

FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Mazda Australia Pty Ltd [2021] FCA 1493

File number(s): VID 1169 of 2019

Judgment of: **O'CALLAGHAN J**

Date of judgment: 30 November 2021

Catchwords: **CONSUMER LAW** – prohibition on misleading or deceptive conduct under s 18 of the Australian Consumer Law (ACL) – prohibition on certain false or misleading representations under s 29(1)(m) of the ACL – statutory guarantee as to acceptable quality under s 54 of the ACL – consumer's entitlement to reject goods under s 259 of the ACL – representations made as to consumer rights under statutory guarantee provisions of the ACL – representations made as to supplier's right to repair goods regardless of consumer's entitlement to reject goods – representations made in the nature of opinions – whether reasonable basis existed for making representations in the nature of opinions – where supplier gave no consideration to consumers' entitlements to a refund or replacement under the ACL – whether misleading or deceptive

CONSUMER LAW – prohibition on unconscionable conduct under s 21 of the ACL – where no allegation of “system” or “pattern” of conduct – whether respondent's conduct unconscionable

Legislation: *Competition and Consumer Act 2010* (Cth) Schedule 2 ss 3, 7, 18, 18(1), 21, 22, 29(1), 29(1)(m), 54, 54(2)(c), 259, 259(2), 259(2)(b), 259(3), 259(3)(a), 260, 260(1)(a), 260(1)(c), 260(1)(e), 262, 262(1), 262(2), 263, 263(4), 263(4)(a), 263(4)(b), 263(6), Parts 3-2, Part 5-4, Part 5-4 Div 1
Federal Court Rules 2011 (Cth) r 5.04(3) item 19

Cases cited: *Allianz Australia Insurance Ltd v Delor Vue Apartments* CTS 39788 [2021] FCAFC 121; (2021) 153 ACSR 522
Australian Competition and Consumer Commission v Jayco Corporation Pty Ltd [2020] FCA 1672
Australian Competition and Consumer Commission v Jewellery Group Pty Ltd [2012] FCA 848; (2012) 293 ALR 335

Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd [2021] FCAFC 40; (2021) 388 ALR 577

Australian Competition and Consumer Commission v TPG Internet Pty Ltd (2013) 250 CLR 640

Australian Competition and Consumer Commission v TPG Internet Pty Ltd (2020) 278 FCR 450

Australian Competition and Consumer Commission v Valve Corporation (No 3) [2016] FCA 196; (2016) 337 ALR 647

Australian Securities and Investments Commission v AGM Markets Pty Ltd (No 3) (2020) 275 FCR 57

Australian Securities and Investments Commission v Kobelt (2019) 267 CLR 1

Butcher v Lachlan Elder Realty Pty Ltd (2004) 218 CLR 592

Campbell v Backoffice Investments Pty Ltd (2009) 238 CLR 304

Capic v Ford Motor Company (No 3) [2017] FCA 771

ConAgra Inc v McCain Foods (Aust) Pty Ltd (1992) 33 FCR 302

Hall (Inspector of Taxes) v Lorimer [1992] 1 WLR 939

Global Sportsman Pty Ltd v Mirror Newspapers Ltd (1984) 2 FCR 82

Google Inc v Australian Competition and Consumer Commission (2013) 249 CLR 435

Medtel Pty Ltd v Courtney (2003) 130 FCR 182

Paciocco v Australia and New Zealand Banking Group Ltd (2016) 258 CLR 525

Transport Industries Insurance Co Ltd v Longmuir [1997] 1 VR 125

Unique International College Pty Ltd v Australian Competition and Consumer Commission (2018) 266 FCR 631

Vautin v By Winddown, Inc. (formerly Bertram Yachts) (No 4) [2018] FCA 426; (2018) 362 ALR 702

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Counsel for the Applicant: Mr NP De Young QC with Ms NJ Hickey and Ms AF Garsia

Solicitor for the Applicant: Webb Henderson

Counsel for the Respondent: Mr MR Scott QC with Mr MJ Hoyne

Solicitor for the Respondent: Mills Oakley

ORDERS

VID 1169 of 2019

BETWEEN: **AUSTRALIAN COMPETITION AND CONSUMER
COMMISSION**
Applicant

AND: **MAZDA AUSTRALIA PTY LTD**
Respondent

ORDER MADE BY: **O'CALLAGHAN J**
DATE OF ORDER: **30 NOVEMBER 2021**

THE COURT ORDERS THAT:

1. On or before 14 December 2021, the parties are to confer and submit to the Court a joint proposal, or if they are unable to agree, separate proposals for the further conduct of this proceeding, including the determination of the questions of remedies, the costs of the proceeding, and any other orders to give effect to these reasons.
2. A case management hearing be fixed on a date convenient to the parties.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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INTRODUCTION

1 The respondent, Mazda Australia Pty Ltd (**Mazda**), is an Australian corporation wholly owned by Mazda Motor Corporation (**Mazda Corp**), a Japanese corporation which manufactures motor vehicles.

2 Mazda Corp supplies motor vehicles to Mazda pursuant to an agreement between the two corporations. In turn, Mazda supplies those vehicles to dealers throughout Australia.

3 Mazda does not have any retail facilities and, other than to a minimal extent, does not engage in the retail sale or supply of vehicles to end consumers. Mazda appoints dealers to sell, service, and repair Mazda vehicles, and to supply Mazda parts, pursuant to individual dealer agreements. Dealers engage in the retail sale of Mazda vehicles, and the repair and sale of parts, to consumers in Australia.

4 The Australian Competition and Consumer Commission (the **ACCC**, or the **applicant**) seeks declarations that between 2015 and 2019, Mazda, in respect of nine identified consumers who owned seven vehicles:

- (1) engaged in conduct that was misleading or deceptive or likely to mislead or deceive in contravention of s 18 of the Australian Consumer Law (**ACL**) (Schedule 2 to the *Competition and Consumer Act 2010* (Cth));
- (2) made false or misleading representations concerning the existence, exclusion or effect of the consumer guarantees under Part 3-2 of the ACL, and the rights or remedies available under Part 5-4 of the ACL, in contravention of s 29(1)(m) of the ACL; and
- (3) engaged in conduct that was unconscionable, in contravention of s 21 of the ACL.

5 The ACCC's amended concise statement alleged, and Mazda in its concise response denied, that Mazda made the following representations to those consumers:

- (1) certain faults with Mazda vehicles owned by the consumers were not "major failures" under the consumer guarantee provisions of the ACL;
- (2) the consumers were not entitled to a refund or replacement vehicle at no cost to them under the consumer guarantee provisions of the ACL;
- (3) the consumers did not have any ability under the ACL to seek to obtain a refund or replacement vehicle, because Mazda was entitled to repair the vehicles regardless of the number of attempts made to repair the faults, the time it took to repair the faults, the

consumers' rejection of the vehicles and requests for a refund or replacement vehicle, and/or Mazda's obligation under the ACL to repair the vehicle;

- (4) Mazda was not required to provide a refund or replacement vehicle at no cost to the consumers because of the age and/or mileage of the vehicles; and/or
- (5) a major failure within the meaning of the consumer guarantee provisions of the ACL in respect of a motor vehicle is limited to a failure of a major component of the vehicle.

6 The ACCC's amended concise statement further alleged, and Mazda denied, that each of those representations was false or misleading because:

- (1) the faults with the vehicles were major failures for the purposes of s 260 of the ACL, or the faults were otherwise failures to comply with the consumer guarantees that the consumers required to be remedied and that Mazda had not remedied (either at all or within a reasonable time) for the purposes of s 259(2) of the ACL, and the consumers were entitled to refunds or replacement vehicles at no cost pursuant to s 263(4) of the ACL in accordance with their requests;
- (2) the representations incorrectly represented the position under the ACL in that:
 - (a) the consumers did have an ability under s 263(4) of the ACL to seek to obtain a refund or replacement vehicle;
 - (b) the right to a refund or replacement vehicle under s 263(4) was not confined by the age and/or mileage of the vehicle; and
 - (c) a major failure within the meaning of s 260 of the ACL in respect of motor vehicles was not limited to a failure of a major component of the vehicle;and/or
- (3) at the time the representations were made, Mazda had not given any proper consideration to whether the consumers were entitled to refunds or replacement vehicles at no cost pursuant to the ACL; and in circumstances where the representations impliedly conveyed that Mazda had reasonable grounds for making the statements, Mazda did not have reasonable grounds for making the representations.

7 The allegation that Mazda made the representations that certain faults with Mazda vehicles owned by the consumers were not "major failures" to comply with a consumer guarantee was narrowed during the course of the hearing. The ACCC's case did not involve seeking to prove that the relevant vehicles **in fact** suffered major failures within the meaning of the ACL.

Rather, its case was that Mazda misrepresented the position as to the consumers' legal rights because Mazda's customer representatives expressed an opinion that there was no major failure, in circumstances where they could have had no basis for holding such an opinion, because Mazda had not considered whether or not the issues complained of were, in fact, major failures. The ACCC submitted such statements about the exercise of rights were misleading or deceptive because the opinion was not genuinely held and there was no reasonable basis for it, citing *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82 at 88; and *Australian Competition and Consumer Commission v Jayco Corporation Pty Ltd* [2020] FCA 1672 at [598].

8 At some points in the ACCC's written submissions with respect to the statements made by Mazda's representatives that were said to constitute misleading or deceptive representations, reference is made to "the Consumers" not being entitled to a refund or replacement vehicle and not having any ability under the ACL to seek a refund or replacement vehicle. These references are not to be understood as references to consumers generally, because the case was not put that way.

9 The ACCC's unconscionable conduct case was not a "system" or "pattern" case. It was, rather, a case directed at Mazda's conduct concerning the nine individual consumers the subject of the proceeding. That conduct, it was alleged, must be considered in light of Mazda's institutional practices, including "internal compliance documentation, process and culture". This was said to be relevant when examining what were alleged to be the common features of Mazda's conduct in relation to each of the consumers. Those common features may be summarised as follows:

- (1) Mazda did not give any, or any proper or genuine, consideration to the consumers' entitlement under the ACL to a refund or replacement vehicle, and failed to comply with its own internal policies and procedures in dealing with the consumers' requests for refunds or replacement vehicles in accordance with the ACL;
- (2) Mazda, by its customer advocates, made false or misleading statements to the consumers in contravention of ss 18 and 29(1)(m) of the ACL;
- (3) Mazda customer advocates made further false or misleading statements to the consumers, in particular, telling them on a number of occasions that their request had been escalated to "senior management" or "legal", when the evidence demonstrated that no such escalation had occurred;

- (4) Mazda did not give any proper or genuine consideration to the consumers' expressed safety concerns arising from the faults with their vehicles;
- (5) Mazda was in a dominant bargaining position in relation to the consumers' requests, and engaged in unfair, unjustified, and unreasonable dealings with the consumers, and placed unfair commercial pressure on them to accept offers rather than pursue their requests (including by summarily rejecting requests without consideration on the merits; seeking to dissuade consumers from continuing with their requests, often in favour of repair, free services or extended warranty; and treating their requests as if they were a matter of commercial negotiation); and
- (6) the sum of Mazda's conduct led to long, drawn-out discussions between the consumers and Mazda customer advocates, often numerous times per day over months, and this frustrated the consumers and their requests.

10 The ACCC submitted that Mazda's conduct was clearly beyond conscience in all the circumstances of each case. It was "irreconcilable with what is right or reasonable", and it involved "unfairness of a significant order, a lack of good faith, or the exercise of economic power in a way worthy of criticism", a "sufficient departure from the norms of acceptable commercial behaviour as to be against conscience or to offend conscience", and "misrepresentation, commercial ... pressure and sharp practice, using a superior bargaining position", as those expressions are used in the cases (to which reference will be made below).

11 There were four main areas in respect of both the misrepresentation and unconscionability cases where the characterisation of the facts (and thus the outcome of the case) was disputed, namely whether or not:

- (1) Mazda gave any proper or genuine consideration to whether the individual consumers were entitled to a refund or replacement car;
- (2) Mazda made the representations alleged;
- (3) to the extent that representations were in the nature of opinions, there was a reasonable basis for making them; and
- (4) taken as a whole, and in all the circumstances, Mazda's conduct was unconscionable.

12 Mazda rejected the ACCC's characterisation of any of the alleged conduct. It contended, among other things, that both elements of the case against it "rely upon selective use of facts and words divorced from a fuller consideration of the circumstances in which they occurred"

and that other “significant factual, temporal and legal dimensions ... must be taken into account”. In its synopsis of its position in written closing submissions, Mazda submitted that such circumstances or “dimensions” included the following:

- (1) Mazda was not obliged to become involved in the process of assisting consumers whose vehicles had reported problems. That obligation was on the dealer. However, Mazda became involved in order to assist consumers and to give certainty to dealers.
- (2) Once Mazda became involved, only part of its involvement related to the entitlement of the consumer under the ACL. That involvement was also aimed at providing assistance under Mazda’s warranties and providing good consumer service by offering solutions which dealt with the reason the consumer was approaching Mazda.
- (3) The consumers did not approach Mazda for legal advice. They approached Mazda looking for an agreed solution to their reported problem. Mazda responded to their concerns by offering solutions in the form of paying for the investigation of the cause of the reported problem, paying for the repair of the vehicles, providing loan cars and other forms of compensation and, in two cases, either giving the replacement or the refund sought.
- (4) Ultimately, the ACCC’s case about Mazda’s conduct reduced to a complaint that Mazda did not sufficiently separate its consideration of ACL issues from other legitimate considerations. More specifically, the ACCC’s case was effectively that Mazda failed to document that “multifactorial” consideration to the extent that the ACCC said should have occurred. However, even if true, that did not constitute unconscionable conduct.
- (5) The fact that Mazda did not always give the consumers precisely what they were seeking was not unconscionable conduct. It was a reflection of the fact that the information before Mazda did not require the conclusion that it was obliged to provide a refund or replacement vehicle, based on its multifactorial approach to meeting the consumers’ concerns.
- (6) In the context of the claim for unconscionable conduct, Mazda was entitled to deny a consumer’s asserted ACL entitlement unless and until the only response conscionably open to it was to accept it.

13 Most of the “circumstances” and “dimensions” that Mazda attempted to employ by way of defence were, it seems to me, ultimately beside the point. By way of example, the ACCC did not contend that Mazda was “obliged to become involved in the process of assisting

customers”. Its case was that once it did become involved, it rendered itself liable for any false or misleading conduct of its employees, or to a finding that it (or they) engaged in unconscionable conduct, despite the fact that it was not a “supplier” of the vehicles. Likewise, the fact that Mazda was endeavouring to provide “good consumer service” goes nowhere to meet the misleading or deceptive conduct case put against it. And as to the assertion that the consumers did not ask Mazda for legal advice, there was (unsurprisingly) never a contention put by the ACCC that the consumers ever did.

14 Mazda also contended, in summary, that the representations alleged were not capable of being conveyed by the express words relied on, and that the ACCC’s case “depends on an artificial and detached reading of what was said and the context in which it was said to alter meaning” and that it fails on the facts.

15 Mazda submitted that:

- (1) The ACCC’s allegation that Mazda did not honestly hold, and could not reasonably form, an opinion that a consumer was not entitled to a replacement or refund unless it had undertaken a detailed review of the facts and the ACL “inverts the analysis”. The correct question “is whether the relevant consumer had, at the relevant point in time, demonstrated that there had been a major failure and they were entitled to a replacement or refund. If that had not been demonstrated then, given the onus of proof, Mazda’s opinion must have been honestly and reasonably held (at least unless and until there was an objective basis to conclude otherwise)”.
- (2) The ACCC “propounds a multitude of permutations and combinations of different representations said to be implied from a handful of words”.
- (3) The context in which those words were used is important. As an example, Mazda referred to the ACCC’s allegation “that an offer of something less than a full replacement or refund conveys a representation that the consumer was not entitled to a replacement or refund”. Mazda’s case was that no such representation was conveyed by such an offer. It submitted:

If the evidence shows that the supplier is not required to conclusively determine that the only conscionable course available to it is to conclude that there has been a major failure then the supplier is entirely justified in making an offer less than a full refund or replacement but which deals with the consumer’s stated concerns. This ... does not carry a representation that the consumer is not entitled to the remedy. They may be. Equally, they may not be.

- (4) The fact that a representation is conveyed as a matter of opinion “does not necessarily carry the implication that the opinion was held ... or that the opinion was reasonably held ... It depends on the context. The context in this case did not involve those implications and, in particular, did not carry any implication that the opinion was based on reasonable grounds”.
- (5) Any opinions conveyed by the representations were reasonably held and “[t]here is no evidence that Mazda had no legitimate option other than to conclude that there had been a major failure. It does not matter whether the information available to Mazda at the time was sufficient. If the evidence discloses a conscionable basis (whether known to Mazda at the time or not) for refusal of relief (including that insufficient evidence is available to conclusively determine that the relief sought must be provided), that is enough”.

16 As to the unconscionable conduct claim, Mazda submitted that the ACCC’s case “ignores the totality of Mazda’s conduct”, including the other support and assistance Mazda gave to the consumers without the consumer proving a legal entitlement to that support or being troubled to do so. It also submitted that the conduct alleged did not, in any event, meet the significant hurdle required to demonstrate that conduct was unconscionable, including among other reasons because:

- (1) there was no allegation of bad faith, and no basis for concluding bad faith in the sense of an act or omission intended to preclude exercise of an established, accrued or potential statutory right;
- (2) any claim based on systems or patterns was disavowed;
- (3) when properly analysed, there was no evidence that the impugned conduct had serious consequences for the consumers;
- (4) the “round table” and “executive panel” processes which made decisions on customers’ requests for a refund or a replacement vehicle “were an authentic attempt to ensure a properly informed and rational decision was made in response to an unsubstantiated assertion of a statutory right”;
- (5) it was not fair or accurate to say that Mazda did not take consumers’ safety concerns seriously; and
- (6) Mazda was not relevantly in a dominant bargaining position.

17 I should, at this point of the introduction, mention another matter that Mazda raised in its written submissions, viz the contention that “an important matter to be confronted at the outset” was that “[t]he ACCC’s case in its closing submissions is not the case that Mazda was on notice of having to meet as set out in the amended concise statement ... dated 14 December 2020”.

18 There was, however, not the slightest mention made of this contention, or any of the reasons advanced in support of it, in Mazda’s closing oral address.

19 I am entitled to infer therefore that it intended not to press the matter.

20 But in any event, to the extent that the ACCC’s case involved additional clarification or refinement of the case set out in its amended concise statement, those changes were flagged in opening. By way of example, Mazda’s written closing submission at [15] complained that “[o]n the misrepresentation case, the ACCC now alleges that the first two representations above were statements of opinion relating to the specific vehicles, rather than statements of fact, and Mazda did not hold the opinions and did not have reasonable grounds for them”. But that case was put unambiguously in opening, at [64] of the ACCC’s outline of opening submissions, as follows: “[t]he representations made by Mazda as to the [c]onsumers’ rights as to the faults with the [v]ehicles should be characterised as statements of opinion which carried an implied representation that Mazda had a basis for them and reasonable grounds for them”.

21 It is important to bear in mind that concise statements perform a different role to pleadings. It is permissible, for example, for an applicant to refine its concise case in opening. See *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* [2021] FCAFC 121; (2021) 153 ACSR 522 at 548 [144] (McKerracher and Colvin JJ). And as their Honours also said at [149], “what [a] party cannot do is save up its complaint that the case is stated too broadly until the conduct of the final hearing and then maintain that no detailed case can be run because no such case has been disclosed”, because “[t]o do so is to treat the concise statement as having the same character as a pleading which it is not”.

22 In my view, the amended concise statement and the ACCC’s opening submissions, both written and oral, provided a fair disclosure of the case it advanced in respect of both claims. For those reasons, even if I am wrong in the view that the “important matter” referred to in Mazda’s written closing was not pressed (because it was not mentioned in closing address), I would reject the submission on its merits.

MAZDA'S ROLE

Mazda's role with consumers

23 When faults with the vehicles occurred, the consumers took their vehicles to authorised Mazda dealers who, often in consultation with Mazda, attempted to repair the faults. Although representatives of the dealers engaged with the consumers in relation to the faults and repairs, Mazda chose to deal with the consumers, principally via customer service representatives (or “customer advocates”). The consumers were often told to approach Mazda by the dealers. Mazda says it was under no legal obligation to become involved in any communications with the consumers, but it did so “in an effort to improve the outcome for [them]”.

24 All customer contact with Mazda (including consumer complaints) was managed by Mazda's National Customer Support (NCS) department. The department was divided into teams which focused on different areas of complaint. The intention was that they worked collaboratively to provide an outcome.

25 The Mazda call centre operated out of Melbourne. It handled all complaints and enquiries of a technical or operational nature made directly by owners of Mazda vehicles to Mazda. Such owners were, in almost all cases, customers of Mazda dealers. Complaints and enquiries were received by the call centre either by telephone, email, or letters. Telephone calls were generally recorded if made to the customer support lines (a 1800 number) and were retained by Mazda for quality control purposes. Where complaints and enquiries were made through the Mazda website via the “Contact Us” page, they were directed to relevant staff within the call centre team. If there was an existing record of an enquiry or complaint in Mazda's contact management system, called **Maestro**, the complaint or enquiry was entered into that record for review by the assigned customer advocate.

Mazda's role with its dealers

26 The dealers were the “suppliers” of the vehicles for the purposes of Division 1 of Part 5-4 of the ACL, set out below. Mazda was the deemed manufacturer within the meaning of s 7 of the ACL. Although, as I said earlier, it had no obligation to provide a refund or replacement vehicle under the ACL, it took on the responsibility for dealing with the consumers' requests. It did so mainly because, as a rule, Mazda bore the full cost associated with any refund or the provision of a new vehicle.

27 The dealers, from time to time, “escalated” vehicle faults to Mazda. They were required to
escalate “ACL” classified repairs and faults that could not be resolved “within the first 4 steps
of Mazda’s Technical Protocol”. Repairs were classified as “ACL” prior to 2016. That
terminology was replaced with “Priority Vehicle Repairs” in or about 2016.

28 Pursuant to Mazda’s Service Standards (see [0] below), any technical and customer handling
concerns needed to be rectified by carrying out corrective measures jointly with Mazda and by
sharing information among all personnel involved.

29 Dealers were required to submit a Prior Authorisation Request (**PAR**) for faults in respect of
which the dealer considered that Mazda had an obligation.

30 Mazda would also, from time to time, seek information from Mazda Corp in respect of some
vehicle faults.

31 Mazda also operated a “Dealer Support Team”, which comprised Technical Services and
Dealer Operations teams. The technical support which Mazda provided to dealers included:

- (1) conducting training on some Mazda specific systems and repair procedures;
- (2) issuing technical bulletins, as required, which dealt with specific issues with Mazda
vehicles and procedures that dealers should follow to repair “Complete Built Unit”
vehicles that presented with these issues;
- (3) establishing a technical protocol setting out the procedure to be followed by dealers
when making technical enquiries of Mazda;
- (4) providing a technical and warranty “help desk” for dealers to contact with technical or
warranty enquiries regarding Mazda products, and responding to technical reports
provided by dealers in respect of specific issues with Mazda vehicles; and
- (5) providing Field Technical Specialists (**FTS**), whose role was to provide advisory
support to dealers in relation to vehicle and customer enquiries.

32 Mazda also relied on written policies, including those contained in the following documents:

- (1) Summary Guidelines for Responding to Consumer Warranty Questions from July 2015
(**Summary Guidelines**);
- (2) Post Major Repair / ACL Form, renamed Priority Vehicle Repair Form in February
2016, and discontinued in May 2017;
- (3) Warranty Bulletins;

- (4) Post Warranty Support Criteria;
- (5) Knowledge Articles (offering training to the NCS);
- (6) Compliance Training Materials;
- (7) Mazda Service Standards;
- (8) CCA Compliance Manual;
- (9) Mazda Australia Buy Back Process; and
- (10) Refund Process.

33 Mazda had the following technical documents which it provided to, and intended to be relied upon by, dealers and Mazda personnel to diagnose the cause of faults and undertake repairs:

- (1) technical bulletins;
- (2) diagnostic protocols; and
- (3) Mazda's Technical Protocol.

34 The ACCC relied on a number of Mazda's internal compliance documents in aid of its unconscionable conduct case, including the contention that departure from the relevant terms of training documents and the like was unconscionable.

35 Mazda's Diagnostics Training Slides (**Diagnostics 2**) were created by Mazda's Technical Training team in 2008, and were last updated in 2018. Their principal purpose was to assist in delivering a two-day technical training course to Mazda dealer technicians, and also to make dealer technicians aware of the ACL, particularly when diagnosing, repairing and servicing customer vehicles.

36 Slide 28 of the Diagnostics 2 presentation was entitled "Mazda's New VEHICLE WARRANTY" and read:

- Important message from Mazda (**First page in the new Warranty Booklet**)
- Our goods come with guarantees that cannot be excluded under the Australian Consumer Law (ACL). You are entitled to a replacement or refund for a major failure and compensation for any other reasonably foreseeable loss or damage
- You are also entitled to have the goods repaired or replaced if the goods fail to be of acceptable quality and the failure does not amount to a major failure.

37 Slide 29 was entitled "Determining ACL cases" and read:

- *What may constitute a Major Failure?*

- Concern that will make the vehicle undriveable & not quickly/easily repaired
- Concern that is safety related, even if driveable
- Concern that is expensive to repair
- Concern requiring replacement of major component (engine, trans, diff)
- Major refinishing of body work
- New vehicle sale after Jan 1st 2011

38 The Diagnostics 2 slides were provided to the court in their native PowerPoint format, including speaking notes. The speaking notes to slide 29 relevantly read: “not quickly / easily repaired – any longer than 5 working days”.

39 Mazda’s Service Standards dated October 2017, which were intended to assist dealers in their dealings with consumers, contained references to “ACL”. The Service Standards included a section entitled “ACL Service Guidelines”, which provided information on the process required by dealers and Mazda for “ACL” classified vehicle repairs. The Guidelines included a flowchart with a list of relevant (ACL) “Vehicle Repairs”:

- Operational failures caused by major assemblies such as engines, transmissions, differential, etc.
- Repeated occurrences of the same failure after the first repair
- Safety [r]elated concerns
- Concerns that make the vehicle not drivable; not quickly & easily repaired in a reasonable time, say, 5 working days

40 Mr Michael Robins, Mazda’s General Counsel, agreed in cross-examination that ACL classified repairs were a “red flag” to consumers having a right to a refund or replacement vehicle under the ACL.

41 Mazda’s July 2015 Summary Guidelines gave practical tips to NCS staff as part of their training. They were prepared for Mazda in consultation with Bird & Bird, introduced to the business by Mr Robins, and used between 2017 and 2019. Under the heading “Purpose of these guidelines” the following was included:

Many customer warranty claims and questions can be dealt with easily under the terms of our factory warranties. However, in addition to those factory warranties customers also have rights under the consumer guarantees contained in the Australian Consumer Law. Those rights can extend for longer, and give greater rights to refunds and replacements, than exist under our factory warranties. Failure to honour those consumer guarantees and/or misleading a consumer about their rights under those consumer guarantees is a breach of the law. The purpose of this summary is to assist you to know when a customer has rights under the consumer guarantees and how to

respond to customer queries when those rights may be involved.

42 Mr Robins also agreed in cross-examination that one purpose was to ensure that Mazda staff understood the rights of consumers under the ACL, including consumers' rights to a refund or replacement vehicle.

43 The Summary Guidelines included a section on "Simple rules to avoid breaching the law", which included the following:

- Never tell a customer that they do not have any rights or aren't entitled a remedy because the factory warranty period has expired. Remember – the consumer guarantees do not have clear time limitations, and last for a "reasonable period". What is a "reasonable period" may differ depending on the component which is defective. For example, a "reasonable period" for windscreen wiper blades will be much less than the "reasonable period" that applies to a transmission.
- Never tell a customer that they do not have any rights or aren't entitled to a remedy because they did not purchase or have not been given an extended warranty. Remember - they may still be entitled to a refund, repair or replacement under the consumer guarantees.
- Never tell a customer the time period for a consumer guarantee has expired - if you suspect that the vehicle is so old that the "reasonable period" for the consumer guarantees has expired, please check with Legal before you advise the customer.
- Do not tell customers that they will only be entitled to a refund or replacement if they have had the vehicle repaired first. A customer will have the right to insist on a refund or a replacement where the vehicle is a "major defect".
- ...
- Do not tell customers that you [are] providing them with a remedy as "a gesture of good will", "as a favour" or "just this once". Remember - the consumer guarantees are mandatory, it is not a choice to comply with them.
- If in doubt, always seek assistance from Legal - the application of consumer guarantees can often involve difficult judgments and Legal can help.

44 The Summary Guidelines also contained a section on "Questions to ask", which included the following:

To help determine whether a customer has a right under a consumer guarantee, ask:

- "What is the factory warranty or extended warranty applying to the vehicle" – use this information to first determine what Mazda can do under these warranties, but remember that this will only give you part of the answer. You must consider whether the consumer guarantees apply.
- "What is the problem with the vehicle?" – use this information to determine the nature of the defect and whether the defect is major or minor. A major defect is one where the vehicle is unsafe or a reasonable person would not have purchased the vehicle had they known about the fault, or a fault which cannot

be repaired. For example, a fault requiring replacement of the engine would be a major defect. There are many shades of grey in between.

- “How did this problem occur” – this will assist you in determining whether or not the cause of the problem is due to a manufacturing default (which is covered by the consumer guarantee), or otherwise. For example, engine seizure due to the customer’s failure to have the vehicle serviced and the oil replaced may not be covered but the same engine failure occurring where the customer has ensured that the oil levels are appropriate would be covered.
- “When did the customer purchase the vehicle?” – this will help you determine whether a reasonable time has passed for the fault to become apparent.
- ...
- “Has the vehicle been repaired previously?” – a history of repeated repairs to the same part, or repairs to multiple parts may indicate that there is a major defect.
- “What is the customer asking for?” – remember that in the event of a major defect only, it is the customer’s choice of repair, replacement or refund.

45 Mr Robins also accepted that Mazda should not act inconsistently with the Summary Guidelines in dealing with consumers and their requests for a refund or replacement under the ACL.

How Mazda’s internal structures were designed to deal with customer complaints

46 At all material times, Mazda had the following internal structures for dealing with customer complaints, including those of the consumers the subject of this proceeding.

47 Consumers’ first point of call was Mazda’s case managers (referred to as “customer service operators” and later “customer advocates”).

48 Before June 2017, decisions on customers’ requests for a refund or a replacement vehicle were made in meetings called “round table reviews”, which could be attended by the Customer Relations Manager (Ms Han), the relevant case manager, the Senior Manager of Customer Support, and/or the Senior Manager Technical (Mr Bradford). Prior to April 2018, the round table made decisions as to whether a replacement or refund or other means of redress would be offered.

49 Following the introduction in April 2018 of an “executive panel review process”, the round table review process continued, but it no longer had authority to make these decisions on requests for a refund or a replacement vehicle. The executive panel comprised members of the NCS and a Mazda executive, and from April 2018 onwards made decisions as to whether a replacement or refund or other means of redress would be offered.

THE FACTS

50 The parties tendered a statement of agreed facts. The representations alleged arose mostly from conversations between the consumers and Mazda customer service representatives.

51 The customer complaints, and what Mazda did or did not do in response to them, are also evidenced in various documents, including in audio clips of recorded telephone calls between consumers and Mazda customer representatives. Mazda also relied on an additional document entitled “statement of agreed facts with respondent’s additions”. Those additions were mostly said to contain matters of context and the like. It was also agreed that I should treat those additions that strayed beyond the facts as submissions. I was not taken, in any substantial way, to the document in closing. Having since read it, it is tolerably clear that it does not contain any submission the substance of which was not made elsewhere. And the additional facts are mostly neither here nor there.

52 At the heart of the controversy is how properly to characterise the facts, including the (very lengthy) agreed facts.

53 In closing submissions, the parties filed, at my request, two agreed documents, the first entitled “Representations alleged to have been made by Mazda to each of the Consumers” and the second entitled “ACCC’s unconscionable conduct case: sources of Agreed Facts and Submissions per Consumer”. They are in tabular form and set out, in the case of the former, a summary of each of the representations alleged, their source, and the evidence and submissions made by both sides with respect to them; and in the case of the latter, the facts and submissions made in respect of each of the unconscionable conduct claims.

54 I asked for the documents to be prepared and agreed primarily because of the volume of material before me. The trial occupied 15 hearing days. Written closing submissions exceeded a total of 450 pages and the court book comprised ten large volumes of evidence. Consistently with the reason that I asked for the documents to be prepared and agreed, I have relied on the summary documents as defining the metes and bounds of the disputed issues.

THE WITNESSES

ACCC witnesses

55 The ACCC called nine consumers as witnesses in relation to seven vehicles. Each consumer described in their affidavits the story of their purchase of a Mazda vehicle, their reasons for purchase, and their dealings with Mazda about various issues they later experienced.

56 The ACCC also relied upon evidence from Mr Andrew Christopher, a solicitor, and Professor
Harry Watson, an expert witness.

57 Each consumer witness was cross-examined, but it was to little, if any, effect.

58 The ACCC relied on the sworn evidence of the following individuals.

59 **Consumer RC.** RC purchased a Mazda2 in 2014, and between 2015 and 2018, had issues with
the car's engine lights coming on and the car going into "limp mode" or losing power. Her
evidence described her interactions with Mazda to attempt to resolve these issues, including
telephone conversations with Mazda's customer representatives throughout 2017 and 2018.
RC ultimately obtained a partial refund.

60 **Consumers CT and MT** are married. They purchased a Mazda CX-5 Akera in 2016. Their
evidence described their individual interactions with Mazda about problems with the vehicle's
adaptive headlights, which began five months after purchase. After seeking to repair the
vehicle, CT and MT told Mazda that they no longer wanted the vehicle, at which point they
contacted NSW Fair Trading and the ACCC and continued to engage with Mazda, seeking a
refund or a replacement vehicle. They commenced proceedings in the NSW Civil and
Administrative Tribunal (**NCAT**) in November 2017, which resulted in consent orders
requiring Mazda to replace the vehicle.

61 **Consumers SB and KB** are married. They purchased a Mazda CX-5 Mazza Sport Diesel in
2013 to use as a family car, including for holidays and for SB's work. Between 2015 and 2017,
they experienced a number of engine issues, including three engine failures and a starter motor
failure. Initially, SB was the one who spoke with Mazda. KB became involved in August
2017. The couple lodged a complaint with NSW Fair Trading and, after further engine issues,
commenced proceedings in NCAT in February 2018. Those proceedings settled, with Mazda
paying SB and KB \$16,000.

62 **Consumer MG.** MG purchased a Mazda6 in 2013, primarily to drive to work. The vehicle
had three engine replacements over four years, and a number of other issues including the car
displaying warning messages, the engine light coming on, a failure and subsequent replacement
of the car's turbo-charger and camshaft, and the car going into "limp mode". In August 2018,
Mazda offered to provide MG with an Atenza Auto Wagon in exchange for his vehicle and
MG paying \$17,700. MG accepted the offer.

63 **Consumer TK.** TK and her husband MK purchased a Mazda BT 50 in 2017 to travel around Australia with a new caravan. Their issues with the car included needing an engine replacement within five months of purchase and an intermittent stalling issue in 2018. The couple took the car to Mazda three times to fix the stalling issues. Mazda could not replicate the fault on the first two occasions; the third time, Mazda was able to replicate the fault and later gave a full refund to TK and MK for the car and its accessories.

64 **Consumer LC (previously LS).** LC purchased a Mazda CX-3 A 6A Akari Diesel All Wheel Drive in 2015. She deposed that she wanted a car that was reliable and safe for personal and business use. Several months after her purchase, LC experienced issues with the car losing power while driving. After discussions with Mazda, Mazda offered LC an extended warranty and free service, which she accepted in December 2017. LC said the issues with the car were ongoing as at the date of her affidavit (April 2020).

65 **Consumer EG.** EG bought a Mazda2 in 2014 to use for travel to work, as well as in her daily life. Her issues included the car going into “rough idle”, an issue which began several weeks after purchase, and “limp mode”, a problem which began in February 2018. She left her car at a Mazda dealer for repairs in early July 2018. EG had several discussions with NSW Fair Trading and Mazda, and ultimately commenced NCAT proceedings in January 2019, seeking a replacement vehicle or services to the value of the purchase price. The matter was resolved, with Mazda agreeing by consent to pay EG \$303 and to provide a one year extended warranty on the car, a two year extended warranty on new parts, and three free car services.

66 **Andrew Christopher** was (and is) a partner at Webb Henderson, the solicitors for the ACCC. Mr Christopher’s affidavit annexed copies of Mazda Recalls’ reports in relation to vehicles the subject of recalls. He deposed that the model of vehicles owned by consumers SB and KB, consumer MG, and consumers MT and CT were affected by recalls (although MT and CT’s specific car was not relevantly affected). Mr Christopher was not cross-examined and the ACCC did not rely upon his affidavit in either written or oral closing submissions.

67 **Professor Harry Watson** was the Head of the Department of Mechanical Engineering at the University of Melbourne. Professor Watson has expertise in the field of the design of engines for motor vehicles, among other areas. Professor Watson’s evidence concerned his opinions about questions relevant to assessing the nature, extent, and cause of the vehicle faults.

68 Before turning to a summary of Mazda’s witnesses, I should mention one other point. Some of the evidence given by some of the consumers concerned their “understanding” of things that they had been told by customer advocates, and others, employed by Mazda. For example, the ACCC relied on evidence given by LC in her affidavit that, based on what she had been told:

LC understood Mazda to be saying that the loss of power issue and the replacement engine with the car were not major failures. She understood Mazda to be saying that she was not entitled to a replacement car at no cost under consumer laws, and that they did not have to give her a replacement car under consumers [sic] laws because they could fix her car under warranty. She also understood Mazda to be saying that a replacement engine was not a major failure under consumer laws.

69 I have not had regard to evidence along those lines from any of the consumers, because the standard is an objective one. See *Australian Competition and Consumer Commission v Jayco Corporation Pty Ltd* [2020] FCA 1672 at [630], and *Australian Competition and Consumer Commission v Jewellery Group Pty Ltd* [2012] FCA 848; (2012) 293 ALR 335 at 348 [62] (Lander J).

Mazda witnesses

70 Mazda relied on evidence from the following individuals, each of whom was cross-examined. Again very little, if anything, turned on it, other than the cross-examination of Ms Han, which the ACCC relied on in closing.

71 **Chooi-Lin Han** was (and is) the Customer Relations Manager at Mazda and a leader of Mazda’s Customer Relations team. Ms Han gave evidence about how the Customer Relations team responded to requests for refunds or replacement, both generally and in relation to each specific consumer. Ms Han described her involvement in the round table – and later, the executive panel – discussions which led to the offers made to the consumers.

72 In the course of cross-examination, Ms Han revealed that she had obtained a legal degree and was admitted as a legal practitioner, although she had never held a practicing certificate, and did not hold herself out as a lawyer within Mazda.

73 **Michael Robins** was (and is) the Head of Legal for the National Legal Department at Mazda, and a member of Mazda’s executive management team. He described the organisation and structure of Mazda, including the relationships between Mazda, its dealers, and Mazda Corp. He also described the structure and processes for handling customer complaints, including the role of customer advocates, processes for managing requests for refunds or replacements, and ACL training.

74 **Shane Bradford** was (and is) the Senior Manager, Customer Service at Mazda. He gave expert evidence in his capacity as a qualified automotive technician with over 30 years' experience, including 13 years at Mazda. During the hearing, the parties agreed, and I made an order to the effect, that certain paragraphs of Mr Bradford's evidence were to be received by way of submission pursuant to r 5.04(3) item 19 of the *Federal Court Rules 2011* (Cth). But in the end, nothing turned on it.

75 Mr Bradford was also responsible for matters involving technical issues with Mazda products in Australia. He explained Mazda's Technical Protocol (developed to assist dealers with complex technical issues), technical reports provided by Mazda's Technical Support team, the role of FTS, how dealers submitted requests for warranty and ACL claims, and the availability of loan vehicles to customers while their vehicles were being repaired. He also gave evidence about the technical elements of the problems exhibited by each consumer's vehicle.

76 Mr Bradford also explained the following technical aspects of vehicle operations and repair:

- (1) critical aspects of car engine operation;
- (2) the complexity in diagnosing problems;
- (3) an explanation of carbon build up and how it could be addressed, including through engine replacement (excessive build up occurred in the engines of several of the vehicles);
- (4) the function of fuel injectors and transmissions;
- (5) the operation and significance of dashboard lights, and the related diagnostic trouble codes which are used to diagnose faults, including within an engine; and
- (6) the "limp mode" feature, which "refers to a 'limited power' mode which is included in Mazda vehicle control systems that reduces engine output if the system detects operation outside the designed operational parameters".

77 **Steven Groves** was (and is) the Customer Relations Operations Specialist at Mazda, and reported to Ms Han. He explained Mazda's internal record keeping system, referred to as Maestro, and annexed the Maestro records relevant to each vehicle the subject of this proceeding. Mr Groves also described the steps Mazda took in relation to each consumer, how they aligned with the general Mazda processes, and Mazda's decision making during the repairs process. He had some involvement in Mazda's dealings with consumers in relation to

four of the vehicles the subject of this proceeding, largely limited to authorising communications with the consumers. Mr Groves did not contact consumers directly.

78 **Andrew George** was a mechanical engineer, with over 31 years of experience in the automotive industry. He provided his expert opinion about the causes of the defects of vehicles the subject of the proceeding, and participated in a concurrent evidence session with Professor Watson. In the end, not much turned on the evidence of Mr George or Professor Watson, and no party suggested that it did. That was so primarily because the experts had been retained at a time when the ACCC was pressing a case that each of the vehicles had at various points in time in fact suffered a “major failure” within the meaning of the consumer guarantee provisions of the ACL. None of the expert witnesses had the benefit of inspecting the vehicles.

THE LAW

Misleading or deceptive conduct

79 Section 18(1) of the ACL prohibited a person from engaging in conduct that is misleading or deceptive, or is likely to mislead or deceive. It provided:

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.

80 In determining whether a contravention of s 18(1) has occurred, “the task of the court is to examine the relevant course of conduct as a whole. It is determined by reference to the alleged conduct in the light of the relevant surrounding facts and circumstances. It is an objective question that the court must determine for itself. It invites error to look at isolated parts of the corporation’s conduct. The effect of any relevant statements or actions or any silence or inaction occurring in the context of a single course of conduct must be deduced from the whole course of conduct”. See *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304 at 341–342 [102] (Gummow, Hayne, Heydon and Kiefel JJ), citing McHugh J in *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at 625 [109].

81 Where the conduct in issue consists of an express representation which is demonstrably false, it is not usually necessary to go beyond that finding to conclude that it is misleading or deceptive. See *ConAgra Inc v McCain Foods (Aust) Pty Ltd* (1992) 33 FCR 302 at 380 (French J).

- 82 The central question is whether the impugned conduct, viewed as a whole, has a sufficient tendency to lead a person exposed to the conduct into error, that is, to form an erroneous assumption or conclusion about some fact or matter. See, by way of example, *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640 at 651 [39] (French CJ, Crennan, Bell and Keane JJ).
- 83 Conduct is likely to mislead or deceive if there is a real and not remote possibility of it doing so, regardless of whether it is less or more than a 50 per cent chance. See, by way of example, *Global Sportsman Pty Ltd v Mirror Newspapers Ltd* (1984) 2 FCR 82 at 87 (Bowen CJ, Lockhart and Fitzgerald JJ); *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2020) 278 FCR 450 at 459 [22(a)] (Wigney, O’Bryan and Jackson JJ). It is not sufficient if the conduct merely has a sufficient tendency to cause confusion or wonderment. See, by way of example, *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435 at 443 [8] (French CJ, Crennan and Kiefel JJ).
- 84 It is not necessary to prove an intention to mislead or deceive, nor is it necessary to prove that the conduct in question in fact misled or deceived anyone. See, by way of example, *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435 at 443 [6], [9] (French CJ, Crennan and Kiefel JJ).
- 85 Further, although representations to the public must be considered by reference to the class of customers likely to be affected by the conduct, “where the conduct is directed to a single person ... attention must be directed to the relationship between the two persons, the context in which the statement is made, the reasonably known characteristics of the recipient of the statement, and the effect on a reasonable person in the position of the recipient of the statement”. See *Australian Competition and Consumer Commission v Valve Corporation (No 3)* [2016] FCA 196; (2016) 337 ALR 647 at 691 [219] (Edelman J). See too *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592 at 604 [37] per Gleeson CJ, Hayne and Heydon JJ (“it is necessary to consider the character of the particular conduct of the particular agent in relation to the particular purchasers, bearing in mind what matters of fact each knew about the other as a result of the nature of their dealings and the conversations between them, or which each may be taken to have known”).
- 86 This is a proceeding, like *Australian Competition and Consumer Commission v Jayco Corporation Pty Ltd* [2020] FCA 1672 (Wheelahan J), where the ACCC alleged that the conduct alleged to be misleading or deceptive, or likely to mislead or deceive, included the

making of representations as to the law or legal rights. As Wheelahan J said in that case at [598]-[599]:

[R]epresentations as to the law or legal rights ... may relate to the existence of rights in a particular relationship or arising from a particular transaction, in a general sense: see, for example, *Valve Corporation v Australian Competition and Consumer Commission* [2017] FCAFC 24; 351 ALR 584, and *Australian Competition and Consumer Commission v LG Electronics Australia Pty Ltd* [2018] FCAFC 96. Others may relate to the exercise of rights in particular circumstances that may depend upon questions of judgment involving fact and degree. In considering such representations, it is necessary to be mindful that a representation in the nature of an appraisal or opinion does not necessarily give rise to a contravention of s 18 because it later proves to be inaccurate. An opinion, so expressed, at least if it is genuinely held and there is a basis for it, however erroneous, misrepresents nothing: *Global Sportsman v Mirror Newspapers* at 88 (Bowen [CJ], Lockhart and Fitzgerald JJ). The High Court made this point in *Campbell v Backoffice Investment*, in which it was held that the provision of financial estimates in pre-contractual documents before a corporate transaction, which were believed to be true but which turned out to be inaccurate, was not misleading or deceptive. In circumstances closer to the present proceeding, Dowsett J in *Australian Competition and Consumer Commission v Bunavit Pty Ltd* [2016] FCA 6 at [29], commented on the potential danger of penalising suppliers for bona fide denials of liability, such as denials that a defect in goods amounts to a major failure of a statutory warranty, which later turn out to be wrong ...

