can be misleading or deceptive if it inaccurately records information about the goods which it is obliged by law to describe accurately. The purpose of the compulsory labelling required by ADR 81/02 is to promote the choice of energy saving vehicles and that can only be achieved if accurate labelling information is presented to consumers. Consumers would mostly have no idea of the certification process or that the testing of the model had been conducted in Japan and approved in Brussels or the suggestion that the labelling did no more than report the results of testing performed for such certification.

126 Section 18 of the ACL does not require an intent to mislead or deceive. Even without the statutory requirement for the label, if a Mitsubishi dealer told a consumer the results of official testing of the vehicle's fuel consumption and added the qualification that the figures would need adjustment for real world driving conditions, a consumer may well rely on those figures in concluding whether the vehicle consumed fuel economically.

127 While Mitsubishi was required to use the exact wording and layout of the label,[113] the issue is not why it attached the label to the vehicle, but what the fuel consumption information it

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111 ADR 81/02 cl 1, figures 1 and 2.
112 *VCAT Decision* (n 2) [32].
113 ADR 81/02 cls 2, 4.

added, when read with the whole of the label, conveyed to a reasonable consumer. Although required by law, the label is titled 'Fuel Consumption' and conveyed information about the vehicle's fuel consumption, including that it had been tested in accordance with ADR 81/02. A reasonable consumer would read the qualifying words in the label and make some adjustment to their expected likely fuel consumption from the vehicle when comparing the vehicle with other vehicles, but not regard the fuel consumption figures as meaningless. The consumer could only make a reasonably accurate comparison with the fuel consumption of other vehicles if the testing results could be replicated under ADR 81/02 testing. The manufacturer, in this case Mitsubishi, could ensure that that was achieved.

128 I do not accept the applicants' **second ground of appeal,** that it was necessary for the Tribunal to decide whether the representations about fuel consumption contained on the label concerned a present fact or were with respect to a future matter. Ground 2 contends that, having accepted that the representation was as to the fuel consumption results of testing that had been conducted 'during certification' in accordance with ADR 81/02 and provided to the Australian Government, the Tribunal ought to have found that the representation was as to a present fact, being the results of testing conducted at the time of certification. The parties appeared to agree that it was not open for the Tribunal to find that the label made representations with respect to future matters. Mr Begovic's case was that the label represented the Triton's fuel consumption at the time of sale, when it was supplied to him. The applicants contended in response that the fuel consumption information recorded on the label was correct and in any event recorded the results of testing previously conducted. In those circumstances, I do not see that the Tribunal was required to address the issue of whether the representations of fuel consumption were about a future matter.

129 The Full Federal Court in *Australian Competition and Consumer Commission v Woolworths Group Ltd* said of representations about future matters that:

> We do not think that, generally speaking, a representation about the nature, quality, character or capability of a product based upon its inherent characteristics is a representation with respect to a future matter. A representation will only be with respect to a future matter if it is in the nature of a promise, forecast, prediction or other like statement about something that will only transpire in the future — that is, a representation which is not capable of being proven to be true or false when made. This interpretation of '… a representation with respect to a future matter' in s 4(1) is the interpretation propounded by Nicholas J in *Samsung* by Rares J in *Ackers v*

Austcorp International Ltd and by Gleeson J in *Kimberly-Clark*.[114] (citations omitted)

130 The fact that the performance of a controlled test and the data derived therefrom were printed on the label makes clear that it did not contain a future representation, because it was said to result from testing under ADR 81/02.

131 In *Samsung Electronics Australia Pty Limited*,[115] Nicholas J defined 'representation with respect to any future matter' as:

> a representation which expressly or by implication makes a prediction, forecast or projection, or otherwise conveys something about what may (or may not) happen in the future.[116]

132 Importantly, what is actually represented and what might be concluded from that representation must be distinguished. Nicholas J stated:

> A person may reasonably infer from the statement 'this is a 3D TV' that he or she will be able to view the TV in 3D at some time in the future. However, this does not change the fundamental character of the representation which is one made with respect to an existing state of affairs.[117]

133 I do not accept the applicants' contention in **ground 3** that the Tribunal erred in finding that the Fuel Consumption Label was false based on evidence as to the fuel consumption of Mr Begovic's own vehicle in 2019. The Tribunal's finding was that the label was false and misleading because it represented that the testing results contained on it could be replicated when the expert evidence established that they could not be. The Tribunal had regard to all the relevant evidence in reaching this finding of fact. Mr Begovic kept fuel receipts, and the level of fuel consumption they revealed was consistent with Ms Winkelmann's evidence of her testing results. The Tribunal accepted Mr Begovic as a witness of truth, who 'presented as an honest witness who gave his evidence unguardedly and without exaggeration'.[118] It stated that his evidence about his reliance on the label was not challenged. The Tribunal also accepted Ms Winkelmann's evidence.