Such cases involving representations as to the law or legal rights may involve claims under both ss 18 and 29(1)(m) of the ACL, such as the ACCC has made in the present proceeding. The general prohibition on misleading or deceptive conduct in s 18 operates concurrently with the more specific prohibitions in s 29: see, s 18(2).

87 Section 29(1) of the ACL prohibited a person from making false or misleading representations about goods or services. Section 29(1)(m) provided:

29 False or misleading representations about goods or services

(1) A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

...

(m) make a false or misleading representation concerning the existence, exclusion or effect of any condition, warranty, guarantee, right or remedy (including a guarantee under Division 1 of Part 3-2); or

...

88 There is generally no relevant distinction between the phrases “misleading or deceptive” in s 18 and “false or misleading” in s 29, and the parties argued the case on that basis.

Unconscionable conduct

89 The relevant provisions in the ACL relating to the question of unconscionable conduct are found in ss 21 and 22.

90 At the time of the relevant conduct, those sections were in these terms:

21 Unconscionable conduct in connection with goods or services

- (1) A person must not, in trade or commerce, in connection with:
- (a) the supply or possible supply of goods or services to a person (other than a listed public company); or
 - (b) the acquisition or possible acquisition of goods or services from a person (other than a listed public company);

engage in conduct that is, in all the circumstances, unconscionable.

- (2) This section does not apply to conduct that is engaged in only because the person engaging in the conduct:

- (a) institutes legal proceedings in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition; or
- (b) refers to arbitration a dispute or claim in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition.

- (3) For the purpose of determining whether a person has contravened subsection (1):

- (a) the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and
- (b) the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.

- (4) It is the intention of the Parliament that:

- (a) this section is not limited by the unwritten law relating to unconscionable conduct; and
- (b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and
- (c) in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:

- (i) the terms of the contract; and
- (ii) the manner in which and the extent to which the contract is carried out;

and is not limited to consideration of the circumstances relating to formation of the contract.

22 Matters the court may have regard to for the purposes of section 21

- (1) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the *supplier*) has contravened section 21 in connection with the supply or possible supply of goods or

services to a person (the *customer*), the court may have regard to:

- (a) the relative strengths of the bargaining positions of the supplier and the customer; and
- (b) whether, as a result of conduct engaged in by the supplier, the customer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the supplier; and
- (c) whether the customer was able to understand any documents relating to the supply or possible supply of the goods or services; and
- (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the customer or a person acting on behalf of the customer by the supplier or a person acting on behalf of the supplier in relation to the supply or possible supply of the goods or services; and
- (e) the amount for which, and the circumstances under which, the customer could have acquired identical or equivalent goods or services from a person other than the supplier; and
- (f) the extent to which the supplier's conduct towards the customer was consistent with the supplier's conduct in similar transactions between the supplier and other like customers; and
- (g) the requirements of any applicable industry code; and
- (h) the requirements of any other industry code, if the customer acted on the reasonable belief that the supplier would comply with that code; and
- (i) the extent to which the supplier unreasonably failed to disclose to the customer:
 - (i) any intended conduct of the supplier that might affect the interests of the customer; and
 - (ii) any risks to the customer arising from the supplier's intended conduct (being risks that the supplier should have foreseen would not be apparent to the customer); and
- (j) if there is a contract between the supplier and the customer for the supply of the goods or services:
 - (i) the extent to which the supplier was willing to negotiate the terms and conditions of the contract with the customer; and
 - (ii) the terms and conditions of the contract; and
 - (iii) the conduct of the supplier and the customer in complying with the terms and conditions of the contract; and
 - (iv) any conduct that the supplier or the customer engaged in, in connection with their commercial relationship, after they entered into the contract; and
- (k) without limiting paragraph (j), whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the

- supplier and the customer for the supply of the goods or services; and
- (1) the extent to which the supplier and the customer acted in good faith.
- (2) Without limiting the matters to which the court may have regard for the purpose of determining whether a person (the *acquirer*) has contravened section 21 in connection with the acquisition or possible acquisition of goods or services from a person (the *supplier*), the court may have regard to:
- (a) the relative strengths of the bargaining positions of the acquirer and the supplier; and
 - (b) whether, as a result of conduct engaged in by the acquirer, the supplier was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the acquirer; and
 - (c) whether the supplier was able to understand any documents relating to the acquisition or possible acquisition of the goods or services; and
 - (d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the supplier or a person acting on behalf of the supplier by the acquirer or a person acting on behalf of the acquirer in relation to the acquisition or possible acquisition of the goods or services; and
 - (e) the amount for which, and the circumstances in which, the supplier could have supplied identical or equivalent goods or services to a person other than the acquirer; and
 - (f) the extent to which the acquirer's conduct towards the supplier was consistent with the acquirer's conduct in similar transactions between the acquirer and other like suppliers; and
 - (g) the requirements of any applicable industry code; and
 - (h) the requirements of any other industry code, if the supplier acted on the reasonable belief that the acquirer would comply with that code; and
 - (i) the extent to which the acquirer unreasonably failed to disclose to the supplier:
 - (i) any intended conduct of the acquirer that might affect the interests of the supplier; and
 - (ii) any risks to the supplier arising from the acquirer's intended conduct (being risks that the acquirer should have foreseen would not be apparent to the supplier); and
 - (j) if there is a contract between the acquirer and the supplier for the acquisition of the goods or services:
 - (i) the extent to which the acquirer was willing to negotiate the terms and conditions of the contract with the supplier; and
 - (ii) the terms and conditions of the contract; and
 - (iii) the conduct of the acquirer and the supplier in complying with the terms and conditions of the contract; and

- (iv) any conduct that the acquirer or the supplier engaged in, in connection with their commercial relationship, after they entered into the contract; and
- (k) without limiting paragraph (j), whether the acquirer has a contractual right to vary unilaterally a term or condition of a contract between the acquirer and the supplier for the acquisition of the goods or services; and
- (l) the extent to which the acquirer and the supplier acted in good faith.

91 Section 21(1) was amended in 2018 to remove the words “(other than a listed public company)”, but those amendments do not affect the analysis here.

92 This is not the occasion to write at length about the meaning of the term “unconscionable”. There was no dispute between the parties about the relevant principles. The question involves the court making an evaluative judgment, which requires close attention to all the relevant facts and circumstances.

93 As the Full Court of this Court said in *Unique International College Pty Ltd v Australian Competition and Consumer Commission* (2018) 266 FCR 631 at 667 [155] (Allsop CJ, Middleton and Mortimer JJ), an allegation of unconscionability is a serious allegation, sufficient to warrant censure for the purpose of deterrence by the imposition of a civil penalty:

To behave unconscionably should be seen, as part of its essential conception, as serious, often involving dishonesty, predation, exploitation, sharp practice, unfairness of a significant order, a lack of good faith, or the exercise of economic power in a way worthy of criticism. None of these terms is definitional. The *Shorter Oxford Dictionary on Historical Principles* (1973) gives various definitions including “having no conscience, irreconcilable with what is right or reasonable”. The *Macquarie Dictionary* (1985) gives the definition “unreasonably excessive; not in accordance with what is just or reasonable”. (The search for an easy aphorism to substitute for the words chosen by Parliament (unconscionable conduct) should not, however, be encouraged ...) These are descriptions and expressions of the kinds of behaviour that, viewed in all the circumstances, may lead to an articulated evaluation (and criticism) of unconscionability. It is a serious conclusion to be drawn about the conduct of a businessperson or enterprise. It is a conclusion that does the subject of the evaluation no credit. This is because he, she or it has, in a human sense, acted against conscience. The level of seriousness and the gravity of the matters alleged will depend on the circumstances. Courts are generally aware of the character of a finding of unconscionable conduct and take that into account in determining whether an applicant has discharged its civil burden of proof.

94 That passage was cited with approval in *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* [2021] FCAFC 40; (2021) 388 ALR 577 at [88] (Allsop CJ and Besanko and McKerracher JJ).

95 The values that inform the standard of conscience include “certainty in commercial transactions, honesty, the absence of trickery or sharp practice, fairness when dealing with customers, the faithful performance of bargains and promises freely made, and ... the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage”. See *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at 17 [14] (Kiefel CJ and Bell J) (internal quotation and citation omitted). The task of the court is to “assess whether [the conduct] is to be characterised as a sufficient departure from the norms of acceptable commercial behaviour as to be against conscience or to offend conscience”. See *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* [2021] FCAFC 40; (2021) 388 ALR 577 at [92].

96 I should also add that it is not necessary under ss 21 and 22 of the ACL to find “some form of pre-existing disability, vulnerability or disadvantage of which advantage was taken”. See *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* [2021] FCAFC 40; (2021) 388 ALR 577 at [78].

Statutory guarantees

97 Section 54 of the ACL provided for a guarantee that the goods are of acceptable quality, relevantly as follows:

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
- (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
 - ...
- (6) Goods do not fail to be of acceptable quality if:
 - (a) the consumer to whom they are supplied causes them to become of unacceptable quality, or fails to take reasonable steps to prevent them from becoming of unacceptable quality; and
 - (b) they are damaged by abnormal use.
 - ...

98 There was no issue that Mazda engaged in the impugned conduct in trade or commerce in connection with the supply of goods (the vehicles); each of the consumers was a “consumer” within the meaning of that term in s 3 of the ACL; in the case of each of the seven vehicles, a Mazda dealer was the “supplier” of the goods; and Mazda was the manufacturer of the vehicles.

99 Section 259 of the ACL provided relevantly as follows:

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.

...

100 Section 260 of the ACL provided relevantly as follows:

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

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

101 It was also common ground that the hypothetical question whether the reasonable consumer would have regarded the quality of the goods as acceptable is to be determined at the time of supply. But for the purposes of determining that question, the reasonable consumer may be acquainted with information known at the time of trial. See eg *Medtel Pty Ltd v Courtney* (2003) 130 FCR 182 at 206 [70] (Branson J, Jacobson J agreeing).

102 There was also no dispute that, as a general rule, a manufacturer’s warranty has no bearing on the question whether the goods comply with the statutory guarantee of acceptable quality. See: *Australian Competition and Consumer Commission v Jayco Corporation Pty Ltd* [2020] FCA 1672 at [43] (Wheelahan J).

103 Section 262 of the ACL provided relevantly as follows:

262 When consumers are not entitled to reject goods

- (1) A consumer is not entitled, under section 259, to notify a supplier of goods that the consumer rejects the goods if:
 - (a) the rejection period for the goods has ended; or
 - (b) the goods have been lost, destroyed or disposed of by the consumer; or
 - (c) the goods were damaged after being delivered to the consumer for reasons not related to their state or condition at the time of supply; or
 - (d) the goods have been attached to, or incorporated in, any real or personal property and they cannot be detached or isolated without damaging them.

- (2) The *rejection period* for goods is the period from the time of the supply of the goods to the consumer within which it would be reasonable to expect the relevant failure to comply with a guarantee referred to in section 259(1)(b) to become apparent having regard to:
 - (a) the type of goods; and
 - (b) the use to which a consumer is likely to put them; and
 - (c) the length of time for which it is reasonable for them to be used; and
 - (d) the amount of use to which it is reasonable for them to be put before such a failure becomes apparent.

104 As Wheelahan J said in *Australian Competition and Consumer Commission v Jayco Corporation Pty Ltd* [2020] FCA 1672 at [46]-[47] (emphasis in original):

As set out above in s 262(2), the rejection period is the period from the time of the supply of the goods to the consumer within which it would be reasonable to expect the *relevant failure* to become apparent. This is a reference to the failure to comply with the statutory guarantee becoming apparent, rather than any underlying defect becoming apparent, which may occur at an earlier point in time. In *Nesbit v Porter* [2000] NZCA 288; 2 NZLR 465 at [40], the New Zealand Court of Appeal explained in relation to the corresponding New Zealand provision –

In some instances the defect will be of a kind where it may be obvious that something is wrong with the goods but the supplier or someone else to whom the consumer turns for help may be in doubt about the exact nature of the problem and thus about how serious it is. For example, the operation of a motor vehicle may be affected by the failure of a small and comparatively obscure part, say, a waver spring in an automatic transmission; until the transmission is dismantled a mechanic cannot be sure what the defect is. Or the cause of malfunction, particularly one which occurs intermittently, may be hard to detect even upon inspection. It may be necessary to carry out a series of tests or even to wait and see what, if anything, develops. Or the repairer may think the fault has been identified and that the correct repair or adjustment has been made but this view may prove to be wrong and the problem may manifest itself again. ... In all such cases, a reasonable period will not elapse before the consumer has had the opportunity to become properly informed about the nature of the defect and has also had a little time then to consider an appropriate decision, whether or not to reject the goods. It almost goes without saying that the period will be correspondingly longer where the supplier has taken steps

which effectively conceal a defect or has withheld relevant information.

The Court in *Nesbit v Porter* at [41] went on to refer to the practical utility to a consumer of the right of rejection as informing what is a reasonable period within which to exercise a right to reject goods –

In considering what is a reasonable period in a particular case it is necessary also to bear in mind the practical utility to a consumer of the right of rejection given by s 18 of the [*Consumer Guarantees Act 1993* (NZ)]. Ms Nield submitted persuasively that, although a right to damages survives the loss of the right to reject, in pursuing it the consumer may face substantial litigation costs where the claim is for a sum exceeding the jurisdiction of the Disputes Tribunal (now \$7500, or \$12,000 by agreement of both parties). Replacement (under s 19(1)(b)) or repair by or at the cost of the supplier or rejection of the goods, where that is available in terms of s 18, are more “user-friendly” solutions to a consumer’s problem with goods, although of course it may still prove to be necessary to litigate in order to recover all or part of the price.

105 Justice Wheelahan at [49] also approved of the following statement in *Vautin v By Winddown, Inc. (formerly Bertram Yachts) (No 4)* [2018] FCA 426; (2018) 362 ALR 702 at [265] (Derrington J):

... the section requires a sufficiently high level of certainty in relation to the knowledge of the relevant failure including its nature and extent and what it will cost to remediate it. If the level of knowledge required is as identified above, it follows that if there exists doubt about the consequences of a defect in an item and, therefore, the cost of repairing it, the failure of the statutory guarantee has not become apparent.

106 Section 263 of the ACL provided relevantly as follows:

263 Consequences of rejecting goods

- (1) This section applies if, under section 259, a consumer notifies a supplier of goods that the consumer rejects the goods.
- (2) The consumer must return the goods to the supplier unless:
 - (a) the goods have already been returned to, or retrieved by, the supplier; or
 - (b) the goods cannot be returned, removed or transported without significant cost to the consumer because of:
 - (i) the nature of the failure to comply with the guarantee to which the rejection relates; or
 - (ii) the size or height, or method of attachment, of the goods.
- (3) If subsection (2)(b) applies, the supplier must, within a reasonable time, collect the goods at the supplier’s expense.
- (4) The supplier must, in accordance with an election made by the consumer:
 - (a) refund:
 - (i) any money paid by the consumer for the goods; and

- (ii) an amount that is equal to the value of any other consideration provided by the consumer for the goods; or
 - (b) replace the rejected goods with goods of the same type, and of similar value, if such goods are reasonably available to the supplier.
- (5) The supplier cannot satisfy subsection (4)(a) by permitting the consumer to acquire goods from the supplier.
- (6) If the property in the rejected goods had passed to the consumer before the rejection was notified, the property in those goods reverts in the supplier on the notification of the rejection.

107 Subsection 263(6) was not the subject of any substantial submission by the parties, who agreed, when I raised it with counsel, that it had no bearing on the issues in dispute.

108 There was some divergence between the parties about the operation of the consumer guarantee provisions, which, it was agreed, provided the statutory context for the misrepresentation and unconscionable conduct claims.

109 Mazda contended that some consumers were not entitled to a refund or a replacement vehicle because a reasonable consumer would not have considered their vehicle as supplied as being of unacceptable quality at the time of supply (under s 54) and in other cases because they had not notified the supplier that they rejected the goods, within the meaning of s 259(3)(a).

110 Mazda also contended that the ACCC's approach to the meaning of the guarantee as to acceptable quality contained in s 54 was in a number of respects incorrect, including because the question of whether a vehicle is safe or durable is not based on symptoms alone and it is necessary to identify a "mechanical" fault with the vehicle at the time of supply.

111 I turn to Mazda's submissions concerning those contentions below, but it is convenient first to set out the matters concerning the operation of the consumer guarantee provisions that were not in dispute.

112 As the ACCC submitted (and Mazda did not dispute), upon a breach of a statutory guarantee (such as the guarantee of acceptable quality under s 54 of the ACL), there are three "pathways" (to adopt the ACCC's term) by which a consumer can reject the goods and then elect for a refund or replacement under the ACL, should they so wish.

113 The first pathway is where there is a failure that can be fixed but it is not fixed within a reasonable period of time (s 259(2)(b)). Here, the failure to comply with the guarantee can be remedied and is *not* a major failure, but the failure has *not* been remedied within a *reasonable time*.

114 The second pathway is where there is a failure that cannot be fixed (s 259(3)). Here, the failure to comply with the guarantee cannot be remedied but does not have to be a major failure (see “the guarantee cannot be remedied *or* is a major failure” in s 259(3)).

115 The third pathway is where there is a major failure (ss 259(3), 260).

116 Accordingly, two of the three pathways do not require there to be a major failure. They rely on whether the failure can be remedied at all, or within a reasonable time.

117 The third pathway does require there to be a major failure, relevantly as follows:

- (1) If the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure, this constitutes a major failure: s 260(1)(a). For example, if the guarantee as to acceptable quality has failed because the goods are not durable, such that a reasonable consumer would not have acquired them had this history been known, the test of major failure will be met.
- (2) If 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, this constitutes a major failure: s 260(1)(c).
- (3) If the goods are not of acceptable quality because they are unsafe, this automatically constitutes a major failure: s 260(1)(e).

118 Section 262(1) of the ACL sets out grounds where the consumer is not entitled to reject the goods, including where the “rejection period” has ended. The rejection period is the period from the time of the supply of the goods to the consumer within which it would be reasonable to expect the relevant failure to become apparent. See s 262(2).

119 Although Mazda never conceded the point expressly, in the end it did not dispute the proposition that if a consumer rejects the goods and seeks a refund such that s 263 applies, there is no scope of reduction of the amount paid on account of depreciation, or any use of the goods by the consumer or the like.

120 The position is the same if the consumer seeks replacement. In that case, the rejected goods must be replaced with goods of the same type, and of similar value, if they are reasonably available.

121 Those propositions follow from the plain language of s 263(4)(a) and s 263(4)(b), which do not admit any relevant scope for reduction or, in the case of a replacement, the provision of

something other than a new vehicle of a similar type and value (where the “goods” are motor vehicles). See also *Australian Competition and Consumer Commission v Jayco Corporation Pty Ltd* [2020] FCA 1672 at [51] (Wheelahan J) (“The imperative terms of the statutory obligation under s 263(4)(a) do not authorise any abatement or adjustment of the amount paid on account of depreciation, or any use of the goods by the consumer...”).

122 Mazda’s written closing submissions under the rubric “The Consumer Guarantees” were lengthy, but not all of the submissions there made bore directly on the case advanced by the ACCC. The submissions that did bear on the case, and which it is convenient at this point to address (because they were in dispute) are these.

123 First, Mazda submitted that in the context of motor vehicles, the relevant statutory factors provided for in s 54 (fit for purpose, free from defects, safe and durable) “reduce to mechanical defects existing at the time of supply”.

124 Secondly, Mazda submitted, it follows that “[t]he question of what constitutes acceptable quality at the time of supply therefore presents a practical difficulty in the context of motor vehicles that have been extensively used over a period of time”.

125 Thirdly, Mazda submitted that “there are at least four potential factors which preclude a ready conclusion of unacceptable quality on the mere symptom or manifestation of a fault” and that “[t]his is so even if ... a mechanical fault (as distinct from user education or expectation) is clearly identified”. Those factors are whether:

- (1) the vehicle has been subject to repairs since its supply;
- (2) accessories have been installed on the vehicle since its supply;
- (3) there has been fair wear and tear; and/or
- (4) there has been abnormal use of the vehicle, or some other action after the supply of the vehicle (such as the use of contaminated fuel),

which may have caused the manifested fault.

126 Fourthly, Mazda submitted that “it is not sufficient for an applicant to show that the reasonable consumer would conclude that the vehicle was not safe or durable based on symptoms alone”.

127 There are a number of difficulties with those submissions, and I do not accept them.

128 First, there is no warrant for reading into the words of s 54(2)(c) (“Goods are of acceptable quality if they are as ... free from defects ... as a reasonable consumer ... would regard as acceptable”) the word “mechanical” before the word “defects”. And no reason for doing so was given, other than that the other factors (that is, that the goods be fit for purpose, free from defects, safe and durable) were somehow said to “reduce” to the “mechanical”. There is not, with respect, any suggestion in the text of the ACL or the statutory history that the legislature intended, in the case of goods like automobiles, to limit the operation of the guarantee to “mechanical” defects. To the extent that any other submission was founded on the necessary presence of such mechanical defects at the time of supply, I do not accept any such submission.

129 Secondly, although it may be accepted that the older a vehicle, and the more repairs that have been carried out on it, the more it may mean that it is more forensically difficult to make good a case brought under the ACL and that there may therefore be “practical difficulties” in relation to such claims, the experts who gave evidence agreed that none of the factors listed at [0] above was relevant to the faults experienced with any of the seven vehicles the subject of the ACCC’s case. So Mazda’s submission about the potential factors listed above is beside the point on the facts in any event.

130 Thirdly, there is also no textual or any other warrant for excluding from the operation of the guarantee provisions faults that are said to be “the mere symptom or manifestation of a fault” or “symptoms alone”. As Perram J said (admittedly in the context of a pleadings summons) in *Capic v Ford Motor Company (No 3)* [2017] FCA 771 at [6]-[8]:

[The] provisions [contained in s 54 of the ACL] open up the possibility for a consumer such as Ms Capic that the unacceptable quality of a vehicle might be established simply by proving it suffered from a range of aberrant behaviours. To run such a case, it would not be necessary to explain why the vehicle suffered from these problems; it would be enough to show that it was not fit for driving (subsection 54(2)(a)) or was not safe (subsection 54(2)(d)). This she might well prove simply by demonstrating that the vehicle was given to sudden powerlessness, violent shaking or other undesirable automotive behaviours.

Of course, Ms Capic could also seek to prove that the vehicle contained a defect in that its transmission was defective and hence bring herself instead within subsection 54(2)(c). But forensically this would be a more ambitious and difficult case because she would take upon herself the engineering burden of explaining what the problem with the transmission actually was.

So there is a distinction between the unacceptable quality of a vehicle being established, on the one hand, by its constellation of symptoms and, on the other, by proving the root cause of those symptoms.

CONSUMER CONTACT WITH MAZDA CONCERNING VEHICLE FAULTS

131 I now turn to consider each of the seven individual cases and the evidence in respect of them.
I will take each case, and the ACCC's case in respect of each such case, in turn.

132 In order to explain how the representations and alleged unconscionable conduct is said to arise, I have structured these reasons in respect of each consumer as follows. First, I have set out the relevant background facts that the ACCC claimed gave rise to each representation (or group of representations, where it is convenient to deal with them in such a manner). I then turn to consider, in respect of each representation said to arise from those facts, whether those representations were false or misleading in the manner that the ACCC claimed. I then continue to set out the relevant facts for the next representation or group of representations, and so on.

133 Having considered each representation in turn, and in the course of doing so, having described all the facts relevant to the consumer, I then consider the ACCC's case on unconscionable conduct in respect of that consumer. As will become apparent, there is a considerable, but necessary, degree of repetition.

Some general points about the unconscionable conduct claims

134 For reasons that I explain below in the context of each of the separate cases the subject of this proceeding, I have formed the view that Mazda's conduct was not unconscionable as alleged. The ACCC's submissions regarding unconscionable conduct, like Mazda's response, turn on how properly to characterise the detail of conduct and communications between Mazda and each consumer.

135 I have formed the view that although Mazda's conduct can accurately be characterised as constituting what I describe as appalling customer service, and although customers were rightly frustrated at Mazda's delays and excuses for not squarely addressing their complaints and their requests for a refund or replacement vehicle, Mazda's conduct was not, in my view, to be characterised as unconscionable (as I say, for reasons that I explain below).

136 That said, there were a number of submissions made by Mazda with respect to the ACCC's unconscionable conduct claims that I do not accept. It is convenient to deal with them now.

137 Counsel for Mazda insisted that in many of the cases alleged, the consumers had not suffered or endured "harm", and that that counted in favour of the contention that Mazda's conduct was not unconscionable.

138 In each of the cases, as the lengthy recital of the facts below makes apparent, it is however, self-evident that the consumers suffered relevant harm. Two of the consumers wanted to drive their utility vehicle with a caravan to the Birdsville Races. They never got there because of failures with their (new) vehicle. Instead, they ended up in Rockhampton and were forced to stay in a caravan park, where they had never intended to stay, and were provided with a loan vehicle without a tow bar so that the caravan remained in situ for some time. And of course, as the facts will show with respect to those consumers, they spent a lot of time engaging in interminable phone conversations with Mazda’s “customer advocates”.

139 In some other instances, consumers missed work because their vehicle had broken down or they had not been given a loan vehicle. In the case of RC, as I explain below, she complained that the loan vehicle that she had been given had a higher insurance excess payment. And all of the consumers, as I will explain, were justified in feeling distressed at the disruption that inevitably ensues when one’s motor vehicle repeatedly fails for one reason or another. I do not propose to address in detail the minutiae of the competing submissions about whether particular instances of the kind I have described constituted relevant harm. It suffices to say that I accept the ACCC’s submissions that in each instance where it alleged unconscionability, the consumers suffered relevant harm.

140 Mazda also submitted that its conduct was not unconscionable viewed in its “totality” because it provided support and assistance to the consumers, including by providing loan vehicles, repairing the vehicles, and paying various amounts of money which it described as “compensation”. But that submission does not address the ACCC’s case, which was that the provision of such support and assistance was in each instance insufficient, and that it formed part of the (unconscionable) process of “obfuscation”, delay, and failure to have regard to the statutory guarantee rights of the consumers.

141 I also reject Mazda’s assertion that the round table and executive panel processes, which even Mazda conceded (eg in its “Summary of respondent’s key propositions” document, filed on 14 July 2021) were “imperfectly undertaken” and “imperfect”, were nonetheless “authentic” attempts to “ensure an informed and rational decision was made in response” to what Mazda insisted were “unsubstantiated assertion[s] of a statutory right”. As the evidence will show, at no point did the round table or executive panel processes make any genuine attempt to consider and apply the consumer guarantee provisions of the ACL to the circumstances of the individual consumer. That is, of course, a very unsatisfactory state of affairs, including because Mazda

by doing so did not comply with its own internal ACL compliance standards and processes. Again, however, it seems to me that such failings are more appropriately characterised as very bad management, rather than unconscionable conduct.

142 Some other of Mazda's submissions confounded me, I have to confess. To take one such example. Mazda submitted that "[t]he application of the statutory test to complex machines such as motor vehicles is not straight forward, particularly where vehicles have been subjected to significant use over time. Mazda took ACL principles and sought to give them real world application". I have no idea what giving legal principles "real world application" means, and counsel did not endeavour to explain what the phrase meant. As will be demonstrated, the simple fact of the matter is that in each case the subject of this proceeding, Mazda made no sufficient attempt to seek technical advice about the particular issues experienced by the consumers and then to have regard to such advice in applying the statutory guarantee provisions. Instead, Mazda decided that in most instances, its interests were best served by engaging in commercial negotiations which had no regard to the parameters or requirements of the consumer guarantee provisions. To say that such conduct was "imperfect" is a considerable understatement.

143 But whatever descriptors one might choose to describe the conduct (and I do not accept, in many instances, Mazda's descriptors), the relevant conduct was not in my view, for reasons which are explained below, unconscionable.

144 Mazda also submitted that any opinions conveyed by the representations in each case were reasonably held and that there was no evidence that Mazda "had no legitimate option other than to conclude that there had been a major failure" and that it does not matter whether the information available to Mazda at the time was sufficient. It submitted that if the evidence disclosed a conscionable basis for refusal of relief, whether known to Mazda at the time or not, that sufficed. The ACCC disagreed. I was not taken to any authority on the point, and in the end, Mazda did not place any particular significance on it in any of the individual cases the subject of this proceeding. In those circumstances, I will put the question aside.

145 I should also mention some aspects of the ACCC's case.

146 First, one of the contentions made by the ACCC was that, in assessing the "relative strengths of the bargaining position" of the parties in each of the cases the subject of the proceeding, I should conclude that Mazda was in a dominant bargaining position. It is important, however,

to bear in mind in assessing that question (necessarily on a case by case basis) what Keane J said in *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525 at 619 [293] about a cognate provision contained in s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth):

The appellants submitted that s 12CB of the ASIC Act was introduced to address “the general disparity of bargaining power” between financial services providers and consumers. That submission may be accepted as far as it goes; but it does not go very far. While a disparity in bargaining power may be necessary to attract the operation of the provision, the mere existence of the disparity is not sufficient to do so. The existence of a disparity in bargaining power, which is an all-pervading feature of a capitalist economy, does not establish that the party which enjoys the superior power acts unconscionably by exercising it.

(Footnote omitted.)

147 Secondly, there was no allegation in the case of any consumer that Mazda acted in bad faith or dishonestly. As Kiefel CJ and Bell J said in *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1 at 31 [59]:

It may be accepted that conduct in the supply of a financial service may be unconscionable in circumstances in which the supplier’s conduct does not involve dishonesty. This is not to say that the absence of dishonesty, or other moral taint, is not a material consideration in determining whether, objectively, the supplier’s conduct involves such a departure from accepted community standards in the supply of the financial service as to warrant the characterisation that it is unconscionable (citing *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* (2018) 329 FLR 149 at 187 [195] per Bathurst CJ).

148 And thirdly, as I have already noted, the ACCC eschewed any case based on a pattern or system of conduct. (Compare, by way of example only, *Australian Securities and Investments Commission v AGM Markets Pty Ltd (No 3)* (2020) 275 FCR 57.) It is therefore necessary to consider each alleged contravention separately.

149 Having made those general observations, I will now turn to deal with the ACCC’s case for each consumer in turn.

Consumer RC

150 RC, a dietician who lived in Brisbane, purchased a Mazda2 (Neo, 5 door hatch, manual) in November 2014 for a total price of \$18,990 including accessories, government charges and insurance, from Eagers MD Pty Ltd in Newstead, Queensland (**Eagers** or the **dealer**). She bought it primarily for work purposes, which involved her driving as far as 100 km away from her home. She relied on the car to earn an income.

151 RC gave evidence that between August 2015 and June 2017, the engine warning light in her vehicle illuminated intermittently. The alleged problems were not recorded in any of the dealer’s service records prior to 22 August 2016.

Representation 1

Relevant facts – 2017

152 On 8 May, RC raised with Mazda via the “contact us” form on the Mazda website various issues she had experienced with the vehicle. Her email commenced:

I am writing to make a complaint in regard to my dealings with Mazda. I purchased a brand new Mazda 2 in December 2014 and have had ongoing, unresolved issues since. I travel a lot for work and thought that Mazda, being a well-known and respected brand would give me the reliability I need. Unfortunately, this has not been the case.

153 RC experienced a further issue with the engine light illumination on 18 May. One of the fuel injectors needed to be replaced. The dealer record disclosed the following:

ENGINE LIGHT BACK ON

LAST TIME IN FOUND CODE P0300 and P0303

Inspected coil and plug of cylinder 3 swapped plug to cylinder 1 and swapped coil to cylinder 2

FOUND MISFIRE IN CYLINDER #3. SWAPPED COIL TO CYLINDER #2 AND PLUG TO CYLINDER #3. FOUND VEHICLE TO STILL HAVE MISFIRE COUNTS IN CYLINDER #3. INSPECTED AND FOUND CYLINDER #3 INJECTOR TO BE3 [sic] FAULTY. CARRIED OUT INJECTION REPLACEMENT - REMOVED AIR BOX, THROTTLE BODY, WIRING HARNESS AROUND THE MANIFOLD TO ACCESS. REMOVED INTAKE MANIFOLD ASSEMBLY. REMOVED FUEL RAIL FROM INJECTORS AND REMOVED INJECTORS. CLEANED ALL RAIL AND FITMENT POINTS. REASSEMBLED VEHICLE AND CLEARED CODES. ROAD TESTED VEHICLE AND FOUND NO FURTHER FAULT.

154 On 13 June, in a telephone call between RC and Ms Marilyn Miller (a customer advocate employed by Mazda), Ms Miller acknowledged receipt of RC’s email “going back to May”. Ms Miller apologised for the delay, and agreed that “this has gone from case manager to case manager”. Ms Miller acknowledged that the last repair “looks like a bit of a major repair actually”. RC expressed her frustration, including that she needed to take a day off work to wait around for her car to get fixed. She added, “I just feel like if I want to sell the car and the engine light’s going to be on all the time, it’s going to be impossible for me to sell because someone’s obviously going to think there’s something wrong with it”. Ms Miller responded, “Yeah, you shouldn’t be, you shouldn’t be getting that engine light on”. Ms Miller further said that “they” were “at the mercy of dealerships in doing their diagnosis”. RC confirmed that

even though the engine light was coming on, it felt like nothing was wrong with the car. Ms Miller, who had no technical expertise, later said to RC:

So you're not the first person to complain on the little Mazda2. There must have been a, just a small batch of them on assembly that just, the springs weren't tight enough or something like that.

I've got a feeling [the dealer] should have - they could have maybe done a little more diagnostic work.

[After asking whether RC subscribed to a roadside assist program] Yeah, that's good. Keep that up, make sure, because you know, a lot of people are of the impression that new cars don't break down ... When they actual - they can. We hope they don't ... But they can, it's a possibility in the real world.

155 During the call, Ms Miller said she was going to add an additional one year manufacturer's warranty to "this little car" to which RC replied, "Yeah, that would be great". Ms Miller told RC she could take the vehicle to any dealership for repairs, and stated she would organise a loan car for RC for a longer period so the dealership could do detailed diagnostics on it as requested.

156 On around 15 June, when RC was driving her car, it entered "limp mode" and the engine light came on. She pulled over to the side of the road and turned off the ignition. When she started the car again, it started normally, but the engine light stayed on. She then took it to Eagers.

157 On 19 June, Mazda sent a letter to RC confirming that it had provided RC with an additional 12 month factory extended warranty.

158 Three days later, RC telephoned Ms Miller and told her that the engine light had come on again after three days but there was otherwise nothing that she noticed that was wrong with the car. Ms Miller said, "I just wouldn't want you to be driving it, and highly likely you're going to cause any damage ... but ... it's not for me to sit here in an office and say that". As to the replacement of parts by the dealer to date, Ms Miller said, "sometimes it can be a process of elimination when something just keeps reoccurring like that". Ms Miller said she would call Eagers and speak to "Andrea", and arrange for her to call RC. Ms Miller added, "And, yeah, I'm so sorry".

159 Ms Miller organised for the dealer to call RC to arrange a diagnosis of the problem. On 10 July, the dealer submitted a technical report to Mazda describing the issues with the vehicle between 25 January and 30 June 2017.

160 In late June, after RC started driving her car, it shut down and the engine light came on. She pulled over to the side of the road and turned off the ignition. When she started the car again, it started normally, but the engine light stayed on. She took the car to Eagers, where technicians removed carbon build up from intake valves, cleared all fault codes, tested the car under various conditions, tensioned electrical connections relating to engine coils, and followed “Bulletin No NS065_09 Diagnostic Protocol”.

161 In early September, RC was driving on the Centenary Highway to Ipswich in Queensland at around 100 km per hour when the car lost power and the lights on the dashboard, including the engine light, began to flash. She estimated that the car’s speed dropped from 100 km per hour to 50 km per hour in about four seconds, and deposed that “[i]t felt like the engine cut out and when I put my foot on the accelerator nothing happened”. She was near an emergency lane, so she pulled into it and turned the ignition off, and telephoned Eagers and spoke to “Brian”.

162 RC said to Brian words to this effect: “I do not want that car back until it is 100 per cent safe. I am not confident in it at all”.

163 The vehicle was towed to Eagers, where it remained for about two months. RC said that she was going overseas for a month and had told the dealership to keep the vehicle unless “it’s going to be fixed”. RC was not provided with a loan vehicle. Her sister picked her up and took her home. RC had to cancel all her patients that day and did not get paid.

164 That same day, RC telephoned Mazda to report the fault. She reported the fault to “Rebecca”, because Ms Miller was unavailable, in these terms:

... I was not accelerating at all and it was just horrible, and I had to pull over on the side of the road ... I’m going overseas for a month and I just said to [the dealer] keep it, because I just, I don’t, like I don’t want it back unless it’s going to be fixed. Like I think this is the eighth time I’ve taken it there, and they just aren’t doing whatever needs to be doing to it because it just keeps having this ongoing issue with the light, the engine light and whatever and I just, yeah, I just wanted to update her on what’s happening because it’s just getting to the point of ridiculousness.

165 RC returned from her holiday on 5 October. When she called Brian at Eagers he told her “we forgot about the car and have not touched it”.

166 The next day, RC posted the following message on Mazda’s Facebook page:

Hi Mazda,

I am not normally one for a Facebook complaint, but at the moment I am at my wits end and feel like I have no other option but to express my annoyance here. Strap yourself in because it’s a long one.

I purchased a brand new Mazda 2 in December of 2014 and it is an absolute lemon. I have had ongoing issue since purchase ... But the most recent issue takes the cake. 4 weeks ago the car lost power/acceleration (with flashing warning lights to go with it) whilst I was driving at 100km/hr on the highway. I'm lucky I didn't die. Honestly. It was a traumatic experience that I don't wish on anyone. I had the car towed (at my own expense) back to Eagers for the 8th time (and missed a day of work due to this as no loan car was available). Really crap when you're a contractor and that meant no pay for the day - awesome) and told them that I do not want the car back unless it can be guaranteed 100% fixed, which to be honest, I don't think I can trust them even if they say it is, given our history. I'm actually now scared to drive my own car!!

...

167 The Facebook message concluded by referring to Mazda's lack of responsiveness, and to the apparent unavailability of Ms Miller. RC concluded, "Bottom line is, I NEED a car (whether it's mine, a loan car or better yet a replacement vehicle). I start back at work tomorrow and apparently no one can tell me what is going on??" That same day, upon receipt of the Facebook message by Mazda, Ms Miller was internally instructed to contact RC "asap".

168 The same day, RC telephoned Mazda and spoke to Mr Dean Oltoumis, because Ms Miller was unavailable. RC said she needed her car the next day, because she had to go to work. She sought confirmation that Ms Miller would call her back that day. She said she felt unsafe in the vehicle, and did not want it unless they could give a 100 per cent guarantee that it was safe. Mr Oltoumis said he would pass the information on to Ms Miller.

169 Having spoken to Mr Oltoumis about RC's call, Ms Miller called the dealer, and was told that they had ordered a clutch switch that day as they had forgotten about RC's car. Ms Miller then called RC and:

- (1) provided this information to RC, saying "that is appalling";
- (2) told RC, "I'm hearing you and I believe every word you're saying ... I honestly do. How disappointing";
- (3) was informed by RC that:

But that day when I was doing a hundred and there were cars behind me and basically it just goes from a hundred and just won't do anything else, and I was just so lucky that there was a - like, an emergency lane, pretty much, a hundred metres ahead, so I just rolled into it, I guess, but I just - I don't - when I took the car, like, into them on that Friday, I got it towed there and I basically said to them, "I don't want the car anymore";

- (4) was informed by RC that, "I can't trust that it's fixed. I'm scared I'm going to be in some sort of accident and kill myself in this car. I don't want it";
- (5) told RC in relation to the work done by the dealer, "they seem to be clutching at straws";

- (6) told RC she had “escalated it” to “our Mazda Field Technical Manager” on the basis that “[h]e’s senior at Mazda and he will just oversee the work at Eagers”;
- (7) told RC she would organise a loan car for her that afternoon; and
- (8) was informed by RC, “I’ve only ever been so nice to them, like, I’m not an angry person” to which Ms Miller responded, “And you’ve given them so many opportunities. I’ve seen that”.

170 Ms Miller then arranged with Eagers for RC to be provided with a loan car.

171 On 10 October, Ms Miller and RC spoke again on the telephone. Ms Miller told RC that the dealer had kept the vehicle following the clutch switch replacement so that they could perform an extended road test to ensure that the car was in good repair.

172 Two days later, the dealer submitted a technical report to Mazda describing the issues with the vehicle and requesting advice. Between 12 and 20 October, Mazda’s technical department instructed the dealer on the tests and repairs to be undertaken. In accordance with this advice, the dealer swapped the injectors between cylinders, carried out a carbon clean and road tested the vehicle. The engine symptoms and the clutch plate replacement were not related.

173 On 31 October, during an 18 minute telephone call between RC and Ms Miller, Ms Miller and RC discussed the various steps the dealer had taken to fix the misfire problem. RC observed that it was “now week eight that I’ve been without my car”. She then asked, “at what point – if it – if it keeps happening, like, what the next step is because obviously if it keeps happening it’s an issue that isn’t fixable”. She said she was too scared to drive the vehicle and that it was a “ticking time bomb”. She expressed misgivings about continuing with a loan car because it had a \$1,000 insurance excess, \$600 more than that which applied to her own car. RC sought a timeframe from Ms Miller. RC said that she was concerned that the dealership was unable to fix the vehicle. Ms Miller said she “can’t guarantee you – that this car ... won’t have a problem sometime in the next six months”.

174 RC then asked, “So what happens if it’s not fixable though?” Ms Miller replied, “It will – it’s fixable. Yeah”. The following exchange ensued:

RC: ... if Mazda – the Mazda Australia technician’s looked at it and it just continues to keep having this problem ...

Ms Miller: Mmm hmm.

RC: ... what - what do you normally do in that instance?

Ms Miller: There hasn't been a car that they can't fix.

RC: Mmm.

Ms Miller: There has never been a situation where they can't. It's just a matter of, ah, sometimes getting the right person on it long enough ... to just persist, just absolutely persist. I mean, they've - they're doing everything they possibly can and are capable of doing at this - at this stage.

RC: Yeah.

Ms Miller: If it plays up again, um, I - I guess we just reassess the whole situation ...

RC: Yeah.

175 Later in the call, Ms Miller asked RC, "would you consider maybe trading it in on another Mazda2 with Eagers?" RC said, "Potentially. Yeah. I mean, I guess that's the thing. Like, it would be an idea. Like, I'd like to do that ... but part of me is scared to have a Mazda again". Ms Miller said, "If it happens again I think, you know, again, we have to look at it on ... its merits". RC said she was concerned about the trade-in price given "it's having all these problems". Ms Miller then said "... in all honesty. It actually makes no difference to the trade-in price". Ms Miller then referred to the fact that the car had been regularly serviced, adding "it's in good nick, it's got low k's, it's young, you're going to get good money for it". Later, Ms Miller said, "Unfortunately that's all I can advise you ... I wish I could give you a magic answer".

176 Eagers returned the car to RC on about 8 November.

Consideration of representation 1

177 The ACCC submitted that Ms Miller's statements in response to RC's query as to what would happen if her vehicle was not fixable and it kept having the problem, that "[t]here hasn't been a car that [the Mazda technicians] can't fix", that "[t]here has never been a situation where they can't", and that "[i]t's just a matter of ... sometimes getting the right person on it long enough ... to just persist, just absolutely persist" conveyed, in the context in which they were made, the representation that RC did not have any ability under the ACL to seek to obtain a refund or replacement vehicle, because Mazda was entitled to repair the vehicle regardless of:

- (1) the number of attempts made to repair the faults;
- (2) the time it took to repair the faults;
- (3) RC's rejection of the vehicle and requests for a refund or replacement; or

- (4) Mazda’s obligation under the ACL to repair the vehicle.

178 Mazda submitted, to the contrary, as follows:

Ms Miller and RC discussed the various steps the dealership had taken. RC said that she was concerned that the dealership was unable to fix the [v]ehicle but she agreed to take the [v]ehicle back and monitor it for two to four weeks. At that point, RC asked, “what happens if it’s not fixable though?” and, in that context, Ms Miller said “It will – its fixable. Yeah”. ... *[T]his was a statement about a possibility of repairing the vehicle from a mechanical point of view, not a statement about the consumer’s rights from a legal point of view.*

RC said that the dealer had been looking at the problem for a while and the car continued to keep hav[ing] this problem. Ms Miller said that there is not a car that cannot be fixed and sometimes it a case of getting the right person to look at the car.

It is plainly true that all vehicles are fixable. It is a question of diagnosis and repair.

The general statement alleged (that consumers had no “ability” to seek a refund or replacement vehicle under the ACL because Mazda was entitled to repair the [v]ehicle) cannot be implied because it is fundamentally inconsistent with the nature of the exchange i.e. the threshold question of the possibility and efficacy of repair. Ms Miller’s statements were responsive to RC’s stated concerns about that topic.

(Emphasis added.)

179 The ACCC’s submission in respect of representation 1 must be accepted. In my view, Ms Miller’s assertions that:

- (1) RC’s car was fixable;
- (2) there had not been a car that the Mazda technicians could not fix;
- (3) there had never been a situation where the technicians could not fix a car; and
- (4) it was just a matter of persisting to get the right technician on the matter long enough,

conveyed, by necessary implication, the representation that RC had no ability or right under the ACL to reject the car, and to seek a refund or a replacement, because Mazda would always – even if only eventually – be able to fix it.

180 Mazda’s submission to the contrary, it seems to me, relies on an altogether too literal and unrealistic, non-contextual reading of what Ms Miller said. Three weeks earlier, RC had told Ms Miller that she could not trust that her car had been fixed, and that she was “scared [she was] going to be in some sort of accident and kill [herself] in this car” and that she “[did not] want it”. And Ms Miller’s assertions during the course of the 31 October call were a direct response to RC’s concerns that her car was a ticking time bomb; that she was too scared to drive it; that she had been without her car for eight weeks; and what was to happen if it was not “fixable”. In that context, Ms Miller’s response – that “[t]here hasn’t been a car that [the

Mazda technicians] can't fix" and that RC just had to "persist" long enough to find the right technician to fix it – must be understood to have conveyed the representation alleged, viz that RC did not have any ability under the ACL to seek to obtain a refund or replacement vehicle.

181 I do not accept Mazda's submissions that Ms Miller's assertion that the car was "fixable" was no more than "a statement about a possibility of repairing the vehicle from a mechanical point of view, not a statement about the consumer's rights from a legal point of view" and that her other assertions were true because "all vehicles are fixable" and "[i]t is a question of diagnosis and repair". It must, or ought to, have been obvious to Ms Miller that RC had a potential ACL claim and that RC was making a request or demand that was required to be dealt with under the ACL, and (whether or not that was the case) her responses to RC by necessary implication conveyed the representation that RC had no ability or right under the ACL to reject the car, and to seek a refund or a replacement. And nothing that Ms Miller said remotely conceded, or admitted the possibility of, such an ability or right.

182 I also do not accept Mazda's submission that Ms Miller and RC were debating what Mazda dubbed "the threshold question of the possibility and efficacy of repair" and that what Ms Miller said to RC was "responsive to RC's stated concerns about that topic". That is, quite frankly, a ridiculous characterisation of the conversations.

Representations 2 – 4

Relevant facts – 2018

183 On 10 January 2018, the vehicle again lost power when RC was driving it on a suburban street at about 50 km per hour. She pulled over and turned the car off. She managed to restart the car, and drove it home. RC drove the car to Eagers the next day. RC again told the dealer that she did not want the car back unless it was fixed.

184 The next day, the dealer told Mazda that the vehicle had been returned with the "dash lights on" and a cylinder misfiring. RC requested a loan vehicle, which Mazda supplied.

185 For the rest of January, representatives of Mazda's technical department instructed the dealer on the tests and repairs to be undertaken for RC's vehicle.

186 On 15 January, the dealer was advised to replace the engine due to the amount of carbon build up on top of the valves. Mazda's technical help desk directed the dealer to seek approval from "MA Warranty" for a "new partial motor, [s]park plugs and injectors".

187 On 18 January, the dealer told RC that there had “likely been a major engine failure” and that the engine had to be replaced. RC told the dealer that she rejected the vehicle and wanted a refund. The dealer told RC to call Mazda directly because “it’s their problem”.

188 The next day, Eagers informed Ms Miller that the car needed an engine replacement, something that Ms Miller then recorded in Maestro.

189 On 23 January, the Service Operations Manager from Eagers, Mr Kim Jones, told RC that the engine had to be replaced to make sure the car was driveable again.

190 Internally, Mr Jones said in an email dated 22 February, “We don’t know 100% why Mazda replaced the engine but it is more than likely due to carbon build up internally on the engine valves causing the engine miss and engine lights etc”.

191 In an email to Ms Miller on the same day, Mr Jones said: “I would suggest we may need to offer a warranty extension or something along those lines to let her know we stand behind our product and will be confident the repair has taken care of the concern”.

192 On 23 January, RC told Mr Paul Tait of Mazda’s NCS by telephone that she rejected the vehicle and she wanted a refund of her purchase price, but that the dealer had refused to provide it.

193 Mr Tait asked whether RC’s “preferred option” was a “refund or a replacement car”. RC said that she wanted a refund. She said that she did not want a replacement car because she was concerned about having the same problem. She also said, “I’m not trusting to be in a Mazda, so I don’t want a replacement”. Mr Tait responded that he had formalised the request under the file for the vehicle. Mr Jones of Eagers then sent an email to Ms Miller telling her that RC was “asking for her car to be bought back”.

194 On 24 January, RC and Ms Miller spoke on the telephone. Ms Miller said that the dealer was replacing the engine in the vehicle and that “theoretically that should fix all your problems”. The following exchange then occurred:

Ms Miller: But you’re actually asking now for - and I think we may have had - touched on this prior ... that you weren’t holding much confidence in this car?

RC: No. So I pretty much told Kim [Jones], the service manager at Mazda, that I’d like - as far as my rights are concerned, I know I don’t have to accept the vehicle back if it’s not safe or it’s taken too long to get fixed, in which ... case I think I fall under both of those categories and so I pretty much-----

Ms Miller: Okay. One step back. We also work with the Australian Consumer laws ... and we are aware of the consumer's rights, just as you are. ... Once this - once this vehicle engine goes in and they test it, quite literally it is going to be safe to drive. They would not release the vehicle to you if it was unsafe to drive. So the-----

RC: [B]ut they don't know that because it happened - that same problem happened in September last year and they told me that it was fixed then it wasn't.

Ms Miller: Yeah, I - we see that. But we have to go on what's fact and we can see the facts there, that it has - that it has actually been in a few times for very similar or the same - the same concern but with different parts replaced. ... There were spark plugs, you know, at one stage - you know, they've done bits and pieces to try and get it to be okay and I'm just - and this is - this is what I'm doing, [RC], this is what I'm doing ... before I can actually have it fully reviewed for any sort of - what are you asking for, a replacement car, or a money back or a discount on a trade-in or-----?

RC: No. I want - I want a refund because I don't want, don't want - I don't want a replacement car because I don't ever want to drive a Mazda car again, to be honest.

Ms Miller: Okay.

RC: Because I feel like I can't trust Eagers and I can't trust Mazda. ... I don't want a discount on the trade-in because the last time I spoke to them about trading in they were going to give me 6 grand, of which I paid \$19,000 for it three years ago. ... And so I want a refund on the vehicle.

Ms Miller: Okay. I'm putting all that - all those - all the facts together ... to give you a yes or no on that. ... Bear in mind, we are aware and we work in line with the Australian Consumer laws.

RC: Yep. No, I understand that. I mean, I have - if it's not going to - if I'm not going to get the outcome from you that I want then I'm not hesitating to take legal action. Like, I have spoken to someone about it and I know that-----

Ms Miller: That's - and as a consumer, it is your right to do that. It is.

195 Ms Miller then said, "We'll put the case forward". She said "... we are fair and reasonable. We work in line with the Australian Consumer laws. If you're not happy with the response you receive from us at the end of all of this, then ... as a consumer you have a right to take further action".

196 The engine was replaced in late January. On 1 February, Mr Jones called RC and told her that the car was ready to be picked up.

197 On 5 February, RC tried to call Ms Miller. She instead again spoke to Rebecca, who told her that Ms Miller was on leave. Rebecca told RC that her request for a refund was still "under

review” with management but, at this stage, Mazda was not prepared to give her a refund and management was reviewing the case to see if there was anything else Mazda could do for her.

198 The ACCC submitted, and Mazda did not dispute, that there was no evidence adduced that the matter was “under review” with management or that there had been any management level review following RC’s rejection of the vehicle in January 2018 (which rejection Mazda admitted). Mazda also did not dispute that the relevant Maestro record also contained no suggestion that Ms Miller had escalated the request to anyone.

199 Between 12 and 19 February, Ms Miller retrieved information relating to RC’s request for a replacement vehicle and on 19 February, she was told to “analyse dealership **VOR** dates [Vehicle Off Road] [and] organise a round table catch up with Ian [O’Day] and Chooi [Han] to review the customer request”. Ms Miller prepared the following summary of information:

Looking at the dealer clock times and [Mazda] information customer was **out of her vehicle for 60 days.

dealer or [Mazda loan vehicle] allocated for the times customer was without her vehicle.

01/2015 1,000K @571km

06/2015 10,000KM @10,692km

11/2015 20,000KM @25,371km

outside services 30,000KM onwards.

7 warranty claims, from 08/2016 onwards related to same/similar complaint rough running.

Engine replaced 2018.

4 PAR,

2 Tech cases,

8 contact to NCS.

200 On 21 February, a round table review meeting considered RC’s request for a replacement vehicle. The meeting was attended by Ms Miller, Ms Han and Mr O’Day. Ms Han entered the following record of the meeting in Maestro:

Discussed with Marilyn and Ian, agreed to offer buyback of vehicle based on concerns customer has experienced. Marilyn will obtain Sales Contract from dealership to determine purchase price. If Customer wants to go into higher spec vehicle, Customer will need to cover additional gap between replacement Mazda 2 and higher spec vehicle.

201 Discussions then took place within Mazda, including with the dealer, to determine a price to be offered to RC. By an email dated 22 February, Ms Han proposed to Ms Miller “offering a figure between Redbook private sale price and her actual purchase price”. The next day, Ms Han entered a note in Maestro in these terms:

Discussed with Marilyn, based on customer’s fair use and benefit of vehicle and in acknowledgement of the issues she has had in the last 9 months, maximum we would buy back vehicle for is \$13,000.

202 The rationale, recorded in an email from Ms Han to Ms Miller dated 27 February, included taking into account RC’s “use of tint and aftermarket accessories as well”. Mr O’Day said of the offer:

... I’m happy with \$13K as we agreed, not sure how the aftermarket components affect this as they were part of the contract and considered in the final offer amount.

...

Realistically, if the customer has turned down your first offer, I’m not sure that another \$1.5K will make a difference? What do you think from the customer on the call, was she still driving for a full refund?

If adding to the offer doesn’t help, we should hold off and leave that amount for Chooi [Han] to use in negotiation, as whatever we offer now will be the starting point for that activity.

203 On 27 February, Ms Miller told RC by telephone that Mazda was prepared to offer her \$12,125 and asked her, “how does that sound ... to you?” RC said she would have to think about it, and “I just feel like in my mind the refund is the cost that I ... paid for the car”. Ms Miller said she would explain “how we arrived at that figure”. She said that the offer was based on factors including current valuation and 30 months of good use, with an additional \$2,125 to recognise “the eight months that you haven’t had good use of the car”. She noted that they also took off aftermarket accessories, and they took into account registration, stamp duty and dealer delivery. RC responded saying, “if I’m paying a loan off for stuff that I’m not even refunded I’m then paying for something that I don’t even have, which doesn’t make sense to me”. RC also referred to the fact that her problems commenced a year into her vehicle ownership, not 30 months into it.

204 A discussion then ensued about the effect of the vehicle being off the road a number of times whilst the engine light issue was investigated. Ms Miller said that the eight month period was

calculated on the basis that “[t]hat’s what date we actually take it from because the other ones were, um, sort of quite minor”. The following exchange then occurred:

RC: Yep. Which I get. I just get - it’s still a car. Like, you know, if this was something cheap, if I bought a TV and it had a four year warranty and the same issue was happening, I’m not going to take it back and the place isn’t going to give me 50 back that I paid for the TV. I don’t understand why it has to then take into account all these other factors. Like, it should just be like any other consumer product.

Ms Miller: But cars, they’re not. Yeah. They’re actually not.

Consideration of representations 2 – 4

205 The ACCC submitted that Ms Miller’s statements to RC on 24 January 2018, in the context of RC stating that “I know I don’t have to accept the vehicle back if it’s not safe or it’s taken too long to get fixed” that:

- (1) “we also work with and work in line with the Australian Consumer laws”;
- (2) “we are aware of the consumer’s rights”; and
- (3) “once this vehicle engine goes in and they test it, quite literally it is going to be safe to drive. They would not release the vehicle to you if it was unsafe to drive”,

conveyed, in the context in which they were made, the representation that RC did not have any ability under the ACL to seek to obtain a refund or replacement vehicle, because Mazda was entitled to repair the vehicle regardless of:

- (1) the number of attempts made to repair the faults;
- (2) the time it took to repair the faults;
- (3) RC’s rejection of the vehicle and requests; or
- (4) Mazda’s obligation under the ACL to repair it.

206 This is representation 2.

207 The ACCC also submitted that Mazda’s statements to RC on 27 February 2018, in response to her request for a refund of the purchase price of the vehicle, that Mazda had reviewed “all the information” and was prepared to offer the sum of \$12,215 for it (less than a full refund) and that this offer took into account the age and mileage of the vehicle and that cars are “actually not” like any other consumer product, conveyed, in the context in which they were said, the representation that Mazda was not required to provide a refund or replacement vehicle at no cost to RC because of the age and/or mileage of the vehicle (representation 3).

208 The ACCC further submitted that, taken together, those statements of 24 January and 27 February 2018 conveyed, in the context in which they were said, the false and/or misleading representation that RC was not entitled to a refund or replacement vehicle at no cost to her under the consumer guarantee provisions of the ACL (representation 4).

209 As to representation 2, Mazda submitted as follows:

The representation alleged should not be implied in its context.

Prior to this call RC had received a letter from the ACCC setting out her rights. She knew that Mazda was not giving her legal advice and she knew her rights although was unsure about the application of those rights to the facts of her case.

During the call Ms Miller said that the dealer was replacing the engine in the [v]ehicle and “theoretically, that should fix all your problems”. She also said that RC was not “holding much confidence in the car”. RC said “as far as my rights are concerned, I know I don’t have to accept the vehicle back if it’s not safe or if it’s taken too long to get fixed”. She said she fell into both categories. In response, Ms Miller said that Mazda ... also works with the ACL and “we are aware of the consumer’s rights, just as you are”. Addressing the safety issue raised, she then said that once the engine goes in and they test it, it will be safe to drive and they would not release it if it was not safe.

RC’s response was that she wanted a refund, that she knew her rights and “If I’m not going to get the outcome from your [sic] that I want then I’m not hesitating to take legal action”. Ms Miller said “As a consumer, it is your right to do that. It is.” Ms Miller then noted that she would put RC’s case forward to the decision makers. She said, “We are fair and reasonable. We work in line with the Australian Consumer Laws. If you’re not happy with the response you receive from us at the end of all of this then, as a – as a consumer, you have a right to take further action”.

RC was not dissuaded from her view that she was entitled to a refund. This was because she knew that Mazda was simply putting a position, not an exhaustive statement of her rights.

The exchange outlined above is fundamentally inconsistent with the representation alleged. The plain meaning of what Ms Miller said was to exactly the opposite effect, that Mazda was aware of, and endeavours to comply with, the ACL but that if RC disagreed with Mazda’s decision on the question of a replacement RC had an affirmative right she could pursue. Ms Miller explicitly confirmed the existence of the asserted right at the level of general principle, she did not negate it.

210 I do not accept Mazda’s submissions.

211 It is, it seems to me, an entirely artificial characterisation of the conversation. Ms Miller was not “simply putting a position”. As senior counsel for the ACCC put it in his closing address, “the representation comes through loud and clear from the customer advocate saying ‘[w]e work in line with the consumer laws,’ and in that context, also saying once the vehicle engine goes in and they test it, quite literally, it would be safe to drive. That was an implied rejection, in our submission, of any notion that RC could seek a refund under the consumer law”. I agree.

212 Ms Miller’s assertion that Mazda “works with” the ACL is also hardly to be understood as a representation that RC was or might have been entitled to the refund she claimed, because she made that curiously worded commitment to compliance with the ACL only as part of her insistence that once the new engine “goes in”, and the car was tested, “quite literally it is going to be safe to drive”. Quite how that, or Ms Miller’s closing comment to the effect that if RC was “not happy” she could institute legal proceedings, are to be characterised as explicit confirmation of a right to a refund under the ACL escapes me.

213 As to representations 3 and 4, Mazda submitted:

The representations alleged should not be implied in their context.

On 21 February 2018 RC’s case was considered by a round table meeting of Mazda Australia executives. That meeting concluded that there had not been a major failure and the amount of time take[n] to repair the vehicle was not unreasonable in all the circumstances. However, it was decided to offer \$12,125 for her vehicle in compensation. This was well above market valuation.

On 27 February 2018 Ms Miller conveyed this offer to RC. It was expressly put as an offer and Ms Miller asked RC what she thought about it. RC said she did not know and would have to think about it. RC said a refund would be around \$18,000 or whatever she paid for the car, which was not what she was being offered. Ms Miller said that in coming to the offer, Mazda Australia took into account a number of things including registration and stamp duty which RC did get the benefit of. After discussing the various factors that went into the calculation of the offer, RC said that if she had a TV with a four year warranty and took it back then she would get her money back. She said cars should be like any other consumer product. In response to that, Ms Miller said “But cars, they[’re] not. Yeah. They’re actually not.” RC then asked for something in writing and said she would need to think about it and work out what was best.

The first general representation alleged (that Mazda was not required to provide a refund or replacement of vehicles at no cost because of the age and/or mileage of the vehicle) misconceives the significance of what was said. The identified exchange was plainly positional. That follows from the express communication of an offer as such. Clearly, the tenor of this exchange was that Mazda Australia did not accept that there had been a major failure and RC understood that to be a statement of Mazda Australia’s position. RC understood it in that way. She said she would think about it which is inconsistent with any other characterisation.

The second general representation alleged (representations of opinion that RC was not entitled to a refund or replacement at no cost to the consumer under the consumer guarantee provisions of the ACL) is misconceived for the same reason.

The identified conversations of 24 January 2018 and 27 February 2018 involved statements of Mazda’s position and an explanation for that position. RC’s case had been to an executive meeting. There is no reason to conclude that any opinion was not held. In making a statement about the application of the ACL to motor vehicles, Ms Miller was not denying the application of the ACL to them; she was at most expressing a personal opinion that motor vehicles were different because they are considerably more complex and the application of the law more difficult. To the extent it matters, that opinion was correct.

Moreover, damage to the vehicle and expiration of the rejection period (the issue first arose in August 2015 according to RC but she did not reject until 18 January 2018) meant there were reasonable bases for the view that RC was not entitled to a replacement or refund. It is immaterial that these were not reasons which Mazda expressly relied on ... They were reasonable bases on which Mazda was entitled to rely.

214 There are a number of difficulties with those submissions.

215 First, there is no evidence that the round table meeting addressed, let alone resolved, the major failure issue. As Ms Han agreed in cross-examination, there was no one at the meeting with technical expertise, and neither RC's safety concerns, nor the extensive period (60 days) that RC's vehicle had been off the road were discussed. And Ms Han agreed that the statutory phrases "major failure", "major defect" or "consumer law" were never mentioned at the meeting. Her best explanation for the decision they came to was that "[w]e didn't believe the circumstances justified a replacement or a refund".

216 Ms Han gave the following evidence in cross-examination about the 21 February meeting:

And do you recall at the meeting someone saying there's no major failure with the vehicle? Not the specific words, no.

HIS HONOUR: Well, when you say "not the specific words, no", is that the same as saying no? So I don't – I don't recall us saying there's no major failure, but I – I do recall that we decided that we would not be providing her with a full refund or a replacement vehicle based on the information that we had.

MR DE YOUNG: And so to the best of your recollection, Ms Han, you made that decision without anyone saying there is no major failure? Yes. We – we generally don't – not – not – no, we wouldn't have used those words. No.

No? We didn't use those words.

Do you recall anyone using similar words "major defect"? No.

...

But, Ms Han, absent anyone speaking about major failure at the meeting, how can it be agreed at the meeting that there was no major failure? By implication; is that what you're saying? Yes. That – how – that's – that's what was decided. That we didn't believe that the circumstances justified a replacement or a refund.

...

And how is it that it can be agreed at a meeting that there's no major failure where there was no discussion about major failure? Can you tell his Honour that? Well, we decided that the circumstances of the matter didn't justify a replacement or a refund offer to the customer.

You knew at the meeting, did you not, Ms Han, that the consumer had a fault with the vehicle apparently requiring a replacement engine? Yes.

And would you agree that the need for a replacement engine is indicative of a right to

a refund or replacement vehicle under the Australian Consumer Law? Can – can you repeat the question, please.

Would you agree with me that a fault with the vehicle apparently requiring a replacement engine is indicative of a right to a refund or a replacement car under the Australian Consumer Law? No, I don't agree.

...

So the replacement of an engine in the vehicle lends no weight whatsoever to the consumer's right to a refund or replacement car under the Australian Consumer Law; is that your position? It – no. It – it does, depending on the specific circumstances of the case.

...

What were the circumstances here about replacement engine that you say had the consequence that the consumer wasn't entitled to a refund or replacement car? We didn't just look at the issue with the engine. We looked at the – all the circumstances of the case.

And so is it – I'm just trying to understand what you say occurred, Ms Han. That you knew there was a replacement engine? Yes.

And did that weigh in the balance towards a right to a refund or replacement car at all in your mind? Yes, it did. And what also weighed on my mind is that Mazda Australia cover the cost of that repair.

Yes. And – and is that – is what you're saying, Ms Han, is that that meant that the consumer wasn't entitled to a refund or replacement under the Australian Consumer Law? Not just that on its own. No.

Who told you that the fact that Mazda was repairing – paying for the repair, was a matter which was relevant to the entitlement to a refund or replacement car under the Australian Consumer Law? I don't think anybody told me.

Is that something you've decided yourself? Based on my interpretation, yes, of the law and of experience ...

217 In light of Ms Han's evidence, Mazda's proposition that the 21 February meeting agreed that, or even debated whether, there had not been a major failure within the meaning of the ACL cannot be accepted. In those circumstances, the fact that Mazda offered more than the market value of the car is neither here nor there.

218 Secondly, it is not altogether clear why attributing the character of "positional" to the offer meets the ACCC's case, in particular when the making of the offer was accompanied by a false assertion, viz that cars are "not like" other consumer products for the purposes of relevant provisions of the ACL.

219 Thirdly, it is difficult to know what legal significance there is in a consumer receiving a "plainly positional" offer. At the point that the offer of \$12,125 was made to RC, she had already

notified Mazda and the dealer that she had rejected the vehicle, with the consequence that property in the vehicle had been re-vested in the dealer pursuant to s 263(6).

220 Fourthly, the ACL does not contemplate refunds made following a proper rejection of goods under the ACL being reduced by (in the case of cars) registration and stamp duty costs, and at the hearing Mazda did not seek squarely to contend otherwise.

221 In my view, the ACCC was correct to contend that what Ms Miller said to RC on 27 February (set out at [0]-[0] above) constituted a representation that Mazda was not required to provide a refund or replacement vehicle at no cost to RC because of the age and/or mileage of the vehicle, for the reasons it submitted (see [0] above).

222 Representation 4 was said to arise from the statements of representations 2 and 3 “taken together”, which conveyed the false and/or misleading representation that RC was not entitled to a refund or replacement vehicle at no cost to her under the consumer guarantee provisions of the ACL. Because I have found both representations 2 and 3 to be made out, and because they both represented that RC did not have any ability to obtain (or conversely, Mazda was not required to provide) a refund or replacement vehicle, representation 4 was also false/misleading, for the reasons submitted by the ACCC.

Representations 5 – 12

Relevant facts – 2018

223 On 1 March 2018, Ms Miller spoke with RC again by telephone, and repeated Mazda’s offer of \$12,125, telling her that Mazda believed this offer was “fair and reasonable”. Ms Miller also said that “and certainly that’s up to you to, um, you know, have a third party outside opinion on that one ... which you’re entitled to do”.

224 The next day, Mazda sent RC a letter (signed by Ms Miller), relevantly in these terms:

You have requested that Mazda Australia refund the full purchase price of \$18,990.00 to you. As discussed, Mazda Australia has reviewed your request and are unable to accede to your request. We are however prepared to offer you an amount of \$12,125.00 to purchase the vehicle from you. We believe this offer is reasonable taking into account you have had fair use and benefit of this vehicle.

The above offer will remain open for your consideration until 9 March 2018 ...

In returning your vehicle, Mazda Australia will require that you do all things necessary to transfer ownership and registration of the vehicle free of encumbrances, to Mazda Australia before the exchange can be made. Any costs associated with the transfer or extinguishment of such arrangements must be borne by you ...

The above offer is in full and final settlement of any and all liability which Mazda Australia, all Mazda dealers, Mazda Corporation and all of their respective employees, directors and officers, and each of them have, or but for this release may have arising from or in relation to the purchase and ownership of your vehicle ...

225 On 3 March, RC sent Ms Miller an email telling her that she was still having her lawyer look through Mazda's offer and would get back to her as soon as possible with her decision. She said that Mazda's offer seemed to only take into consideration the physical car itself and its value, with no compensation for the ongoing personal stress and costs to herself. RC referred to the physical, financial and mental stress she had experienced over the previous two years and "the last 6 months in particular since the major failure has been the worst, as every time I hopped in the car I never once felt safe". She also noted the poor service that she had received from the dealer and said, "I understand that certain cars can be 'bad cars' or lemons, however the way issues are dealt with says a lot about the company and I feel that Mazda has really let me down, not only with the car, but with the overall service I have received and feel that further compensation should have been offered to account for this".

226 On 5 March, by a letter drafted by RC with the assistance of a friend who was a lawyer, RC rejected Mazda's offer and counter-offered on the basis that Mazda paid her \$18,990, being the purchase price of the car. She stated that the reference to "fair use and benefit" was misconceived and said that Mazda was not entitled to offset her entitlement to a remedy under the ACL against some use she may have had of the vehicle. She set out her views that the vehicle had suffered a major failure under the ACL.

227 In response, Mazda agreed to offer a "partial refund" of \$13,000, an offer Ms Miller conveyed to RC by telephone on 16 March. Ms Miller said Mazda could offer up to \$13,000 and asked RC what her thoughts were about that. RC repeated her entitlement to a full refund on the basis of a major failure, and said, "the car had a major failure, so, you know, the engine obviously has needed to be replaced in the car, which is a major failure with the car". Ms Miller repeated that Mazda could "bring up the offer to 13,000", and said that she was sure Mazda could cover the transfer fee. Ms Miller also said, "if you want to stick to your guns and say no, you want full purchase price ... and take the matter further ... as a consumer you have a right to do that". RC said that her lawyer wanted her to go for more, but she needed to think about it.

228 On 21 March, RC sent an email to Ms Miller requesting Mazda's offer in writing, which was provided the next day. The letter was relevantly in the following terms:

We refer to your recent telephone conversation with the writer on the 16th March 2018

in relation to your Mazda2 vehicle purchased from Eagers Mazda in December 2014.

You have requested that Mazda Australia refund the full purchase price of \$18,990.00 to you. As discussed, Mazda Australia has reviewed your request and are unable to accede to your request. We are however prepared to offer you an amount of \$13,000.00 to purchase the vehicle from you. We believe this offer is reasonable taking into account you have had fair use and benefit of this vehicle.

229 RC accepted the offer. In her evidence, RC said that because the offer had a short timeframe for acceptance (seven days) she felt pressured to accept it quickly or it would be off the table.

230 On 26 March, Ms Miller sent an email to Ms Chance Chiera of Mazda (which was automatically recorded in Maestro), which relevantly included the following: “Assistance: [Mazda] has agreed to pay customer \$13k in exchange for Mazda2. Customer has accepted our offer in writing (email). Reason: Vehicle had numerous warranty concerns in the last 9 month [sic] (Prior December 2017) resulting in engine replacement”.

231 As a result of accepting the offer, RC had to pay about \$4,000 owing on her car loan and an additional “pay out” fee for early termination of the loan. RC then purchased another car (a Holden) for about \$20,000. She had to borrow \$9,000 from her partner to pay the deposit. The remaining \$11,000 she took out as a loan. She then repaid her partner when she received her payment from Eagers.

Consideration of representations 5 – 12

232 The ACCC alleged eight representations arising from the exchanges between Mazda and RC that occurred between 1 and 22 March 2018 described above, as follows.

233 First, the ACCC alleged that Ms Miller’s statement to RC on 1 March, in response to her request for a refund, that Mazda was prepared to offer the sum of \$12,215 for the vehicle (less than a full refund) conveyed, in the context in which it was made, the representation that RC was not entitled to a refund or replacement vehicle at no cost to her under the consumer guarantee provisions of the ACL (representation 5).

234 Mazda denied that allegation, as follows:

The representation alleged was not conveyed. Ms Miller stated an offer and nothing more. She also said “As we believe this is a fair and reasonable figure... And certainly that’s up to you to, um, you know, have a third party outside opinion on that one – which you are entitled to do”. That did not convey a representation about RC’s rights. To the contrary, it recognised there might be a difference of opinion in the circumstances.

In any event, there was nothing in what was said which conveyed an implied representation that the rejection of the claim for a full refund was reasonable.

Nonetheless, in the circumstances it was reasonable given the limited information available. The issues of vehicle damage and the expiration of the rejection period are repeated.

235 Secondly, the ACCC alleged that in so far as Mazda's letter of 2 March 2018 said:

You have requested that Mazda Australia refund the full purchase price of \$18,990.00 to you. As discussed, Mazda Australia has reviewed your request and are unable to accede to your request. We are however prepared to offer you an amount of \$12,125.00 to purchase the vehicle from you. We believe this offer is reasonable taking into account you have had fair use and benefit of this vehicle.

it conveyed, in the context in which the statements were made, the representations that:

- (1) RC was not entitled to a refund or replacement vehicle at no cost to her under the consumer guarantee provisions of the ACL (representation 6); and
- (2) Mazda was not required to provide a refund or replacement vehicle at no cost to RC because of the age and/or mileage of the vehicle (representation 7).

236 Mazda denied the allegations, for the same reason given above, namely that the making of an offer did not convey a representation about RC's rights, but rather recognised there might be a difference of opinion in the circumstances.

237 Thirdly, the ACCC alleged that Ms Miller's statement to RC on 16 March, in response to RC stating that the vehicle had a "major failure" and "the engine obviously has needed to be replaced in the car, which is a major failure with the car" and that she was entitled to a full refund, that Mazda was prepared to increase its offer for the vehicle to \$13,000 (less than a full refund), conveyed, in the context in which the statement was made, the representations that:

- (1) the faults with the vehicle were not major failures under the consumer guarantee provisions of the ACL (representation 8); and
- (2) RC was not entitled to a refund or replacement vehicle at no cost to her under the consumer guarantee provisions of the ACL (representation 9).

238 Mazda denied that allegation, as follows:

During this conversation, Ms Miller conveyed an increased offer of \$13,000 and asked RC what she thought of the offer. RC said she would think about it and said that her lawyer wanted her to ask for more. Ms Miller said that if RC wanted to go for the full purchase price and take the matter further then she had the right to do that.

Mazda repeats its previous submission about the significance of an offer for the purposes of characterisation. Plainly the conversation confirmed that RC had a right to pursue the matter further if she wished to obtain a full refund. It follows that the unspoken premise was that it was possible there had been a major failure and that RC

might therefore be entitled to a full refund. That premise forecloses the implication of the representations alleged.

239 Fourthly, the ACCC alleged that in so far as Mazda's letter of 22 March 2018 said:

We refer to your recent telephone conversation with the writer on the 16th March 2018 in relation to your Mazda2 vehicle purchased from Eagers Mazda in December 2014.

You have requested that Mazda Australia refund the full purchase price of \$18,990.00 to you. As discussed, Mazda Australia has reviewed your request and are unable to accede to your request. We are however prepared to offer you an amount of \$13,000.00 to purchase the vehicle from you. We believe this offer is reasonable taking into account you have had fair use and benefit of this vehicle.

it conveyed, in the context in which the statements were made, the representations that:

- (1) the faults with the vehicle were not major failures under the consumer guarantee provisions of the ACL (representation 10);
- (2) RC was not entitled to a refund or replacement vehicle at no cost to her under the consumer guarantee provisions of the ACL (representation 11); and
- (3) Mazda was not required to provide a refund or replacement vehicle at no cost to RC because of the age and/or mileage of the vehicle (representation 12).

240 Mazda denied the allegations, for the same reason given above, namely that the making of an offer did not convey a representation about RC's rights, but rather recognised there might be a difference of opinion in the circumstances.

241 These representations can be dealt with together. As will be apparent from what I have already said in relation to the representations arising out of the earlier facts, the ACCC's case in respect of representations 5 – 12 is that by making an offer for the vehicle, orally and in writing, for a sum (ultimately increased to \$13,000) considerably less than a full refund, and justifying the quantum of the offer as "reasonable" having regard to RC's "fair use and benefit of" her vehicle, and thus impliedly rejecting RC's claim that she was entitled to a refund because the failure of her vehicle had been a major failure under the ACL, Mazda conveyed the representations, in the precise manner set out above, that:

- (1) the fault with the vehicle was not a major failure under the consumer guarantee provisions of the ACL;
- (2) RC was not entitled to a refund or replacement vehicle at no cost to her under the consumer guarantee provisions of the ACL; and

- (3) Mazda was not required to provide a refund or replacement vehicle at no cost to her because of the age and/or mileage of the vehicle.

242 It will be recalled that representation 0 above is to be read as an allegation that Mazda misrepresented the position as to the consumers' legal rights because Mazda's customer representatives expressed an opinion that there was no major failure, in circumstances where the customer representatives had no basis for holding such an opinion, because Mazda had not considered whether or not the issues complained of were, in fact, major failures. Senior counsel for the ACCC put its case in that regard in his closing address as follows:

Your Honour, we don't need to [prove that the consumer was entitled to a refund], but we would submit that this, amongst others, is an overwhelming case for a refund. But let me just make it clear on the facts here, your Honour, why we don't need to seek to take that further step: if your Honour accepts that, by putting an offer in this context, it was an implied rejection of the consumer's request for a refund under the ACL; step 1. Step 2, we submit, [it] follows from that that Mazda is making a representation to the consumer that [RC] is not entitled to a refund under the consumer law. It's the flipside of the same coin. That representation, if made, is a statement of opinion. Step 3, characterise the representation as opinion. Our learned friends accept that, if made. Step 4 – and this is the home plate – is that representation ... misleading because it was baseless or there was no reasonable grounds for it [?]

Why is it baseless and why are there no reasonable grounds for it? Because the evidence at the meeting, which I've taken you to in Ms Han's evidence, does not establish any proper genuine or reasonable consideration of the point. And so like the authorities in this area say, if you make a statement in the nature of an opinion, it's not misleading because it proves to be incorrect. The corollary is it's not exonerated from being misleading, as our learned friends would have it, merely because it happens to be correct. They haven't proved correctness, but that's their mode of analysis. And so your Honour can find, in our submission, and should find, that the statement – a representation was made and was misleading because there was no basis for [it] at all and, certainly, no reasonable basis for it. And your Honour can, therefore, find that it was a false or misleading representation in contravention of sections 18 and 29(1)(m) of the [ACL], without needing to take the further step, your Honour, of saying, "Well, she was, in fact, entitled to [a refund] in any event."

243 I accept those submissions – that is, I accept that:

- (1) putting an offer of \$13,000 to RC in response to her claim for a refund on the ground that her vehicle's failure was a major failure under the ACL was an implied rejection of her request for a refund;
- (2) by that rejection, Mazda represented to RC that she was not entitled to a refund under the ACL;
- (3) that representation was a statement of opinion; and

(4) that representation was misleading because there were no reasonable grounds for making it, in circumstances, which I explained above, where Mazda never made any enquiries into the question whether, in the events that occurred with RC’s vehicle (including those necessitating multi-engine replacements), its failure or failures was or were “major” ones.

244 I turn now to the representations set out at [00] and [00] above. For the reasons given above in relation to representations 1 – 4, I also accept the ACCC’s submissions (and reject Mazda’s submissions) in respect of representations 5 – 12, that Mazda conveyed the representations, in the precise manner set out above, that:

- (1) RC was not entitled to a refund or replacement vehicle at no cost to her under the consumer guarantee provisions of the ACL; and
- (2) Mazda was not required to provide a refund or replacement vehicle at no cost to her because of the age and/or mileage of the vehicle.

245 There was one additional submission made on behalf of Mazda in respect of representations 8 and 9 that was not put with respect to representations 1 – 4, that I should mention. Mazda contended that when Ms Miller told RC that she “had the right” to “take the matter further” (meaning to initiate legal proceedings seeking a refund), that amounted to “confirmation” of that right and that “it follows that the unspoken premise was that it was possible that there had been a major failure and that RC might therefore be entitled to a full refund”. I am at a loss to understand how such an unspoken premise follows. In my view, even accepting that Ms Miller “confirmed” RC’s right to sue Mazda, such acceptance says nothing about Mazda’s view of its prospects.

Unconscionable conduct – RC

246 The ACCC alleged that Mazda engaged in unconscionable conduct in its dealings with RC in respect of her request for a refund or replacement vehicle under the ACL. It pointed to the following considerations.

247 First, the ACCC said because, in her dealings with Mazda, RC rejected the vehicle, requested a refund on a number of occasions, and raised serious safety concerns about it, it was thus that “[t]he provisions of the ACL were engaged”.

248 Mazda disagreed. It contended that “[t]he first unequivocal rejection of the vehicle [within the meaning of s 259 of the ACL] was not made until 23 January 2018” and that “[t]he statements

on 6 October 2017 were equivocal”. Mazda contended that RC did not reject the vehicle until January 2018, because RC’s earlier statements are to be understood as saying that she did not want the car until it was fixed or until she was given a loan car.

249 The ACCC’s second point was that RC’s vehicle was off the road under repair for significant periods of time, including for about two months from September to November 2017, and a further three weeks in January 2018.

250 Mazda did not contest those facts, but pointed to the fact that, for most of the time, RC was provided with a loan car.

251 The ACCC’s third point was that Mazda summarily rejected RC’s requests without consideration on the merits. It submitted that the evidence showed that following RC’s rejection of the vehicle in September and October 2017 (when the car first lost power on the freeway), Mazda repeatedly assured RC that it had to be repaired. RC requested a refund following the engine replacement. When the matter was escalated to a round table review, the evidence revealed that no proper or genuine consideration was given to whether RC was entitled to a refund under the ACL.

252 Mazda sought to put an entirely different complexion on the 21 February 2018 round table meeting. It submitted that Ms Han’s evidence about the meeting was “authentic evidence given by a witness burdened with the passage of time and a proliferation of cases over time” and that the meeting “was a genuine attempt to grapple with the issues under the ACL in the context of complex facts, where the causes of the symptoms [had] not been proved and where the application of the laws to those facts [was] not straight forward”. Mazda agreed that “[t]he fact that the vehicle was 60 days off road [was] unfortunate but ... much of that time was for diagnosis ... and RC had a loan vehicle over that time in any event”.

253 Mazda agreed that the Maestro record of the round table meeting did not refer to the ACL, but it did record Mazda’s decision to offer a partial refund, which, it submitted “reflects the purpose and function of the record”.

254 Mazda further submitted that “[t]he consideration at the round table and the executive panel was a genuine consideration of RC’s rights under the ACL as well as a consideration of what else she might be offered under the warranty and in the interests of good customer relations”, and that although “Mazda’s internal documents [did] not expressly separate out Mazda’s consideration of the various elements ... there is no requirement for that to occur”. It further

submitted that “[w]hile the round table and executive panel may not have used the ACCC’s formulation, the important points were considered”.

255 The ACCC’s fourth point in support of its unconscionable conduct case was that Mazda sought to dissuade RC from continuing with her requests, and instead sought to negotiate a commercial outcome with her, by suggesting she trade in her vehicle for a new Mazda, instead of considering her requests under the ACL. On a number of occasions, Mazda told RC that the age and mileage of the vehicle could be taken into account when providing a remedy under the ACL – something that was obviously wrong. And even when the round table review had approved a figure to be offered, the offer put was less than that approved, treating the offer as an opportunity for further commercial negotiation.

256 In response, Mazda submitted that the ACCC’s unconscionable conduct case was dependent on the basal proposition that it was unconscionable for Mazda to come to any conclusion other than a finding that there was a major failure. Otherwise, it submitted, Mazda was entirely justified in making a commercial offer and the ACCC’s criticisms of Mazda’s approach had no consequence. It further submitted:

Unconscionable conduct cannot be found where it was legitimate to negotiate and it must be legitimate to negotiate in circumstances where cause of problems is not self-evidently a manufacturing defect (i.e. a defect that existed at the time of supply). While the validity of that point does not depend on a firm conclusion that there was not a major failure, the opposite is not true. If there was no major failure then it cannot be unconscientious to negotiate. This is particularly so where a consumer (as here) was evidently aware of her consumer rights and confident in asserting them.

257 Mazda also submitted RC was not dissuaded from continuing her requests, nor did Mazda seek to do so. Offering alternatives was not, in its submission, properly characterised as “dissuasion”, but “good customer relations” because “it meant that there [was] not a need to return to the consumer in the event that Mazda did not accept that there [had] been a valid rejection of the vehicle”.

258 The ACCC’s fifth point was that Mazda obfuscated RC’s requests and did not take her safety concerns seriously.

259 Mazda rejected those contentions.

260 The ACCC’s sixth point was that Mazda was in a completely dominant bargaining position with respect to RC’s requests. The ACCC submitted that Mazda was (and is) a large and very well-resourced organisation by comparison to RC; Mazda had the technical expertise and legal

resources she lacked; there was information asymmetry between the parties; and Mazda did not share its information with RC. The ACCC also relied on the fact that RC had paid a significant sum of money for the car, which she relied on for her job as a dietician.

261 Mazda submitted that the fact that Mazda was a large organisation, and RC was an individual, does not demonstrate that Mazda was in a dominant bargaining position in any relevant sense. Mazda submitted that RC knew her legal rights sufficiently and wrote to Mazda seeking to enforce them; Mazda did not withhold any relevant information from RC and, in any event, it only had the information because it was undertaking the diagnosis when the ACL placed the onus for doing that on the consumer; and that no obfuscation was involved.

262 The ACCC's seventh point was that Mazda placed unfair and unreasonable commercial pressure on RC to accept its offer. It submitted that despite the fact that RC had waited months for a response from Mazda to her requests, she was only given one week in which to consider whether to accept the initial offer made by letter dated 2 March 2018. A further offer letter of 21 March 2018 also only provided a limited time in which the offer could be accepted. If she did not accept Mazda's offer, RC had to retain her car and her only recourse involved the costs and uncertainty of litigation against a major corporation. She did not want to do this. Further, RC was concerned about on-selling her vehicle. If she did not accede to Mazda's offer, she had no other option but to keep it, which (as Mazda was well aware) she considered unsafe. RC faced additional pressure in that, if she did not accept the outcome put by Mazda, she might be left with nothing, and have to remain in a car she regarded to be unsafe.

263 In response, Mazda submitted that no illegitimate pressure was placed upon RC. It submitted that giving RC one week to accept the offer was ample time, in circumstances where RC did not suggest that she needed any additional time or that her response would have been any different, and where there was no suggestion that, had she asked for more time, it would not have been given.

264 I am not persuaded, as Tadgell JA said in *Transport Industries Insurance Co Ltd v Longmuir* [1997] 1 VR 125 at 141, citing *Hall (Inspector of Taxes) v Lorimer* [1992] 1 WLR 939 at 944 (Mummery J), that "standing back and viewing it from a distance, making an informed, considered, qualitative appreciation of the whole", Mazda's conduct in respect of RC was unconscionable.

265 The ACCC’s case with respect to RC, and each of the other consumers, was that Mazda’s conduct towards them in the individual circumstances of each case, considered in the context of all the relevant circumstances, and as a whole, was sufficiently divergent from community standards of acceptable business practices that it objectively answered the description of unconscionable conduct within the meaning of s 21 of the ACL.

266 Although some of Mazda’s submissions in relation to the ACCC’s unconscionable conduct claim about RC, quite frankly, baffled me, their rejection, in the end, did not matter much.

267 For example, on 8 September 2017, RC told Ms Miller, “I do not want that car back until it is 100 per cent safe. I am not confident in it at all”. And in her Facebook post of 6 October, RC said, “Bottom line is, I NEED a car (whether it’s mine, a loan car or better yet a replacement vehicle)”. And it may be, as Mazda contended, that those words do not constitute a notification of the rejection of the vehicle within the meaning of the ACL. But the ACCC did not rely on those words. It relied instead upon the separate and emphatic statement that RC made during her 6 October 2017 telephone call with Ms Miller, namely:

I can’t trust that it’s fixed. I’m scared I’m going to be in some sort of accident and kill myself in this car. I don’t want it.

268 Mazda contended, in aid of its contention that the ACL was not invoked until later in RC’s dealings with it, that viewed in “context”, this statement was “not an unequivocal rejection” of the vehicle. But it is difficult to posit a less unambiguous rejection of a vehicle – “I can’t trust it, I’m scared I will kill myself in it and I don’t want it”. Quite what Mazda would accept as an “unequivocal” rejection was not explained.

269 Mazda’s case that it did not summarily reject RC’s requests for a refund without consideration of the merits of the claims is equally untenable.