134 The applicants' proposed **ground 4** contends that the Tribunal erred in finding that the label represented that the 2017 model was 'more fuel efficient than the 2008 model' and that the

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114 [2020] FCAFC 162 [132].
115 *Samsung Electronics Australia Pty Limited v LG Electronics Australia Pty Limited* [2015] FCA 227.
116 Ibid [84].
117 Ibid [85].
118 *VCAT Decision* (n 2) [67 c].

label was misleading or deceptive on the basis of Mr Begovic's evidence that his 2017 vehicle 'used more fuel than [his] 2008 vehicle in the same driving conditions'. In the absence of any evidence of the test data at certification of either the 2008 or 2017 models, the Tribunal ought to have dismissed Mr Begovic's claim that the label was misleading or deceptive.

135 I do not consider that the Label represented that the 2016 Triton was 'more fuel efficient than the 2008 model' as the Tribunal stated in paragraph 50. That would be to confuse the representation that the label made with the use that reasonable consumers could make of the representation or the reliance that they could place upon it. But, when the Senior Member's statement in paragraph 50 is read in context, I do not consider that the Senior Member found that the label was misleading or deceptive because it represented that the Triton was 'more fuel efficient than the 2008 model'. When the last sentence of paragraph 50 of the Senior Member's reasons is read with paragraph 52, it appears that she accepted that each label represented something of the fuel consumption characteristics of the vehicle to which it was affixed, and that a comparison could be made of those two representations leading to a conclusion that one was more fuel efficient than the other. That is to use the labels in a manner that the Vehicle Green Guide considered appropriate. I do not read the Senior Member's reasons as suggesting that she intended to find that the Label itself represented that the 2016 Triton was more fuel efficient than the 2008 vehicle. That representation could not be drawn from the label. If I am wrong in this conclusion about the reading of the Senior Member's reasons, it would make no difference to the fact that I do not consider that the Senior Member erred in finding a contravention of s 18. I accept that the substance of Mr Begovic's ultimate submission about the representation contained in the label was correct and justified the Tribunal's conclusion that the applicants had contravened s 18.

136 The applicants in **ground 5** contend that the Tribunal erred in having regard to the actual performance of Mr Begovic's vehicle in 2019 in assessing the truth of the representation contained in the label. It ought to have found that the label contained no representation as to the fuel consumption of Mr Begovic's vehicle either at the time of sale or in future, either alone or vis-a-vis Mr Begovic's 2008 model vehicle, being a representation with respect to a

future matter.

137 For similar reasons to those previously given, I do not accept this ground. I consider that the label represented that the test results could be substantially replicated under ADR 81/02 testing. The results of Ms Winkelmann's testing on Mr Begovic's Triton in 2019 were relevant to the decision of whether that representation was accurate or was misleading or deceptive.

138 Mr Begovic did not contend that the test results referred to on the label were wrong or falsified, but that his Triton vehicle did not achieve those results when adjustments were made for real world driving conditions. The Tribunal did not regard the test results as false but stated:

> I accept that Mr Begovic's actual experience of fuel consumption, based on 19 fuel receipts, for the vehicle was an average of 12.44 L/100 km on Extra Urban driving. This finding does not however mean that the information in the label was wrong. The label is not representing anything other than that, based on testing conducted in accordance with ADR 81/02, the fuel consumption figures are as stated in the label.[119]

139 The Tribunal was presented with conflicting evidence about whether the label's fuel consumption figures could be replicated under ADR 81/02 testing. Vipac's report said that they could be, but its author was not called and the Tribunal noted criticisms of its methodology. It accepted Ms Winkelmann's evidence as the only expert witness called and cross-examined. The joint testing produced lower fuel consumption results than Ms Winkelmann's testing did. If was for the Tribunal to decide which evidence to accept and its decision on that question could not be challenged in this proceeding which is limited to questions of law. The Tribunal was also entitled to take into account, Mr Begovic's own evidence of the vehicle's fuel consumption.