270 The gist of Mazda’s submission was that the consideration at the round table and the executive panel was “a genuine consideration” of the “important points” concerning RC’s rights under the ACL. As the ACCC submitted, the record of the round table meeting on 21 February 2018 did not properly reflect RC’s position; nor did it contain any reference to the ACL or the subject matter of the relevant ACL provisions; there was no evidence of technical input into the discussion; and there was no technical person (such as Mr Bradford or Mr Rick David (Mazda, Manager Dealer Support)) present at the meeting. Ms Han conceded all of that in cross-examination. Among other matters, she admitted that “we wouldn’t have specifically

discussed major failures”, “we don’t generally use that term [major failure]”, the ACL was not referred to, and that that there had been no technical input into RC’s case at that time.

271 The proposition that Mazda gave any proper or genuine consideration to whether RC was entitled to a refund or replacement car is inconsistent with Ms Han’s evidence, and I do not accept it.

272 Mazda also submitted that although the Maestro record of the round table meeting held on 21 February 2018 did not refer to the ACL, it did record Mazda’s decision to offer a partial refund, which it said “reflects the purpose and function of the record”. I confess that I do not understand, and it was not explained, what purpose and function was being referred to.

273 It can be accepted, as the ACCC submitted, that Mazda sought to dissuade RC from continuing with her requests, and instead sought to negotiate a commercial outcome with her, by suggesting she trade in her vehicle for a new Mazda, instead of considering her requests under the ACL. And Mazda was clearly wrong to tell RC that the age and mileage of her vehicle could be taken into account when providing a remedy under the ACL.

274 It can also be accepted that RC was in a lesser bargaining position than Mazda.

275 I do not, however, accept that Mazda placed unfair and unreasonable commercial pressure on RC to accept its offer. As Mazda submitted, RC never suggested that she needed more time, something that she could readily have done had she wished.

276 And nor do I accept that Mazda “did not take RC’s safety concerns seriously”. There is no sufficient basis to enable me so to characterise anything that Mazda told RC.

277 Mazda also submitted that if, in fact, there was no major failure of RC’s vehicle, then it could not have been unconscientious for Mazda to have negotiated with her. But as I said earlier, the ACCC did not ask me to make such a finding.

278 Weighing all these competing factors in the balance, and having regard to the totality of the circumstances, I am not satisfied that the ACCC has established a case that Mazda’s dealings with RC were unconscionable.

279 I have no doubt that RC, like the other consumers considered below, was rightly very frustrated and disappointed by Mazda’s conduct. In colloquial terms, as the ACCC put it in opening, RC (and the other consumers) could hardly be criticised for thinking that Mazda was “giving them the run around”. That phrase is defined in the Macquarie Dictionary (1st ed, 1981) to mean

“Colloq. to fob (someone) off with evasions and subterfuges”, which seems to me to be an accurate colloquial characterisation of RC’s experience (and many of the other consumers).

280 A number of things that Ms Miller said to RC can also correctly be characterised as subterfuge. One example was Ms Miller’s observation, in response to RC’s complaint about the engine warning light, that “[t]here must have been a, just a small batch of them on assembly that just, the springs weren’t tight enough or something like that”. See [0] above. Another was Ms Miller’s false assertion: “But cars, they’re not [like any other consumer product]. Yeah. They’re actually not”. See [0] above.

281 But that said, having conducted the evaluative exercise that is required in cases such as this, I am not satisfied that Mazda’s conduct towards RC, considered in the context of all the relevant circumstances, and as a whole, was sufficiently divergent from community standards of acceptable business practices that it objectively answered the description of unconscionable conduct.

282 Ultimately, it seems to me, that although Mazda’s conduct with respect to RC (and the other consumers) can surely be characterised as appalling customer service, it falls short of being unconscionable, for the reasons I have given.

Consumers CT and MT

283 CT and MT purchased a Mazda CX-5 Akera diesel for a total price of \$52,160 in July 2016 from West End Mazda in Blacktown, NSW (**West End** or the **dealer**). MT was the registered owner of the vehicle, which developed a problem with its adaptive headlights.

284 Adaptive headlights are designed to assess the conditions ahead of the vehicle through a forward sensing camera located at the top of the windscreen and, by way of actuators (which move the headlights and determine the headlight height and direction), adjust automatically to the driving conditions and the illumination level in line with external lighting levels. The camera senses the light coming in from oncoming traffic and can then respond to high beam lights (or ordinary lights) coming in the opposite direction. When this happens, the headlights will then adapt by, for example, going from high beam to ordinary beam, dipping and/or directing the light away from the middle of the road to the left hand side. When the approaching vehicle passes, the light will not enter the forward sensing camera and the headlights will return to their position. The function can be switched off, such that the headlights revert to normal operation.

285 MT and CT drove with the adaptive headlights turned on until around November 2016.

Representations 1 and 2

Relevant facts – 2017

286 Prior to 2017, there was a known issue with actuators in the CX-9 Mazda model, not with the CX-5. But on 9 January 2017, Mazda issued Technical Bulletin NS002_17 in respect of CX-5 models for the date range 27 November 2014 to 12 September 2016 (which included MT and CT's vehicle), which relevantly stated:

... a customer may experience that one or both side headlight LO/HI beams are too low, due to an auto leveling system failure ...

... the front housing of the headlight leveling actuator, may be damaged due to insufficient durability. This causes a change in the initial positioning of the actuator when the ignition is turned ON.

287 Pursuant to the repair procedure, Mazda instructed repairers, via a technical bulletin, to replace the affected side headlight levelling actuator with a modified one, and how to do it.

288 After the headlights experienced an issue on 30 November 2016, MT and CT took the car to West End at least four times in December 2016.

289 There was contact between the dealer and Mazda about these technical issues between 23 December 2016 and 18 July 2017. Mazda provided instructions to West End about how to fix the issue with the headlights.

290 On 23 December 2016, West End advised Mazda that the forward sensing camera had been replaced previously and, on 4 January 2017, advised that they had inspected the actuators and that there did not seem to be any damage to them.

291 The initial repair work on CT and MT's car was concluded on about 5 January 2017.

292 In mid-May, the headlight issue occurred again. When MT was driving home from Gosford, she almost hit a suitcase on the highway because she could not see very far in front of the car. MT and CT took the vehicle to West End on around 15 May for a service, and again on 19 and 26 May.

293 On 30 May, CT and MT took the car for a drive at night and took photos of the headlight beams from inside the car. CT took the car to West End the following day, and showed the photos to Mr Steve Rochford, the service manager.

294 In early June, when they were forced to cancel their family holiday for a long weekend because they could not drive at night, MT contacted NSW Fair Trading and the ACCC about the issues with the car. Before doing so, CT looked on the ACCC website and formed the view that the problems with the car satisfied the criteria of a “major failure”. MT was told by NSW Fair Trading:

- (1) about the concept of a “major failure”;
- (2) that if there was a major failure, then they would be entitled to a refund or replacement; and
- (3) that they “may have a case”, given the type of problems they were experiencing, the number of times they had taken the car back for repairs, and the time it was taking for Mazda and the dealer to fix the problem.

295 By email dated 2 June, CT provided photos of the headlights to Mr Rochford.

296 On 9 June, CT and MT took the vehicle to West End and told Mr Rochford that they did not want the car repaired anymore.

297 Around 11 June, MT and CT returned to West End and spoke with the manager, Mr Mark Wiggins. CT told Mr Wiggins they did not want any more repairs on the car and they wanted a refund or replacement. Mr Wiggins told CT and MT that they should contact Mazda. CT also sent an email to Mr Wiggins setting out a timeline of the issues and attempted repairs and saying, among other things, “[w]e no longer want the vehicle returned as we no longer have faith it can be resolved”.

298 I interpolate that Mazda’s counsel in closing address conceded that those two communications were “a rejection or attempted rejection” of the vehicle. I am not sure what the qualification “attempted” means. In any event, in my view, at that point CT and MT had rejected the vehicle within the meaning of s 259(3)(a) of the ACL.

299 On 13 June, West End reopened the technical report and corresponded with Mazda in relation to the testing and repairs to be done on the vehicle. The dealer told Mazda that the same problem had happened on 9 December 2016 when the headlights were replaced and that they “had not had a complaint until his [sic] come in now”. The dealer advised that they had done various tests and the headlights had been replaced in December 2016, due to broken actuators. The dealer told Mazda that the vehicle was then returned on 9 June, with the same problem.

300 On 14 June, MT was told that the car was ready to be picked up. The next day, MT and CT went to the service centre at West End and spoke with Mr Wiggins, who said that he had spoken to the service centre but had not contacted Mazda. He said he was not prepared to offer any refund, replacement or compensation and directed MT and CT to take their consumer guarantee claim directly to Mazda.

301 On 15 June, after again being told to contact Mazda by Mr Wiggins, MT telephoned Mazda directly and spoke with Ms Jacqueline Temling. Ms Temling told MT that a case manager (Mr Justin Waldron) had been appointed to their case that day and she would take a message and get him to call them back. Ms Temling asked for a “heads up” on what was wrong with the lights. MT said that there had been problems with the headlights and they had spoken to the manager of the service department, and that “he thinks he has fixed them but we don’t know until we drive them at night”. MT said that with the holidays coming up, they had a big trip planned to drive up to Queensland in two weeks’ time and that they had lost confidence in the car. Ms Temling told MT that the matter had been allocated a case number. In response to a query from Ms Temling, MT again confirmed that the manager of the service department believed he had fixed the problem “but he doesn’t know. And unfortunately we’ve heard this story far too many times for our liking”.

302 MT and Ms Temling then had the following exchange:

MT: And, and I have actually spoken to the ACCC and opened up a case under the Consumer ...where they said trumps the warranty.

Ms Temling: No. So we - as a manufacturer, we have the right to fix the car under warranty, and that’s what ... that’s what’s happening at the moment ...

MT: And also, if you refer back to the ACCC, the Consumer Guarantee overrides any warranty. ... I’ve been on the phone quite a fair bit to the ACCC today and they’ve said that their legislation overrides warranty ... And because the headlights are a major failure, this - we can actually seek either a full refund or replacement vehicle. And that’s unfortunately the path that we’re going down ... Because it has been six months.

Ms Temling: ...and that’s totally fine because you’re able to do that, your - that’s your choice ... You have to follow your path, and we have to do what we feel - what, what we’re, we’re - according to our guidelines, what we [...] do.

...

Ms Temling: So I’ll let Justin [Waldron] know the story.

303 Ms Temling then asked how long the car had been at the dealership and to whom MT had spoken at the ACCC. MT answered Ms Temling's questions and said that NSW Fair Trading, rather than the ACCC, would contact Mazda. Ms Temling then said:

Yep. Our problem is to fix the car, and that's what we're going to do. So I will pass this all on to Justin and you can - and he can contact you.

Consideration of representations 1 and 2

304 The ACCC submitted that the exchanges recorded at [0] above were unequivocal references to the ACL and that, in the context of the conversation, the assertion that Mazda "had a right to fix the car under warranty", was false and/or misleading because it represented that:

- (1) CT and MT were not entitled to a refund or replacement vehicle at no cost to them under the consumer guarantee provisions of the ACL (representation 1); and
- (2) CT and MT did not have any ability under the ACL to seek to obtain a refund or replacement, because Mazda was entitled to repair the vehicle regardless of:
 - (a) the number of attempts made to repair the faults;
 - (b) the time it took to repair the faults;
 - (c) the consumers' rejection of the vehicle and requests; or
 - (d) Mazda's obligation under the ACL to repair it (representation 2).

305 Mazda submitted that neither representation should be implied for the following reasons, set out in its written closing submissions:

The representations alleged should not be implied in their context.

Neither representation should be implied. MT then said that she had spoken at length to the ACCC and asserted the headlights were a major failure, an entitlement to refund or a replacement vehicle and that was "the path we're going down". In response Ms Temling said "that's totally fine because you're able to do that, your – that's your choice". That exchange is irreconcilable with the implication of the representations alleged. By affirming MT's right as a consumer to pursue a remedy Ms Temling confirmed such a right existed.

Secondly, the impugned statement was plainly based on the information then available to ... Ms Temling, including that the dealer had confirmed that the vehicle had been fixed. That is, on the information communicated to Ms Temling by the dealer, there had been a problem on 9 December 2016 but both headlights were then replaced. According to the dealer, there had been no further complaint until 9 June 2017 when the headlights were aiming slightly low and they were then fixed. If the problems were as identified by the dealer then ... CT and MT would not have had any right other than repair.

Thirdly, the impugned statement expressly spoke to the manufacturer's position as manufacturer and it accurately set out Mazda's warranty obligation. On that basis,

Ms Temling stated her opinion that Mazda had an obligation under the warranty to repair the vehicle. So it did. There was a reasonable basis for that opinion as stated because it was correct.

306 I do not accept Mazda’s submissions.

307 I do not agree that the “context” relied on enables the attribution of any meaning different to the ordinary meaning of the impugned words.

308 CT had rejected the vehicle. At that point, it was surely Ms Temling’s obligation under the ACL and Mazda’s own training materials (see [0] above) to “escalate” that request for consideration by the appropriate executives designated by Mazda to assess the merits of the rejection – not instead to say, as Ms Temling in effect said, “well you can do whatever you like, but we are relying on our warranty obligation to fix the vehicle”.

309 And the submission that Mazda was instead, by telling CT and MT that they had the “choice” to seek either a full refund or a replacement vehicle, “affirming MT’s right as a consumer to pursue a remedy” is a wholly unrealistic characterisation of the exchange relied on by the ACCC.

310 Further, the submission that “the impugned statement was plainly based on the information then available” to Ms Temling is hardly to the point.

311 In my view, the assertion by Mazda that, as the manufacturer, it had “the right” to fix the vehicle under the warranty, made in the face of the rejection of it by the consumer under the ACL, did convey, by necessary implication, the representations alleged.

Representation 3

Relevant facts – 2017

312 On 16 June 2017, CT telephoned Mazda and spoke with their case manager, Mr Waldron. Mr Waldron expressed his understanding (based on the notes from the dealer) that new headlights were fitted in December 2016, and they had worked until the previous Friday. CT told him that the problems with the headlights had been going on for longer than that and set out a number of days that the vehicle had been back to the dealer. Mr Waldron noted that he was looking through the help case information but “all the information isn’t there”.

313 The following exchange took place:

CT: So we’ve, we have tried to get it resolved but at this stage, we’re not happy and we’ve already contacted the ACCC and raised a case with

them as a major fault.

Mr Waldron: Look, that's something that, that's your option. **From our point of view, our, our requirement is to fix the vehicle, and that's the information I'll be looking through.** So, yeah, so I'll call the dealership and then I'll give you a call back and advise what they have done and then see where we need to move forward from there.

CT: **Well, well it's not really relevant from our point of view because we no longer have faith in the vehicle and it's not lived up to our expectations as a new vehicle, and we therefore classify it as a major fault, as per the Consumer Guarantee.**

Mr Waldron: And that's something that, as I say, that's your option. **But our, our requirement as a manufacturer is to, is to fix the car.** And if that's what we've done, then as a case manager in the customer support area, our, our advice then would be to pick up the car if it's fine. If you, if you're not happy with that side of it, if we get contact from Fair Trading or somewhere like that, then we're happy to deal with them as well and advise them what we have done to rectify the concern.

CT: Under your own warranty conditions, you acknowledge that a major fault is - entitles us to a refund or a replacement car.

Mr Waldron: Yeah, well I guess it's under the interpretation as to what a major fault is. So ...

CT: The ACCC's interpretation is - so, which we've met three of the four conditions at least that they list on their website.

Mr Waldron: Yeah. And that may be the case. And if it needs to go that way, then that may be a way it will go and ...

CT: It's not needs to, it's going that way. We are giving you formal notice, we have raised a case and if we don't get a resolution, we are definitely going that way.

Mr Waldron: Yeah. But we haven't had any contact from them. So as I've said, our, our - as a manufacturer, our requirement is to fix the vehicle. And I'm not sure what we've done to do that yet, so I need to get more information. And in doing that, I need to call the dealer and go through that with them.

...

Mr Waldron: Well, as I've advised you, certainly what I'll be doing is calling the dealer, getting the information and then, if you would like that in an email, I can certainly send you an email outlining what's been done.

CT: So, your story is still that you're obligated to repair it and not follow the Consumer Guarantee?

Mr Waldron: Our obligation is to repair the vehicle. As a manufacturer, we work on the repair, repair process.

...

Mr Waldron: Look, that's an option you're making [to not pick the car up]. As I say, from our point of view, I've advised you I have research that I have to

do at this end and that won't be finished today. So I, I have a time frame there, so early next week I would expect to have that email out to you. But unfortunately, it's not going to happen today.

...

Mr Waldron: Yep. So have you - are you asking West End Mazda to replace the vehicle or are you asking ... ?

CT: Yeah.

Mr Waldron: Mazda Australia.

CT: Well, we, we approached West End Mazda for a replacement or refund. And their response was to say it's a warranty issue and to direct us to call Mazda. Our opinion is it's not the warranty issue and falls under the Consumer Guarantee and should actually be directed therefore to the manager of West End Mazda, but we did - he did ask us to call you ...

...

Mr Waldron: Because we, we haven't been passed on that email [which CT sent to the dealer] so we have no visibility to that email at all.

314 CT and MT followed up with email correspondence, advising that they no longer wanted the vehicle returned as they had no faith that the issue with the headlights could be resolved, and notifying Mazda and West End that they were seeking a refund or replacement "as per the statutory guarantee". CT collected the vehicle from the dealer to avoid the prospect of storage fees (an issue which NSW Fair Trading raised).

315 CT then sent an email to West End confirming that his collection of the car did not constitute an acceptance of the repairs.

316 Mr Rochford contacted Mr Timothy Edwards at Mazda and "advised that he is happy with the customers [sic] vehicle and that it is within spec".

Consideration of representation 3

317 The ACCC submitted that the words emphasised in the exchanges recorded at [0] above were unequivocal references to the ACL and that, in the context of the conversation, the assertions "our requirement as a manufacturer is to fix the car" and "as a manufacturer, our requirement is to fix the vehicle" were false and/or misleading on the basis that they represented that CT and MT did not have any ability under the ACL to seek to obtain a refund or replacement vehicle, because Mazda was entitled to repair the vehicle regardless of:

- (1) the number of attempts made to repair the faults;
- (2) the time it took to repair the faults;

- (3) the consumers' rejection of the vehicle and requests; or
- (4) Mazda's obligation under the ACL to repair it.

318 For similar reasons to those set out above in respect of representations 1 and 2, I agree.

319 Mazda contended that, read as a whole, the conversation between CT and Mr Waldron "conveyed that if there was a major failure then consumers would be entitled to a refund or replacement vehicle. There was a dispute as to whether or not the complaint amounted to a major failure. Mr Waldron expressly stated that it may be found that the consumers' vehicle had suffered a major failure".

320 I disagree. Mr Waldron said no such thing. It was in the face of CT's insistence that the car had suffered "a major fault" and that they were entitled to a refund or a new vehicle that Mr Waldron replied, "our requirement is to fix the vehicle". That necessarily implied that CT and MT did not have any ability under the ACL to obtain a refund or a replacement vehicle, as the ACCC contended.

321 The "context" of the conversation reinforces that conclusion. In another part of the conversation, CT asked the question: "your story is still that you're obligated to repair it and not follow the Consumer Guarantee?" Mr Waldron responded: "Our obligation is to repair the vehicle. As a manufacturer, we work on the ... repair process". That too is consistent with the ACCC's case. And when CT pressed Mr Waldron about having been told by the dealer to call Mazda in response to his "approach" for a refund or replacement vehicle, Mr Waldron's Delphic response is "so we have no visibility to that email at all". I thus fail to see how the conversation could be characterised as "involv[ing] a dispute about whether CT/MT's vehicle ha[d] experienced a major failure", as Mazda submitted.

Representations 4 and 5

Relevant facts – 2017

322 In June and early July of 2017, Mazda sought further information from the dealer about the fault.

323 On 10 July, the service manager of the dealer reported that when the vehicle had been brought in on 9 June, he took it home in a night driving situation to test the customers' complaint, and the lights were "operating", "but seems to be slightly low in AIM" and that the system was

aimed as per the workshop manual. He said the vehicle was again taken home by the service manager to test in night driving conditions and “all was operating fine”.

324 Mr Waldron telephoned MT the same day. Mr Waldron asked, “Just out of interest, how is car going ... ?” MT said she had not had working headlights for such a long time that “we forgot how they work”, but that the headlights seemed to be pointing too high. MT also said she was “not happy with them” and then, she was not “a hundred percent happy with them”. She said, “I’ve lost faith in the vehicle”, and “I’m driving my family around in the car and I’m just expecting the headlights to fail at any moment”. Mr Waldron asked what the issue with them was. MT said she was not an expert and not qualified but, to her, they seemed too high. Mr Waldron asked if oncoming cars were flashing their lights. MT said no. MT said it had happened in the past but not recently, although she had not been driving much recently. She later added, “... we’ve got a big trip up north in the car coming up, and I’m just - I don’t have faith in the car because I don’t want to be stuck on a highway between here and, and Northern Queensland, stuck on a road with nowhere to go”.

325 Mr Waldron explained that Mazda had been advised by the dealer that when the vehicle was dropped off in June, the service manager took the vehicle home at night to test and, in his professional opinion, the lights were low, but only marginally. Mr Waldron noted that the service manager advised that they carried out the relevant test. Mr Waldron said that, although he was not from the technical area, “I guess at the end of the day, from our point of view, we, we rely on the dealers because they check the vehicles ... If there is a manufacturing defect there, we – then obviously under the warranty we, we’re obligated to repair it. And that’s what we do. So if that repair’s been carried out and you’re still concerned about it, then our recommendation would be to go back to the dealer and see why”.

Consideration of representations 4 and 5

326 The ACCC submitted, in the context of the conversation recorded at [0] above, the assertion that “[i]f there is a manufacturing defect there, we – then obviously under the warranty we, we’re obligated to repair it. And that’s what we do” was false and/or misleading on the basis that it represented that:

- (1) CT and MT were not entitled to a refund or replacement vehicle at no cost to them under the consumer guarantee provisions of the ACL (representation 4); and

- (2) CT and MT did not have any ability under the ACL to seek to obtain a refund or replacement vehicle, because Mazda was entitled to repair the vehicle regardless of:
- (a) the number of attempts made to repair the faults;
 - (b) the time it took to repair the faults;
 - (c) the consumers' rejection of the vehicle and requests; or
 - (d) Mazda's obligation under the ACL to repair it (representation 5).

327 Mazda again contended, in effect, that read as a whole the words relied on by the ACCC did not give rise to the alleged representations "in their context". Again, I disagree, for similar reasons given in respect representations 1 – 3.

Representations 6 – 8

Relevant facts – 2017

328 On 14 July 2017, Mazda requested clarification about the repair from the dealer. On 18 July, the dealer responded that they had been confusing CT and MT's vehicle with another CX-5.

329 In August, the vehicle suffered an oil leak, so CT or MT took it to a dealer, Tom Kerr Mazda. The dealer fixed the leak and also looked at the headlights at the request of CT and MT.

330 Tom Kerr Mazda submitted a technical report on 24 August on the issue of the headlights. It also called "dealer support" at Mazda and was told that the case was being looked into. Tom Kerr Mazda sought, and was given, permission to order new headlight auto leveling actuators as the technical bulletin suggested and noted that no evidence could be found that the previous dealer had actually replaced the headlights.

331 During a call of 15 August between CT and Mr Daniel Noone of Mazda, CT sought to speak to someone "higher" than Mr Waldron who, CT said, was not returning his phone calls. Mr Noone sought to find a supervisor, but was not able to have anyone speak to CT immediately. He noted that he had not had a chance to look at the case. Mr Noone said that he would get someone other than Mr Waldron to call them back. CT said that they had been back to the dealer on multiple occasions. Mr Noone noted that the dealers were independent businesses from Mazda and then said, "We do have a close working relationship with our dealers, so I certainly don't want to be pointing the fingers at this point in time".

332 On 28 August, Mr Edwards, a team leader in Mazda NCS, reviewed the case. He entered the following note in Maestro:

Reviewed case:

Customer has taken vehicle to new dealer Tom Kerr.

Dealer has created tech case and have been told to carry out NS002_17.

West [End] did not replace head lamps and have not successfully followed up this matter with tech.

333 The same day, Mr Edwards telephoned CT. During the call (which lasted over an hour), CT said that he did not want the car back and that he did not want it repaired. CT told Mr Edwards that he and MT wanted a refund or new vehicle under the “Consumer Guarantee” as a major fault. Mr Edwards replied that Mazda would review the request for a refund or replacement, whether or not the repairs were carried out. He also asked whether CT would be happy with having the vehicle repaired. CT said no, on the basis that “if you told me a brand-new car would be un-roadworthy for over two months of its 12 months life I think you’d find very few people would think that was reasonable ...” CT said he deemed it a major fault because it had not been repaired in a reasonable time. He added:

Um, it meets all the criteria basically that according to the ACCC a major fault - sorry, the ACL, sorry - is a fault where [the] problem would have stopped me from buying the vehicle if I had known about it. Well, obviously I wouldn’t have bought it. Ah, it is unsafe. Clearly the headlights not working make it unsafe, um, and the kids and if, ah, or it cannot be repaired in a reasonable amount of time, and this was - this was our concerns. We’ve - every time we’ve had to take it down for repairs that is a huge burden on us to take it back 13 times.

334 The next day, at Mr Edwards’ request, CT sent an email to Mazda providing a timeline of events.

335 On 31 August, Mr Edwards told CT that Mazda would review the email and respond the next week. That same day, Mr Edwards reassigned Mr Charlie Micallef as the contact person.

336 The repairs to the headlights were carried out under the relevant Mazda warranty, and at no cost to CT and MT, on about 1 September.

337 When CT and MT had possession of the vehicle again, MT was prepared to drive it at night.

338 On 6 September, Mr Groves entered the following note in Maestro:

We need to speak to Tom Kerr Auto Centre and confirm that ... the headlight levelling actuators have been replaced and vehicle is now fully repaired. Also confirm that customer now has the vehicle back. We can’t comment on discussions between

customer and West End Mazda however we do apologise that issues took a long time to resolve. We can offer compensation due to his experiences such as free servicing 2 services or an extended warranty on entire vehicle.

- 339 The same day, Mr Micallef telephoned CT. The call lasted more than two hours.
- 340 Mr Micallef confirmed that the issues with the headlight actuators had been repaired. CT agreed and that as far as he could see, there was nothing wrong with the vehicle. Mr Micallef noted that there was a discrepancy between the information provided by the dealer and the information provided by CT and MT and he was not able to resolve that as he was not there. Mr Micallef said that Mazda was prepared to offer two free services and a one year extended warranty and asked how that sounded to CT. CT said it “sounds very weak, frankly”.
- 341 Mr Micallef explained that when management looked at the issue of a replacement or refund, they did not seek to resolve the differences between what the dealer said and what CT and MT said occurred. Rather, Mr Micallef explained, management looked at the warranty claims in respect of the headlights and decided that it was **not what he called a “major breakdown in the vehicle” and “it is an inconvenience”**.
- 342 CT responded that it was a “major breakdown” if the vehicle was un-roadworthy – and that was the definition of a major fault. Mr Micallef said that Mazda appreciated that it was an inconvenience but it was not a major issue and, on that basis, it was prepared to offer free services and extended warranty for the inconvenience.
- 343 CT said that he wanted Mazda to confirm in writing that not having working headlights was not a major issue. Mr Micallef said that the problem was “not the headlights weren’t working, they weren’t - they weren’t, um, the range wasn’t as high as it should have been”. CT said that the headlights were pointing to the ground. Mr Micallef said that was not discussed. Mr Micallef said that the dealer was adamant that he never said the car was un-roadworthy.
- 344 Mr Micallef explained that he was happy to investigate the issue of the un-roadworthiness of the vehicle. Mr Micallef said that the failure of the headlights was not considered a major concern on the vehicle like it might be if the engine failed.
- 345 CT said that he and MT were in agreement that the offer was not acceptable.
- 346 CT recounted the inconvenience to him and the number of trips to the dealer. Mr Micallef explained that he understood the frustration, but he felt he had been transparent about what Mazda had based its decision on, and Mazda took the view that the vehicle was not faulty, but

rather had a faulty component. He agreed that it took a long time to fix, but said that the car was not faulty and that it had been repaired. On that basis, he said that Mazda was prepared to make the offer in respect of the customers' inconvenience. He said that if CT was not happy, then he would relay that back. CT said that would be a big understatement.

347 CT said that because Mazda was not (in his view) prepared to follow the consumer guarantees, he and MT would take the matter further. CT provided his summary of Mazda's position and then asked Mr Micallef to confirm. Mr Micallef again said that Mazda would ignore the allegation that the car was un-roadworthy. Mr Micallef then said:

---all right, that's the end of it, that's it, if a car's un-roadworthy whether you - whether - whether it's you say that or the dealer says that you shouldn't be driving a car on the road if it's un-roadworthy full stop, right, so let's take that out of the equation. What we are saying is whatever the concern was with this vehicle, which is **the headlights, okay, in the scheme of things it is not considered to be a major - it's not a major component that's failed in the car---**

...

---component of a vehicle is an engine and what people say, you know, they say about the consumer laws, what people don't understand is, yes, you are entitled to a replacement vehicle if you have numerous issues on the same - on the same component as in, like, if - if your car had an engine replaced and two months later your car needed another engine replaced, that may not even warrant a - a replacement vehicle because under - under the warranty we're obliged to replace whatever fails as a manufacturing concern ---

...

---but if then a transmission went on that vehicle, we've got two engines and a transmission, you're probably entitled to another vehicle, okay? So I'm trying to - please don't misunderstand what I'm saying, we don't feel your headlights are roadworthy and if you had an accident we're not - it's not to do - we're not saying that at all, what we're saying is if you - if you take the vehicle as a whole component, nothing to do with roadworthiness, nothing to do with danger or safety, if you look at a vehicle as a component there are large components in the vehicle that are obviously big ticketed items that if they fail constantly, yes, you've got a cause for concern. **What we're saying that this is not a major ticketed item on the vehicle so it's not considered a major issue on the vehicle, it's not - nothing to do with the safety or the fact that, you know, you - that you don't have headlights.**

348 The same day, Mr Micallef entered a note of his conversation with CT in Maestro. The note included the following: "Spoke with Chooi [Han] – the compensation above is all we are prepared to offer".

Consideration of representations 6 – 8

349 It was common ground that each of representations 6, 7 and 8 were in the nature of opinions, arising from statements made during the 6 September phone call. The ACCC's case was that

the representations were misleading or deceptive because there was no evidence that Mazda had given any, or any proper or genuine, consideration to the matters the subject of the representations at the relevant time. (Mazda agreed that, if they were made, the representations were in the nature of opinions.) See, for example, RC at [0]-[0] above.

350 I turn first to representation 6. The ACCC submitted that the words emphasised in the exchanges recorded at [0]ff above, in the context of the conversation, represented that the headlight fault with CT and MT's vehicle was not a major failure under the consumer guarantee provisions of the ACL. In that regard, the ACCC relied in particular on Mr Micallef's assertions that:

- What we are saying is whatever the concern was with this vehicle, which is the headlights, okay, in the scheme of things it is not considered to be a major - it's not a major component that's failed in the car ...
- ... and ... [headlights are] not an engine [which is] considered a major component of a vehicle ...
- what people say ... about the consumer laws, what people don't understand is, yes, you are entitled to a replacement vehicle if you have numerous issues on the same ... car [and] had an engine replaced and two months later your car needed another engine replaced, that may not even warrant a ... replacement vehicle because under ... the warranty we're obliged to replace whatever fails as a manufacturing concern ...
- ... but if then a transmission went on that vehicle, we've got two engines and a transmission, you're probably entitled to another vehicle ...
- ... what we're saying is if you ... take the vehicle as a whole component, nothing to do with roadworthiness, nothing to do with danger or safety, if you look at a vehicle as a component there are large components in the vehicle that are obviously big ticketed items that if they fail constantly, yes, you've got a cause for concern.
- What we're saying that this [the headlights] [are] not a major ticketed item on the vehicle so it's not considered a major issue on the vehicle.

351 Representation 7 was that Mr Micallef's assertion, set out at [0] above, that the fault with the headlights was not a major breakdown of the vehicle, but merely an inconvenience, such that Mazda would not provide a refund or a replacement vehicle, was a false and/or misleading representation that the fault with CT and MT's vehicle was not a major failure under the consumer guarantee provisions of the ACL.

352 Representation 8 was that Mr Micallef's assertion, set out at [0] above, that headlights were not considered to be a major component, and CT and MT were not entitled to a replacement vehicle unless there were numerous issues on the same component, was a false and/or

misleading representation that CT and MT were not entitled to a refund or replacement vehicle at no cost to them under the consumer guarantee provisions of the ACL.

353 Mazda's submissions about representations 6, 7 and 8 dealt with them compendiously, as follows:

The representations alleged should not be implied in their context.

At the time of this call:

- (a) the repairing dealer had told Mazda that the headlights were working but the range was not as high as it should have been; and
- (b) the dealer disputed the consumer's assertion that the lights were pointing to the ground i.e. not functional.

Mr [Micallef's] characterisation of the fault as an inconvenience therefore reflected the facts as understood by Mazda at the time. Mr [Micallef] made it clear that this was the basis upon which the decision was being made. Specifically, on what Mazda had been told by the dealer, the headlights were functional at all times since January 2017 and only required a minor adjustment in June 2018. It was entirely reasonable to characterise that as an inconvenience. That is the basis of the opinion stated. Even if it was to be implied that there were reasonable grounds for the opinion, it follows there were reasonable grounds for that opinion.

Secondly, Mr [Micallef's] reference to major components is taken out of context. His statement about major components was introduced by the notion that roadworthiness was "taken out of the equation" (effectively because there was a conflict in the information about that topic between the dealer and the consumers). He did not say that a headlight failure could not be a major failure or that the failure of an engine always was. He effectively recognised that it might well be by his reference to roadworthiness (that is if, in fact, problems with the headlights had rendered the vehicle unroadworthy that might, depending on the length of time it continued for, constitute a major failure).

354 Mazda did not dispute that by 6 September, when CT and MT had made an unequivocal request for a refund or replacement vehicle, the only evidence of any internal consideration of that request was that which Mr Groves recorded in Maestro, relevantly that "[w]e can offer compensation due to his experiences such as free servicing 2 services or an extended warranty on entire vehicle". See [0] above.

355 The limits of the offer were set or agreed as a result of Mr Micallef's conversation on 6 September with Ms Han, who gave the following evidence in cross-examination about it:

Yes. Okay. And is it not startling to you, Ms Han, that he has had to take, so he says – had to take the vehicle to the dealership 13 times? That's what he says and – or – or that – that is what Charlie [Micallef] has recorded that he has said.

Yes. And as we have already indicated, based on those circumstances the customer is asking for a refund or replacement vehicle; correct? Yes.

And it seems as if ... Mr Micallef has taken upon himself to refuse that request based on the note; do you agree? He has written that he explained to the customer that [Mazda] does not believe this issue to be a major concern. Yes. He has written that.

Yes. And he has then gone on to give an offer to the customers, which is not [a] refund or replacement car; right? He has made an offer to try to resolve it. Yes. With two services and ... an extended warranty.

But doesn't that appear from that – do – do you – do you resist the proposition, Ms Han, that this note suggests that Mr Micallef has denied the consumer's request for a refund? Well, the note – the note clearly indicates that he's communicating that Mazda does not believe the issue to be a major concern.

And that wasn't something which he had the expertise to decide himself; was it? No. I don't believe he should be making that decision himself. No.

No. And so what he says is that he spoke to you about it and you agreed that, all we're prepared to offer is something well less than refund or replacement. That's what he's saying in this note; do you agree? In the note, yes. That's what he said.

And do you deny, Ms Han, that you had a discussion with Mr Micallef, along the lines recorded in this note? I have no recollection of having a discussion with him about this at that time.

But you don't deny that it occurred? I – I have no recollection.

How is it, Ms Han, that you are able to recall so precisely some meetings and not others? I'm not sure.

Ms Han, you – you would agree with me, would you not, that you and Mr Micallef were in no position to make a decision about the consumer's request for a refund or replacement vehicle under the Australian Consumer Law, as at 6 September 2017; do you agree? Yes. On my own, no.

I'm sorry, I didn't catch that? Not on my own, no. I didn't have that authority.

No. But yet, according to the note, that appears to be exactly what occurred? Well, I have no recollection of that, so I can't really comment.

And under Mazda's practice, this request should have been escalated to a round table meeting. That's your evidence; right? It should have been escalated, yes, for discussion as to a round table.

And you were aware of that at the time of this alleged meeting on 6 September 2017; right? No.

You weren't aware that – of the need to escalate requests for refund or replacement vehicles to the round table meeting at this time? If there was a request, yes. There would – there would be a need to escalate.

...

No. As far as you were aware, Ms Han, as at 6 September 2017, no real consideration had been given to the consumer's right to a refund or replacement under the Consumer Law; is that right? On 6 September, that note from Charlie. Doesn't appear so.

356 Mazda did not dispute that Mr Micallef told CT that “not having working headlights” was not “a major issue”. And nor did Mazda’s counsel seek to support Mr Micallef’s (ridiculous) assertion.

357 Mazda’s case on representations 6, 7 and 8 was, in substance, that Mr Micallef was hidebound by the fact that he could not “resolve” the “discrepancy” between what the dealer said (“there was nothing wrong with the vehicle”) and what CT and MT insisted was the case (that the headlights did not work properly and that was a major failure under the ACL). And again, it said that I am to read the impugned remarks “in context”.

358 I reject those submissions. In my view, it is not open for Mazda now to say that the fact that Mr Micallef could not, or would not, make any attempt to resolve the “discrepancy” provided any arguable basis for the proposition that Mazda had reasonable grounds for its stated opinion (that the headlights failure was not a major failure or major issue), in particular when he made no attempt to “escalate” the request for a refund or replacement vehicle in accordance with Mazda’s internal policies. As the extracts from the cross-examination reveal, Ms Han conceded that “as at 6 September 2017, no real consideration had been given to the consumer’s right to a refund or replacement under the [ACL]”.

359 And, as for the context point, that was a mere assertion, and there was no basis for it.

Representations 9 and 10

Relevant facts – 2017

360 On 7 September 2017, CT sent an email to Mazda, copying MT, summarising the discussion he had had with Mr Micallef the previous day.

361 The next day, Mr Micallef telephoned CT. Mr Micallef referred to CT’s email and said a lot of the questions he was raising in the email were things that he would “need to refer to someone in the legal department” particularly in relation to “some of the ACCC wording on there”. He explained that the call was a courtesy call, and he would pass on the email to someone in the “legal area” to “cast their eyes across it”. Mr Micallef noted that he wanted them to look at it so that he did not give CT the wrong information or steer him in the wrong way.

362 Mr Micallef said the issue had dragged on for too long but he did not know if that entitled CT to more than compensation, as this was not his area. He said that, “playing devil’s advocate”, he was trying to understand CT’s position. He said that CT had a problem with the headlights

and it dragged on but got resolved. Mr Micallef asked if CT thought it was fair and reasonable to seek a replacement vehicle. CT said that, following the letter of the law, the fault met the definition of a major fault.

363 CT said that they were trying to be reasonable. Mr Micallef said the vehicle had a faulty component, and it was replaced, and the car was returned and seemed to be okay now. CT agreed with that. The following exchange then ensued:

Mr Micallef: But it's like, don't forget - and I do have to use this analogy - cars today are not the cars of yesterday where there was just an engine in there and a transmission. There is now, I guess 50%, or I don't know the exact, but there's, I'd say 50% would be computers and software and electronics. And it's like, it's like going to the doctor, I guess. And I, I'm not trying to be, you know, it's like going to a doctor and, and telling him the symptoms. And how many times would you have to go back and forth to a doctor before he diagnoses what your concern is? You know, he may say to you oh, I think it's the flu. And then you go back and say, well it's not the flu because I'm still not feeling well. It's been three weeks later. And they'll say do these tests and do these tests. And unfortunately, cars are like that now. It's not just driving a car in, driving it and saying, oh, okay - and, and I, and, and in fairness too, I guess the headlights are a little bit - they're not something that - what's the word? That needs a lot of investigating, I guess.

CT: No.

Mr Micallef: But from, from, from, you know, I, I, I, you know, I grant you that, okay. But, you know, when I spoke to, when I spoke to the service manager, Steve, he said to me that he did testing and it, and it seemed to be okay. Obviously it does say here that, that there was a, there was only three metres, so you know, I, I just guess this - and I'm not, as I said, I just - what I believe is this; Mazda makes the vehicle, we make it with the best intention for customers to buy. Sure, there is going to be some issues with vehicles, that's just any product that's made, whether it's a car or a fridge, even a chocolate bar, I guess, you know.

CT: Yep.

Mr Micallef: There's going to be issues. I know we're talking about a car, which is a, a large ticketed item.

CT: Yes.

Mr Micallef: And obviously ...

CT: And a safety item too, let's put ...

Mr Micallef: Yeah, and the customer wants, and the customer wants to have a car that's reliable, we understand that. But sometimes concerns happen in a vehicle and they go into a dealership and they need to be investigated. Now, I'm not shying back - I'm not shying away from the fact that I've said to you yes, it's taken a while for this to be resolved. But when I talk to people here about it and when I've sat down and talked to people, previous case managers, I've spoken to

Tim, I've spoken to my manager, and they're saying yes, we understand that the customer had to go back and forth, back and forth. But we still feel that what is fair and reasonable for the customer is to offer him compensation. That's what we feel is fair and reasonable for what's happened to the customer's inconvenience. Now, that's what they're telling me. Once again, I will take your email to the legal people and then they will guide me. They may tell me the same thing. They may say no, we, we agree with you, that's what we feel is fair and reasonable, that's what we'll offer the customer, some compensation.

CT: Okay

Mr Micallef: As I said to you, some compensation, we'll put in a letter, we can address your concerns, and then it's up to the customer if he wants to accept that or go to the ACCC. ... they [the decision makers at Mazda] may turn around and agree with you. I don't know. All I'm telling you is my job is to talk to you, to try and make you understand the whole, the whole area of how it works from the dealer's point of view, from our point of view, to also look after you as a customer and that we want to help you. But then, once again, once all this information is collated and given to someone else from the legal department, they will make that decision on what they think is fair and reasonable.

...

Mr Micallef: The, the vehicle's now been rectified. We are now moving forward to try and resolve the issues that you have about the, the length of period it has taken to, to fix your car. Okay? And whatever the outcome comes - whatever the outcome is, we will, we will let you know that and then it's up to you to decide whether you think that's - alright, I'll go with that or no, I'm going to go with that and then take it further.

364 On 12 September, Mr Groves entered the following note in Maestro: "I suggest Chooi [Han] read customer's latest email regarding ACL implications. We are not here to discuss matters of law, we have repaired the vehicle under our warranty obligations, however acknowledge the repair took longer than was necessary which is why we have offered additional compensation".

365 On 15 September, Mr Micallef discussed the matter with Ms Chiera who said she was looking at the matter. Mr Micallef called CT to tell him.

366 On 19 September, Ms Chiera (after consultation with Ms Han) instructed Mr Micallef to offer CT and MT two free services and a one year extended warranty, with the offer to remain open for 14 days. In doing so, Mr Micallef was instructed as follows:

As discussed, I have reviewed this matter in company with Chooi [Han] and have made the following determination:

Concern: Headlights continued dipping which provided 3 metres of headlight coverage until the final repair was complete

Outcome: Repair completed and vehicle now operating as intended

Current Status: Customer is seeking a replacement vehicle

Our standpoint: Mazda Australias [sic] Technical Team can only operate as efficiently as the information provided to them by the dealership and in these circumstances, communication appears to have been somewhat compromised by West End Mazda. Notwithstanding, Tom Kerr Mazda have successfully rectified the issue in utilising the applicable bulletin and this has solved the headlight concern.

Next step: I believe the offer you have put forward to the customer is fair and reasonable. [Mazda] appreciate the customers [sic] frustration towards what feels like a lengthy diagnosis however the vehicle has been repaired and is operating as intended. We have decided that the customers [sic] request for a replacement vehicle is not justified and we therefore reinstate the following offer:

1. 2 free services
2. 1 year extended warranty

Please advise the offer will remain open for consideration for 14 days.

In your telephone call to the customer, refrain from using terminology major/minor failure. Potentially, the customer could argue that what was a minor problem turned into a major problem as the concern took almost 9 months to resolve - so best not to use words which misrepresent the ACL as all matters are reviewed on a case by case basis.

...

367 That same day, Mr Micallef told MT that, although it took a long time to repair the vehicle, the concern was now rectified and compensation of two free services and one year extended factory warranty was fair and reasonable. MT rejected the offer and told Mr Micallef that they had already started legal proceedings. MT said it was poor form for Mazda to blame the dealer, the people who represent the corporation. (There was no recording of this call available.)

368 By letter dated 28 September, Mazda wrote:

We refer to the concerns you have raised in regards to the operation of the headlights on your Mazda CX-5 vehicle.

We understand the headlight concern has been resolved and the headlights are now operating as intended.

...

In recognition of the inconvenience you may have experienced and in order to provide you with an assurance of our ongoing support, Mazda Australia would like to extend the following offer to you in full and final satisfaction of your matter:

1. We will provide you with complimentary servicing for the next two scheduled services (30,000km and 40,000km) for the above vehicle ... and
2. Mazda Australia will extend the factory warranty on your vehicle until 19 July 2020.

369 Mazda made this offer to CT and MT with full knowledge of the matters which CT and MT had raised with it.

Consideration of representations 9 and 10

370 The ACCC submitted that the letter from Mazda to CT and MT on 28 September made the following false and/or misleading representations:

- (1) the fault with CT and MT's vehicle was not a major failure under the consumer guarantee provisions of the ACL (representation 9); and
- (2) CT and MT were not entitled to a refund or replacement vehicle at no cost under the consumer guarantee provisions of the ACL (representation 10).

371 It will be recalled that the allegation of representation 9 above is to be read as an allegation that Mazda misrepresented the position as to CT and MT's legal rights because its customer representatives expressed an opinion that there was no major failure, in circumstances where the customer representatives had no basis for holding such an opinion, because Mazda had not considered whether or not the issue (here, the headlights) was, in fact, a major failure.

372 As is apparent from the evidence set out above, the evidence, including that given by Ms Han in cross-examination, showed that because Mazda never properly explored the question of whether the failure with the headlights was a major failure, including in circumstances where CT and MT had taken the vehicle back to the dealer 13 times, and where safety concerns were, one would have thought, very real. I reject Mazda's submission that the letter was a mere "offer". As counsel for the ACCC said in closing, that submission misses the point.

373 Mazda also submitted that "the statement that the faults had been rectified was plainly based on the information CT had conveyed to Mazda on 6 and 8 September 2017", citing an answer given by CT in cross-examination. But that goes nowhere in circumstances where the evidence established that Mazda gave no proper consideration to the request made by CT and MT for a replacement vehicle or a refund.

374 I accordingly accept the ACCC's submissions in respect of representations 9 and 10.

Remaining facts – 2017

375 CT and MT continued to have contact with Mazda for the rest of 2017. The ACCC did not allege that any false or misleading representations arose from those further interactions. I have

set them out below because they are necessary to understanding the unconscionable conduct case.

376 MT gave evidence that on 13 November she was driving and the headlights flashed on and off and there was not enough illumination on the road to see properly. MT deposed that she was driving with the adaptive headlights turned off.

377 On 14 November, MT emailed Mazda rejecting the suggestion that the headlights were fixed, and requesting further action. MT said that they were still experiencing issues, including the high beam not automatically disengaging when it should, and the high beams continuously flashing on and off when the adaptive headlights were engaged, particularly when travelling up a hill, and that when the normal lights were engaged, vehicles in oncoming traffic flashed and shined their high beams.

378 On 16 November, MT told Mr Micallef of the continuing problems they were experiencing. MT said that people flashed their lights at her constantly and the adaptive headlights were flashing on and off. Mr Micallef said they would need to take the car to a dealer. In the course of the telephone conversation, Mr Micallef said:

But what I'm saying to you is, you know, every, every manufacturer that manufactures cars, Icy Poles, make-up, TV sets, every manufacturer has some issue with a, with a product. ... Not every, every ... product that they make is perfect. So it's not, it's not that there's an issue - it's not Mazda that you should be saying oh, don't buy a Mazda. There is an issue - there is a component in your car that is not, is not meeting your expectations ...

... But it's people who work at dealerships ... they've gone to school to learn how to fix cars. So why aren't they fixing the car? ... That's where my frustration lies. Because I can offer you all the compensation in the world, but at the end of the day, they can only ... fix your car, not me.

379 MT responded: "So how many repairs do I have to go through to have the car fixed? Like it's just ridiculous". Mr Micallef said that, as a consumer, it was MT's right to go to NCAT or the Victorian Civil and Administrative Tribunal (VCAT), and he did not seek to dissuade them from that. Mr Micallef said he agreed with MT that the issues should be diagnosed rather than repaired and, at some point, if they realised what the problem was, then "it's not going to go any further until that's, that's fixed" and "at some point it will have to get fixed".

380 MT and CT commenced a NCAT proceeding the next day, seeking a full refund of the purchase price (\$52,160).

381 On 30 November, CT confirmed to Ms Chiera that he wanted the vehicle replaced. He refused an invitation for an FTS to inspect the vehicle, stating that he understood the purpose was only to assist Mazda.

382 On 5 December:

- (1) MT told Ms Chiera that the problems were resolved if the adaptive headlights were turned off, but that the car came with adaptive headlights and they should work. If they were turned on, people coming in the other direction would flash their headlights, and the headlights of the high beams kept flashing on and off. Ms Chiera asked whether an FTS should inspect the vehicle, as only the dealers had done inspections so far. CT stated that this was not to their benefit.
- (2) Ms Chiera had a further conversation with MT, who set out her concerns about the vehicle. They discussed the matter in some detail.
- (3) Ms Chiera discussed CT and MT's case with Ms Han, and entered a note of their discussion in Maestro, relevantly as follows:

With respect to customers [sic] request:

1. They do not have Service Invoices/Owners Manual as this went missing whilst it was with West End

Need to follow up with dealership to confirm whether this was the case and if so, they need to arrange for a service book and owners manual

2. Customer is seeking a definition from [Mazda] as to what constitutes a major failure

We do not know what a court would determine as a major failure so we cannot speculate or provide a response to this. Charlie [Micallef] may have provided examples however he is not technically/legally trained.

3. Customer is seeking telephone recording

Will look into this request

In conclusion, best efforts to get customer to agree to FTS inspection. Alternatively we will be requesting this at the Directions Hearing as the customer had the vehicle repaired at Tom Kerr and according to our account, the vehicle was fixed until now.

383 On 6 December, Ms Chiera again asked CT for Mazda to be permitted to inspect the vehicle, adding that if there was a fault, Mazda would "put up its hand". CT declined, saying that it would not matter because they wanted a replacement vehicle or refund based on the number of repairs it had taken to get to that stage.

384 On 7 December, Ms Chiera sent an email to Messrs Rochford and Wiggins at the dealer telling them of the NCAT application, putting CT and MT's chronology to them and asking if they agreed with it.

385 Mazda had an internal meeting the following day. Ms Chiera's Maestro note read as follows:

Meeting with Rick & Chooi

Provided breakdown of matter

Bulletin released in January 2017 - Headlight height

Lower they are shorter the beam

Symptom was 1 or more would be low

Headlight alignment too low is the bulletin

Rick reviewed tech case

Identified headlights are low according to picture in tech case

Tom Kerr Tech Case appears to have fixed concern

We had a known fix published at a dealer level in Jan 2017 - Vehicle was not appropriately repaired for 6 months.

Unroadworthy - headlight aim is part of it (board over distance) or aiming device on what emulates distance.

Tech Case is about headlight aiming - current concern raised relates to adaptive headlights. This may be customer education.

CONCLUSION: We need to obtain the Service Invoices and RO's from West End. We further need to validate the timeline provided by the client because if their account is accurate, which is that they were driving around a defective vehicle for 6 months as West End didn't implement the bulletin than is a UCX consideration that requires our attention. Furthermore, why wasn't [Mazda] sending out an FTS early than the point of escalation?

(Errors in original.)

386 Ms Chiera and the dealer exchanged various emails, seeking confirmation of the dealer's view of what had occurred.

387 On 12 December, in response to a question from Mazda as to whether he had advised that the vehicle was un-roadworthy on specified dates (23 December 2016 and 31 May and 9 June 2017), Mr Rochford responded relevantly as follows:

2. On frequent occasions the vehicle was presented to us with little or no notice, on these occasions the vehicle was described as unroadworthy by the owner. This was difficult to determine as the vehicle could not be left as we did not have a loan vehicle available each time as they were not a booked appointment. The vehicle was driven (by myself in my own time) to assess the condition that

was reported when I did have a loan vehicle.

3. The owner arrived at the dealership unannounced and was stating the vehicle is unroadworthy, I agreed that if the lights were not working it would be classed as unroadworthy, at this stage I could not confirm as was middle of the day.
4. Vehicle was inspected, as the owner had left for West End Mazda to inspect. Once again I drove the vehicle personally (in my time), could not fault so asked my technicians to carry out a test, with photographic evidence, showing the workshop manual process to inspect headlight operation. We created a light tunnel within the workshop area, still today the distance markers are marked on the floor.

388 The same day, Ms Chiera took notes of an internal discussion to consider next steps:

Reviewed customer time line of events

Noted the concern was first raised on 1st Dec 2016

Customer brought vehicle in throughout December with no repair attempt successful

Customer returned vehicle 5th January 2017 - Tech case logged and NO BULLETIN recommenced. VEHICLE COULD HAVE BEEN FIXED HERE.

Rick confirmed that the technical team have advanced knowledge of all bulletins and would have known a bulletin was to be released however made NO RECOMMENDATIONS for such to be carried out

Customer collected car on 5th January 2017

Bulletin was released on 9th January 2017

Customer did not return car till 15th May 2017 complaining of same problem

West End continued to test with no success of repair

West End launched Tech case 11th June 2017 - Provided incorrect information as they advised [Mazda] Tech actuators had been replaced

Rick advised this suggestion by the dealership infers the replacement was carried out PER BULLETIN

Dealership led Technical Department astray

NEXT STEP: Chance and Chooi discussion. Although [Mazda] always engage FTS in matters where changeover/refund is being considered, we unanimously agreed that the customer experience has not been a positive one as there is a KNOWN CONCERN and the customer has spent TIME attending the dealership to have this concern addressed. Given the length of time for the bulletin to be carried out, we will be offering changeover.

NEXT STEP: Chooi to contact Brett of West End to advise on our decision and note we will need them to value the vehicle

Chance to contact customer once Chooi has actioned above to advise we need them to bring the vehicle in for valuation. [A]nd we will also require detail as to the current concerns as we will need to attend to repairs if necessary and know specifically what those concerns are.

389 In December 2017, Mazda decided to offer a replacement vehicle or refund, because the problem had been ongoing.

390 On 14 December, Ms Chiera told CT and MT by telephone that Mazda “would like to keep them in the brand” and would offer them a new vehicle (new current model CX-5 of equivalent specification), or they could take a refund. The offer was confirmed by letter dated 15 December 2017.

391 On 28 December, CT spoke with Ms Chiera and CT sent an email to Mazda responding to Mazda’s 15 December letter.

392 CT and MT accepted Mazda’s offer of a replacement vehicle. They were provided with a 2017 plated Soul Red Crystal Metallic, diesel CX-5 Akera with the features of the original. MT and CT still have the replacement vehicle, and the headlights work properly.

Unconscionable conduct – CT and MT

393 The ACCC alleged that Mazda engaged in unconscionable conduct in its dealings with CT and MT in respect of their request for a refund or replacement vehicle under the ACL. It pointed to the following considerations.

394 The ACCC submitted that CT and MT’s case is “notable for the number of times they rejected their [v]ehicle and requested a refund or replacement when the fault could not be fixed, and the ongoing and manifestly unreasonable delay attempting to repair the fault with the [v]ehicle”.

395 It submitted that CT and MT’s requests were instead met by Mazda:

- (1) summarily rejecting the requests without consideration on the merits, and instead making various misrepresentations to CT and MT, including to the effect that they did not have any right to a replacement car under the ACL;
- (2) seeking to dissuade CT and MT from continuing with their requests, and Mazda instead “continually advanced the position ... that the [v]ehicle was fixed and that there were no longer any concerns”;
- (3) putting CT and MT in the position where in order to get Mazda to give proper consideration to their request they had to commence legal proceedings;
- (4) not escalating the June 2017 request for a refund or replacement vehicle in accordance with Mazda’s processes;

- (5) later offering compensation (free services and extended warranty) without any round table review, technical input, or any proper or genuine consideration of the consumers' rights under the ACL;
- (6) only deciding to refund the purchase price when faced with the legal risk posed by the NCAT proceeding;
- (7) obfuscating the requests in the course of many lengthy conversations with MT, who "felt like they were not progressing to a resolution", that "there would be no end", and that she "was being run around in circles";
- (8) blaming the consumers for causing the faults when challenged; and
- (9) not taking CT and MT's safety concerns seriously and only belatedly acknowledging that the vehicle had likely been un-roadworthy since January 2017.

396 The ACCC also repeated the submission that Mazda was in a completely dominant bargaining position with respect to CT and MT's requests, adding:

It must not be forgotten that Mazda is a very large and well-resourced organisation by comparison to ... CT and MT. Mazda had the technical expertise and legal resources they lacked. There was information asymmetry between the parties. Mazda did not share its information with ... CT and MT. [They] had outlaid significant amounts of money in purchasing the car. The faults often occurred when a distance from home, causing inconvenience. They would have had to remain in the same [v]ehicle unless Mazda provided a replacement vehicle as requested.

397 The ACCC also submitted that the fact that Mazda ultimately agreed to provide a replacement car after CT and MT commenced legal proceedings, likely for reasons of self-interest, did not ameliorate Mazda's conduct. It was submitted, "[t]o the contrary, it highlights the absence of commercial conscience with Mazda's previous dealings with the [c]onsumers about their requests".

398 Mazda denied that its conduct was unconscionable. In summary, it relevantly submitted:

- (1) viewed objectively, Mazda sought to engage with and address the consumers' concerns;
- (2) Mazda did not seek to dissuade CT and MT from continuing their requests;
- (3) when Mazda learned that the necessary repairs had not been carried out, a good faith consideration of ACL issues was conducted;
- (4) Mazda never blamed the consumers for causing the faults;
- (5) any criticism of the time for response to offers was de minimis;

- (6) there was no evidence that CT and MT were labouring under any particular disadvantage, and when they were not happy with the outcome, they issued proceedings in NCAT; and
- (7) the counterfactual did not demonstrate that Mazda would have agreed to supply a replacement or refund even if it had undertaken a detailed and thorough review at an earlier point in time.

399 In the case of CT and MT, I am unpersuaded that in the individual circumstances of their case, considered in the context of all the relevant circumstances, and as a whole, Mazda's conduct was sufficiently divergent from community standards of acceptable business practices that it objectively answered the description of unconscionable conduct within the meaning of s 21 of the ACL.

400 Again, I have no doubt that CT and MT were the victims of appalling customer service. And some of the things that the consumer advocate said to them were, at times, preposterous. I cite, by way of example, this passage from Mr Micallef's efforts to assuage CT's concerns about how long it was taking to fix the problem with the headlights:

But it's like, don't forget - and I do have to use this analogy - cars today are not the cars of yesterday where there was just an engine in there and a transmission. There is now, I guess 50%, or I don't know the exact, but there's, I'd say 50% would be computers and software and electronics. And it's like, it's like going to the doctor, I guess. And I, I'm not trying to be, you know, it's like going to a doctor and, and telling him the symptoms. And how many times would you have to go back and forth to a doctor before he diagnoses what your concern is? You know, he may say to you oh, I think it's the flu. And then you go back and say, well it's not the flu because I'm still not feeling well. It's been three weeks later. And they'll say do these tests and do these tests. And unfortunately, cars are like that now. It's not just driving a car in, driving it and saying, oh, okay - and, and I, and, and in fairness too, I guess the headlights are a little bit - they're not something that - what's the word? That needs a lot of investigating, I guess.

401 That is nonsense, and any reasonable consumer would be justified in thinking that they were, to use again the expression, being "given the run around". And it is true that it was only when proceedings were issued in NCAT that Mazda appeared to take the claim for a replacement vehicle seriously. But in my view, the conduct of Mazda in relation to CT and MT, viewed as a whole, was not unconscionable.

Consumers SB and KB

402 In May 2013, SB purchased a Mazda CX-5 Maxx Sport Diesel AWD for a total price of
\$42,000 from Regal Motors Newcastle, later called Newcastle Mazda (**Newcastle Mazda** or
the **dealer**).

403 SB and KB are married. The vehicle was paid for using their joint finance, and registered in
SB's name. SB and KB purchased the car primarily for SB to drive for work.

404 The vehicle was driven without incident for almost two years.

Representations 1 and 2

405 Mazda made the statements the subject of representations 1 and 2 in 2017. However, it is
necessary to set out the facts from 2015 to 2017 in order to understand the context in which
those statements were made, as well as the unconscionable conduct case.

Relevant facts – 2015

406 On 8 April 2015, the vehicle lost power while SB was driving along the Pacific Highway. He
was returning home to Newcastle from a holiday in Brisbane, with his two sons. He was
driving in one of the centre lanes, with the cruise control set at about 110 km per hour.
Suddenly, warning lights came up on the dashboard and the car lost power. SB was able to get
the car into the left lane and took the next exit into a rest area. He used the momentum of the
car to get off the highway. He then put his foot on the brake and turned the car off. When he
turned the car back on, the warning lights were still on. The car was towed to the Lismore
Mazda dealership. Whilst waiting for the tow truck, SB read the manual and ascertained that
the car had gone into "limp mode". When the vehicle returned to the workshop it was no longer
in limp mode.

407 On the same day, the dealer submitted a technical report to Mazda. From 8 to 13 April,
investigations were undertaken. On 16 April, it was identified that the head gasket had failed,
and approval was sought from Mazda for a partial engine replacement. The dealer submitted
a PAR to Mazda. Approval was given, and the replacement motor was installed by 7 May.

408 During this period, SB spoke with Mazda on a number of occasions in relation to arranging a
loan car.

409 On 9 April, Mr Mark Crawshaw of Mazda entered a note in Maestro stating, among other things, “I spoke with Steve Groves. He will be happy to support the customer with a rental vehicle”.

410 On 5 May, “Andrew” of Lismore Mazda called Mazda and spoke with Mr Tim Edwards. Mr Edwards requested the job number and noted that the vehicle was “VOR ACL as well. Limp mode ...”

411 On 18 May, Mazda completed a “Post Repair Checklist” indicating “ACL Major Failure: yes”.

412 On 18 July, SB was driving on the F3 freeway during peak hour, returning to Newcastle from Sydney. He was in the middle lane, with the cruise control set, travelling at around 110 km per hour. Suddenly, the warning lights came up on the dash again and the car lost power. He was able to get the car to an exit ahead. He had to park the car in what he considered a dangerous position on the inside curve at the top of the exit. A lot of cars were passing by in very close proximity. The sun had just gone down. SB had the car towed to Central Coast Mazda in Gosford. He told KB that the engine had failed again. He caught the train home to Newcastle and KB drove him back to Gosford the next day, when they drove the car to the service centre.

413 On about 18 July, SB tried to contact Mazda by telephone, and submitted a message to Mazda via the “contact us” form on the website. The message referred to the previous incident and then said:

Last night while returning home from Sydney to Newcastle the same occurred on the F3 motorway. This time the car was towed to Gosford. The car has done less than 10,000 kms since the replacement engine. Could you ring me urgent (this morning Saturday 18 July) to discuss this terrible situation.

414 SB’s email contact was entered into Maestro on 18 July.

415 On 20 July, the dealer submitted a technical report to Mazda’s technical department describing the issues with the vehicle.

416 SB asked Mazda for a loan vehicle on the same day, which was arranged later that day. SB missed work that day as his car was at the dealership and he did not have a loan car in time.

417 About a week afterwards, KB (in SB’s presence) told Newcastle Mazda that they had no confidence in the vehicle and wanted a replacement. The dealer (who KB recalled was called Daniel) told KB there was “absolutely no way” Mazda would give them a replacement. He told them to take it up with customer care at Mazda.

418 On 23 July, the dealer contacted Mazda and said SB and KB had rejected the vehicle and requested a replacement vehicle. During that discussion, the following exchange took place:

Daniel: Now they are a service customer, as I said, of ours, it's had regular servicing and they're quite dissatisfied with the product. Basically once the car's fixed, they're saying they don't want their car back and they came in here last weekend on the Saturday and spoke to our sales manager and were talking, they wanted a replacement car. He said, no, that's completely out of the question, you know, you've had the vehicle since 2013 and done 100,000 kilometres in it, that's not going to happen.

Brad: Mm.

Daniel: However, they've asked me, being that they're a service customer of ours, even though they've already spoken to Michael Burlak in Customer Support and he's contacted them and they've spoken to him, they wanted me to give you guys a call. I've also spoken to Peter Stewart about it, just to, you know, basically send the message home of how unsatisfied they are and what is Mazda willing to do about the situation.

Brad: Sure, righty-o, no worries.

Daniel: Peter Stewart basically said to me ... fix the car. I said, well that's pretty much what I thought. But ... I just - I don't know, I'm assuming they're seeking some kind of compensation ... A replacement car is off the cards, but I just don't know what else you guys would be willing to offer them, that's all.

...

Daniel: And I will give these people a call back this afternoon, let them know that look, I have spoken to Customer Support, I've you know, expressed, you now, your dissatisfaction and put forward your case ... It's, you know, up to them to now speak to you, I can't make the call on what they'd be willing to offer you, that's up to the Customer Support.

Brad: Of course, yeah, yeah. Yeah, no that's fair enough.

...

Daniel: And I'll just let them know I've touched base with you and done all I can do as a dealer and go from there.

Brad: Yep, no worries at all, mate.

419 Mazda's internal record of the conversation stated, among other things:

Received phone call from Daniel at Newcastle Mazda. He has been contacted by the customer stating their complete disappointment in their vehicle and have apparently spoken with Newcastle Mazda Sales Manager requesting a replacement. Vehicle was purchased from [sic] Regal Motors which was name changed to Newcastle Mazda.

Daniel [at Newcastle Mazda] advised that the customer was advised vehicle replacement wasn't an option from Newcastle Mazda and that [Mazda's] obligation is to repair the vehicle under the Manufactures [sic] Warranty. ... the vehicle has combustion gases leaking from the Injector Seals. He also mentioned without placing any blame that the vehicle recently had an engine replacement completed by Lismore Mazda. I questioned perhaps whether something might not have been done correctly

by Lismore Mazda and would any current repairs need to be investigated by the FTS as Dealer Rework ...

Daniel said he was requested by the customer to contact [Mazda] to relay their disappointment with their vehicle and the repeat [e]ngine concerns and will be seeking some form of compensation from [Mazda] so his call today was to purely relay this message.

420 Between 20 July and 7 August, Mazda's technical department instructed the dealer on the tests and repairs to be undertaken in respect of the vehicle. The vehicle was under repair for about two to three weeks, and injector seals and an oil sensor were replaced. Mr Burlak from Mazda customer support entered a note in Maestro on 6 August stating, among other things, that "it appears that previous [sic] Mazda may not have fitted the injectors correctly". Mazda's warranty department provided "prior authorisation" for some or all of the repairs and the costs of the repairs were covered by Mazda under warranty. The invoice dated 7 August recorded the work done under the advice and instruction of "MA Technical".

421 On 11 August, SB submitted a request to Mazda via the "contact us" form on the website, asking, "[t]he car is now up to approximately 118,000 kms. Given the history so far, I would like to understand my future warranty position on this car. Could you please advise?" SB also noted his thanks for the quick work of Mazda in organising a loan vehicle and Central Coast Mazda "for keeping the communication going through the process".

422 SB spoke with Central Coast Mazda's chief mechanic, Alan, on the same day. SB was provided with an explanation which included reference to a failed oil sensor.

423 Two days later, SB and Mr Crawshaw from Mazda had a telephone call following on from SB's submission on the Mazda website.

424 SB recounted the current issue with the vehicle and said, "I'm getting a bit worried about it" and "you'd reckon it would be like a new car". Mr Crawshaw asked, "I'd like to try and look after you somehow, is there any way I can compensate you for any of this at the same time as well?" SB responded:

You know, I don't think so Mark. My wife has been the worst - the hardest person to manage in all this. She reckons, she demands, oh you know, they should trade it in and allow you to get a new car at a different rate now. I don't think that's warranted but you know, if it happens again ... The reason for the email, right, I suppose you know, I want to put a peg in the sand with you guys at head office, you know, if it does happen again, I think I will have every right to demand some sort of replacement vehicle or a changeover vehicle or something like that.

425 Mr Crawshaw offered to extend the warranty on the car by 12 months. SB said this was not necessary so long as Mazda would look after SB if there were any further issues with the car. Mr Crawshaw said that Mazda would. The following exchange ensued:

SB: So I'm pretty happy that what they did was on - was kosher. But as I said to him, Mark, I said, you know, Mazda do make a very good product, I have no issue with that, but I'm sure one in 500,000 diesel engines that get pushed out of the factory, one's a lemon and you know, I mean just statistically that will be - that will happen, that there will be a lemon amongst - in every half-million of them that come out of the factory and I just hope I don't have that lemon.

Mr Crawshaw: No, I mean, look, I know people's perception on the word lemon, okay and it's something that we hear and I don't like customers feeling that they may have that or use that word. I mean in your situation too, two incidences within two months, in my opinion it's unacceptable, you know? It shouldn't occur. I wouldn't necessarily be calling the vehicle a lemon, okay, because I don't like using that word.

SB: I don't either, but I don't know what else ...

Mr Crawshaw: But in saying that, you know, you're a consumer, this has happened to you twice within a certain amount of time, sorry, within a short amount of time. So of course it's going to be a concern there now. Just to provide you some form of reassurance, [SB], I mean we don't take these cases lightly, okay? If something is to occur in the future, you know and the vehicle's out of warranty, it doesn't mean we're going to wipe our hands clean, okay?

Relevant facts – 2016

426 On about 13 April 2016, SB was in Port Macquarie for a work trip. He tried to turn on the car late one afternoon and it would not start. He arranged for a new battery to be installed via his NRMA membership, but the car still would not start. He told KB what had happened by telephone, that he was trying to sort it out with Mazda and he would have to stay the night in Port Macquarie. He had the car towed to Port Macquarie Mazda the following day. A representative at Port Macquarie Mazda told SB that a new starter motor had to be sent to Port Macquarie.

427 That day, SB contacted Mr Jarrod Whitehead at Mazda to deal with the towing and asked if the issue would be met under warranty. Mr Whitehead informed SB that Mazda would confirm either way once the vehicle was inspected by a Mazda dealer.

428 The vehicle was under repair for one week. The starter motor was replaced under warranty. At SB's request, Mazda reimbursed the costs of towing, overnight accommodation, and a hire vehicle. At the time, SB's vehicle had travelled over 150,000 km.

429 After the starter motor incident, in an email dated 20 April 2016 to Mazda, SB said, “I am very concerned with the on-going reliability of the particular car I have. It comes out of warranty in one month (3 years expires on 12 May 2016) and I expect to have continued problems. I plan to keep the car for a further 2 years so what can Mazda provide by way of future support given the terrible run I have had with this particular car?”

430 On 22 April, SB spoke with Mr Whitehead and exchanged emails about the reimbursement of out of pocket expenses.

431 On 28 April, SB spoke with Mr Whitehead, who confirmed that he had received SB’s email and his out of pocket expenses would be reimbursed. SB noted that the car was to come out of warranty in a month’s time, that he had had three instances in 18 months and that “I have had a much higher episode of problems with it than - than I think I should expect”. SB asked, “so what happens going forward once the car comes out of warranty?” Mr Whitehead told SB that Mazda may be able to give a “letter of assurance” and said he would come back to SB.

432 The following day, Mr Whitehead agreed to extend the manufacturer’s warranty by a further 12 months and to provide two years’ premium roadside assistance free of charge. Mazda confirmed this by letter dated 3 May 2016. SB accepted the offer.

Relevant facts – 2017

433 On about 21 July 2017, SB noticed while driving the car that the engine was not running at full capacity. It lacked power, particularly when he accelerated. The engine light came on very briefly, flashing on for a matter of seconds or less than a minute. He drove home because the light was no longer on. SB observed when opening the bonnet that there was coolant spray over it. He took the car to the service department at Newcastle Mazda. At this stage, the vehicle had 214,863 km on the odometer.

434 Later that day, SB was informed by a Newcastle Mazda representative that the car required an engine replacement. Because the warranty had expired, he was told it would cost him about \$23,000. Newcastle Mazda did not tell SB why the engine needed replacing. He responded, “No. I don’t want to drive that car anymore”.

435 SB spoke to Ms Miller on the telephone about the incident on 21 July. SB told Ms Miller that the dealer servicing the vehicle had reported that the engine was “buggered”. SB told Ms Miller that the same thing had happened twice before, but now he was being told by the dealer that the car was out of warranty by two months. SB told her that the warning light had

the previous day “flashed on and off very, very briefly” and “I didn’t know what it was until, I got back home and I opened up the user manual to see what was sort of red and down in that corner, and it was definitely the temperature gauge”.

436 Ms Miller replied: “Look, from, from what you’re telling me, because all of that history is there, it’s not something we’re going to get you to pay for the repairs or a new engine, so what we’ll do is we’ll work with the dealer ... I’m sure it’s going to be another manufacturing issue with that engine ... there’s something fishy”, and that it was “definitely something you’re not going to pay for, no way, no way”. She promised to get back to him.

437 The dealer submitted a technical report to Mazda’s technical services department describing the issues with the vehicle on the same day. The dealer “suspected” the thermostat had failed. SB’s vehicle was found to have an engine coolant leak and the head gasket had blown. Mazda’s technical department instructed the dealer on the repairs to be undertaken. Mazda instructed the dealer to (again) replace the engine. The cost was in excess of \$16,000.

438 In a telephone call between Ms Miller and SB on 26 July, Mazda offered to cover the cost of the new engine. Mazda also provided use of a loan car. In response to the offer, SB said, “Fantastic” and “I’m just very, very pleased to hear that you’re, you’re going to fix it” and “Thank you very much. This is wonderful news”.

439 On 28 July, in a telephone call between KB and Ms Miller, KB said, “the outcome that we were hoping for is for a new car”. She said that it was their “priority” given it was the third time it had happened with the car. Ms Miller noted that “I haven’t been getting that from [SB]”; KB responded, “Look, he’s very stressed”. Ms Miller said, “So the fact that you’re wanting another car ... regardless, even that going forward, the ... Your CX-5 is still registered in your name. It’s going to be driveable” and that, “It’s going to get a brand new engine and associated parts”. Ms Miller explained that Mazda would give an additional two year “assurance”. KB explained that she had previously asked the dealer for a replacement and been denied this outcome.

440 The following discussion ensued:

Ms Miller: So - so what we’ll do is the car needs to be fixed anyway, okay, so-----

KB: Yeah. Go ahead with what you’re doing

Ms Miller: We’re doing it anyway but what we’ll do-----

KB: Yeah, exactly.

Ms Miller: -----if this is the path you want to take-----

KB: It is.

Ms Miller: -----what I'm going to need to do is get Newcastle Mazda to do a-----

KB: Yes.

Ms Miller: Do up a new quote for us.

KB: Yeah.

Ms Miller: So what they'll do - did you want to perhaps - and I'm - and I'm going to refer to it as "trade into another CX5 sport diesel"?

441 KB referred to the loss of power at speed on a freeway. Ms Miller responded by identifying this as "limp home mode" which provided "enough power to get you off the road" to which KB said, "yes that's right".

442 Ms Miller said:

... if you want to go into a new CX-5 we can make it happen but there will be an amount that you will need to pay. I can't tell you what that amount is. We're not going to - we won't be able to give you a brand new CX-5 diesel with no cost to you. ... That won't happen. That can't happen. That's not going to happen. ... Because you've had the failures and all that is taken into consideration. ... We do look at a certain - we look at all of that. ... When we come back to you with a bottom line figure ... of - of, okay, [KB], this is what we've got. Are you happy to accept this offer? ... You can say yes or no.

443 Ms Miller then explained it had to go through a chain of events including being considered by the "Mazda legal team". She said "there will be a figure" but "how much that's going to be, if you're willing to accept - that's your choice". Ms Miller also said, "you can seek your own independent legal advice if you choose", and:

...we look at the background, we look at the history. ... You know, the warrantable history on these sorts - you know, when we come - when we're down this path we look at the warranty background. ... But you've got to bear in mind that it is a four year old car with close to 200,000 ks on it, so all that is taken into consideration. ... Everything is reviewed and we present you with the best figure that we possibly can squeeze.

444 Later that day, Ms Miller sent an email to Mr Groves, which said in part:

We have just approved parts and labour 3rd engine replacement CX5 Diesel. Customer now wants to 'trade out of this vehicle' [text cut off] Customer said they shouldn't need to feel this way or have to do this. I discussed trade out of Current CX5 with customer, we are [text cut off]

Steve, Should I start the process with Newcastle Mazda? I will need them to give trade in price, price on new CX5 Diesel, review DBM.

Customer contacted us in 11/8/15 maestro 1166534 not happy about 2nd warranty claim on engine. Customer had the discussion with SM [text cut off]

Customer has good service history with Newcastle Mazda, CX5 now has 214,000km.

Previous warranty claims

...

445 Ms Miller also made an entry in Maestro about her call with KB on that day, as follows:

[KB] called has asked for this vehicle to be replaced on 2nd engine failure. [N]ow in for the 3rd engine failure and doesn't want it back, [KB] said even if we give a 2 years assurance, it doesn't mean the new engine or other major components won't fail.[]Customer would like to be traded into another cx5 diesel.

Consideration of representations 1 and 2

446 The ACCC submitted that during the 28 July 2017 conversation between KB and Ms Miller, KB made "a clear request" for a replacement vehicle.

447 Mazda said it was not such a request. It sought to fasten on to the notion that because KB had said to Ms Miller that "the outcome that [they] were hoping for is for a new car", that fell short of a rejection within the meaning of s 259(3) of the ACL, and that the ACL was therefore not relevantly invoked.

448 The insuperable difficulty with that submission is that Ms Miller quite clearly understood KB to have requested a new vehicle. That much is obvious from her response to the request ("We're not going to - we won't be able to give you a brand new CX-5 diesel with no cost to you. ... That won't happen. That can't happen. That's not going to happen.") and from her Maestro note ("[KB] called has asked for this vehicle to be replaced").

449 The ACCC submitted that in representing that Mazda would not give KB a new vehicle at no cost, Mazda made the false and misleading representation that SB and KB were not entitled to a refund or replacement vehicle at no cost (representation 1).

450 The ACCC submitted that in representing that the vehicle was four years old with an almost 200,000 km mileage, Mazda made the false and/or misleading representation that Mazda was not required to provide a refund or replacement vehicle at no cost because of the age and/or mileage of the vehicle (representation 2).

451 Mazda submitted that Ms Miller's statements were "a spontaneous prediction of what Mazda would do"; that "[i]t was clear from the context that it was not her decision and KB knew it"; and that "[t]he prediction that Mazda would not give SB a new vehicle and that an important factor was the age and mileage of the vehicle was (a) her opinion and (b) accurate".

452 Mazda also submitted:

Further, when read in its context, the statement made to the effect that it was a four year old car with 200,000 kms was not a statement about the reasons for denial of the claim for a replacement vehicle at all. It was an explanation for a factor that was taken into account in determining the amount of compensation to be offered to the consumers. The representation alleged has been taken out of context. In any event, the statement was certainly not a general representation of fact (as alleged) that Mazda is never required to give a replacement or refund based on the age and mileage of the vehicle.

453 I reject Mazda’s submissions. How can the words “[w]e’re not going to - we won’t be able to give you a brand new CX-5 diesel with no cost to you. ... That won’t happen. That can’t happen. That’s not going to happen” conceivably be read or construed as “a spontaneous prediction of what Mazda would do”? I am equally at a loss to understand the relevance of seeking to characterise Ms Miller’s response as “spontaneous”. Whatever meaning the submission sought to convey is a question that I can put to one side, because Mazda did not call Ms Miller to testify. But in any event, and more importantly, what Ms Miller said was not a “prediction” – it was a resolute assertion of something that was to be regarded as incontrovertible, viz getting a new car could not and would not happen.

454 I also do not accept that “when read in its context, the statement made to the effect that it was a four year old car with 200,000 kms was not a statement about the reasons for denial of the claim for a replacement vehicle at all”. That is exactly what it was.

455 In my view, the ACCC’s contentions in respect of representations 1 and 2 must be accepted.

Representation 3

Relevant facts – 2017

456 On 4 August 2017, KB and Ms Miller had a further telephone call. KB told Ms Miller that, rather than the diesel, they would now prefer a petrol model. Ms Miller said she had some figures back from the dealer, and informed KB that the history of the vehicle, SB’s previous requests for a replacement, the fact that SB did not feel confident in the vehicle, and the age and mileage of the vehicle would be “taken into consideration”.

457 The following discussion then ensued:

Ms Miller: What’s going against - what’s going against us is the age and the kilometres of the car. ... That’s what’s - you know, that’s what’s pulling - pulling us down.

KB: I understand that and - and, yeah, exactly.

Ms Miller: Yeah.

KB: And I suppose in some ways it isn't really, like, a normal trade-in, is it?

Ms Miller: Well, yeah.

KB: I know you're looking at that but I don't think it should be the - the focus of the outcome.

Ms Miller: Yeah. So there's two parts to it. ... There's the trade-in - the trade-in value, which is at the dealer level, basically. ... And we're not talking Mazda dealer, we're talking, basically, Redbook. ... So what - what the - what most - I dare say all - used car and new car dealerships and agents look at is the Redbook price. So regardless of the warranty history on it, what they're going to look at is - and the service, what they're going to look at is Redbook value, which is-----

KB: Yeah. Yeah. And I - yeah.

Ms Miller: And you could look at that yourself and it will give you an indication of a car of that age and that kilometres.

KB: Yeah. I understand that but it's not - we wouldn't be in this situation - like, I don't think we can be treated as people that are coming to trade in their car-----

Ms Miller: No-----

KB: -----and have those rules apply to us. Because we've been in a-----

Ms Miller: You're not.

KB: Yeah.

Ms Miller: You're not, and that's where it steps over into Mazda.

KB: Yeah. Yes. Okay.

Ms Miller: That's where it steps over into Mazda. So dealers can only do so much. ... And then, because of the history on this one ... and because we're not treating you like a normal customer who's walking in a trade-in-----

KB: Yeah, that's right. Exactly.

Ms Miller: That's where it's - exactly. That's where it does step in to Mazda.

KB: Yeah, to do the right thing. Yeah.

Ms Miller: Okay. To do the right thing, yes, and we do take - and all - all the history on this car, the communication-----

KB: Yeah, because there's quite a bit. Yeah, so - yeah.

Ms Miller: -----the inconvenience - yes. And, look, I went through some of the notes there and it's just - it's just been a nightmare every time it's been off the road.

KB: It's been a nightmare for [SB] and, like, it's been one starter motor and three engines, so that's - that's four separate issues where, you know,

it's come off the road, yes.

Ms Miller: Yeah. Yeah, so length of time-----

KB: Yes.

Ms Miller: -----and - and at - and at the most inconvenient time, from what I was looking back at the notes there, so-----

KB: I know.

Ms Miller: -----we are taking all that into consideration.

KB: Good. I'm pleased to hear that, Marilyn, thank you.

458 During the call, Ms Miller also said that SB and KB's case needed to be further reviewed by Mazda and "by our legal team" and that "I had that actually reviewed by our legal team and senior management". Ms Miller noted that the vehicle was being repaired but that "that doesn't mean that this is off - off the table ... Not by a longshot".

459 Internally, Ms Miller tested the position about whether Mazda would make a "contribution" to a replacement vehicle, by email to Ms Han dated 4 August, which set out the "changeover" details and summary history including warranty claims. It then stated:

Can we please discuss further, customers [sic] expectation is [we] should contribute to change over due to warranty history.

Customers [sic] expectation is that a reliable vehicle shouldn't need 2 engines @214,000km. Has lost faith in the reliability.

This will be the second time customer requested a new car. Maestro 1166534 11/8/2015

Chooi, each time this vehicle breaks down it has caused customer a lot of expensive and Inconvenience [sic]. Please review [M]aestro history.

Please let me know how to proceed.

Consideration of representation 3

460 The ACCC alleged that Ms Miller's statement in her 4 August 2017 telephone call with KB that "the age and kilometres of the car" were "pulling us down" involved a false or misleading representation that KB and SB were not entitled to a refund or replacement at no cost because of the age and/or mileage of the vehicle.

461 Mazda's submission to the contrary was in these terms:

By this time SB and KB had been told that they would not be provided with a replacement vehicle provided at no cost. It is plain from the context of the discussion on 4 August 2017 that the impugned statements were not statements of reasons for Mazda's refusal to replace the vehicle. The substance of the discussion concerned the value of the vehicle and was an explanation of how Mazda arrived at an offer of

compensation.

462 I disagree. In a context where Ms Miller had told KB only a few days earlier that “[w]e’re not going to - we won’t be able to give you a brand new CX-5 diesel with no cost to you. ... That won’t happen. That can’t happen. That’s not going to happen”, it is, contrary to Mazda’s submission, plain that the impugned statements (the age and kilometres of the car were “pulling us down”) were indeed statements of reasons for Mazda’s refusal to replace the vehicle.

463 I accordingly accept the ACCC’s submissions in respect of representation 3.

Representations 4 and 5

Relevant facts – 2017

464 A new engine was fitted on 8 August 2017. Ms Miller called SB and advised him that the car had been repaired. The car was with the dealer for around three weeks.

465 Two days later, Ms Miller entered a note in Maestro stating, among other things, that “I had a meeting with Ian [O’Day] and Steve. We will continue to review previous history before making”.

466 Ms Miller made another Maestro entry that day, as follows: “emailed Ian and cc Chooi [Han] regarding the service, who pays?” The email read: “Hi Ian, As briefly discussed last night with you, please find attached 200k service invoice quote. Should we cover this?”

467 The next day, Mr O’Day replied to Ms Miller’s email with the following (which is reflected in the Maestro record): “We’re not paying for the service but you can go back with an initial offer for [Mazda] to put \$5,000 toward the change-over. Let me know how it goes”.

468 Ms Miller and SB spoke again on the telephone on 11 August. Ms Miller made an offer based on the “Red Book” value price (around \$10,000) for a four year old CX-5 car with over 200,000 km on it, in these terms, with the following response:

Ms Miller: I did meet with our management this - last night and this morning about your request. Now at this - they’re willing to tip in only 5,000 towards the changeover.

SB: Sorry?

Ms Miller: They’re willing to contribute - contribute \$5,000 to a changeover.

SB: Oh, well, that’s nothing.

Ms Miller: Not enough?

SB: So I - I don’t understand. What’s - what’s that mean? Like, so a new

car, typically, would be about 43,000, is that right?

469 Ms Miller told SB that “the reason the figure is - is - is only 5,000 is because it is a four year old car with over 200,000 ks on it. Yes, it has had the two engines, we see all that”. Ms Miller said that Mazda’s offer amounted to \$5,000 in addition to the trade-in value for the vehicle. She explained that if SB purchased a new car for, say, \$43,000 and traded in the vehicle for \$10,000, Mazda would contribute another \$5,000, so that the amount owing would in that event be \$28,000.

470 SB responded by pointing out that he still owed a debt of \$11,000 on the financing of the vehicle and said, “[a]ll of a sudden, it’s back to 40,000 so that’s a totally unacceptable outcome”.

471 Ms Miller said, “I’m just letting you know where - what the call on it was”. SB said that he considered the offer was “outrageous” and that it was an “absolute rubbish offer”. SB referred to their intention to go to NSW Fair Trading. Ms Miller responded that “my seniors ... also look at the - their consumer laws as well and - and there you have it”.

472 SB asked whether he received a warranty on the new engine. Ms Miller confirmed that it would be a two year/40,000 km warranty. They then discussed that SB noted that he would travel more than 40,000 km in a year and asked if Mazda would offer a warranty without the limitation of kilometres on it.

Consideration of representations 4 and 5

473 The ACCC alleged that by making the statement during the 11 August 2017 conversation that the decision not to replace the vehicle was based on all the information about the vehicle and “consumer laws”, Mazda made the false and misleading statement that SB and KB were not entitled to a refund or replacement vehicle at no cost to them under the consumer guarantee provisions of the ACL (representation 4).

474 The ACCC also alleged that by making the statement during the 11 August 2017 conversation that “[t]he reason that the figure is only \$5000 is because it’s a four year old car with over 200,000 kilometres on it” was a false and misleading representation that Mazda was not required to provide a refund or replacement at no cost to the consumers because of the age and/or mileage of the vehicle (representation 5).

475 Mazda submitted that the impugned statements “were not representations about why the claim for a replacement vehicle or refund was not being provided. They were about how the amount

of compensation being offered was arrived at. This was explicit and it was a statement of position”.

476 Mazda also submitted that “[t]he reference to the consumer law was a (correct) reference to the fact that the ACL was considered as part of Mazda’s process. The fact that a decision was made to offer lesser compensation does not affect that”.

477 I do not accept Mazda’s submissions, for the same reasons set out above at [0] and [0] in respect of representations 1 – 3, and I accept the ACCC’s submissions in respect of representations 4 and 5.

Representations 6 – 8

Relevant facts – 2017

478 On 1 September 2017, KB spoke with Ms Miller.

479 KB rejected Mazda’s offer and told Ms Miller that they were proceeding to NSW Fair Trading. KB asked again for the service history to take to NSW Fair Trading. Ms Miller said that Mazda would have to ask the dealer for it, as Mazda did not have it.

480 KB asked whether Mazda had formulated its offer based on all the facts. She said that there had been “four major things”. Ms Miller said, “I can only see two - two major”. Ms Miller then referred to the 2015 engine replacement, and acknowledged that that “would be considered major”. In relation to the 2016 starter motor incident, Ms Miller said, “[t]he starter motor is not major” (although she added, “Yes, it was [major] to you, I’ll agree with that”). Ms Miller said the starter motor was a “major dilemma when that happened because obviously the car wouldn’t start but it’s not considered major”. KB said that she did not hear of too many cars having a starter motor fail in such a short period of time. Ms Miller said that when she was seeking legal advice, she should put that in too.

481 KB pressed the request for a replacement vehicle, as follows:

You know, like, just saying, “Oh, we’ll give you 5,000 off,” you know, we’re - we’re not coming in with a clean slate trying to buy a car off you. We’re coming in as customers that have had a very traumatic and bad deal with buying a brand new car and I just don’t think anyone’s acknowledged that.

482 In response, Ms Miller said, “Look, let’s - there is absolutely no way that Mazda is going to agree to a new car, full stop”. Ms Miller asked KB, “I might have been able to up that 5,000 or just ask them to relook at it and up the offer of 5,000 but it won’t ... it could be six, it could

be seven. Is that going to be enough?” KB said no. Ms Miller then said, “Then let’s proceed with plan A and that’s ... your plan A, which is to go to Fair Trading, go down that line. ... Because there is no way - no way I’m going to get them to agree to a - to a - to a new car at no cost to you”.