140 The applicants' proposed **grounds 6 and 7** raise issues that arise if it were found the label contained a representation about a future matter. Those issues do not arise in view of my conclusion that the representation was about a present matter. There was no need to determine whether the dealer or manufacturer had reasonable grounds for making the representation at the time it was made in accordance with s 4(1)(b) of the ACL. There was

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119 Ibid [42].

also no need to determine whether the applicants were unaware of the need for, and should have been given the opportunity to, present evidence establishing that they had reasonable grounds for making a representation about a future matter. In any event, the applicants provided the Vipac report as their evidence about the fuel consumption results following the retesting of the vehicle. I also consider that the applicants should have been aware that the Tribunal was conducting the final hearing of the proceeding and not some preliminary hearing.

Conclusion about s 18 grounds

141 The applicants challenge to the Senior Member's findings that the applicants had contravened s 18 of the ACL does not succeed.

The Tribunal's findings that the applicants had contravened s 54 - questions of law 12-21; 27-28; grounds 8-13, 16-17

142 The Tribunal considered the application of s 54 under the heading 'Is the Vehicle defective or not of acceptable quality?'. The Tribunal stated:

> Mr Begovic's claim as set out in his application dated 6 April 2018 is that the vehicle is defective because of excessive fuel consumption. He claimed that the vehicle was not of acceptable quality given the nature of the vehicle, the price of the vehicle and statements made about the vehicle on the label.
>
> Mr Miller's position is that no defect has been identified in the vehicle.
>
> No evidence of a specific defect causing the increased fuel consumption in the vehicle was identified. Ms Winkelmann's report concludes "However I note excessive fuel consumption in the extra urban segment is highly unusual and leads me to believe that it is possible that this vehicle has a serious technical issue of some kind. It was beyond the scope of work for this project to investigate and determine what that issue might be."
>
> On the evidence before me, I am not satisfied that the vehicle is defective.
>
> The next issue is whether there has been a breach of the consumer guarantee of acceptable quality in s 54 of the ACL.
>
> The test of whether the car is of acceptable quality and whether the contravention constitutes a major failure is an objective test. What would the reasonable consumer think or have done rather than what did Mr Begovic think or do. The subjective desire of Mr Begovic is relevant, but the issue is whether a reasonable consumer, desiring to purchase a fuel efficient vehicle (ie standing in the shoes of Mr Begovic) would regard the vehicle as acceptable.
>
> The manufacturer made no submissions on this point.
>
> As set out previously, I found that the label contained representations about the vehicle which were untrue. The label can be construed as a statement made on

> packaging or label under s54(3)(c). The label information is also a representation under s 54(3)(d). In the circumstances, given the matters set out in s54(3)(c) and (d) of the ACL I find that the vehicle was not of acceptable quality and the failure to be so is a major failure. A reasonable consumer in Mr Begovic's position would not have found the vehicle to be of acceptable quality in circumstances where its fuel consumption was substantially more than represented by the label.[120]

The submissions about s 54

143 The applicants submitted that because they had not breached s 18, then there could be no finding that they had breached ss 54 or 56 of the ACL because such a finding could only be made on the same facts that were relied on to establish a breach of s 18. Mr Begovic had not asked the Tribunal to make a finding of a breach of s 54, but the applicants did not rely on a breach of natural justice, as they did in respect of the finding that they had breached s 56.

144 In **ground 8**, the applicants contend that because the Tribunal expressly found the vehicle was not defective, it could not find that the vehicle was not of acceptable quality under s 54(2)(c) of the ACL. The Tribunal could only have found a breach of s 54 if it had first found that a requirement of the consumer guarantee contained in subsection (2) was absent from the vehicle so that a reasonable consumer, having regard to the matters in subsection (3), would regard it as not of acceptable quality.

145 It followed from the Tribunal's finding that the vehicle was not defective and because no suggestion was made that it was not of acceptable quality due to the absence of any other feature listed in s 54(2), that it was not open to the Tribunal to find that the applicants had breached s 54 in connection with the sale of the Triton.

146 Mr Begovic's response to ground 8 was that there was ample evidence that the vehicle was not of acceptable quality. He did not have to identify a specific technical defect in it, as its excessive fuel consumption was sufficient. Fuel consumption is evidence of the performance of the vehicle and as he stated in his VCAT application, his Triton vehicle was a defective vehicle because of its excessive fuel consumption.[121] The Tribunal's statement that, '[o]n the evidence before me, I am not satisfied that the vehicle is defective',[122] was to be understood in context, following as it did the statement of Ms Winkelmann's evidence that she believed

120 Ibid [54]-[61].
121 CB 364.
122 *VCAT Decision* (n 2) [57].

that it was possible that 'this vehicle has a serious technical issue of some kind', but that it was beyond the scope of her work to investigate and determine what that issue might be. The Senior Member accepted her evidence and stated that 'on the evidence before me, I am not satisfied that the vehicle is defective'. But, the Senior Member's reasons then stated that 'the next issue is whether there has been a breach of the consumer guarantee of acceptable quality in s 54 of the ACL'. The Senior Member's statement that she was not satisfied that the vehicle was defective appears not as part of her consideration of s 54, but was a comment on Ms Winkelmann's evidence. The Tribunal clearly found the vehicle was not of acceptable quality by reason of its excessive fuel consumption significantly exceeding the figures stated on the Label. The Tribunal found that when the Triton was driven for extra urban travel, it consumed 36% more fuel than the Label represented. This fact supported a finding that the vehicle had a defect within the meaning of s 54(2)(c) or a finding that the vehicle was not 'fit for all the purposes for which goods of that kind are commonly supplied' pursuant to s 54(2)(a).

Tribunal's findings that s 54(3)(c) and (d) applied - grounds 9 and 10

147 The applicants argued that the Tribunal erred in finding that the Label contained any statements made about the vehicle within the meaning of s 54(3)(c), or any representations made about the vehicle within the meaning of s 54(3)(d). It should have found that the matters in s 54(3) were not, by themselves, discrete grounds on which the Tribunal could determine that the applicants had breached s 54, but were intended to inform the reasonable consumer's consideration of the features of acceptable quality required by s 54(2).

148 If the Label contained any representations about the vehicle within the meaning of s 54(3)(c), the Tribunal erred in finding that the statement of fuel consumption on the Label was untrue. The Tribunal ought to have found that the Label made statements or representations about the future performance of the Triton. Having found that there was insufficient evidence of any defect in the vehicle and it not being contended or found that any other feature of the vehicle listed in s 54(2) was absent, the Tribunal should have dismissed Mr Begovic's claim under s 54.

149 In respect of proposed grounds 9 and 10, Mr Begovic submitted that the label made

representations about the vehicle. The matters referred to in s 54(3), especially paragraph (c), were relevant to a consideration of whether the vehicle was of 'acceptable quality' within the meaning of s 54(2). The Tribunal had regard to them in this way. Mr Begovic submitted that the paragraphs of s 54(3) did not have to be considered with reference to, or in conjunction with, any particular paragraph of s 54(2). He advanced the alternative submission that the only conclusion open to the Tribunal and to the Court was and is that the vehicle had a defect within s 54(2)(c) and/or that the vehicle was not 'fit for all the purposes for which goods of that kind are commonly supplied' within the meaning of s 54(2)(a). In any event, it is not the law that a finding may only be made in respect of a breach of the consumer warranty in s 54, if the decision maker refers to the paragraph of s 54(2) that identifies the want of acceptable quality.

Characteristics of the reasonable consumer - grounds 11 and 17

150 The applicants argued that in applying the reasonable consumer test under s 54(3) and s 260 the Tribunal erred in considering Mr Begovic's subjective state of mind and purpose, being to 'purchase a fuel efficient vehicle'. The Tribunal erred in finding that a reasonable consumer fully acquainted with the extent to which the vehicle's fuel consumption exceeded the figures shown on the label would not have acquired it. It also erred in finding that the failure to comply with the guarantee in s 54 was a 'major failure' within s 260 by reference to the subjective state of mind of Mr Begovic which was to 'purchase a fuel efficient vehicle.' The Tribunal ought to have found that a reasonable consumer, fully acquainted with the terms of the label and the nature and extent to which the fuel consumption of the vehicle exceeded that on the label, but absent Mr Begovic's subjective state of mind, motivations or priorities would have acquired the vehicle.