483 The following discussion between Ms Miller and KB then ensued:

KB: Well, I don’t know - I don’t know why there isn’t, for such a big company, you know, when they have something like this that has gone terribly wrong. To me, it’s just proper customer service. I don’t understand why it would be a “no way” statement and that’s why I am going to Fair Trading because it isn’t fair. What you’re offering’s not fair.

Ms Miller: Yeah, I understand. I understand where you’re coming from. So, but I guess the managers and the powers that be look at it and - and I did review it with them-----

KB: Well, they’re not putting customers first, I can tell you, they’re putting their own pockets first, which is wrong.

Ms Miller: Well, we have supported - I can tell you, there is quite a few customers that we have supported with replacement cars.

KB: Yeah. I wonder why - why did they get them?

Ms Miller: I tell you when that happens, when they drive it out the workshop brand spanking - sorry, off the sales yard, brand spanking new ... It stops. Goes back to a dealer, the dealer has it for two weeks. We don’t know what’s wrong with it ... I’ve turned around and I’ve said, “Do you know what? Managers, let’s just give these people a new car.”

484 Ms Miller said that she would have another discussion with her supervisor but she considered it “highly unlikely” that Mazda would agree to a new car at no cost to SB and KB. In the end, Mazda declined to provide a new car to SB and KB.

Consideration of representations 6 – 8

485 The ACCC alleged that in the circumstances, the 1 September conversation between Ms Miller and KB gave rise to the following three false or misleading representations:

- (1) SB and KB were not entitled to a refund or replacement under the ACL because of the age and mileage of the vehicle (representation 6);
- (2) they were not entitled to a refund or replacement at no cost to them under the ACL (representation 7); and
- (3) a major failure within the meaning of the consumer guarantee provisions of the ACL was limited to a failure of a major component of the vehicle (representation 8).

486 As to representation 8, the ACCC submitted that Mazda made the false and/or misleading representation in that it represented to KB that “the 2015 was a major one, that was a – that was an engine” and that replacement of a “boost sensor” and a “starter motor” failure were “not considered major”. The representation was said to be false because it failed to consider the full definition of “major failure” under s 260 of the ACL, and, moreover, a major failure was not required for the consumers to be entitled to reject the vehicle under the ACL.

487 Mazda’s submissions with respect to representations 6, 7 and 8 were along what are now familiar lines:

By the time of this call, the request for a replacement vehicle had been rejected. KB called to ask for the service history to take to Fair Trading. That context is irreconcilable with the broad form representations alleged. The impugned statements were consistent with Mazda’s previously stated position which reflected the known facts.

Ms Miller said Mazda did not have the service history and only had the claims under warranty. It was in that context that Ms Miller characterised past repairs as “major”. An engine replacement is self-evidently a major event (which is not to say that it is invariably a major failure for the purposes [of] consumer guarantee provisions of the ACL). A boost sensor and a starter motor is, depending on a range of factors, much less likely to be so. The point of the discussion was identification of the past issues visible to Mazda, not a characterisation of breaches of the consumer guarantee or even a discussion of that topic. The impugned statements arose in the context of her explanation of what Mazda took into account in an offer of compensation.

All Ms Miller said in that context was a predicative statement based on her experience. It was reasonable. It was consistent with Mazda’s position in the subsequent NCAT proceeding.

In any event, Ms Miller made no statement of rights, either specifically or generally. When KB said that she would not be happy with a slightly increased offer and Ms Miller said “Then let’s proceed with plan A ...your plan A which is to go to Fair Trading, go down that line.” That is irreconcilable with the representations alleged as it recognised that SB and KB might be legally entitled to the relief they sought.

488 I do not accept those submissions. First, Ms Miller’s assertion that “there is no way ... I’m going to get them to agree to a ... new car at no cost to you” was a statement of the incontrovertible – that is, whatever KB or SB said or did, and whatever the proper characterisation of the failures with their vehicle, there was “no way” they would get a new one. The statement is not “predicated” on anything. Secondly, the fact that Ms Miller then said that KB and SB could “go down [the] line” of “go[ing] to Fair Trading” cannot be understood to have qualified, let alone be “irreconcilable” with, Ms Miller’s dogmatic statement that there was no way Mazda would “agree” to providing a new car at no cost.

489 And how could it possibly be “reasonable” for Ms Miller to have told KB in response to her question along the lines of “when does Mazda actually provide a replacement car”, that Mazda had “supported a few customers with replacement cars” when they have driven a “brand spanking new” car out of the sales yard and “it stops”. The most charitable thing that might be said about that response is that it was a very long way short of an adequate statement of Mazda’s obligations under the ACL.

490 I therefore do not accept Mazda’s submissions and I accept the ACCC’s submissions in respect of representations 6, 7 and 8.

Remaining facts

491 KB and SB continued to have contact with Mazda throughout 2017 and 2018. The ACCC did not allege that any false or misleading representations arose from those further interactions. I have set them out below because they are necessary to understanding the unconscionable conduct case.

2017

492 In late 2017, KB applied to NSW Fair Trading on SB’s behalf. In his affidavit, SB deposed that “[a]t that point I thought we were stuck with the car. I did not know what else to do. I had lost total faith in the car and did not think it was safe to drive because of the accumulation of problems with it”.

493 On 23 November, NSW Fair Trading wrote to Mazda. As a result, Mr Edwards of Mazda instructed Ms Miller to review SB’s case and give him “a summary of [where] you are at and current offers to the owner” in order to address NSW Fair Trading’s correspondence.

494 On about 5 December, NSW Fair Trading responded to KB’s correspondence, saying that Mazda was not prepared to change its offer of a \$5,000 contribution towards a replacement car.

2018

495 On around 4 February 2018, SB’s daughter called him and told him that the car had shut down when she was driving it home from Sydney along the M1/F3. SB took the car back to Newcastle Mazda. The engine wiring harness and engine sensors were replaced. SB paid \$1,650 for the work. The invoice records that the engine wiring harness was removed and replaced due to the wiring having melted when the exhaust pressure sensor failed.

496 On 22 February, SB commenced a proceeding in NCAT, seeking a refund of \$19,210. The amount claimed was a refund based on the Australian Red Book valuation plus the cost of the most recent major failure repair.

497 On 9 April, as SB was driving to the NCAT hearing, fumes started coming into the cabin of the car. The fumes made SB feel sleepy and sick. SB took the car to Newcastle Mazda and told Mr Daniel Nancarrow of Newcastle Mazda, “the car is unsafe and I don’t want it” and left the vehicle there.

498 The NCAT proceeding was settled after a negotiation at the first directions hearing. Mazda agreed to pay to SB the sum of \$16,000. At this time, the odometer read 235,573 km.

499 In the course of his cross-examination, SB was asked why he accepted the offer. He responded:

Probably more because I – by that stage – by that stage I – I was wanting out of the car, because even that morning we had another issue, where we’re getting fumes into the cabin out of the car. So I had driven it to Newcastle Mazda, and I truly just did not want to see that car ever again. So I was prompted by that emotion more than the monetary one to accept that \$16,000, and – and so I said “yes”.

...

[SB was referred to the \$5,000 offer which “felt like a slap in the face”.]

The issue for you at the time of the NCAT settlement was the net cost to you of a changeover into a new car? No, that wasn’t. That – that wasn’t. So in the time after that – that, I’ve had two more issues with the car. I’ve had an engine harness – an engine wiring harness failure. And, you know, whilst my daughter was driving the car up that same dangerous F3 Highway, and I’ve had fumes in the car. So, you know, since – since that document, clause 76, my feelings towards Mazda and that particular car had – had – had changed. You know, if you can imagine, you know, your daughter driving that car, my car, she borrowed it for a weekend, she was driving it on the F3, it went into limp mode again and I instructed her to drive it in limp mode from, you know, half or three – the last quarter of the F3, I instructed her to drive and I did not want her to stop on that road on the side of the road. I did not want that to happen because I believed that would have been a very unsafe situation and that’s what she did.

500 KB deposed that, as a result, they were left with a debt of \$21,000.

Unconscionable conduct – SB and KB

501 The ACCC alleged that Mazda engaged in unconscionable conduct in its dealings with SB and KB in respect of their request for a refund or replacement vehicle under the ACL. It pointed to the following considerations.

502 First, SB and KB’s case for a no cost replacement car was compelling at every stage when such a request was made because there had been faults with their vehicle leading to the need for two

engine replacements; Mazda had identified the first engine replacement as giving rise to an ACL major failure; the faults had given rise to genuine safety concerns; the consumers were, unequivocally, asking for a replacement vehicle; and Mazda's training and compliance documents indicated that replacement engines and a history of repeated repairs to the same part indicated ACL major failure.

503 Instead, so the ACCC submitted, SB and KB's requests were met by Mazda:

- (1) summarily rejecting their requests without consideration on the merits;
- (2) seeking to dissuade them from continuing with their requests, including by making false or misleading statements about the operation of the ACL, particularly by reference to the impact of the age and mileage of the vehicle;
- (3) wearing SB and KB down to accept a partial refund, after they were forced to issue NCAT proceedings and to reject the car for a final time;
- (4) not escalating the requests in accordance with Mazda's processes, in particular in the face of a clear request that engaged the ACL and had "red flags";
- (5) obfuscating SB and KB's requests, including by attempting to move them towards an outcome that was not provided for in the ACL;
- (6) falsely claiming that the request was to be or had been considered by legal and senior management; and
- (7) not taking SB and KB's safety concerns seriously.

504 The ACCC also submitted that the differential in bargaining position between Mazda and consumers was very clear in the case of SB and KB. The ACCC's submission in that regard was as follows:

Mazda is a large and very well-resourced organisation. Mazda had the technical expertise and legal resources they lacked. There was information asymmetry between the parties. Mazda did not share its information with ... SB and KB. [They] had outlaid significant amounts of money in purchasing the car. SB had to continue to rely on the car for his job. They were relying on Mazda to address the serious and recurring faults they had experienced with their car, which had taken them off the roads for significant periods of time. In the case of ... SB, the faults occurred multiple times when he was a distance from home, causing significant inconvenience. ... SB and KB could not afford another new car failing Mazda's compliance with the consumer guarantees; they ultimately bought a second-hand car after the Mazda vehicle was rejected for a final time.

505 Further, the ACCC submitted that Mazda exerted unfair commercial pressure and/or unfair tactics with respect to SB and KB throughout the process, including as follows:

- (1) Ms Miller’s outright rejection of their request for a no cost replacement under the ACL with no apparent consideration;
- (2) Ms Miller’s application of a “trade-out” analysis which included the imposition of the conditions (which KB expressly drew to Ms Miller’s attention as unfair);
- (3) Ms Miller’s failure to escalate their request for a no cost replacement for consideration through Mazda’s processes of a managers’ meeting or round table meeting; and
- (4) Ms Miller’s false or misleading representations that the request was to be or had been considered by legal and senior management, when that was not the case.

506 Further, the ACCC alleged that “SB and KB faced additional pressure in that, if they did not accept the outcome put by Mazda at the NCAT hearing, they might be left with nothing, and have to remain in a car which they regarded to be unsafe”.

507 I am not satisfied that Mazda’s conduct with respect to SB and KB was unconscionable.

508 The ACCC submitted that Ms Miller “falsely” claimed that the request was to be or had been considered by “legal” and senior management, but there is insufficient evidence to make such a serious finding in the case of SB and KB (or any other consumer). As Mazda submitted, and I accept, the references to “legal” may have been inapposite but that was an “understandable vernacular” when used by lay people in referring to executives, like Ms Han and Ms Chiera, both of whom had legal qualifications and were responsible for managing disputes.

509 I also do not accept that the evidence established that Mazda did not take SB and KB’s safety concerns seriously.

510 Much of what the ACCC otherwise submitted may be accepted, but I am unpersuaded that in the individual circumstances of their case, considered in the context of all the relevant circumstances, and as a whole, Mazda’s conduct was sufficiently divergent from community standards of acceptable business practices that it objectively answered the description of unconscionable conduct within the meaning of s 21 of the ACL. Again, I have no doubt that SB and KB were subject to appalling customer service, but it falls short of unconscionable conduct.

Consumer MG

511 In June 2013, MG purchased a Mazda 6 Diesel Touring Wagon for approximately \$46,663 from Maitland City Motor in East Maitland, NSW (**Maitland Mazda** or the **dealer**). MG also purchased an extended warranty pack and ten years' additional roadside assist for \$1,100.

512 For the first year or so of owning the car, MG had no issues with it.

Representations 1 – 6

513 The ACCC submitted that Mazda made six false/misleading representations between 5 July and 15 August 2018. However, it is necessary to set out the facts from 2014 to 2018 in order to understand the context in which those statements were made, as well as the unconscionable conduct case.

Relevant facts – 2014

514 On about 8 October 2014, the engine warning light came on and an oil pressure warning message displayed on the dashboard. At the time, the vehicle had travelled 30,697 km. MG called the dealer and was told to have the car towed to the service centre, which he did. The dealer then submitted a technical report to Mazda describing the issues with the vehicle and requesting advice.

515 Between 8 and 14 October, Mazda's technical department instructed the dealer on the tests and repairs to be undertaken on the vehicle. The dealer identified the fault code "engine oil deteriorated" and, at the instruction of Mazda's technical department, replaced the engine oil and filter, reset the oil data, updated the Powertrain Control Module (**PCM**) (Mazda's term for the engine computer) and reset the diagnostic trouble codes, and installed an on-board data recorder. MG was told by the dealer words to the effect of "we have replaced the oil and oil filter and reset the computer codes. The error on the dashboard meant the oil quality had degraded. It should be ok now".

516 After MG picked up the car, he had no further issues with it for about three months.

Relevant facts – 2015

517 On around 24 January 2015, the engine light and low pressure warning message again displayed on the dashboard. MG and his wife were on holidays in Kingscliff, and MG took the vehicle to South Coast Mazda.

518 MG also contacted Mazda on 24 January by submitting a message through Mazda’s “contact us” page, as follows:

Hi, I have a 2013 Mazda 6 Touring Wagon Diesel that is having regular problems. It seems that every 7000k it is showing a low oil pressure alert on the dash. I have had this “fixed” previously however it is now reoccurring. I travel long distances regularly for work and need a vehicle I can rely on. Can someone call me urgently to discuss this? I have owned the vehicle from new and it has been serviced regularly.

519 On 27 January, South Coast Mazda submitted a technical report to Mazda’s technical department notifying Mazda of the fault.

520 The next day, Mazda’s technical department instructed the dealer on the tests and repairs to be undertaken. A system reset was performed on the vehicle addressing the oil pressure warning light. Mazda’s technical department also told the dealer to conduct further tests, but MG had by then left. Before leaving, the dealer told MG the oil data had been reset, which cleared the error on the dashboard, and that the oil had been checked, but that they could not fix it before he left the following day, and the car should be taken to “your usual service depo” when MG got home.

521 Mr Scott Gaskell from Mazda NCS called on 11 February and left a voicemail message for MG to return his call. Mr Gaskell closed the Maestro case the same day.

522 In February, MG was driving home on the Hunter Expressway near Maitland, travelling at about 100 km per hour. Engine lights illuminated on the dashboard and the “low oil pressure, take car to dealer” warning message again displayed on the LCD screen. MG pulled over to the side of the road. The brake pedal felt “rock hard”. MG thought the car had entered “limp mode”. MG called Maitland Mazda and was told to have the car towed there, which he did.

523 On 20 February, Maitland Mazda submitted a technical report to Mazda’s technical department and Mr Micallef opened a Maestro case with the description “HEADS UP - CAMSHAFT - ACL”.

524 Between 20 February and 2 March, Mazda’s technical department instructed Maitland Mazda with respect to the testing and repairs to be undertaken on the vehicle. Mazda instructed the dealership to replace the camshaft, rockers, turbo charger, vacuum pump, and other components. MG collected the vehicle on around 3 March, by which time the dealer had had the vehicle for about two weeks.

525 The dealer told MG that they had been in contact with Mazda and that the issue was not just with the brake pedal, but that there was “a problem with oil flow around the engine. There are metal shavings from the camshaft which are blocking the filters and the turbocharger and camshaft needed to be replaced. There’s a recall on the camshaft”.

526 On 2 March, the dealer and Mazda completed Mazda’s “Post Repair Checklist”. The checklist noted that the failure was an “ACL Major Failure”.

527 After the incident in February, MG undertook online research about his position, including making some short telephone calls to NSW Fair Trading and/or the ACCC.

528 MG deposed that he spoke with the service manager (Simon) on around 3 March when he collected the vehicle from Maitland Mazda, and said words to the effect of: “I am not happy with the problems I’ve had already with the car. What are my chances of getting the vehicle replaced by Mazda Australia?” MG deposed that he was told that Mazda did buy vehicles back, but not often, and the dealer was confident that the repair had fixed the problems. MG also deposed that on another unspecified occasion he spoke to an unnamed person in sales at the dealer, asking if there was any chance Mazda could give him a refund or replacement, and was told that was “pretty unlikely”, and that he should take it up via the dealer’s service department.

529 On around 11 May, the dashboard engine light and oil pressure warning came on again. MG took the vehicle back to Maitland Mazda. The dealer submitted a technical report and received instructions from Mazda in relation to testing and repairs to be carried out on the vehicle, namely an engine oil and oil filter change, an update to the PCM, and replacement of the engine oil pressure switch. The vehicle was in repairs for around three days. MG was told the oil was replaced and the oil filter reset, and that he should “monitor it and keep in touch”.

530 On around 22 May, the dashboard engine light and warning message came on again. MG had the car towed to Maitland Mazda and said to someone in the service centre, “You need to fix it properly this time”. MG was told words to the effect, “the oil is clogged with black soot and there is significant damage to the engine bearings and crankshaft and wear on other internal parts. We need to replace the engine”.

531 The dealer again submitted a technical report to Mazda and between 22 May and 5 June, Mazda’s technical department instructed the dealer on the testing and repairs to be carried out. The car was at the dealer for around three weeks. The engine was replaced at Mazda’s expense

following a PAR being submitted by the dealership. The dealer completed Mazda's "Post Repair Checklist" on 2 June.

532 After the engine was replaced and MG collected the car, Simon, the dealer representative, said to MG words to the effect, "We've fixed the car now". MG deposed that he told Simon that he wanted the car replaced.

533 On around 12 October, the low oil pressure light illuminated again, and Maitland Mazda again attempted repairs under the direction of Mazda's technical department. The engine oil and oil filter were replaced under warranty, at Mazda's expense.

Relevant facts – 2016

534 In November 2016, MG took the vehicle to Maitland Mazda because the engine light and low pressure warning had illuminated on the dashboard.

535 Between 14 and 16 November, Mazda's technical department instructed the dealer on tests and repairs to be carried out. The engine was again replaced at Mazda's direction, and the cost covered by Mazda under warranty. The vehicle was in repairs for between two to three weeks. The dealer told MG that "the fuel injector was not sealed correctly, which is letting air into the combustion chamber. That is what is causing soot to build up in the oil and block the oil pick-up leading to substantial damage to the internal components".

Relevant facts – 2017

536 In July 2017, MG again took the vehicle to Maitland Mazda for a service and in relation to a low oil pressure concern. The dealer identified a fault code indicating oil deterioration, updated the PCM, and carried out an oil data reset.

537 On around 4 August, after MG had started the car, the power steering and brakes stopped working, and the car went into limp mode. MG had the car towed to Maitland Mazda the following day. The power steering and brake warning lights were on. The invoice noted: "the steering went heavy but is not heavy at the moment".

538 MG took the vehicle to Maitland Mazda for further attempted repairs on around 9 August, because the steering was continuing "to go heavy" and the power steering and brake warning lights were illuminated on the dashboard.

539 The dealer submitted a technical report on 9 August, and was told by Mazda’s technical department to undertake testing and repair work in accordance with a technical bulletin. The dealer cleaned the earth points and cleared the error codes.

540 At one point in this period, MG was told words to the effect of “it was because of the earthing connection, so we have disconnected and reconnected it and cleaned it up”.

Relevant facts – 2018

541 In around June or July 2018, MG was driving, about a block from his home, when the engine light and low oil pressure warning came on. He then arranged to have the vehicle towed from there to Maitland Mazda.

542 The dealer submitted a technical report on 2 July, and conducted testing and repairs as instructed by Mazda’s technical department between 2 July and 2 September. The vehicle had travelled 95,571 km at this point.

543 On 3 July, a Mazda FTS inspected the issue on-site at the dealership. On the same day, Mazda’s technical department notified its customer service department of concerns with the vehicle. The FTS also informed the dealer to contact Mazda, “as this vehicle has already had two engine replacement for the same issue”.

544 MG deposed that some time after the car was transported to the dealer, he said to the dealer service manager words to the effect: “This has been five years of recurring problems. Keep the car; I don’t want it anymore”.

545 On 5 July:

- (1) a Maestro note was entered stating “CRITICAL PART DELAY - VOR”, with an ETA of 9 July 2018;
- (2) Mr Raymond Woodhouse (Mazda NCS) entered a note in Maestro which said “Case manager to call the customer this morning and explain that [Mazda] will be working with the dealer and if there is anything we can do for him during this time”; and
- (3) the dealer sent an email to Mr Dustin Miller of Mazda noting, “as per phone conversation, Mazda Aust have still not contacted the customer after me giving them plenty of notice as to the severity of the case”.

546 The dealer discovered that the oil pick up was blocked and the top half of the bearing shell was discoloured and scored. The FTS directed that the engine be replaced, which was done at

Mazda's cost. The repairs took approximately three weeks. The dealer told Mazda that the customer was unhappy with the reliability of the vehicle.

547 The same day, Mr Tristian Reimers of Mazda telephoned MG. Mr Reimers explained that Mazda had become involved at the instigation of the dealer and that Mazda had approved the "engine repairs". MG explained that his "biggest problem" was what he perceived as potential harm to the resale value of the vehicle and also that he had a car that had not been as reliable as he had hoped.

548 The following discussion ensued:

MG: Yeah. I mean, I've looked up, like, what - I was at one point where I thought, 'oh god, I should just' - 'I should push you guys to see if you'll replace the vehicle completely'. Because I just got that fed up with it. So, like - when I started looking up, you know, other cases, I thought the best I could ever hope for was Mazda to buy the vehicle back at its current market value, which, you know, would still put me significantly out of pocket.

Mr Reimers: Mmm.

MG: Which has kind of - you know, kind of left us stuck with the thing. You know, all I really-----

Mr Reimers: Well, I'm happy to review-----

MG: -----want-----

Mr Reimers: -----you know, based on the experience, you know, something around goodwill, or, you know, some compensation as a result of, you know, everything you've told me about the - you know, the history of the vehicle and what Simon's obviously told us about it. I mean, I'm more than happy to have a - you know, a - a discussion with - with management here, and - and loop back to you. You know, with a - with a response to that.

I mean - yeah, whether it would involve Mazda doing what you've just outlined in terms of, you know, buying it back, I mean, I - I - I don't know. I'll probably have to set an expectation that that would probably be unlikely.

MG: Yeah. The-----

Mr Reimers: But - yeah. Yeah-----

MG: The thing that annoys me-----

Mr Reimers: Yep.

MG: -----the most about it is, like, it's a lovely car to drive.

Mr Reimers: Mmm.

MG: And - when it's - when it's working. And even - even when it's had

issues, it's still - it's still - like, it still drives exactly the same. It just, you know - only once it's really had a good shutdown where it's gone - gone into limp-home mode.

Mr Reimers: Mmm-hmm.

MG: But it's just - it's a really nice car. It's really frustrating that it's had these problems.

Mr Reimers: Yeah, yep.

MG: You know, the - the-----

Mr Reimers: No, it isn't what we want. I mean - yeah, and-----

MG: Yeah. I mean, the - the best possible - like - and I know this is really unlikely, but the best possible outcome for me is if you replaced it completely with a new - new model. ... And - and I'd be, like, steering well away from another diesel one. Yeah. ... That'd - that'd be the - the - yeah, the ideal outcome for me. ... If the vehicle got completely replaced with a brand-new one. Yeah.

Mr Reimers: Yeah. Look - I mean, I'd - yeah, I'd have to be really honest with that and say, look, that - that would probably - that would probably be unlikely. I mean, unless you're-----

MG: I know.

Mr Reimers: Yeah. I - I'm-----

MG: I - I wouldn't push-----

Mr Reimers: I'm not saying that it wouldn't - wouldn't happen. I'm saying that there'd have to be some contribution, you know, I guess in terms of - and like a financial contribution through yourself to - to facilitate something like that, if it was to - to be approved at this end.

MG: Yep.

Mr Reimers: But, yeah - I mean, I'd - yeah, it certainly wouldn't be a case of Mazda saying, "Yep, let's" - "let's replace the" - "the vehicle and put you in a new one". As - you know, as a----

MG: I just have - got so little faith in the current car.

Mr Reimers: Mmm. Yeah. No, I understand that. Yeah.

...

MG: Yeah, I would like you to go to your management team and - who - you know, whoever approves these kind of things, and let them know. I mean, I think it's - it would have to be pretty rare at your end that, you know, a car would have its engine swapped out - we're beyond the fourth engine now since it was - you know, since it was new.

...

Mr Reimers: Mmm. But I - I guess in terms of me reviewing it here at this end, I guess in terms of offering a - a buy-back at market value, that's not something that you would be open to?

MG: I - I don't want to do it. Because-----

Mr Reimers: Yeah.

MG: I - I mean, I bought the car to keep it for 10 years. And I've had it-----

Mr Reimers: Yeah.

MG: -----for five now. I mean, I bought it with extended warranty, I paid extra for that. I bought it with, like, 10 years roadside assist.

Mr Reimers: Mmm.

MG: You know, I really wanted to get 10 years out of the vehicle. You know, if - if it's worth 18, 20 grand or something as its current market value, if I was to go and spend 20 grand on something, I'd be lucky to get anything as nice as what I'm driving at the moment.

Mr Reimers: Yeah, sure.

MG: Yeah.

Mr Reimers: Yeah. I mean, the other - I mean - I guess when we're talking about goodwill, I mean, there's - there's, you know, servicing; there's, you know, accessory fitments; you know, there's all - I mean, there's that sort of goodwill that we can - we can potentially offer, based on the experience you've had. Would you be open to something along those lines?

MG: If - if you guys offered me, like - like, guaranteed me that - I don't know. Extended the warranty on the vehicle till - till it - it was 10 years old, that'd be the kind of thing I'd be interested in as well.

549 MG then said, from Mazda's point of view, it would have been cheaper to replace the vehicle than to undertake three engine replacements. In response, Mr Reimers said that was not how Mazda viewed it and added:

And I guess if it's a, you know, confirmed manufacturer issue - and I guess that's what we're dealing with here, through, you know, the vehicle - taking into fact, you know, how many kays you've done, the history of all the previous issues, yeah, I think that's - that's probably how Mazda would generally approach it in terms of, you know, what we need to do to address the - the actual manufacturing problem with the car.

...

I'm just trying to explain it from a - a Mazda perspective in terms of how they would look to - to resolve an issue with a car, and that would be along the lines of addressing the manufacturing fault through a repair process involving a dealer, mmm.

550 MG then said: "I guess - I'd like you to go with management. So I guess the first thing would be replace the vehicle completely, and then other - those other options you've just mentioned after that". Mr Reimers agreed.

551 MG then said that he had looked at his legal options and "I don't think I'd be very lucky to get away with much more than it being bought back at market value, according to the ACCC,

anyway”. MG said he would be open to the option of making a contribution depending on what the dollar figures were.

552 Mr Reimers made a Maestro entry about that conversation, which included the following:

... [MG] explained he is going to pick up a dealer loan car tomorrow and pointed out he loves driving the vehicle however has lost all confidence in it based on the latest engine only lasting 15,000 kms. He understands Mazda cannot guarantee the vehicle will not have another engine failure however based on the 4th engine about to be fitted to the vehicle he was hoping Mazda would consider replacing it with a new one. Advising him I will be more than happy to review his request however based on the age of the vehicle it will be unlikely Mazda would agree to replace it with a new vehicle. I pointed out if Mazda was to make a decision about potentially buying the vehicle back it will be at market value more likely. He was not open to this option as he would significantly be out of pocket ...

553 On 13 July, Mr Reimers called MG to tell him that he was reviewing MG’s request and hoped to have further updates for him in the following week.

554 Mr Reimers called MG again on 20 July and told him that he was still waiting on an answer from management.

555 The same day, Mazda’s executive panel considered MG’s request for a replacement car. Ms Han recorded the following in Maestro:

Meeting attended by Kym, Chooi and Ian. Agreed to assist Customer into new vehicle with [Mazda] contribution 50 - 70% into like for like Diesel and this figure translated to Petrol vehicle. Please see Chooi or Ian prior to speaking to Customer.

556 Mazda’s record of the executive panel review listed the service and warranty history and said, among other things:

Request: Replacement Petrol Vehicle

Recommendation: NO to full replacement - YES to assistance into new vehicle (50 - 70%)

...

Customer’s vehicle is 5 years old however has required 3 engine replacements to date, the first one at 2 years of age and 61,270 and thereafter every year and a half and 20,000 km later. It also had the camshaft, turbo and vac pump SSP completed at 41,412 km. Customer’s vehicle has been town in once (1st engine replacement) and all other times, symptom was warning light.

Agreed offer [Mazda] contribution 50-70% changeover costs into like for like Diesel, then translate figure to petrol vehicle.

557 In a telephone call on 25 July, Mr Reimers offered MG a 50 per cent contribution to the change over costs for a new Mazda 6 wagon petrol vehicle, including accessories and on road costs.

558 Mr Reimers explained that this meant that Mazda would pay half of the change over cost after the trade-in price, so that if a new vehicle cost, say, \$42,310, and the trade-in figure was \$15,000, then the change over cost would be \$27,310, half of which Mazda would pay.

559 Mr Reimers explained that this amount could be used for a different model if that was what MG wanted to do. Mr Reimers said that he did not expect an answer immediately but if MG did want to go ahead then he would draft an official letter with the settlement offer. MG asked to think about it and said the offer was “kind of pretty close to what I was expecting”.

560 On 3 August, MG emailed Mazda setting out the reasons why he did not accept Mazda’s offer, including that he wished to change to a new CX-9 vehicle rather than a Mazda 6 because the Mazda 6 did not fit his family, he had to consider his finances, and he wanted a petrol vehicle rather than a diesel. The email also said:

The summarised backstory with my vehicle is that it is currently undergoing its 4th engine replacement. I’m sure you can look up its full service history through East Maitland Mazda, suffice to say my confidence in the reliability of the 2.2L Diesel is low.

...

The whole reason I purchased a brand new vehicle with extended warranty from the dealer was so that I would have a reliable car that could be used for long distance around the country with my family and since the first few issues started occurring with the car back in 2014 the car has barely left a 30 km circle from my house.

561 On 7 August, Ms Katherine Eason of Mazda telephoned MG. Ms Eason told MG that Mr Reimers had left Mazda and that she was taking over as MG’s case manager. She said that she had to learn about what had happened from the beginning and she could see that Mazda had made an offer of a 50 per cent contribution towards “change-over costs”.

562 MG said that the offer of 50 per cent contribution to change over costs was Mazda’s “initial offer”. Ms Eason agreed and noted that MG was looking to upgrade to a CX-9.

563 MG described the issues he had had and why he was leaning towards the petrol rather than the diesel given the problems he had with the diesel, and said:

I bought a new car so that I wouldn’t have to worry about a car breaking down ...

... it was pretty obvious really early on that there was something, you know, critically wrong with the car.

... And it - it felt like we just - they just kept fixing it under warranty when, like, these discussions we’re having now could have easily happened, like, two years ago ... Or three years ago. And - and the trade-in - potential trade-in value of my car would have been a lot - lot higher back than ... than what it is now.

... But like, what I meant - I mean, as - the longer it went on, the less the car was worth, and - and then the more I have to pay to kind of sort myself out now ... Whereas - whereas if this had've happened two years ago, after, like, the second engine - which is probably when it should have happened ... (Ms Eason then said, "The value would be higher.")

564 MG asked whether Mazda would be prepared to contribute more than 50 per cent or whether it was fixed and Ms Eason said, "Yeah, it looks like it's 50 per cent. ... I've been advised of that, and it's in the notes from the review meeting as well that ... Mazda Australia are able to offer 50 per cent".

565 MG and Ms Eason discussed the various options and other vehicles that MG was interested in. The following discussion ensued:

MG: Yeah. It's quite - it's a bit of a shame you guys - like - I mean, I wouldn't mind the money if your management are willing to be more negotiable on how much they're willing to put in.

Ms Eason: Yeah. I mean, what - what would you see as reasonable? As - for Mazda Australia to offer?

MG: If you could put me in, like, a GT or in an Atenza with, like - and I'd be putting in, like, 10 grand or less, then I'd be quite happy with that.

Ms Eason: Yeah. So you're looking at - I mean, Mazda Australia have offered 50 per cent. Are you - are you requesting maybe 55 to 60 per cent? What's - what - what would you - what would your request be? I mean, I can take it and have it reviewed, [MG], I don't mind doing that at all on your - on your behalf.

566 Ms Eason said she would get quotes on the other models and see if there could be a higher contribution from Mazda.

567 Ms Eason made the following entry in Maestro: "I advised Chooi [Han] the customer would like for [Mazda] to contribute more than 50% if possible. Chooi advised [Mazda] can offer an amount of \$17,000 towards his new vehicle".

568 On 8 August, Ms Eason offered MG \$17,000 towards his new vehicle. MG said he was prepared to accept this. He asked for quotes on the cars in which he had expressed interest. After being provided with quotes, on 14 August, MG selected a (new) Mazda 6 Atenza wagon.

569 Mazda confirmed its offer to provide such a vehicle, upon a payment of \$17,700 from MG, on 15 August. The offer was open for acceptance until 21 August. MG accepted the offer on 20 August.

Consideration of representations 1 – 6

570 The ACCC alleged in relation to the communications between MG and Mazda between 5 July and 15 August 2018, Mazda made false or misleading representations that MG was not entitled to a refund or replacement vehicle at no cost to him under the consumer guarantee provisions of the ACL. These are representations 1, 4, 5 and 6.

571 It is common ground that these representations alleged were in the nature of opinions. Again, the ACCC alleged that they were misleading or deceptive because there was no evidence that Mazda had given any, or any proper or genuine, consideration to MG’s request for a refund or replacement vehicle at the time.

572 Representation 1 is founded on Mr Reimers’ 5 July 2018 statement made to MG (in the context of his request for a replacement vehicle and his statement that “we’re beyond the fourth engine now since it was ... new”) that “there’d have to be some contribution ... a financial contribution through yourself” and “it certainly wouldn’t be a case of Mazda saying ... ‘let’s replace ... the vehicle and put you in a new one’”. See [0] above.

573 Representation 4 is founded on Mr Reimers’ 25 July statement to MG, in the context of MG’s request for a replacement vehicle, that Mazda was prepared to offer a 50 per cent contribution towards the change over costs to a replacement vehicle. See [0] above.

574 Representation 5 is founded on Ms Eason’s 7 August statement to MG that Mazda was prepared to offer a 50 per cent contribution towards the change over costs of a replacement vehicle. See [0]ff above.

575 Representation 6 is founded on Mazda’s letter dated 15 August 2018, which relevantly provided:

We are writing regarding your 2013 MAZDA6 K 6A WGN DIESEL TOURING RED vehicle purchased from Maitland Mazda in July 2013.

As discussed, we offer to supply you with a new Mazda 6 Q 6 SPD AUTO WAGON ATENZA 2.5L vehicle in exchange for the return of your current vehicle and an additional payment from you to Maitland Mazda of \$17,700.00.

576 Representation 2 is that when Mr Reimers told MG on 5 July 2018 that if the problem with the vehicle was a “confirmed manufacturer issue” Mazda would resolve the issue by “addressing the manufacturing fault through a repair process” (see [0]), that constituted a false or misleading representation by Mazda that MG did not have any ability under the ACL to seek

to obtain a refund or replacement vehicle, because Mazda was entitled to repair the vehicle regardless of:

- (1) the number of attempts made to repair the faults;
- (2) the time it took to repair the faults;
- (3) MG's rejection of the vehicle and requests; or
- (4) Mazda's obligation under the ACL to repair it.

577 Representation 3 is that Mr Reimers' 5 July 2018 statement to MG that if it was a confirmed manufacturer issue with the vehicle, Mazda would generally take into account how many kilometres the car had done and the "history of all the previous issues", constituted a false or misleading representation that Mazda was not required to provide a refund or replacement vehicle at no cost to MG because of the age and/or mileage of the vehicle.

578 There are a couple of factual matters that I need to deal with in respect of representations 1, 4, 5 and 6.

579 Mazda disputed that MG had rejected the vehicle by the time the statements said to constitute representations 1 – 3 were made (on 5 July 2018).

580 MG deposed that in June 2015, after he had told the dealer that he wanted his vehicle replaced (see [0] above), he telephoned Mazda and spoke with someone. He said that he did not know the name of the person to whom he spoke or the exact date of the call. He deposed, however, that he said, "I want a replacement" and that the Mazda representative to whom he spoke said, "You need to take it up with the dealership. I'll pass on the information".

581 It was suggested to MG in cross-examination that he was mistaken, as follows:

What I'm suggesting to you is that your memory - your recollection of events at [paragraphs] 48, 49 and 50 [of MG's affidavit] is not accurate in the sense that you actually didn't have a conversation with anybody from Mazda at this point in time? No. I definitely called Mazda Australia. I can remember talking to, basically, someone on reception. Their job was to pick up the phone and getting shut down aggressively and - and not being able to get through to someone at Mazda Australia that could actually help me. I remember being quite upset that I had tried on several occasions and never managed to get through to anyone at Mazda Australia that could help me. I almost felt like it was their job to try and turn me back to the dealership for support.

582 I accept that evidence. MG was emphatic that he called Mazda and asked for a replacement vehicle, and there is no basis for me to accept Mazda's submission that he was mistaken about it. I therefore find that by June 2015, MG had rejected the vehicle.

583 Mazda also disagreed with the ACCC’s contention that there was no evidence that Mazda had given any, or any proper or genuine, consideration to MG’s request for a refund or replacement vehicle.

584 In my view, the ACCC was correct to contend that Mazda never gave any, or any proper or genuine, consideration to MG’s request for a refund or replacement vehicle.

585 The record of the 20 July 2018 executive panel meeting set out at [0]-[0] above did not mention any consideration relevant to any issue that might have arisen under the ACL.

586 As the ACCC submitted, “[t]here was no evidence in [the] contemporaneous record of any consideration of whether MG was entitled to a replacement vehicle under the ACL. There was no technical input; neither Mr Bradford nor Mr David were at the meeting ... Ms Han recalled that the repair time was “fairly short”, on the basis that the car was off the road for “two weeks”, and it was a bigger and more complicated repair. She recalled that the car was five years old. She did not recall major failure or ACL being discussed”.

587 Mazda submitted that I should find that Ms Han’s concession in cross-examination that a request for a full refund was not discussed at the meeting was “mistaken”, but there is no sufficient foundation for such a finding.

588 I therefore accept the ACCC’s submissions in respect of each of these representations, for reasons that I trust are sufficiently clear from my earlier reasons in respect of similar representations concerning other consumers. See eg [0]-[0] in respect of RC above, and [0] in respect of SB and KB.

Unconscionable conduct – MG

589 The ACCC alleged that Mazda engaged in unconscionable conduct in its dealings with MG in respect of his request for a refund or replacement vehicle under the ACL. It pointed to the following considerations.

590 First, it submitted that there can be “no doubt” that MG’s request for a replacement car was a compelling one and raised numerous “red flags” for Mazda under the ACL, in particular the three replacements which led to his car having four engines in five years. The circumstances were sufficiently severe that Mazda’s FTS escalated the matter internally.

591 However, the ACCC submitted, MG’s requests were met by Mazda:

- (1) summarily rejecting his requests without consideration on the merits;
- (2) seeking to dissuade him from continuing with the requests, including by making false or misleading statements concerning the proper construction of the ACL, namely, that the age of the car counted against him, no matter its history, and any replacement would have to involve a financial contribution on his part;
- (3) negotiating a commercial outcome with MG, instead of considering his request under the ACL;
- (4) not escalating the requests in accordance with Mazda's processes, and even when the matter was finally escalated, presenting the request as a contribution to trade-in, and not a request for a replacement car;
- (5) obfuscating MG's requests, including by not telling MG that Mazda had identified an "ACL" major failure after the first engine replacement; and
- (6) not taking MG's safety concerns seriously.

592 As to Mazda's bargaining position, the ACCC submitted that:

Mazda enjoyed a completely dominant bargaining position over MG. Mazda is a large and very well-resourced organisation by comparison to ... MG. Mazda had the technical expertise and legal resources he lacked. There was information asymmetry between the parties. Mazda did not share its information with ... MG. ... MG had outlaid significant amounts of money in purchasing the car. He relied on Mazda to address the serious and recurring faults he had experienced with their car, which had taken him off the roads for significant periods of time.

593 In my view, Mazda's conduct with respect to MG was not unconscionable.

594 First, I do not accept that the evidence showed that Mazda did not take MG's concerns seriously. As with the other consumers, I have no doubt that MG was the subject of appalling customer service and was rightfully frustrated with the situation that he found himself in, having had three engine replacements in five years. For similar reasons to those which I have expressed in respect of the other consumers, and while much of the ACCC's submissions can be accepted, I do not accept that the totality of Mazda's actions in dealing with MG amounted to unconscionable conduct.

Consumers TK and MK

595 In around May 2017, MK purchased a Mazda BT-50 3.2I dual cab utility XTR for approximately \$55,500, inclusive of third-party insurance, registration, and stamp duty, from Graeme Powell Mazda, in Seaford, Victoria (**Frankston Mazda** or the **dealer**). After taking

delivery, TK took the vehicle back to the dealer for its first service to have the vehicle wired for a reverse facing camera for the caravan. This was outsourced by the dealer to an auto-electrician.

596 TK and MK are married. The vehicle was registered in MK's name. TK and MK purchased a caravan and a new car to tow it, so they could travel around Australia with friends.

Representation 1

Relevant facts – 2017

597 On about 15 August 2017, whilst driving the vehicle on holiday in Queensland with their caravan on their way to Birdsville for the races, TK and MK noticed a tapping noise coming from the engine. MK drove the vehicle to the closest Mazda dealership (in Mt Isa). The dealer told TK that they could not fix the issue, and told MK and TK that the vehicle should be taken to Townsville or Rockhampton.

598 On around 18 August, TK contacted Ms Temling at Mazda and explained the situation. Ms Temling said that until a dealer looked at the issue there was little that they could do, and that TK and MK should take the car to a Mazda dealership in Rockhampton or Townsville.

599 On 21 August, MK and TK took the vehicle to Rockhampton Mazda. The dealer found metal shavings in the oil filter, oil and sump from the fuel injector. The invoice records that there was an "internal fault in engine with suspected spun bearing in bottom end".

600 The dealer submitted a technical report to Mazda the next day describing the issues and requesting advice.

601 Between 22 August and 1 September, Mazda's technical department instructed the dealer on the tests and repairs to be undertaken.

602 On 23 August, the dealer was instructed to seek approval from Mazda for a new engine and turbo. The engine and turbo were replaced as outlined below. Mazda bore these costs (pursuant to the "prior authorisation" process for parts under warranty, including the costs of a loan vehicle for TK and MK). Mazda paid the 10,000 km service fee to the Rockhampton dealer on behalf of TK and MK at the time when the vehicle was undergoing the engine replacement. (The dealer had attempted to charge TK and MK for the service.) Mr Mike Silverman of Mazda NCS considered Mazda should pay for it as "the customers concerned [sic] happened when the vehicle was only 3 months old".

603 TK called Mazda that day, and spoke with Ms Temling. Mr Silverman also spoke to TK by telephone on the same day. He said that a new engine would be ordered, and a loan vehicle was available. Mr Silverman said that Mazda would replace the entire engine assembly and not just attempt to repair part of the engine. During the call, Mr Silverman said that “we don’t repair motors, especially - no. No, we don’t. We don’t repair motors. We don’t put new parts internally into them. ... We - we just replace them”.

604 The following exchange ensued:

TK: I mean this is just a question-----

Mr Silverman: Yeah. Yeah?

TK: Yeah, just a question.

Mr Silverman: Mmm?

TK: And, like, because now this has happened after such a short amount of time ... I’m a bit wary. ... Cost wise ... what’s the difference in cost to you freighting a motor up here and getting them to fit it, time wise and everything, to replacing the car and taking the, what, accessories I have on my car and putting them on a new car?

Mr Silverman: We don’t do that. We repair cars under the terms and conditions of the warranty. Yep.

TK: Oh.

Mr Silverman: So that’s what - that’s the status of - and the process that we do deal with here. So, yeah, I’m sorry about that.

TK: All right. I just thought monetary-wise it might be cheaper just to replace the car than freight a motor up.

Mr Silverman: ... it’s not a bother for us. It’s something that we do all the time. The business is set up to deal with it ... The concern for us is that we get you going as soon as possible and on your way.

605 Mr Silverman made the following entry in Maestro on the same day:

CALL OUT TO CUSTOMER

...

Customer wanted to know if we can replace her vehicle instead of repairing.

Advised customer that we repair vehicles under the terms and conditions of the warranty.

606 The engine was replaced. TK and MK collected the vehicle on 31 August. The car had been in repairs for about ten days.