151 Mr Begovic submitted that the Tribunal did not err in its application of the reasonable consumer test under s 54 or s 260. The 'reasonable consumer' must be placed in the position of the actual consumer who relied on the consumer guarantee.[123] In any event, it is clear that the Tribunal applied an objective test of the reasonable consumer.

152 Mr Begovic also submitted that in the absence of a finding that there was a major failure

123 *Graham Barclay Oysters v Ryan* (2000) 102 FCR 307, [534] (Lindgren J).

under s 260, the Tribunal's orders ought to be affirmed on the basis that the same orders are the only conclusion open to the Court. Mr Begovic gave Northpark reasonable time to remedy the failure of his vehicle and it did not do so. It told the Tribunal that there was nothing wrong with the Triton. Had the Tribunal not found that the failure to comply with the s 54 guarantee was a major failure, the only course open to it would have been to find that Mr Begovic was nevertheless entitled to reject the vehicle and obtain a refund.

Timing of representations – ground 12

153 The applicants submitted that was not open to the Tribunal to find that the vehicle was not of acceptable quality within s 54 by reference to the fuel consumption of that vehicle in 2019, more than 2 years after its purchase, rather than at the relevant time, which was when the vehicle was supplied to Mr Begovic in early 2017. Because Ms Winkelmann's tests were carried out after the vehicle had travelled almost 50,000 km over two years, the tests were not evidence of its fuel consumption of when it was purchased.

154 Mr Begovic responded that it was not disputed that the Court was required to determine whether the goods were of acceptable quality at the time at which they were supplied. However, the quality of goods will sometimes be revealed after the consumer is supplied with them. Section 54(2)(e) lists 'durable' as an aspect of acceptable quality.

Failure to consider or apply s 54(4)(b) – ground 13

155 The applicants submitted that the Tribunal erred in not finding that the label did specifically draw to Mr Begovic's attention the vehicle's departure from the fuel consumption shown on the label. Having found that Mr Begovic had seen and relied on the information in the label in making his decision to purchase and that the label was expressly qualified by the words 'actual fuel consumption and CO_2 emissions depend on factors such as traffic conditions, vehicle conditions and how you drive' and given the further qualifications incorporated into the label by reference, the Tribunal ought to have found that a departure from the fuel consumption in the label had been specifically drawn to Mr Begovic's attention before he agreed to its supply and therefore, by operation of s 54(4)(b) of the ACL, the vehicle was taken to be of acceptable quality and should have dismissed the claim under s 54.

156 Mr Begovic responded that the operation of s 54(4) was enlivened only where the only reason

why the goods were not of acceptable quality was specifically drawn to the consumer's attention before the consumer agreed to the supply. Section 54(5) only applied where the reason why the goods were not of acceptable quality was disclosed on a written notice that was displayed with the goods and it was transparent. The Tribunal could have only found that the want of acceptable quality was 'specifically drawn' to Mr Begovic's attention if the label had stated that the fuel consumption figures on the label were false. The facts found by the Tribunal did not enliven the operation of s 54(4) or (5).

Application of s 54 and s 56 to manufacturers – ground 16

157 The applicants submitted that the Tribunal erred in finding that Mitsubishi had breached the guarantees in ss 54 and 56, as those provisions only applied to suppliers and not to manufacturers. The Tribunal should have found that the only remedy available against a manufacturer who has breached ss 54 or 56 was in damages under s 271. However, Mr Begovic did not seek damages, but wanted to reject the vehicle and be repaid his purchase price. That remedy was available only against the dealer, Northpark.

158 Mr Begovic replied that the Tribunal did not make orders against Mitsubishi, but against Northpark, although it found that both had breached the consumer guarantees. The Tribunal correctly concluded that s 259 permitted Mr Begovic to claim against Northpark for a failure to comply with the ACL guarantees. The Tribunal was entitled to find that Mitsubishi had breached the guarantees contained in ss 54 and 56, but as Mr Begovic was not seeking damages, Northpark and not Mitsubishi was correctly ordered to refund his purchase price.