Representation 1

607 The first representation alleged by the ACCC arises out of this exchange on 23 August between TK and Mr Silverman, set out above:

TK: And, like, because now this has happened after such a short amount of time ... I'm a bit wary ... Cost wise ... what's the difference in cost to you freighting a motor up here and getting them to fit it, time wise and everything, to replacing the car and taking the, what, accessories I have on my car and putting them on a new car?

Mr Silverman: We don't do that. We repair cars under the terms and conditions of the warranty.

608 The ACCC alleged that, in relation to this exchange, Mazda made the false/misleading representation that TK and MK did not have any ability under the ACL to seek to obtain a refund or replacement vehicle, because Mazda was entitled to repair the vehicle regardless of:

- (1) the number of attempts made to repair the faults;
- (2) the time it took to repair the faults;
- (3) the consumers' rejection of the vehicle and requests; or
- (4) Mazda's obligation under the ACL to repair it.

609 I do not agree. In my view, Mazda correctly contended that the conversation did not even impliedly relate to the ACL. TK's inquiry was whether it would not be in Mazda's best economic interests in meeting a claim under the vehicle's warranty to provide her with a new car, rather than to go to the trouble and expense of freighting a new engine to remote Queensland and having it installed. For Mr Silverman to have said "we don't do that", so it seems to me, implied nothing about TK's rights under the ACL.

610 The ACCC contended that Mr Silverman's Maestro note that "Customer wanted to know if we can replace her vehicle instead of repairing" proved that TK sought a replacement vehicle, but I do not think that her inquiry went that far. In my view, TK did not at that point reject the car within the meaning of s 259(3) of the ACL.

611 Representation 1 is therefore not established.

Representation 2

Relevant facts – 2017

612 On 8 September, TK called Mazda and spoke with Ms Miller. TK said she was annoyed that no one from Mazda had been in contact to follow up how the car was. TK said that they had

intended to sell the vehicle after two years but were concerned about the impact on the resale value of a new engine being placed in the vehicle, and that “[t]hey said they couldn’t accommodate me in monetary value but, you know, like, maybe something else. No-one’s followed me up on that”. TK also said “... Mike said that they don’t really do, like, a monetary compensation. He said, ‘Keep all your receipts,’ like, from - we were staying in caravan parks so ... he said, ‘Keep all your receipts.’ But, I mean, I was stuck in Rockhampton for ten days”.

613 Mr Silverman returned TK’s call later the same day. During that call:

- (1) Mr Silverman gave an email address for TK to send receipts to Mazda, and said if TK sent bank account details he would arrange an EFT;
- (2) TK said, “I’m still not feeling great about it all. ... I just don’t have confidence in the bloody car to move. I just - I know it’s probably - it’s stupid and I just - the car’s running fine ...” and “I’m still feeling really, really disappointed that it happened”;
- (3) TK said she felt that they would be at a disadvantage if they tried to sell the car in two years; and
- (4) Mr Silverman said, among other things:

... I can understand that you’re feeling disappointed but certainly as far as we’re concerned, you know, we have - we’ve got on top of it. We - we got the engine replaced for you, we’re looking after you in regards to, you know, those costs that are outstanding ... You know, as you’ve said, the vehicle is running all right now. We - we can’t really, you know, acknowledge concerns that are going to happen in the future now because they haven’t happened yet, so it is a fear, and I understand that, and that’s anxiety, but - but we can’t really act on that. What I can do though for you, if you’d like, is I can put something in writing to give you a letter of assurance that if something does happen outside the warranty for another 12 months, that we can certainly, you know, look at taking care of it as it would be under the terms and conditions of the - of the manufacturer’s warranty. So I can put that in writing to you and you can have that as a reference.

614 By letter dated 18 September, Mazda offered TK and MK an additional 12 month manufacturer’s warranty.

615 In around September or October, while TK and MK were travelling home from Rockhampton, the steering wheel was shaking. (This was fixed at the next service in Victoria on 23 October 2018, by which time the vehicle had travelled 62,993 km.)

Relevant facts – 2018

616 On around 16 December 2018, TK and MK were travelling to work, approaching a roundabout at low speed. As they entered the roundabout, turning right, the car stalled and lost all power.

The car was still “on” but the motor cut out, it was not possible to accelerate, the power-assisted steering and brakes were not working, and the dashboard lights lit up. MK was driving; he stopped the car, got it into park, and restarted the engine.

617 About a week later, the vehicle stalling problem occurred again in similar circumstances: MK was driving, approaching the same roundabout at low speed. The vehicle stalled and lost all power as MK and TK entered the roundabout. MK and TK then continued their trip to work.

618 At this point, TK thought the problem may have been caused by dirty fuel or a fuel blockage; she thought it might have been the same tank of fuel on both occasions and let it go thinking the issue would not happen again.

Relevant facts – 2019

619 On around 10 February 2019, while TK was driving the vehicle, turning left into her street, the car stalled again and lost all power.

620 On 21 February, the car again stalled while MK was driving. TK was not in the car at the time; MK called her and told her that the car had stalled again and lost power as he was making a right turn.

621 TK and MK had planned to travel to Byron Bay the following day for MK’s work. That morning, as TK and MK were driving, towing the caravan, turning left on to a busy main road in Melbourne in peak hour traffic, the car stalled. They were on a downwards incline and MK struggled to get the car and the caravan to stop using the handbrake. MK pulled over into the gutter, put the car in park, and turned it on again.

622 TK did not have any further issues with the vehicle stalling during the trip, and arrived in Byron Bay two days later. On two or three occasions during the trip, without warning, the electric braking system locked the brakes on the caravan and a green light illuminated on the dashboard.

623 The day after TK and MK arrived in Byron Bay, TK contacted the closest Mazda dealership, Lismore Mazda. She explained the issues with the car, and made an appointment to take the car to the dealership a few days later. When TK took the vehicle to Lismore Mazda, she told them about the problems with the car and the dates that each issue had occurred.

624 That same day, TK spoke to Mr Georgie Mathew at Mazda’s NCS by telephone and told him that the vehicle had stalled when at low speed and turning. TK told him about the stalling issue, that the engine had been replaced 18 months earlier, and that the vehicle was a “lemon”.

Mr Mathew said that he could arrange a hire vehicle, or TK and MK could hire one and Mazda would reimburse them. Mr Mathew said that until the dealer confirmed the issues, it was difficult for Mazda to investigate the next step as “we don’t know what exactly is causing the stalling”. Mr Mathew opened a Maestro case for the vehicle that day.

625 The same day, TK or MK submitted an enquiry through Mazda’s website, stating “Car stalling for no reason close to causing a major accident”.

626 By email dated 26 February, Mazda informed TK that Mazda would cover the cost of TK and MK hiring a car similar to a Mazda BT-50.

627 In around late February or early March 2019, Lismore Mazda contacted TK and said that there were no fault codes for the dates and times TK had provided, and that they would need to get the car to replicate the fault. TK said words to the effect of “you’re making me sound like a liar”, and agreed to let the dealership drive the vehicle to try to replicate the fault.

628 On 1 March, TK contacted Mazda NCS and spoke with Mr Paul Tait. TK also spoke with Mr Mathew the same day. TK told him that Lismore Mazda were raising a “technical thing with you guys today”.

629 TK spoke with Mr Mathew again on 4 March. Mr Mathew told TK that the dealer needed to replicate the issue so they could determine what was wrong, the dealer needed the vehicle for a few more days to try to replicate the concern, they had not raised a technical case with Mazda and he could not see any information from the dealer, and he would contact the dealer again the next day.

630 On 6 March, someone from Lismore Mazda contacted TK and told her that they had driven the car around 600 km, and could not replicate the fault with the car stalling or the issue with the brakes.

631 On 7 March, Lismore Mazda submitted a technical report to Mazda in relation to the “Polaris button”. Between 7 and 26 March, Mazda’s technical department instructed the dealer on the tests and repairs to be undertaken in respect of the Polaris button.

632 On 8 March, TK spoke with Mr Mathew. TK told Mr Mathew that there would be a one-way fee for the hire vehicle and Mr Mathew said that would be covered by Mazda. TK told Mr Mathew that she had heard nothing from the dealership since Wednesday (6 March). Mr Mathew stated that Lismore Mazda “did raise a technical case with us” and that the “Mazda

Australia team has requested some tests on the vehicle and the dealers are supposed to send some photos and - and some details on the Polaris of your unit as well”. The technical case related to the Polaris unit only. TK stated, “the audio unit is the least of my worries. The stalling is the - is really the only worry I have ... that’s my main concern is the car stalling. So when Lismore rang me Wednesday, they said there was no fault recorded in their diagnostics”.

633 At this point, TK and MK had flown back to Melbourne for five days and the car was still with the dealer. Mr Mathew said that hopefully during those five days, the dealer could replicate the fault so that they could identify what the problem was (which they hoped they could do over the five days). TK and Mr Mathew then had the following exchange:

Mr Mathew: ... when you get back on Tuesday hopefully they will be able to ... get some more details because like in the span of five days, they have a lot of information, even during this five days if the vehicle’s not replicating the same concerns, that’s - that’s when it gets - that’s the situation where we’re not able to replicate the issue and we’ll have to - like if there is a concern, definitely you can get it back to us and we investigate it further, but like that will be a stop for the time being if they’re not able to replicate the concern.

TK: Yeah, but the thing is I don’t want the car back until it’s fixed.

Mr Mathew: Yeah, I understand [TK], like all your concerns-----

...

Mr Mathew: ... we need some solid information so that we can go ahead and I can put all these details and then assist you. So let’s hope that the dealer is able to replicate different situations and then obviously they’ll test everything and they’ll only give you a car - if the car is not roadworthy, they won’t give it to you.

634 In around March, TK contacted the ACCC, and later Consumer Affairs Victoria. Consumer Affairs Victoria told TK to visit their website and use one of their template letters to write to Mazda.

635 TK and MK returned to Byron Bay on 12 March.

636 The next day, TK spoke with Ms Manukia of Mazda NCS. TK told her that she did not want to take the vehicle back if it had not been fixed, and that she wanted a new vehicle with all the accessories swapped over. She also told Ms Manukia that they could only stay at the caravan park until 31 March and the car needed to be sorted out.

637 On the same day, TK spoke with “Emma” of Mazda NCS:

- (1) TK told her that she had contacted the ACCC and they had told her about her consumer rights.
- (2) TK said that she had had no response from Mazda, and she had spoken to Mr Mathew on 7 March.
- (3) TK said, “I’m pretty sure under my consumer rights, I’m not happy to take the car back even if they can’t find something wrong with it, only because of what happened to us three weeks ago”.
- (4) Emma asked, “So ideally, what, what, what are you wanting to do? Give the vehicle back or-----?”
- (5) TK said, “Yeah, so I’m just, I’m frustrated”. Emma responded, “Oh, definitely. I can tell. It’s been a long time. And just not to be getting anywhere would be frustrating”.
- (6) Emma asked TK, “what are you want, ideally, like overall, what are you wanting us to do?” TK responded, “I don’t know. I don’t know. Because I don’t know what can be done”, and expressed concern about her and MK being hurt in the vehicle.
- (7) TK said that after the engine was replaced at 10,000 km, “we were thinking, well, maybe we shouldn’t have bought this car. ... And now this has happened 12 months on again. And now I’m thinking, like have I made a big mistake buying this car?” Emma stated, “Yeah. So shall we just put that forward maybe and just see what, what comes of it?” TK responded, “You know what? I want - that’s what I want. I want a new car”, and, “I don’t think the car that I got was what I should - was the car that I ordered, you know, like I’m just really, really disappointed”.
- (8) TK said she had about \$20,000 worth of accessories on the car and wanted them transferred, as the vehicle had been set for her and her husband to travel.
- (9) Emma said, “you don’t want to take the vehicle back if it hasn’t been fixed” and, “if the issue hasn’t been fixed and you’re not feeling safe in your car, well then - we’ve got to do something to help really”, with which TK agreed.
- (10) TK said that they definitely had to move out of the caravan park by 14 April.
- (11) TK stated, “If you can’t find the defect, that’s - I can’t help that. I - that’s not my problem”. Emma responded, “Yeah, no, it’s not”.

638 On the same day, TK sent a letter to Mazda. The letter set out a timeline of events, and said in part:

[In relation to the 2017 incident set out at [0]ff] We arrived in Rockhampton on the 22/08/2017 and went to dealership and explained to them what had happened and as the noise was very loud now they gave us reassurance that everything would be okay. We got a phone call a few hours later stating that they had found metal in the stump and we would require a new motor ... I contacted Mazda Australia again, my disbelief that this could happen to a new car and did request at the time that I thought I should be given a new car as putting in a new motor after 3 months was putting me a disadvantage should I wish to sell the car in the future. Again reassurance given that once a new motor was in the car it would be like a brand new car, IT WAS ALREADY A BRAND NEW CAR. And that it would change people [sic] view on the car.

...

[After setting out the incidents up to the date of the letter] I have been very patient with this vehicle, and I'm still impressed with this car as it works well when it's going. I have invested a lot of money in this vehicle with accessories and having it the way my husband and I need it. Was told it would be a great tow vehicle.

At this stage I think the only way forward is to have the vehicle replaced under warranty, I have no faith in my current vehicle, I'm positive there was a problem from the start and no amount of repairs, diagnostics is going to help. ... if you are unable to replace my current vehicle I would want a written guarantee that my problems have all been rectified and the vehicle is totally safe to drive.

639 On 15 March, TK spoke with Mr Mathew, who told TK that he was following up with the dealer. TK said "... the service foreman is driving my car ... trying to get it to fault, but as I said, there's no guarantee, it may never fault again. I could pick it up tomorrow and it faults as soon as I drive out the driveway. I - I can't pick when it's going to fault as you know in my letter I wrote every time it's done it and what the situation was when it happened. ... I don't know why it's not coming up on the computer system when it faults".

640 TK said, "it's just too dangerous for me to even contemplate driving at the moment, because the last time it faulted, when we had the van on the back was so scary in peak hour traffic like. So yeah, and that was my concern. I feel like I had a defective vehicle from the start. You see in the letter ... a new motor, these defects. I'm happy with the car 99 per cent of the time. I would buy another car. I just feel that the vehicle that I got is defective".

641 Mr Mathew responded, "It's definitely not defective from the company, because basically if there was a defective piece, it should have shown very bad signs of such stalling a long time back".

642 Mr Mathew then added, "And the dealers are only keeping the vehicle because they want to see if there is this concern or not".

643 TK said:

Everyone's telling me they're [sic] got to see if there's a problem. I know there's a problem, it's happened to me five times, so because it's not happening for you, I can't help that, it's happened to me five times. I know there's a problem. So when you and the service advisors at Lismore are telling me, we can't get it to fault, we can't find a fault with it, there is a fault in that car somewhere. There is a fault with that car. So don't - it's not telling me that you can't find it, that's not my concern, I'm not the person who manufactured the car or works on the car, I know what's happened to me five times. ... I've given you the times and the dates and the situation of where it occurred, in that letter. ... It's happening. It's not - it's not a figment of my imagination, it happens. I have witnesses when it happens. So it happens to that car. There is a fault in that car, it's not a fallacy, it's nothing else, there is a fault in that car. ... I just want to make that perfectly clear, because I'm sick of everyone saying to me, we can't get it to fault, we can't - we can't find anything wrong with it. There is something wrong with that car.

644 Mr Mathew said, "The only thing is for Mazda Australia to consider anything ... it's really important for the dealership to find a fault, so that I can put all the information to the management and then we can work towards helping you".

645 TK said that she had contacted Consumer Affairs Victoria and, if she had to, she would go to VCAT.

Consideration of representation 2

646 The second representation alleged by the ACCC arises out of the exchange on 15 March 2019 between TK and Mr Mathew.

647 The ACCC alleged that, in the context of TK stating that the vehicle was "just too dangerous for me to even contemplate driving at the moment" and "defective", when Mr Mathew responded that the vehicle was "definitely not defective from the company", Mazda misrepresented the position as to TK and MK's legal rights because Mr Mathew expressed an opinion that there was no major failure, in circumstances where he could have had no basis for holding such an opinion, because Mazda had not considered whether or not the issues complained of were, in fact, major failures.

648 Mazda conceded in the statement of agreed facts that Mr Mathew's response ("it's definitely not defective from the company") was "infelicitously expressed ... in terms that being a definitive position prior to investigation". It also agreed that, by this point, TK had rejected the vehicle within the meaning of s 259 of the ACL.

649 Mazda disputed that it made the false/misleading representation as alleged. First, it relied on Mr Mathew's statement in the same call that "if there was a defective piece, it should have

shown very bad signs of such stalling a long time back” as being “a statement of opinion about cause (the vehicle itself was not defective at the time of supply) and the basis of that opinion was also stated (because if the fault existed at the time of supply then it would have shown signs earlier)”. It was contended that this “logic” was “objectively sensible”, and that “[i]t may prove (on fuller investigation) to be right or wrong but that is not the point”. I confess that I do not understand that submission. Whatever it means, it does not appear to have anything to do with the ACCC’s case in respect of representation 2.

650 Secondly, Mazda contended that:

There is no reason to imply any other basis for the stated opinion when the basis was expressly stated. That is, the impugned statement did not also carry the contended representation of reasonableness as a matter of implication. For that to follow more would be required. The context precludes any suggestion that Mazda had yet verified a fault or its cause or made any determination that it would not refund or replace the vehicle.

651 I do not agree. No amount of “context” changes the meaning of what Mr Mathew said – that the vehicle was “definitely not defective”. And he made that assertion, as Mazda conceded in opening, without any basis for it.

652 It follows, given that Mr Mathew could not therefore possibly have had any basis for his assertion (opinion) that the car was “definitely not defective”, in a context where TK and MK’s rights under the ACL must be taken to have been invoked, that the ACCC’s allegation with respect to representation 2 is to be accepted.

Representations 3 and 4

Relevant facts – 2019

653 On 19 March, Mr Mathew spoke with a representative from Lismore Mazda, and was told that the dealership could not find the stalling fault that TK and MK had reported, during three test drives of 30 minutes.

654 TK spoke with Mr Mathew again, who told her that “it’s really important for us to check it manually as well just to confirm there is this concern. In that way at least we are making sure we are trying to fix and find the issue first time and then fix the issue for you ... we’ll just have to be patient on this one because, like, it’s really difficult to find a fault ID with an intermittent concern”.

655 Mr Mathew asked for some more time for the dealer to do additional tests and TK said she would give it a few more days.

656 Mazda's round table review summary prepared in May stated that no "tech case" was raised, because the dealer could not replicate the fault, and that "[a] round table request was raised but since there was no tech case raised by the dealer the request was denied. Customer wanted the vehicle back as she had to travel back to Melbourne so [dealer] returned the vehicle on 27/03/19 as they could not replicate the stalling concern".

657 On 25 March, TK spoke with Mr Mathew twice. In the first call, TK advised that she and MK were leaving Byron Bay the next Sunday and she needed her car to do that so that they could tow their caravan. Mr Mathew said he would check with the dealer in relation to the Polaris unit and the stalling concern to see where they were up to. TK said that "three and a half weeks is ridiculous.", and "I think the amount of time is ridiculous".

658 Mr Mathew later rang back. He said that the Polaris unit had been repaired but the stalling was not able to be replicated. Mr Mathew said that "since it's not replicated we cannot confirm if there is a concern at this stage, at least, but we - we are happy to investigate at any point of time if there is an issue with the vehicle ... and the dealership will be giving you a call with regards to any other issues on the vehicle but they didn't - like, basically there's no other manufacturing concerns which was found with the vehicle" and "for Mazda Australia to fix any concern it needs to be replicated".

659 TK stated that Mazda were saying that she had made the whole thing up. Mr Mathew said, "No. So what I'm saying is, that since it's not happening and since all the specific areas of the vehicle were inspected, that means that the vehicle is all safe".

660 TK told Mr Mathew that the vehicle "hasn't performed the way that I was told that car was going to perform from the day I bought it", "I feel that we are at great risk of injury. But if Mazda feel that we're not, I want it in writing ... Do you understand how concerned I am with my own safety?", and "It's a new motor and faulting five times in 18 months. That's not - that's - to me, that's unacceptable".

661 TK asked Mazda to provide a letter which stated that the vehicle was safe to drive and there should not be any stalling effect. Mr Mathew said he would have to check with management.

662 On 26 March, TK reiterated to Ms Antara Roy of Mazda that she wanted a letter to say that the vehicle was safe to drive before she collected it from Lismore Mazda. Ms Roy added a note to the Maestro system requesting Mr Mathew call TK.

663 Mr Mathew then called the dealer, recording in his notes afterwards:

- [The dealer] advised that the customer is asking them if the vehicle is safe to drive or not.
- [The dealer] advised that is something he could not answer.

664 Mr Mathew called TK back. TK said, “So what about my guarantee from you guys? ... As I said, I don’t feel safe in the car. I don’t feel safe in that car. That’s my main concern. I don’t feel safe”. Mr Mathew responded, “Yeah. No, so I understand you’re not feeling safe in that car but, like, the dealer has properly tested that vehicle. But at this stage, since the dealer has tested all the - the concerns and they could not replicate it, so they’ve not given us - so this issue has not been raised to our technical department because they could not replicate any concerns. So from Mazda Australia, we cannot provide a letter as such but obviously if there are any issues with the vehicle we can investigate these concerns for you at any stage”.

665 TK said that she would pick up the car the following day as she needed her car back. TK said, “There is something wrong with the car. ... I can’t help it if you can’t find it. It’s not my department. I brought the car in good faith that I was getting a good car. I haven’t got a good car, George”, and, “It’s not a good car. There is something wrong with that car. And I’m going to pick it up tomorrow but I want - I want - if you’re - if Mazda, and those technicians, and that service department are so sure that there is nothing wrong with my car, put it in writing. Put it in writing that you have done every test known to man and you cannot find a fault in my vehicle. That’s fine, that’s all I want”. Mr Mathew responded, “Yes. So that’s something which the dealer will have to do. We cannot do it from Mazda Australia at this stage because our people have not tested the vehicle”.

666 Mr Mathew said:

... if the dealership doesn’t find the issue and they think it should be checked by Mazda Australia they do it as a tech case. Basically, they do it as a case with Mazda Australia technical team so that they can - they actually ... I want to see every aspect of the vehicle has been properly checked but the dealer needs to raise the concern directly, I can’t force them. If they feel a vehicle doesn’t need more checking other than – other than which they have done, they - it’s up to them to raise a technical case, it’s not up to me.

667 Mr Mathew said, “if the concerns are not being replicated, how do you want anything to be rectified?” TK responded, “How do I - I put it in the writing how I wanted it to be rectified. I think that car needs to be replaced. There is something wrong with that car. It is a huge safety concern”.

668 Mr Mathew said, “you have just said you want to replace the vehicle ... if you want to replace the vehicle now, okay, I can take that request with the replacement of the vehicle”.

669 TK said she made that request in writing two weeks ago. Mr Mathew said that the replacement of the vehicle was not closed and that the request was under review and that “since you want the vehicle back, that ... aspect of the vehicle, I’m saying, they believe the vehicle has not replicated that concern and it’s still okay to be driven out”, and “[o]bviously they wouldn’t have - they wouldn’t be giving you the vehicle if they feel the vehicle is not driveable ...”

670 On 27 March, the vehicle was returned to TK and MK because they were returning to Melbourne and needed a car to tow their caravan. TK told Mr Mathew that she had picked up the car, gone for a test drive with the dealer foreman, and that the car did not fault while they were driving. TK explained that the dealership had “given me a button to push in case, so I can get the car into neutral if we’re rolling, rather than trying to bring it to a complete stop to try and get it into park. ... [The foreman’s] given me free reign on the auto, which will hopefully, hopefully get us out of trouble. But no guarantees on that. And he said he doesn’t know, you know, because it didn’t fault - there’s, you know, he couldn’t raise a technical thing because he couldn’t find a fault with it. But he said, ‘I understand your concerns’”. TK said that she had purchased a “dash cam” to record their journey.

671 While the car was at Lismore Mazda, TK and MK had been staying in a caravan park in Byron Bay. The caravan park was not a long-term caravan park, but the manager agreed to let them stay for three months, although they could not move the caravan as required to preserve the grass.

672 TK and MK left Byron Bay on about 31 March and drove home without issues.

673 On 4 April, TK spoke with Mr Mathew. Mr Mathew noted that he had an appointment with “management” the following week to have TK’s case reviewed. TK replied, “I just want this car rectified or I want a replacement car. I don’t feel safe in this car”.

674 TK told Mr Mathew that the ACCC had contacted her and asked her to join “a litigation case” against Mazda. TK said “... from ACCC’s point of view I should have been given a new car

when that car needed a motor when it was three months old. On my consumer rights ... I should have been given a new car. So not the motor replaced at three - when the car was three months old”.

675 Mr Mathew said, “the issue has not been replicated at the dealership and that, that is a major thing because for any major concerns to be considered as an issue, it needs a proper inspection to be done, which was done with your vehicle. The vehicle was tested for three weeks. But the only problem is, with all the tests done on the vehicle, the replication of the stalling effect was not there”.

676 TK said that it was “pretty impossible” to replicate because the Lismore dealer did 400 km in the car and it did not replicate.

677 On 6 April, the vehicle stalled and lost power while TK and MK were driving at about 50 km per hour. MK stopped the car, put the car in park, restarted it and drove the rest of the way to where they were staying that night.

678 The next morning, MK and TK were driving home. MK was driving the vehicle. TK was following behind in their other car. There was a lot of traffic. As MK came out of a roundabout, driving uphill, the vehicle stalled again and began to roll backwards. TK pulled up behind MK to allow him enough room to pull up the car, get it into park, and restart it.

679 The next day, TK telephoned Mr Mathew and said, “we nearly had an accident yesterday, a big accident. The car stalled. It’s happened twice in less than 12 hours ... We’re too scared to drive the car. Like he had to - I drove - you know, like I had to follow him all the way back because you’re scared to - we’re petrified to drive the frigging thing ... I’m not taking this car back ... until I get a guarantee that it won’t happen again. Because it’s terrifying, it is absolutely terrifying when it happens when you’re in traffic ... And I need this car replaced or guaranteed because we can’t drive it”.

680 Mr Mathew replied, “I’ve noted down your request of replacement vehicle as well, so for that, I just need some more detailed analysis of the work on the vehicle, so I have asked the previous dealer as well to send some details on that”. Mr Mathew added that Mazda would arrange a loan car at no charge.

681 On 10 April, TK took the vehicle to Traralgon Mazda, where it remained for about two months.

682 The next day, Mr Rhys Patterson of Traralgon Mazda sent an email to Mr Goran Turk (Mazda FTS) requesting some direction with respect to the vehicle. Mr Turk then sent an email to Mr Mathew, requesting an update on the basis that the case was likely to require FTS involvement. Mr Mathew replied:

Hi Goran,

Vehicle was book [sic] two days in advance with the service department but I personally did not contact the dealership.

The current concern with the vehicle:

- Vehicle stalls while driving it has happened 5 times before.
- The concern was raised with Lismore Mazda but they could not replicate any issue with the vehicle after testing it for 2 weeks. (No help case raised)
- Customer contacted us again on Monday (8/04/19) and advised that the vehicle had stalled twice in less than 12 hours.
- The issue mainly occurs while slowing down like at round about and while turning.

Vehicle History:

The vehicle was taken to Lismore Mazda on 27/02/19 for the below concern:

- Brakes are locking up
- Car intermittently stalling unable to use any function when it happens.
- Issue with the [P]olaris unit.

The dealer could not replicate the stalling concern. Polaris unit was replaced and brakes were functioning as normal.

Previously:

23/10/18: PCM was reprogrammed.

30/08/17: Partial engine R&R and PCM reprogrammed (P244D)

Customers [sic] expectation:

- Customer has raised a request for replacement of the vehicle as she feels the vehicle is not safe to drive.
- She advised she wants [Mazda] to fix the vehicle (stalling issue) and provide a letter to her which says that the vehicle is safe to drive.
- Also, the maps are playing up again on the [P]olaris unit with [M]andarin language coming up on the screen.

Customer advised that if she does not get a replacement vehicle she wants a letter from [Mazda] stating that the vehicle is safe to drive.

683 On 15 April, TK telephoned Mr James Barker of Mazda and asked about what progress had been made with her vehicle and to make sure that the dealer had raised a technical case with

Mazda. TK said, “I’ve requested a replacement vehicle, so I want an update on that as well”. Mr Barker said that Mr Mathew “is definitely investigating it, I know that much. I just don’t know if he’s got an update from the dealership and your request for the replacement car. He may. I just can’t see it on our notes yet”.

684 Mr Barker’s detailed record of the call included the following reasons provided by TK for seeking a new vehicle:

- Engine replaced under warranty when vehicle 3 months old and had 10,000 km.
- Scared to drive vehicle as keeps stalling
- Unable to tow caravan as concerned about safety implications of driving vehicle and towing caravan.
- She feels within her rights to make this request.
- There have been multiple repairs to vehicle.
- Customer has a farming lifestyle and needs to tow.
- She does not feel confident to sell vehicle as concerned with the integrity of the vehicle ...
- She was hoping the vehicle would last for at least 5 years.

685 On 16 April, the dealer and Mr Mathew spoke about the tests and repairs that had been attempted on the vehicle. The dealer had not been able to replicate the fault. Mr Mathew asked the dealer to submit a technical report. The dealer said, “we wouldn’t normally put a tech report in, only because we’ve already done it, but I understand where you’re coming from on it, that he mentioned the word buyback and things like that ...” Mr Mathew explained that he wanted to take the case to management but without the “tech case” the technical department did not know what tests had been done.

686 TK spoke with Mr Mathew on the same day. Mr Mathew updated her in relation to a loan vehicle and told her that the dealer wanted “to do some, some more road tests and then - I’ll also raise a help case with the technical department”.

687 Between 16 April and 31 May, Mazda’s NCS and the dealer spoke on a further eight occasions about the repair attempts, and in relation to TK and MK’s request for a replacement vehicle or refund. Employees of Mazda’s technical department also had numerous conversations and dealings with the dealer over the same period.

688 On 18 April, Traralgon Mazda submitted a technical report to Mazda describing the issues with the vehicle and seeking advice. Between 23 April and 24 May, Mazda instructed the dealer on the tests and repairs to be undertaken. Mazda paid for the costs of the tests and repairs.

689 In Mazda's communication with the dealership of 23 April, recorded in the technical report, Mazda asked for details of any electrical accessories and all non-genuine accessories fitted to the vehicle. On 2 May, user "CBROWN" entered the following note in the technical report: "My suspicions are that the After Market Accessories maybe / possibly contributing towards some of the vehicles running / stalling issues!"

690 On 23 April, TK spoke with Mr Mathew, again seeking an update on her request for a replacement vehicle. Mr Mathew told TK that Traralgon Mazda had raised a tech case and Mazda was waiting for test reports from them.

691 The next day, the vehicle stalled as it was turning into the workshop. Further road tests were necessary to diagnose the issue. No recordings or other information was available from the stalling incident and the dealer was not able to reproduce the fault.

692 On 26 April, TK's request for either a refund or replacement vehicle was "escalated". The "outcome summary" of the meeting, attended by "Kym, Shane, Ian" stated, among other things (emphasis in original):

Customer Request: Customer has requested for replacement of the vehicle.

Recommendation: Decision on hold until further update to the tech case.

...

Background

Previous buyback request was made by customer on 23/08/2017. [Mazda] carried out the partial engine repair and provided letter of assurance to the customer along with reimbursement of out of pocket expenses.

There is a notable servicing gap from 8/5/18 to 23/10/18 of approx. 28,000kms with no service history evident.

...

Dealer to do more road tests near roundabout as they believe there is a correlation between turning and stalling.

...

OUTCOME

[X] ACL considerations taken into account.

It was agreed that unable to currently accede to request but case to return to this forum once diagnosis and potential repair work is authorised.

The Customer Advocate will be advising the Customer of the outcome of this review within the next 1 business day.

INFO FOR MAZDA AUSTRALIA TECH TEAM USE ONLY:

In regards to the vehicle, the following actions are required: Continue with vehicle diagnosis.

693 The same day, Mr Groves sent an email to Traralgon Mazda and others notifying of the outcome of the executive panel review.

694 TK collected another loan car from Traralgon Mazda. TK was told that the car had stalled when the mechanic was driving the car, but that no fault codes were recorded.

695 Mr Mathew called TK a few days later, and said, “with regards to your case, I’ve basically taken this case to the senior management. At this stage they have asked to wait till the dealership completes further tests on this vehicle ...”

696 Mr Mathew also said, in relation to the dealership replicating the stalling issue, “[b]ut they have seen that once, so they’re just trying to find out some more details with regards to this”.

697 TK responded, “that car is a death trap, an absolute death trap”, and “[y]ou’re clasping at straws trying to find something when that car is an absolute lemon, death trap from the day I picked it up”, and “it’s nothing for you guys to replace this bloody car, it’s the whole world to me and my husband”.

698 TK then said that she would give Mazda two weeks and then seek a legal opinion. She said she would not pick up the vehicle.

699 On 9 May, TK spoke with Ms Patricia David at Mazda and told her, “I want my car”. She said that she was considering legal action. Her Maestro record of the call was: “Customer feels her life is on hold as she can’t tow her caravan and just pack up and go”.

700 TK also spoke with Mr Mathew on the same day. Mr Mathew told TK that the executive team was aware of the situation, that there was testing being done every day and the technical team were helping the dealer, and Mazda was reviewing the details provided by the dealer. TK said she would send Mazda a legal letter. TK told Mr Mathew that the car was a “lemon” and a “death trap” and that there was “something wrong with it since the day I picked it up, and you

keep trying to fix it up with band-aids and they just keep falling off. It ain't going to cut it no more with band-aids".

701 On 10 May, Mr Mathew contacted TK and said:

... the main concern here is like with - with all the data which we are getting from the vehicle it's obviously showing that everything is functioning normally. But since it did fault once at the start that's the main issue, we are trying to replicate that with different - with different steps. Like basically at this point of time what's happening on the vehicle is they have tried to disconnect some of the additional accessories on the vehicle and they're trying to record some data and - and till now the - till now what is happening is the data which they have received it says that there's no concerns even after removing some of the accessories, but obviously they're still going to do that thing over the weekend.

702 Mr Mathew then asked TK what the loan car needed so that she would be able to tow her caravan with it. TK explained that the vehicle needed electric brakes to allow them to tow the caravan, a new wiring system, a reversing camera and then said, "actually my husband said don't worry about it, it's too much to put on this car ... it's just ridiculous. We'd be looking at thousands of dollars".

703 TK then said, "Yeah, I can't - and grandkids, I pick my grandkids up from school, I can't put them in the car", and "I will never drive that car again. You wouldn't be - you can't fix it. You can't guarantee that you are going to fix that car. Unless you can put it in writing that you are 100 per cent sure that that car is never going to fault again ... then I'm never going to drive that car again. ... Because ... there is obviously something wrong with that car that you can't find".

704 Mr Mathew said that "since there is a fault that's the reason they're trying to check through all the details and we don't want to give your vehicle back to you without putting confidence".

705 TK replied, "But you know there's a fault, but no one knows what it is. So best case scenario would be replace the car or refund me the money ... [and] Consumer Law tells me that's it, I'm entitled to a replacement or a - or a refund on that vehicle".

706 Mr Mathew's Maestro record noted: "Customer is really unhappy with the situation".

707 Mr Mathew then told Mr O'Day that TK was really frustrated with the situation, and that she had now changed her request to a refund. Mr Mathew asked Mr O'Day to take the case to the executive team the next Tuesday for final decision and noted that the customer wanted an outcome "regardless of the diagnosis that the vehicle is undergoing at Traralgon Mazda".

708 On 13 May, Ms Temling called TK and told her that Mazda could not give her an answer in the timeframe she was after as they were still waiting on further testing.

709 The dealer continued to test the vehicle during this period but could not replicate the fault.

710 A round table meeting was convened the next day. It referred the request to Mazda's executive panel.

711 On 17 May, the executive panel met. It did not agree to a refund, but said that the vehicle diagnosis should continue and the request could return to the executive panel once that was completed. The minutes of the meeting, attended by "Kym, Shane, Rick, Ian", recorded:

Customer Request: Customer has changed the request from replacement to refund for the vehicle.

Recommendation: NCS will not go for refund for the vehicle as the fault could possibly be due to accessories on the vehicle.

...

Executive Panel Review - 26/04/2019

It was agreed that unable to currently accede to request but case to return to this forum once diagnosis and potential repair work is authorised.

In regards to the vehicle, the following actions are required: Continue with vehicle diagnosis.

OUTCOME

[X] ACL considerations taken into account.

It was agreed that unable to accede to customer request.

The Customer Advocate will be advising the Customer of the outcome of this review within the next 1 business day.

INFO FOR MAZDA AUSTRALIA TECH TEAM USE ONLY:

In regards to the vehicle, the following actions are required: [no content]

712 On 20 May, Mr Mathew again called TK. Mr Mathew said, "So based on that details the panel has reviewed the issue and everything and they feel we will not go ahead with the replacement of the vehicle at this stage ... Since the testing is not complete at this stage and since you wanted me to take the case and advise you an outcome ... I had to go with the minimum information".

713 TK responded that she was going to proceed with legal action.

714 Mr Mathew said, “[i]nitially they did find and then after that they could not replicate that in the recording sessions”. TK asked, “Are you able to email me their decision? ... What it was based on? Everything it was based on. I want every bit of information it was based on and how they come to that decision”. Mr Mathew agreed that he would do so.

715 Mr Mathew’s notes of the conversation recorded as follows:

CALLED CUSTOMER

- Advised customer [of] the outcome. Advised her that the outcome is based on the findings on the vehicle till Thursday (16/05/19).
- Advised here there is a possibility of the accessory on the vehicle causing the concern but again we are testing the vehicle.
- Customer mentioned that it is not possible the accessories have been there on the vehicle since day 1 and was recommended by the dealer.
- Advised customer that the replacement vehicle request cannot be accepted and we will continue testing the vehicle till Thursday this week.
- Customer advised that she does not want to wait any more and wants a letter from us stating the reason for this outcome.
- Advised her that it is best for us to provide a letter on Thursday after the final tech details.
- Customer denied to wait any more and wants a letter by tomorrow.

716 On 20 May, TK sent an email to Mazda agreeing to allow one of the “techs” to drive the vehicle to see if it faulted.

717 On 21 May, Mr Mathew asked Ms Chiera to review a letter to be sent to the customer, telling her that “[t]his is the same case where we are still continuing with the testing even after a decision has been made by the exec panel”.

718 On 22 May, Mazda wrote to TK relevantly as follows:

We understand you have requested we provide you with a replacement vehicle or refund due to your concerns with the performance of this vehicle.

Your request has been reviewed by Executive Management who did not believe the circumstances of the case justified a replacement vehicle or a refund.

As per our investigations, we believe that there is no manufacturing concern with the vehicle and it is operating as per Mazda manufacturing standards.

Nonetheless, due to the intermittent nature of your concern, Traralgon Mazda and the Mazda Australia Technical Division will carry out further inspection and testing of the vehicle before it is returned back to you to ensure no further concerns arise.

Consideration of representations 3 and 4

719 The third representation alleged by the ACCC arises out of the exchange on 20 May 2019 between TK and Mr Mathew set out at [0]ff above.

720 In the course of the telephone call, Mr Mathew said:

- (1) “So based on that details the panel has reviewed the issue and everything and they feel we will not go ahead with the replacement of the vehicle at this stage”.
- (2) “Since the testing is not complete at this stage and since you wanted me to take the case and advise you an outcome ... I had to go with the minimum information”.
- (3) “Initially they did find and then after that they could not replicate that in the recording sessions”.

721 The fourth representation alleged by the ACCC arises out of Mr Mathew’s 22 May 2019 letter to TK set out at [0] above.

722 The ACCC alleged that what Mr Mathew said and wrote in both instances conveyed, in the context in which they were said and written, the false and/or misleading representation that Mazda was not required to provide a refund or replacement vehicle at no cost to TK and MK under the consumer guarantee provisions of the ACL.

723 Mazda contended to the contrary as follows:

During the call on 20 May 2019 the position simply relayed was that investigations were incomplete. That was an accurate statement of fact. It carried no representation about ACL entitlements.

The letter dated 21 May 2019 was consistent with that fact. The letter also stated:

Nonetheless due to the intermittent nature of your concern[, Traralgon] Mazda and Mazda Australia [T]echnical [D]ivision will carry out further inspection and testing of the vehicle before it is returned back to you to ensure no further concerns arise.

This was a statement of position based on the limited information then available to Mazda. To the extent it communicated an opinion that opinion was reasonable given the uncertainties existing at that time.

TK did not interpret this as a statement about rights. She said [she] was going to proceed with legal action.

724 I do not agree. In particular, I do not agree that Mr Mathew’s statement during the phone call that “based on that details the panel has reviewed the issue and everything and they feel we will not go ahead with the replacement of the vehicle at this stage” was “simply relaying that

the investigations were incomplete”. And even if those words may be so interpreted, the letter of the next day admitted of no such “incompleteness” (“Your request has been reviewed by Executive Management who did not believe the circumstances of the case justified a replacement vehicle or a refund ... [the vehicle] is operating as per Mazda manufacturing standards”).

725 I also do not agree that the last paragraph of the 22 May 2019 letter was “a statement of position based on the limited information then available to Mazda”, which “communicated an opinion that was reasonable given the uncertainties existing at that time”. TK and MK’s vehicle, by this time, had had the engine and turbo replaced, experienced the steering wheel shaking, stalled while driving a number of times, and had “locked” the brakes on their connected caravan two or three times.

726 In my view, the ACCC’s submissions about representations 3 and 4 must be accepted. Quite apart from anything else, the letter made clear that Mazda had made the decision not to provide a replacement vehicle or a refund because there was no “manufacturing” concern. As I have explained earlier (see [0] above), that is quite wrong. The operation of the statutory guarantee provisions is not limited, in the case of motor vehicles, to “mechanical” defects.

Representations 5 and 6

Relevant facts – 2019

727 On 23 May, TK telephoned Mr Mathew.

728 TK told Mr Mathew that Mazda’s letter dated 22 May “wasn’t actually exactly what I wanted. I wanted to know the reasons why they’ve declined to replace the vehicle at this stage. ... not the decision itself. I want to know the reasons behind the decision”.

729 Mr Mathew replied, “basically the reason now, like I’ve mentioned, there’s not a - they believe it’s not a manufacturing concern at this stage”.

730 TK said that the vehicle had failed at the dealership, and asked why it was not a manufacturing concern. TK said, “I’m not prepared to take the car back until I know why it’s not a manufacturing fault, because as long as I know what the fault is, then I can get it fixed. ... So, I need to know what the fault is, if it’s not a manufacturing fault”. Mr Mathew told TK that he would have to discuss this further with the technical department as he needed further details.

731 Mr Mathew's notes of the conversation recorded, among other things, the following:

- Advised her that we believe there is no manufacturing concern as we cannot get the vehicle to fault.
- Customer advised that this is not correct as Traralgon Mazda had the vehicle fault when they were taking the vehicle inside the workshop.
- Advised customer that it was only once when the dealer could fault that and the vehicle has not done the same since then.
- ...
- Advised her that we will have to wait for the testing results from the dealer and [Mazda] tech team to finalise the findings.

732 On 27 May, TK again spoke to Mr Mathew, who told her that Traralgon Mazda had disconnected some accessories and the car had not stalled.

733 On 30 May, Mr Mathew again called TK. TK told Mr Mathew that she wanted a written guarantee from Mazda that the car was repaired and fixed and in a safe condition to drive. Mr Mathew stated, "we have tested the vehicle for so long and since then it's not faulted and we believe there is no concerns at this stage". Mr Mathew went on to say, "Obviously, we'll need your car to be monitored" and that the fault had not occurred with the accessories removed.

734 On 5 June, Mazda wrote to TK, informing her that it would not accede to a request for refund or replacement in circumstances where, despite extensive testing, the dealer could not replicate the fault after the aftermarket light bar and reverse camera accessories were disconnected. The letter provided:

Your request has been reviewed by Executive Management who did not believe the circumstances of the case justified a replacement vehicle or a refund.

As per our investigations, the vehicle has not faulted after the light bar and reverse camera were disconnected. At this point you will have to monitor the vehicle with these accessories disconnected and if there is any concern please let us know.

As a gesture of support from Mazda Australia we have covered the cost for the 75,000 Km service on the vehicle.

735 TK responded by email on the same day, as follows:

This letter fails to state that the vehicle has been repaired and will no longer fault while I'm driving. I don't see why I have to monitor the vehicle this was the reason I purchased a new vehicle in the first place. The camera was fitted to the vehicle at Frankston Mazda at first service why is this my problem now.

Consideration of representations 5 and 6

736 The fifth representation alleged by the ACCC is founded on Mr Mathew’s statement to TK on 23 May 2019 that Mazda’s decision not to replace the vehicle or provide a refund was based on Mazda believing that “it’s not a manufacturing concern at this stage” and Mazda was “not able to find the fault”.

737 The sixth representation alleged by the ACCC is founded on the statements in Mr Mathew’s letter of 5 June 2019 set out at [0] above.

738 The ACCC alleged that what Mr Mathew said and wrote in both instances conveyed, in the context in which they were said and written, the false and/or misleading representation that Mazda was not required to provide a refund or replacement vehicle at no cost to TK and MK under the consumer guarantee provisions of the ACL.

739 Again, Mazda submitted in the case of both representations 5 and 6 that “this was a position based on the information then available”.

740 I disagree for the same reasons given in respect of representations 3 and 4.

Remaining facts – 2019

741 TK and MK continued to have contact with Mazda for the rest of 2019. The ACCC did not allege that any false or misleading representations arose from those further interactions. I have set them out below because they are necessary to understanding the unconscionable conduct case.