Analysis of s 54 grounds

The Tribunal's findings about whether the vehicle was defective - ground 8

159 In applying s 54 it is necessary to determine whether the vehicle had each of the features of acceptable quality contained in s 54(2) as a reasonable consumer fully acquainted with the state and condition of the goods, including any hidden defects, would regard as acceptable having regard to the matters set out in sub-section (3). Mr Begovic contended that the vehicle was not of acceptable quality because its excess fuel consumption showed that it was not free from defects. But the Senior Member stated that she was not satisfied that the vehicle was defective, so she did not conclude that the vehicle lacked a feature of acceptable quality

prescribed by s 54(2). Her finding that the vehicle was not defective, in my opinion, meant that the she could not find that s 54 had been contravened because she had not found that any element of 'acceptable quality' was absent.

160 I do not accept Mr Begovic's submission that the evidence inevitably led to the conclusion that the vehicle lacked the feature of acceptable quality contained in s 54(2)(a) that the vehicle was not fit for all the purposes for which goods of that kind are commonly supplied. Even if the purpose for which vehicles are supplied includes providing fuel efficient transport, there was no evidence on which the Tribunal could have found that the 2016 Triton lacked fuel efficiency to the extent that it was not fit for purpose. The evidence was only that it used more fuel than the 2008 Triton.

161 Although I have found that the Senior Member erred in finding that the applicants breached 54 because she concluded that it was not satisfied that the vehicle was defective, I will state my conclusions about the other issues argued by the parties about its application.

The Tribunal's findings that s 54(3)(c) and (d) applied - grounds 9 and 10

162 In respect of the application of s 54(3), Mr Begovic relied on statements made about the 2016 Triton on the label as representations made about the goods by their supplier or manufacturer (see s 54(3)(c) and (d)). While the Tribunal identified the label as containing a statement or a representation made about the goods, which might engage s 54(3)(c) and (d), it did not make a finding as to why the vehicle was not of acceptable quality by reference to any elements of the guarantee contained in s 54(2). The Tribunal's reasoning was as follows:

> I find that the vehicle was not of acceptable quality and the failure to be so is a major failure. A reasonable consumer in Mr Begovic's position would not have found the vehicle to be of acceptable quality in circumstances where its fuel consumption was substantially more than represented by the label.[124]

163 But, that finding did not follow the steps that s 54 requires before the Tribunal could make it. With respect, the Tribunal erred in that reasoning in concluding that the issue was whether a reasonable consumer, desiring to purchase a fuel efficient vehicle, and standing in the shoes of Mr Begovic, would regard the vehicle as acceptable.[125] Rather, the issue was whether a

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124 *VCAT Decision* (n 2) [61].
125 Ibid [59].

reasonable consumer, considering the question of whether the vehicle was free from defects would regard it as acceptable having regard to the matters listed in s 54(3).

164 I accept that if Mr Begovic had established that the vehicle lacked one of the features of 'acceptable quality' contained in s 54(2), that the reasonable consumer in deciding whether to regard the vehicle as acceptable would have had regard to the Label's statements of fuel consumption in considering the matters listed in s 54(3)(c) and (d). I accept that the statement on the Label was a statement made about the vehicle within the meaning of s 54(3)(c), because it was a statement about the fuel consumption of the vehicle, albeit subject to the qualification contained in the words on the Label. I also consider that the statements about the fuel consumption were a representation made about the vehicle within the meaning of s 54(3)(d). The Tribunal did not err in so concluding.

165 I consider that it was open to the Senior Member to find as it did in paragraph 61 of her reasons that a reasonable consumer would not have found the vehicle to be of acceptable quality in circumstances where its fuel consumption was substantially more than represented by the label. There was ample evidence from Ms Winkelmann's testing, the joint testing, and Mr Begovic's evidence to make that finding.

The characteristics of the reasonable consumer – grounds 11 and 17

166 I do not accept the applicants' submission that the Tribunal erred in its application of the reasonable consumer test by having regard to Mr Begovic's subjective purpose in purchasing the Triton. Rather, I accept Mr Begovic's submission that the reasonable consumer was to be regarded 'as a reasonable consumer placed as that actual consumer or other person was'.[126] The Senior Member correctly stated that the test was an objective test. In addition, she also correctly noted that the subjective desire of Mr Begovic was relevant stating:

> [B]ut the issue is whether a reasonable consumer, desiring to purchase a fuel efficient vehicle (ie standing in the shoes of Mr Begovic) would regard the vehicle as acceptable.[127]

The timing of the representations - ground 12

167 I do not consider that the Senior Member erred in relying on Ms Winkelmann's tests results

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126 *Graham Barclay Oysters v Ryan* (n 123) [534].
127 VCAT Decision [59].

as to fuel consumption conducted two years after Mr Begovic purchased the Triton and after he had been driven 49,000 km. Mr Begovic's evidence was that he noticed the excess fuel consumption soon after he purchased the vehicle and his fuel receipts and the four occasions when he sought to have his problem rectified support his evidence. The issue raised in ground 12 was not raised at the Tribunal. In fact, all parties were prepared to conduct a joint test of the vehicle to obtain its fuel consumption in August 2018, after Mr Begovic had driven it for one and a half years.

168 The Label did not state that testing of the vehicle under ADR 81/02 conditions would indefinitely produce the fuel consumption results stated, nor would the reasonable consumer believe or expect that the vehicle's fuel consumption would remain the same over the life of the vehicle. But, Mr Begovic's evidence established that he had noticed 'excessive' fuel consumption when he first drove the vehicle.[128] I consider that a reasonable consumer would expect the fuel consumption figures contained on the label to be capable of being replicated under ADR 81/02 testing for a reasonable period, at least two years and perhaps for the life of the vehicle warranty.

The Tribunal's failure to consider or apply s 54(4)(b) - ground 13

169 In my opinion, s 54(4)(b) was not applicable. The Tribunal found that the vehicle did consume excessive fuel. If that finding was correct, the Label could not be taken to have specifically drawn to Mr Begovic's attention that the vehicle consumed excessive fuel, which was the reason why it was said not to be of acceptable quality to a reasonable consumer. Ground 13 is not established.

Application of s 54 to manufacturers – ground 16

170 The applicants contended that the guarantee under s 54 did not apply to Mitsubishi, the manufacturer. Certainly, an action in damages against the manufacturer was available if the guarantee was not complied with: see s 271. The consumer is given an additional right by s 259(3) when the manufacturer or supplier has failed to comply with the s 54 guarantee and there has been 'a major failure' within the meaning of s 260. The consumer may terminate the contract under s 267 and obtain a refund of their purchase price under s 263. The

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128 See, eg, T 93-95.

Tribunal's findings that the fuel consumption of the vehicle was a 'major failure' within s 260 was amply supported by the facts that it found. The Tribunal accepted that the vehicle had problems with fuel consumption from the time it was purchased and that it was not of acceptable quality. The Tribunal's finding of a major failure under s 260(a) was also based on the contravention of s 56.

Section 56 - Questions of law 22-26 - grounds 14-16

171 After finding a contravention of s 54 of the ACL, the Senior Member stated in respect of s 56:

> For the same reasons, there has been a breach of the guarantee contained in s 56 of the ACL. The fuel consumption of the vehicle departed in a material sense from the description of fuel consumption in the label. This provision was not raised by the parties. I raise it now for completeness. Consideration of the provision does not change the outcome.[129]

172 The Senior Member also stated:

> Mr Begovic is also entitled to reject the vehicle because of a breach of the guarantee in [s 56] of the ACL. I find that the vehicle departed in a material sense from the description of the vehicle's qualities concerning fuel consumption given by the manufacturer on the label.[130]

The parties' submissions on s 56

173 The applicants submitted that as the possible application of s 56 was not raised or argued, it was not open to the Tribunal to find that they had contravened it, as they were not given an opportunity to be heard on its application or possible contravention. This was particularly so following the Senior Member's assurances to Mr Miller that she would ensure that he was aware of any legal issues that arose and 'have an opportunity to consider things'.[131] Moreover, s 56 had no application because the Triton's fuel consumption was not part of its description within the meaning of s 56. The description of the vehicle did not include the fuel consumption label, which was no more than a description of test results performed on that model at certification as reported to the Government.

174 Mr Begovic's counsel, who had appeared at the Tribunal, submitted that because he did not make any submissions about the law to VCAT, the proceeding at least on legal issues, was

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129 *VCAT Decision* (n 2) [56].
130 Ibid [78].
131 Ibid [33]; VCAT T 4.

conducted as if the parties were self-represented.[132] The requirements of natural justice depend on the context. It was up to the Senior Member to determine if particular sections of the ACL had been breached. She heard the parties in respect of the factual controversy and applied the law to the remedy Mr Begovic claimed. In his written application filed in VCAT, he stated that he was making a claim under the ACL, but he did not identify the sections that the applicants had contravened or under which he claimed remedies. In that application, he described the problems with the Triton as: 'defective vehicle; excessive fuel consumption' and gave details of its fuel consumption. He stated that he purchased the vehicle on the basis that its advertised fuel economy was better than his 2008 Triton. He sought orders entitling him to reject the Triton and to be given 'a refund or replacement in the amount of [his] claim'.[133]

175 The dispute between the parties was framed by Mr Begovic's application and Northpark's response which was made in lay terms. Throughout the Tribunal proceedings, the issue in dispute was whether the vehicle did or did not use excessive fuel.

176 Mr Begovic submitted that a sale of goods 'by description' is not limited to features of the description which concern the identity of the goods, such as the particular make or model of a vehicle, but can include a description of features such as a vehicle's fuel consumption. A sale by description occurs when it must have been within the reasonable contemplation of the parties that the buyer was relying on the description.[134] The fuel consumption of the vehicle was a description of a quality or feature of the Triton on which consumers, like Mr Begovic, were expected to rely. Mr Begovic's purchase of the vehicle was therefore of a vehicle sold 'by description' within the meaning of s 56 and it did not meet the description represented.

Analysis of s 56 - grounds 14 and 15

177 In my opinion, the principles of natural justice, which bind the Tribunal, required that the parties be given the opportunity to address any adverse finding that might be made against them.[135] This requirement would apply to a finding or possible finding that the applicants had

132 T 129, 165.
133 CB 364.
134 *Walker v Sell* [2016] FCA 1259 [106]–[107].
135 *Victorian Civil and Administrative Tribunal Act 1998* s 102.

contravened s 56. Significant legal issues needed to be considered before a finding could be made that s 56 applied or had been contravened. In addition to the statutory requirements of natural justice, the Tribunal had assured Mr Miller that it would alert him to any legal issue that arose.[136] I therefore consider that the error identified by ground 14 is established.

178 I consider the statements on a label about fuel consumption, particularly when the form of the label was required by law, were not part of the Triton's description within the meaning of s 56. The vehicle was sold as a Triton motor vehicle of a particular year. It did not cease to have that description because the fuel consumption did not meet the figures contained on the compulsory Label, when the qualifying words were taken into account.[137] There are differing views as to when a quality, characteristic or attribute of goods are part of the description. But, however wide a definition is given to 'description', I do not consider that the fuel consumption figures contained on the Label, when read with the qualifying words, formed part of the vehicle's description. The Tribunal erred in finding that the applicants had breached s 56 of the ACL in respect of the sale of the 2016 Triton to Mr Begovic. Ground 15 is established.

Grounds 16 and 17

179 I have dealt with grounds 16 and 17 in dealing with the s 54 grounds.

Conclusion

180 Because I have found that the Tribunal erred in law in finding that the applicants had breached s 54 and s 56, its orders terminating the contract and ordering the refunding of the purchase price could not be made under s 259(3). However, the Tribunal's finding that the applicants contravened s 18 remains. Mr Begovic submitted that on the foundation of that finding, the Tribunal had power under s 243(a) and (d) to make the same orders and therefore that the Court should affirm the Tribunal's orders.

181 I consider that I should give the parties an opportunity to be heard on whether it is appropriate to do as Mr Begovic requests.

182 I grant the applicants leave to appeal against VCAT's orders on all their questions of laws

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136 VCAT T 4.

137 See *Christopher Hill Ltd v Ashington Piggeries Ltd* [1972] AC 440; *Lockhart v Osman* [1981] VR 57.

and proposed grounds of appeal. The Tribunal erred in its finding that the applicants contravened ss 54 and 56 of the ACL in connection with the sale of the 2016 Triton to Mr Begovic, but not in its finding that the applicants contravened s 18. I will hear the parties as to the appropriate orders to give effect to my findings and conclusions, including in respect of costs.

Annexure A – Copies of Labels affixed to Vehicles