742 On 17 June, TK collected the vehicle. After about a month of driving the car and nothing happening, TK “started to feel comfortable again”. She and MK started planning another trip.

743 However, further issues arose shortly thereafter.

744 On 23 July, the vehicle again lost power when MK was driving. The same day, TK informed Ms Amelia David of Mazda and then Mr Mathew that the vehicle had stalled again.

745 Mazda NCS called the dealer the next day, telling the dealer that the fault had reoccurred, and that TK would make contact.

746 On the same day, TK spoke with Mr Mathew. TK asked him how much more testing there would have to be, and “when is enough enough?” Mr Mathew replied, “the only thing, every time, we found out was, it wasn’t replicating except for once, as you were aware”.

747 The vehicle stalled again on the same day. MK captured the incident on a dash cam.

748 On 26 July, the vehicle stalled again while MK was driving. The vehicle was returned to Traralgon Mazda, and TK and/or MK told the dealer that they would not take the car back. Mazda provided a loan car at no charge.

749 On 29 July, TK provided dash cam footage to Mazda and said, via email, that they would not accept the vehicle back.

750 The dealer submitted a technical report to Mazda on the same day, describing the issues with the vehicle and requesting advice.

751 Between 29 July and 23 August, Mazda instructed the dealer on the tests and repairs to be undertaken in respect of the vehicle, including instructing the dealer to replace the fuel system.

752 On 29 July, “Rhys” from Traralgon Mazda contacted Mr Himanshu Rajwar at Mazda. The following exchange occurred:

Rhys: The customer dropped the car off on Friday.

Mr Rajwar: Yep

Rhys: And I just want to know what you guys are requesting of us. ... they’ve also made demands saying that they’re not taking this car back, ever.

Mr Rajwar: Ok.

...

Mr Rajwar: Did you say that he’s not going to ever take his vehicle back, until it’s repaired there?

Rhys: Oh, well, the impression I got was they don’t want it back at all, ‘cause they just don’t trust it. They’ve been driving it for several months without any issue, and then it cut out on them a couple of times over the last few days. And, yeah, that’s why they’ve just lost faith in the vehicle and don’t want to drive it again, ever.

Mr Rajwar: Ok. That could be a possible buyback or refund case, that’s for sure.

753 On 31 July, the matter was reviewed by the executive panel. The minutes recorded:

Customer Request: Customer has changed the request from replacement to refund for the vehicle.

Recommendation: NCS will not go for refund for the vehicle as the fault could be possibly due to accessories on the vehicle.

...

UPDATE

29/7/2019 - Customer contact received with video attached (dated March 2015) advising he experienced concern of vehicle stalling again.

Video was reviewed, unable to determine from video whether accessories have be disconnected, date of video also indicating to be March 2015. Noted that Customer has presented vehicle to dealership for further diagnosis, vehicle still currently at dealership.

OUTCOME

[X] ACL considerations taken into account.

It was agreed that further information is required before assessment of request.

The Customer Advocate will be advising the Customer of the outcome of this review within the next 1 business day.

INFO FOR MAZDA AUSTRALIA TECH TEAM USE ONLY:

In regards to the vehicle, the following actions are required: [no content]

754 By email dated 1 August, Mr Groves informed Traralgon Mazda of the outcome of the executive panel review.

755 The same day, Mazda's customer service department contacted the dealer and "advised him it is important for us to get 400 kms on the clock so that we can get some data".

756 The same day, TK spoke with Ms Lisa Clarke of Mazda, and later, Mr Mathew. TK said to Ms Clarke, "Yeah. And I'm a nurse. I ... save lives. I don't want someone in my car in the emergency department fighting for their life. ... Because I said, oh yeah, that's okay, drive it. It's just not sitting with me, it's not sitting comfortably with me. ... It doesn't matter if it's my vehicle, because I've actually written that car off in my mind. It's not even mine anymore. That car needs to be crushed".

757 TK initially refused to authorise the dealer to test the vehicle on the basis it would be unsafe; then said, "the dealer can do whatever they want to do with the car as they are not going to drive the vehicle any more".

758 TK and MK had planned to leave on another trip later that month. However, they could not go because the car was still at Traralgon Mazda.

759 A round table review took place on 8 August. It again considered TK's request and resolved to await further technical diagnosis.

760 The same day, Mr Rick David (Manager Dealer Support) of Mazda sent an email to Mr Mathew with a list of questions to ask TK about the stalling issue. Mr Mathew called TK.

761 The next day, Mr Mathew provided Mr David with the detailed responses from TK to the list of questions.

762 On 13 August, the dealership replicated the stalling fault, and the next day, it told Mr Mathew that the fault had been replicated.

763 On 15 August, Mr Groves recorded the following:

INFORMATION FROM CRAIG IN TECH CASE:

Good morning Sam,

Sorry for the delayed response!

Based on your latest recordings, the fuel pressure on this vehicle is dropping away and therefore is pointing toward a suspect fuel system on this vehicle. This being the case the vehicle will require the following:

- High Pressure Fuel Pump x 1
- Injectors x 5
- Common Rail x 1

Also please inspect the Engine emission harness as per Tech Tip TT022_15 and advise if you can find any wiring rub on the harness especially underneath the harness.

Please advise on outcome of vehicle after Fuel system replacement and emission harness inspection.

764 On 20 August, after Mr Mathew had informed TK that the vehicle needed a new fuel system, she responded that this did not change anything for her, “she will never take the vehicle back”.

765 On 21 August, a round table meeting again considered TK’s request and produced the following summary of the outcome:

Customer has raised concern with the vehicle stalling and loosing [sic] power while driving at low speed. The vehicle was taken to Lismore Mazda and tested for three weeks but the dealer could not replicate the issue. Vehicle was also taken to Traralgon Mazda, a tech case was raised. Vehicle had only stalled once in the workshop in April and after the aftermarket accessories were removed no issues could be replicated. Vehicle was returned to the customer on 07/06/2019. VOR59 days.

Customer has again contacted us for the same concern and has provided a video evidence as well. Customer has demanded this time for the replacement vehicle as she believes the vehicle is a death trap and is giving her a lot of inconvenience. Dealer has replicated the fault and it was decided that the fuel system will have to be replaced. Dealer advised that the repairs will be complete by end of this week and then they will road test.

766 TK spoke with Mr Mathew on 22 and 23 August.

767 On 23 August, two years after the first rejection of the vehicle, the executive panel determined to offer TK and MK a refund, recording as follows:

Customer Request: Customer has requested for replacement vehicle or refund.

Recommendation: Yes to the request.

...

OUTCOME

[X] ACL considerations taken into account.

It was agreed that we will offer Customer a refund.

The Customer Advocate will be advising the Customer of the outcome of this review within the next 1 business day.

INFO FOR MAZDA AUSTRALIA TECH TEAM USE ONLY: In regards to the vehicle, the following actions are required: Complete current repair at dealership then vehicle is to be brought back to [Mazda] HQ for further testing.

768 Mazda then told Traralgon Mazda that Mazda would offer TK a refund.

Unconscionable conduct – TK and MK

769 The ACCC alleged that Mazda engaged in unconscionable conduct in its dealings with TK and MK in respect of their request for a refund or replacement vehicle under the ACL. It pointed to the following considerations.

770 It submitted that TK and MK's requests for a replacement car under the ACL were "cogent" and that the case raised "red flags". The car had an engine replacement only months after purchase. Thereafter, the car experienced reoccurring and serious faults which gave rise to safety concerns.

771 It alleged that instead of dealing with the requests in accordance with its own internal ACL directives, TK and MK's requests were met by Mazda:

- (1) summarily rejecting the requests without consideration on the merits;
- (2) giving incorrect assurances that proper consideration was being given to the requests;
- (3) seeking to dissuade them from continuing with the requests;
- (4) not escalating the requests in accordance with Mazda's processes;
- (5) obfuscating TK and MK's requests, such that TK deposed that she "felt like Mazda ... treated me as though I was wrong until they proved me right, until the very end";

- (6) blaming TK and MK for causing the faults when challenged by insisting on continuous investigations seeking to find an external factor causing the issues with the vehicle; and
- (7) not taking TK and MK's safety concerns seriously.

772 The ACCC also submitted that “[a]nother important circumstance in this particular case is that it was only after TK was able to obtain some publicity about Mazda’s conduct that Mazda’s technical investigation of her vehicle commenced in earnest. Within a few weeks, the fault had been determined”. In that regard, it relied on evidence that on 5 August 2019, it came to Mazda’s attention that TK had called into a radio show run by Paul Maric, a Senior Road Tester from CarAdvice.com, who then contacted the Mazda public relations team.

773 The ACCC also submitted that Mazda’s dominance in bargaining position over TK and MK was clearly a factor in this case, as follows:

Mazda is a very large and well-resourced organisation by comparison to ... TK and MK. Mazda had the technical expertise and legal resources they lacked. There was information asymmetry between the parties. Mazda did not share its information with ... TK and MK. TK expressly asked for the reasons behind Mazda’s rejection of her request for a replacement vehicle at no cost. She was fobbed off with a high level explanation that failed to provide the information she required. [TK and MK] had outlaid significant amounts of money in purchasing the car. They wanted to travel but were unable to do so whilst the car was off the road for long periods of time. The loan car was unsuitable because it could not tow a caravan. They relied on Mazda to address the serious and recurring faults they had experienced with their car, which had taken them off the roads for significant periods of time.

774 One cannot help feeling considerable sympathy for TK and MK. Their concerns about their vehicle were, indeed, “fobbed off” for a very long time. And TK and MK were doubtless justified in thinking that Mazda did not believe their word, insisting that whatever the problem with the vehicle may have been, it was not a “manufacturing” concern and therefore did not entitle them to a refund or replacement under the ACL, and nor would any problem be conceded until a dealer could “replicate” it. And again, I have no doubt, therefore, that they were subject to appalling customer service.

775 But for reasons that I have given in respect of the other consumers, I am unpersuaded that in the individual circumstances of their case, considered in the context of all the relevant circumstances, and as a whole, Mazda’s conduct was sufficiently divergent from community standards of acceptable business practices that it objectively answered the description of unconscionable conduct within the meaning of s 21 of the ACL.

Consumer LC (formerly LS)

776 In August 2015, LC purchased a Mazda CX-3 Akari for \$38,508 less a \$9,208 trade-in, from Grand Prix Sales, Aspley in Queensland (**Aspley Mazda** or the **dealer**).

777 LC purchased the car for personal and work use. At the time, she was a business development manager and drove around 30,000 km per year.

778 LC deposed that from around October 2015, her vehicle began “jerking” while she was driving. This happened infrequently over the course of around three or four weeks. Around a month after this started happening, the jerking became more frequent and more intense. Sometimes it happened multiple times per day, and on multiple days per week.

779 LC also deposed that around the same time, the car also began losing power. This also happened intermittently, again sometimes multiple times per day, and multiple days per week. It was most noticeable when LC was driving through a roundabout. For example, when approaching a roundabout, the car lost power after LC took her foot off the accelerator and “it felt as if the car was gliding”. This happened multiple times.

780 In late 2015 and early 2016, LC took the vehicle to Aspley Mazda two or three times. LC was told by the dealer that they could not find anything wrong with it.

Representations 1 and 2

Relevant facts – 2016

781 In around January 2016, LC again took the vehicle to Aspley Mazda. The car remained there for around two weeks, during which time the transmission was replaced.

782 On 15 January, Mazda opened a Maestro case in respect of LC’s vehicle. The contact description said, “Heads-up Possible Major Failure. Transmission failure. PAR approved”. On the same day, Ms Miller entered a note in Maestro: “AUTO TRANS FAILURE - ACL VOR”.

783 On 19 January, LC was provided with a loan vehicle.

784 On 25 January, LC telephoned Mr Jarrod Whitehead at Mazda and, the ACCC alleged, requested a replacement car.

785 LC explained: “I just don’t want any issues ... so that’s why I buy new cars, is that I don’t have to worry about it breaking down for the next, you know, five years. And I do a lot of Ks, so part of my job is driving”. The following exchange ensued:

Mr Whitehead: Yeah. I mean I can’t comment as to whether the vehicle will ever fail you again and stuff-----

LC: No, I know that.

Mr Whitehead: You certainly will have your warranty and it can go to any Mazda dealer, so if any future things was to happen with your vehicle – obviously we wouldn’t think that would be the case, there will be a new transmission obviously that’s getting fitted to the vehicle at the moment, and you certainly do have the warranty, which basically covers you for anything like this right through, so there’ll be no cost to yourself, you’ll always be provided with things like that, when available, with a, with a loan vehicle to, to limit any inconvenience and things. But I can’t guarantee that the vehicle never ever-----

LC: No, I know that.

Mr Whitehead: -----will fail again. There’s so many mechanical parts in the cars-----

LC: If you, if you did say that, I wouldn’t believe you anyway.

Mr Whitehead: Yeah.

LC: But just understand, like what – I, I did ring Fair Trade and all that sort of stuff. Obviously there was no specific thing that you need to do. However, the car is defective, so I just, I’m just really concerned that it – you know, I’ve had many new cars. I go through them quite quickly-----

...

LC: So, are there any other – is there anything else? Can I, can I have a new car? Can I – what can I do? Because I tell you what, if you give me this car back, I’m going to sell it.

Mr Whitehead: Yeah, Well, in regards to consumer affairs, we do have a right to repair the vehicle. So-----

LC: I know.

Mr Whitehead: -----that’s why the transmission has gone into the vehicle.

LC: Yep.

Mr Whitehead: So there definitely would be a new transmission. At this stage, I wouldn’t think there would be – in regards to providing you with a new vehicle, due to the fact, as I said, we do have the right to repair the vehicle, which is a whole new transmission. It’s not like we’re replacing one component of the transmission. We’re giving a whole, whole new transmission to, to yourself with the loan vehicle and things there. And as I said, you have definitely have your warranty, so in regards to peace of mind, that’s the best thing about buying new vehicles, you have peace of mind that something like this – and it’s

always – obviously this is the worst sort of case scenario, that when something does go wrong, we always, you know, our Mazdas are a good product and it's not something we generally expect to happen, but that's what our warranty is there for, is to obviously cover yourself and give you peace of mind, [LC], that, that these sorts of things will be covered at, at no cost to yourself. So in regards to, yeah, a new vehicle, if it did fail again, it may be something that could be looked into. But we're sort of, you know, this is sort of predicting the future-----

...

LC: So you would tow it home from like thousands of kilometres-----? [If the vehicle broke down far from LC's home]

Mr Whitehead: We wouldn't tow it home. We would tow it to your closest Mazda dealer and have the repairs carried out there. As I said, these are all things that are possible in the future. But we are here to help. So anything like that, we do take these case by case. Remote repairs are always a little bit more tricky. But if you are in a remote area like that, we would organise the vehicle to be towed. If it's a manufacturing defect with the vehicle, it definitely is a warranty concern. We can look at possibly all sorts of scenarios. But if you're, if you're stuck in a remote area, we might be able to look into accommodation and things like that for you while you're working out there-----

...

LC: Can you tell me though, is that the only issue? Like is that the only issue, the transmission? They haven't found anything else when they've gone in there? Like operating on a body.

Mr Whitehead: I can't ... It would probably be something to speak to maybe the dealership about, yeah. All I can see here, that we've organised for a transmission and things like that to be sent out as quickly as possible and, and for the dealer to have those repairs carried out. ...

LC: Yeah.

Mr Whitehead: Yeah. So generally, what would generally happen is they would report that there's been a failure inside the transmission, gain authority from, from our warranty team to get that replaced. And then they would generally remove the gearbox, put the whole new gearbox in and, and road test the vehicle, make sure it's all okay and the foreman would sign all off on it.

LC: Yeah.

Mr Whitehead: And then at times, the gearbox will return to Mazda, and sometimes even through back to Japan and they'll assess it just to make sure that any – if there's been a failure, they'll want to know why, why it's caused and, and then they'll look into, you know, if there's something that needs to be changed in the, in the manufacturing process of it, they can look into it there. So that's generally the sort of procedure...

LC: Yeah. I'm just hoping that it's not just – that it – you know, if that's the case, it's just the transmission and is not, it's not one of those other cars that – where everything just goes wrong.

Mr Whitehead: Yeah, no-----

LC: I know you can't tell me that.

Mr Whitehead: I know, I know it sort of does put a bit of a sort of bad taste in the mouth and things like that. Obviously it still does, like it's only a few months old but you've still – it's done 11,000 Ks and things, so it's not – I think it's something, as I said, it just has gone astray in the gearbox. But as I said, these, these things get noted in our case here anyway. So as soon as these things happen, it goes against your case file in our system.

786 Mr Whitehead made the following Maestro record of that conversation later that day:

Customer called requesting a replacement car due to the transmission failure. I advised that Mazda have provided a new replacement gearbox and reassured the customer that they have warranty through to 30/08/18 should any future manufacturing defects [arise]. I also added that these things do get noted in the customer[']s case for us to review. Customer was happy to discuss her options and t[h]anked NCS for response.

787 After that conversation, LC deposed that she thought she had no choice but to accept that the car was being repaired and that she believed that the car was a “lemon” and “unsafe to drive”. She also said that she would not have bought the car had she known this would happen with the transmission.

788 LC collected the vehicle on 28 January. She was provided with a loan vehicle for the period her vehicle was being repaired.

Consideration of representations 1 and 2

789 The ACCC alleged that, in the context of LC stating during the 25 January 2016 call with Mr Whitehead that she had telephoned “Fair Trade” and said that “the car is defective”, that when Mr Whitehead told her that “in regards to the consumer affairs, we do have a right to repair the vehicle” and at that stage Mazda would not be providing her with a new vehicle “due to the fact, as I said, we do have the right to repair the vehicle”, that was:

- (1) a representation in the nature of an opinion that LC was not entitled to a refund or replacement vehicle at no cost to her under the consumer guarantee provisions of the ACL (representation 1); and
- (2) a representation in the nature of an opinion that conveyed, in the context in which it was made, the representation that LC did not have any ability under the ACL to seek to obtain a refund or replacement vehicle, because Mazda was entitled to repair the vehicle regardless of:
 - (a) the number of attempts made to repair the faults;

- (b) the time it took to repair the faults;
- (c) her rejection of the vehicle and requests; or
- (d) Mazda's obligation under the ACL to repair it (representation 2).

790 I do not agree. It seems to me that, on this occasion, reading the words relied on in their context, they do not convey the representations alleged. In my view, Mr Whitehead did not discount the possibility that LC might at some time become entitled to a new vehicle. He conceded, for example, that a new vehicle “may be something that could be looked into”, depending upon what happened in the future. In that circumstance, in my view, the words alleged do not convey either representation.

Representations 3 – 5

Relevant facts – 2017

791 LC deposed that from around February 2017, the vehicle again experienced a loss of power. The problem was intermittent and became progressively worse.

792 By around April, the problem was occurring every day, and then multiple times a day. On some occasions, LC was able to accelerate again; on other occasions, she had to pull over, stop the car, and restart it. Sometimes the car jerked or coughed or spluttered, especially when LC was driving uphill. When it happened, the car did not respond when LC put her foot on the accelerator.

793 LC deposed that on at least one occasion, she was driving at around 110 km per hour in the right hand lane of the highway when the car lost power. She had to pull over, across multiple lanes of traffic, and stop on the left side of the road. Once LC turned off the car and restarted it, she was able to continue driving.

794 LC deposed that on most occasions, she contacted Aspley Mazda and asked whether she should bring in the car. She was usually told that she should. On one occasion, LC was told to take the car to Caboolture Mazda as this was closer to where LC was at the time. On most such occasions, a mechanic inspected the car and told LC that they could not find anything wrong with it.

795 LC took the car to the dealer on 26 April (at which time the vehicle had travelled 50,872 km). The invoice referred to a complaint about a “lag/delay on take”. A road test was conducted

and it was recorded that the delay seemed normal until the turbo kicked in. No fault codes were found.

796 LC took the car to the dealer again on 4 May. The invoice on this occasion referred to LC's concern about a "cough/splatter" on light acceleration, and noted that this could not be replicated during a road test with LC. The invoice also noted that LC had said that it had only happened since the service in April. The invoice also recorded that a 10-minute road test had been undertaken and "car drives perfect small amount of normal turbo lag present".

797 LC deposed that the loss of power continued occurring daily between April and June.

798 In around June, LC again took the car to Aspley Mazda. Around a week later, "Jamie" from Aspley Mazda told LC that the car required an engine replacement. LC deposed that Jamie referred to it as "the second major fail" and told her she needed to do something about it. He directed her to call Mazda and to take it up with them.

799 LC then did some online research and formed the view that she should be given a replacement vehicle because her car did not live up to expectations or the purpose for which she had purchased it.

800 On 27 June, Aspley Mazda contacted Mr Stuart Marshall at Mazda NCS. As a result, the following was recorded in Maestro: "Dealer have found the Engine is allowing Carbon build up and TSD [Technical Service Department] have instructed to replace Partial Engine with new modified engine. Customer doesn't want the car back!" On the same day, Aspley Mazda submitted a technical report to Mazda's technical department, seeking instructions and advice on the testing and repairs to be carried out. Between 27 June and 12 July, Mazda provided such instructions.

801 On 3 July, Mazda instructed the dealer to replace the engine following "prelim advice from Mazda Japan in relation to this concern relating to carbon build up through these engines". Mr Sweerts from Mazda explained why in this internal note:

What we have been advised by MC is the valves are not closing correctly under specific driving conditions (higher load/rpm) which is allowing carbon to build up or be trapped on valve seats.

The later superseded engines have revisions mechanically to address this concern.

We are currently awaiting requested tooling to be able to pull the heads apart & possibly repair but at this stage engines are to be replaced with the advised superseded part number.

All cases on this concern are reviewed case by case.

Hope this helps

802 The engine was replaced. The cost of the repairs was covered by Mazda under warranty, after the dealer submitted a PAR.

803 On 5 July, LC spoke with Mr Bradley Miller of Mazda. There was no recording available of this call. LC recalled the following exchange:

LC: I want a replacement car; I do not want my car. I have no confidence in the car. This is the second major failure; the car has failed twice with major things.

Mr Miller: It was only a minor issue within the engine and it was easier for them to replace the whole motor.

LC: If you replace the motor it is a major failure. You can't say replacing the motor is not major.

Mr Miller: The transmission failure was major but the motor issue was not major because what caused it was minor. Mazda would repair it under warranty. I am going to escalate it and talk to my superiors.

804 Mr Miller made a Maestro entry, recording the substance of the call, as follows:

Customer has called to raise concern with her vehicle - has had an Auto Trans replacement early in its life and is now having a Partial Engine replacement due to a mechanical concern.

[LC] is on the road all the time with her job and has lost all confidence in this vehicle and would never have expected such major troubles to occur. [LC] made it clear to me on the phone that she does not want this car back and fully expects that under ACL the product is replaced.

I advised that whilst is [sic] is disappointing these concerns have occurred the vehicle has been and is being repaired under NVW and can see that the diagnosed concerns are quite minor failures however we are replacing full components.

I advised that taking this into consideration we may not be able to replace the vehicle for her however will escalate her concerns to Senior Management who can make such decisions. I advised that this decision may not be reached until next week as key people are away on business. [LC] understood and was fine with this however asked if we could email her and acknowledgement [sic] of today's call.

805 Mr Miller sent an email to LC later that day and acknowledged that LC had requested that her CX-3 be replaced with a new vehicle due to the auto transmission replacement in January 2016, and the partial engine replacement currently required. The email also said: "[t]his matter will be further reviewed with Senior Management and at such time we will be in contact with you to discuss matters further".

Consideration of representations 3 – 5

806 Representations 3 – 5 are all said to arise from the 5 July conversation between LC and Mr Miller, in particular, Mr Miller’s statement that Mazda may not have been able to replace the vehicle because the diagnosed concerns were “quite minor failures”, and that Mazda was replacing “full components”, in the context of LC making it clear to Mazda that she did not want the vehicle back and fully expected that “under ACL the product is replaced”.

807 The ACCC alleged that this statement conveyed the false or misleading representation that the faults with the vehicle were not major failures under the consumer guarantee provisions of the ACL (representation 3). It was common ground that the representation (if made) was in the nature of an opinion. The ACCC alleged that, in that context, it was misleading or deceptive because there was no evidence that Mazda had given any, or any proper or genuine, consideration to the matter at the time.

808 The ACCC also alleged that the same statement conveyed the false or misleading representation that LC did not have any ability under the ACL to seek to obtain a refund or replacement vehicle, because Mazda was entitled to repair the vehicle regardless of:

- (1) the number of attempts made to repair the faults;
- (2) the time it took to repair the faults;
- (3) LC’s rejection of the vehicle and requests; or
- (4) Mazda’s obligation under the ACL to repair it (representation 4).

809 The ACCC also alleged that the statement conveyed the false or misleading representation that a major failure within the meaning of the consumer guarantee provisions of the ACL in respect of motor vehicles was limited to a failure of a major component (representation 5).

810 These representations can be dealt with together. I do not agree with the ACCC’s submission that the statement conveyed the representations alleged. The first difficulty with that submission is that there is no recording of the call, and the ACCC only relied on part of a single sentence of Mr Miller’s summary of his exchanges with LC. And his note also recorded that he “advised that taking this [the diagnosed concerns] into consideration we may not be able to replace the vehicle”, but that he would “escalate [LC’s] concerns to Senior Management who can make such decisions”. That seems to me to be an important part of the context in which the impugned summary of what was said took place, and it does rather point to the fact that, whatever the precise words that were exchanged, Mr Miller did not assert that the faults with

the vehicle were not major failures under the consumer guarantee provisions of the ACL. On the contrary, his note (which is to be assessed on its face) made it tolerably clear that that decision was for senior management, not him – something that he made clear in his email to LC on the same day (see [0] above). Further, in relation to representation 5, I do not think that Mr Miller’s note of what he said was capable of conveying the alleged representation. For these reasons, in my view, Mazda did not make the representations alleged.

Representations 6 and 7

Relevant facts – 2017

811 On 6 July, Mr Stuart Marshall of Mazda told LC by telephone that he had been assigned her case, that he was putting everything together to present to the senior managers the following week, and that his job was to present all the facts “to the powers that be”. LC told him that she used her car for work, and she needed it to be reliable and that it had 56,000-57,000 km on the odometer.

812 On 12 July, the dealer told Mr Marshall that “the customer is refusing to pick up the vehicle as she wants it replaced”.

813 LC spoke with Mr Marshall on the telephone on the same day. He told LC that “I’ve presented it [LC’s case] to our legal team this morning ... and at this stage they’re not entertaining the idea of a buy back”, but that he had looked into “some compensation for you, obviously there’s some issues that you’ve had”. Mr Marshall said he wanted to get LC’s feeling on what she would like to do.

814 LC told him she was not happy with the outcome and that “[t]here are two fails or like two major things have gone wrong”. LC asked why, after two major fails, her request for a replacement had been rejected, and asked what the decision was based on “and before you even answer that, is it something that ever gets done, so does anyone ever get a buy back?”

815 The conversation continued:

Mr Marshall: It does happen but it is very rare.

LC: Yeah.

Mr Marshall: But it’s normally brand new vehicles, if that makes sense. Like I understand your car’s only a couple of years old, but normally it’s-----

LC: Yeah, it sort of had its first fail though that like the - the transmission failed totally.

Mr Marshall: Yeah, I know that was only - that was four months out of you buying it, I've seen that.

LC: Exactly.

816 Mr Marshall then conveyed an offer of an extended warranty and two free services. The conversation continued:

LC: Okay. Which doesn't solve the problem of me getting in it and driving for 1000 kilometres and trusting that it's not going to have another issue. And I know that you can't - no-one can assure me of that, that's one of those - yeah, open ended things.

Mr Marshall: Yeah, unfortunately it's one of those sort of crystal ball situations where at the moment the dealer - you know, they believe the vehicle is fixed. They've road-tested it several times.

817 LC said she would have a think about it, to which Mr Marshall said, "yeah, absolutely" and that he would put the offer in writing.

818 LC then asked, "is it worthwhile me pursuing this, Stuart...?" Mr Marshall responded, "To be honest, I wouldn't want you to waste your time, reading between the lines. Yeah, just because some of these things I have seen where people have pushed them before haven't been a great outcome ... in regards to personal costs and you know court time and all the other things that go with it".

819 Mr Marshall's Maestro record of the conversation was as follows:

Spoke with customer and advised that we will not be able to refund or replace her vehicle but can offer compensation in the form of a letter of assurance and 2 free services. Customer was not happy with this outcome and wanted to know why we could not replace the vehicle. I advised due to vehicle being a couple of years old and having travelled 52,000 km's this is our position and we would not be able to replace the vehicle. Customer understood our position but was still not happy with the outcome. I advised I will draft a letter stating our compensation offer and let her think about it over the next few days.

820 Mazda confirmed the offer in writing that same day (12 July), the email stating in part:

Thank you for contacting Mazda Australia and we regret to learn of the concerns that have occurred with your 2015 Mazda CX3.

We understand your vehicle has required repairs and that these repairs have been conducted under the manufacturers [sic] warranty.

We would like to take this opportunity to sincerely apologise for any inconvenience which may have been caused as a result of the repair.

When designing vehicles, Mazda engineers go to great lengths to ensure that all components adhere to Mazdas [sic] product performance guidelines and Australian Design Regulations.

Although we expect our vehicles to perform trouble free, sometimes a repair situation can arise and it is for this reason we provide 3 year unlimited kilometres factory warranties on your vehicle.

To restore your confidence in the performance of your vehicle, we would like to offer you an extension to the manufacturers [sic] warranty period on your Mazda CX3 ... Further to the above offer of compensation Mazda Australia will also cover the cost of your vehicles [sic] next two maintenance service which is due at 60,000 km and 70,000 km or no longer than 12 months from your last service, whichever arrives first.

Consideration of representations 6 and 7

821 The ACCC alleged that by making the statements during the 12 July conversation, in the context of LC stating that “there are two fails or ... two major things that have gone wrong”, that Mazda would not replace the vehicle, that “normally” a “buy back” was “normally [for] brand new vehicles” and that “to be honest”, LC should not “waste her time” pursuing the matter, Mr Marshall on behalf of Mazda conveyed the representation that Mazda would not replace LC’s vehicle, and in doing so Mazda made the following false and misleading representations:

- (1) a representation in the nature of an opinion that the faults with LC’s vehicle were not major failures under the consumer guarantee provisions of the ACL (representation 6); and
- (2) a representation in the nature of an opinion that LC was not entitled to a refund or replacement vehicle at no cost to her under the consumer guarantee provisions of the ACL (representation 7).

822 Mazda submitted that the ACCC “fundamentally misconstrued” the conversation, as follows:

LC cited statement about two fails *followed* her being told of Mazda’s position “at this stage” that a “buy back” was not being considered. In other words, on the information available the request for replacement was refused. The context asserted in the particulars did not arise and Mazda’s position was not stated in response to anything LC said.

What followed was an informal exchange in which a clear distinction was drawn between the decision communicated at the outset and [Mr Marshall’s] impression from experience.

LC recognised that distinction. LC asked [Mr Marshall] (after noting that he worked for Mazda so was not the best person to ask) whether it was worth her time and effort pushing it forward ([Mr Marshall] responded that he had seen other people do it [but] did not have a great outcome “in regards to obviously personal costs and you know court time and all the other things that go along with it.”)]

This was a statement of [Mr Marshall’s] opinion about the practical consequences of “pushing” the matter further expressed in the vaguest terms. It carried no discernible meaning referable to the contended subject-matter of ACL rights. There is no reason

to conclude that [Mr Marshall's] experience was other than he described. Personal cost and court time are rational factors to identify. The statement did not suggest that the rights did not exist but, rather, that they may be difficult to enforce. [Mr Marshall's] statement therefore confirmed, rather than denied, the existence of the right.

(Emphasis in original.)

823 It seems to me that Mazda's characterisation of the exchanges between Mr Marshall and LC is unrealistic. Construed in context, in my view, the impugned statements do convey the representations alleged, and Mr Marshall could not have had a reasonable basis for saying what he did because there was no evidence that anyone at Mazda ever gave LC's request for a new vehicle any apparent consideration, which was surely warranted in circumstances where the transmission had failed after four months and Mazda had noted it as an "ACL" failure (see [0] above).

Representations 8 and 9

Relevant facts – 2017

824 LC spoke with Mr Marshall again on 14 July.

825 On 16 July, having carried out some further research online about consumer law rights, LC sent an email to Mazda telling it of her "absolute disappointment" with the outcome, and of her lack of confidence in the vehicle. She stated that after experiencing "'2 MAJOR FAILS', I would have hoped that you may have recognised this and bought back the vehicle". She also asked for copies of her service records.

826 On 17 July, Mr Marshall telephoned LC in response to her email of the previous day. He told her that she would be able to get the service records from the dealers and that Mazda did not have them. He also said that if LC were to commence proceedings it would not prejudice her position and the conversation they were having at the moment would continue.

827 Mr Marshall added: "The only other thing I wanted to float past you was ... obviously you've asked us to replace the vehicle and at this stage we're not able to do that at the moment, but I did have a meeting with my senior representatives just before ... we've sort of come up with, if you were looking to replace the vehicle ... We may be able to assist you in that somehow, in regards to the changeover costs of a replacement vehicle".

828 LC said that she did not want to pay anything in terms of change over. Mr Marshall then asked LC to return the loan vehicle and collect her car. She did so the next day, when she also collected the service report she had requested.

829 LC then emailed Mr Marshall, pointing out that the service report made no mention of the fault with the car that had instigated the replacement of the engine. She asked for Mazda to send the faults found by return email.

830 Mr Marshall responded:

In response to your return email, the concern with your engine was a misfire or hesitation, which was due to the valves not closing correctly under specific driving conditions (higher load / rpm). This allowed carbon to build up or to be trapped on valve seats. A decision was made to replace the engine avoiding the need to remove and repair the cylinder head, as this is the easiest and most efficient way of getting your vehicle back on the road and reducing any further delays with the repair.

831 He then made the following Maestro record of the conversation:

Customer called back advised that I am drafting a response to her email and will get it out to her in the next few days. Advised that the dealer will be able to provide her service records and a list of parts used in the replacement engine. Also advised that if she were to consider replacing the vehicle we may be able to assist in the change over cost instead of the compensation we have already offered. Customer was a bit taken back buy [sic] this as she feels she will not get true trade in value [sic] due to the transmission and engine being replaced. Advised this would no[t] [be] the case and it would be of market value and condition of the vehicle. Also advised that we needed her to pick up her car and return the loan vehicle but this would not stop the conversation we are having in regards to her concerns. Customer said she will pick up her vehicle tomorrow and dr[o]p it [sic] off the loan vehicle

Consideration of representations 8 and 9

832 The ACCC alleged that by making the statements during the 17 July conversation that “[t]he only other thing I wanted to float past you was ... obviously you’ve asked us to replace the vehicle and at this stage we’re not able to do that at the moment, but I did have a meeting with my senior representatives just before ... we’ve sort of come up with, if you were looking to replace the vehicle ... We may be able to assist you in that somehow, in regards to the changeover costs of a replacement vehicle”, Mr Marshall on behalf of Mazda conveyed the representation that Mazda would not replace LC’s vehicle, and in doing so, Mazda made the following false or misleading representations:

- (1) the faults with LC’s vehicle were not major failures under the consumer guarantee provisions of the ACL (representation 8); and
- (2) LC was not entitled to a refund or replacement vehicle at no cost to her under the consumer guarantee provisions of the ACL (representation 9).

833 Mazda’s only written submission to the contrary was that “[t]his was a statement of Mazda’s position not a statement about rights”.

834 I do not agree, for the reasons given in respect of representations 6 and 7. Further, as the ACCC submitted, contrary to what Mr Marshall said, there was nothing in the evidence to suggest that any meeting with his “senior representatives” had ever taken place.

Representations 10 and 11

Relevant facts – 2017

835 On 21 July, LC emailed Mazda and advised that she was out of the country but wanted a follow up from her previous email.

836 On 3 August, LC and Mr Marshall had another telephone conversation.

837 LC confirmed that she wanted a buy back “or something similar” and asked Mr Marshall for an update on that. Mr Marshall said, “Look as I said to you last time, they’re not looking to buy back at this stage, but I could put that towards the legal team again. ... And just see what they come back with. ... And then go from there, if you like, or yeah, as I said, you’re more than willing - more than entitled to, you know, pursue whatever legal action or whatever you think’s necessary”.

838 LC said she had spoken to a solicitor and “obviously it’s not cheap”. She also said that she had had “a bit of a chat to Fair Trade” and “all these guarantees and things and I don’t feel that it’s lived up to any of those”.

839 LC said, “I know you guys don’t want to call it a major fail, however anyone that I say that you’ve replaced the engine, replaced the transmission, certainly considers that a major failure”.

840 Mr Marshall confirmed that he would put it to “them” again and see what he could come up with, but advised he did not believe Mazda would “look into buying the vehicle back”.

841 On 8 August, Mr Marshall discussed LC’s case with Ms Han and Mr O’Day. Mr Marshall entered a note in Mazda’s Maestro record: “Spoke with Ian and Chooi over case we are still not in a position to buy this vehicle back at this stage”.

842 The same day, Mr Marshall told LC that Mazda’s position had not changed, that “legal” was still not prepared to replace or refund the vehicle, and again offered compensation. LC told Mr Marshall that she had no confidence in the car, that it was not running properly, and that it had not lived up to the original specification. LC said she would pursue legal redress. Mr Marshall said, “So where you want to take it from here is totally up to you ... it’s totally your decision”. LC said she would pursue it from her end.

843 On 1 December, LC sent an email to Mazda saying she would accept Mazda’s offer (that is, the extra year’s warranty and two free services).

Consideration of representations 10 and 11

844 The ACCC alleged that when considered together, the conversations of 3 and 8 August between LC and Mr Marshall (see [0]ff above) conveyed the representation that Mazda would not replace LC’s vehicle and in doing so, Mazda made the following false and misleading representations:

- (1) the faults with LC’s vehicle were not major failures under the consumer guarantee provisions of the ACL (representation 10); and
- (2) LC was not entitled to a refund or replacement vehicle at no cost to her under the consumer guarantee provisions of the ACL (representation 11).

845 Mazda again submitted to the contrary, and that what was said in those conversations was merely a statement of Mazda’s position. Its written submission on the point was as follows:

In the calls of 3 August 2017 and 8 August 2017 Mazda’s position was stated and it was confirmed that a further review could be undertaken.

On 3 August 2017 [Mr Marshall] said that the existing decision was not to purchase back the vehicle but that he could have them look at it again. He said “they’re not looking to buy back at this stage but I can put that towards the legal team again” and “as I said, you’re more than willing – more than entitled to, you know, pursue whatever legal action or whatever you think’s necessary.”

On 8 August 2017 [Mr Marshall] said that “legal” had not changed its position “at the moment” on the question of the buy-back of the [v]ehicle and queried whether there was other compensation LC might be interested in. LC clearly understood this as a statement of Mazda’s position because she responded that she would be lodging a formal complaint with Fair Trading. [Mr Marshall] responded that “where you want to take [it] from here is totally up to you” and that was “totally your decision”.

846 I do not agree, for the reasons given in respect of representations 6 and 7.

Unconscionable conduct – LC

847 The ACCC alleged that Mazda engaged in unconscionable conduct in its dealings with LC in respect of her request for a replacement vehicle under the ACL. It pointed to the following considerations.

848 First, it was submitted that LC had a clear and cogent request for a replacement car or refund under the ACL and that her case raised numerous “red flags” to Mazda in this regard, with LC having experienced two major failures. The first was after she had only had the car for a few

months. The whole transmission had failed and had to be replaced. It is apparent that Mazda had identified that the transmission replacement was an “ACL” major failure. The transmission replacement also satisfied the description of major failure in Mazda’s Summary Guidelines. And the ACCC said (correctly) that it even satisfied Ms Han’s definition set out in her affidavit (at [15]), namely, “a complete failure of a major assembly (such as an engine or transmission) which occurs early in the life of a vehicle (such as in the first 6 months or less) and which means the vehicle is not able to be driven”.

849 Despite that, the ACCC submitted, Mazda’s customer advocate dismissed LC’s request under the ACL for a replacement car without any apparent consideration.

850 The second “major failure”, the ACCC submitted, required the replacement of an engine and was based on a manufacturing defect. It was submitted that there was no evidence to support the notion that the need to replace the engine was a “minor” fault, and that the court should infer that the statement was false or misleading and an attempt to persuade LC to give up pursuing her rights under the ACL with Mazda.

851 Secondly, the ACCC submitted that there was no evidence that LC’s request had been considered by anyone in the legal department, contrary to what the customer advocate told her; there was no evidence of any review by any senior management before rejecting LC’s requests; there was no record of any round table meeting in the Mazda system or otherwise, and no compliance with Mazda’s own processes; and the request was rejected, without any apparent consideration of the position under the ACL.

852 Thirdly, it was submitted that instead, the customer advocate “appears to have decided on [his] own that [LC] was not entitled to a replacement car under the ACL”.

853 Fourthly, the compensation offered by the consumer advocate was within his personal remit, something that was said to go “to the culture of Mazda”.

854 The ACCC also submitted that, as in the earlier cases, Mazda:

- (1) summarily rejected the requests for a replacement vehicle without consideration on the merits;
- (2) sought to dissuade LC from continuing with the request;
- (3) did not escalate the requests in accordance with Mazda’s processes;

- (4) obfuscated LC's requests, including by "raising the bar so as to deny [LC's] requests" – eg "when LC sought a replacement car after the engine replacement, the request was assessed based on the age and kilometres of the car at that time" – and ignoring the history of failures, including the new transmission within three months of LC's purchase; and
- (5) did not take LC's safety concerns seriously, in circumstances where the faults experienced by LC "gave rise to immediate, serious and apparently continuing safety concerns".

855 I do not accept that the evidence showed that Mazda did not take LC's safety concerns seriously. The rest of the ACCC's propositions concerning LC may be accepted – but, again, I do not regard Mazda's conduct as rising to the level of the unconscionable. It is, to be sure, another example of appalling customer service and a failure to comply with Mazda's own procedures. And LC was, I have no doubt, justified in remaining disappointed by and frustrated at the outcome to which she agreed (one extra year's warranty and two free services). But that does not mean that Mazda's conduct was unconscionable.

Consumer EG

856 On 13 December 2014, EG purchased a Mazda2 Neo for \$17,350 less a \$4,000 trade-in from West End Mazda, Blacktown, NSW (**West End** or the **dealer**).

857 EG deposed that from within the first few weeks of purchase, she experienced an intermittent rough idle. EG felt a little shake in the vehicle when sitting at traffic lights, and heard a little flutter in the engine.

858 EG took the car to the dealer for scheduled services. A West End invoice dated 14 December 2015 noted that the vehicle was tested for a "clicking noise" reported by EG, but that the person who carried out the test "could not hear any abnormal noises". The issue of the rough idle was recorded in the dealer records at a scheduled service on 23 March 2018, when the vehicle had travelled approximately 60,000 km.

859 EG deposed that:

- (1) from around October 2017 to around March 2018, warning lights illuminated on the dashboard intermittently when she was driving;

- (2) this occurred around every three to four weeks, and the lights usually stayed on for around a week before turning off;
- (3) on each occasion, she contacted West End, and was told that if the engine felt normal, the vehicle could still be driven; and
- (4) she booked the car in for the first available appointment, however, the lights turned off before the appointment and she was told that the dealer would not be able to run diagnostics if the lights had turned off.

860 EG took the vehicle to West End on around 8 November 2017 in relation to a fuel gauge issue. The dealer's record of the work carried out was that the traction control system warning light had come on. The vehicle had travelled 53,450 km at the time.

861 EG deposed that between November 2017 and early 2018, the dashboard warning light issue occurred around five more times.

862 In December 2017, a technical bulletin was issued in response to reports of idle harshness by some customers, in respect of which a change to the fuel injection control while the vehicle was cold was recommended.

Representations 1 and 2

Relevant facts – 2018

863 EG deposed that in late February 2018, she started her vehicle in her driveway and it had no acceleration. The dashboard lights illuminated. She put the car into first gear and drove, but the car would only go at around 5 km per hour. EG drove a short distance, the car kicked into gear and it started driving normally. EG contacted West End and booked the vehicle in for a service for 23 March.

864 EG deposed that between February and March, the issue with the acceleration and dashboard lights continued to occur intermittently. EG requested that a loan vehicle be available for her.

865 EG took the car to West End for the scheduled service on 23 March. No loan car was available. The service record included the following:

PLEASE CHECK ENGINE LIGHT IS COMING ON LOOKED AT BEFORE

Checked for codes, found cylinder 4 misfire.

Removed spark plugs and checked spark plugs condition, checked coil condition, swapped over spark [plugs] 3 and 4 and road tested.

Misfire code not showing, require full day for more diagnosis.

866 EG collected the car that day and deposed that she was told that one of the engine's cylinders was misfiring and that she would have to bring the car back in for further repairs.

867 EG deposed that she continued to use the vehicle because the mechanic at West End had told her that it was "fine" but the limp mode issue continued to get worse. EG deposed that between 23 March and 16 April, the vehicle went into limp mode almost every time EG started it, and at least two times a day.

868 On around 16 April, EG took the vehicle to West End. EG was provided with a loan car, and was told to collect her vehicle on 19 April. However, when she was on her way to West End, after leaving work early to pick it up, the dealer called and told her they needed to keep the car for longer because a cylinder was misfiring.

869 The repair order of West End dated 17 April recorded:

Customer complaint of rough idle & misfire on cyl 4. Checked & found spark plugs to have manufacturing fault. Replaced spark plugs & tested - all ok

Carried out PCM update

870 EG collected the vehicle on 28 April. She was told words to the effect that the car was "idling a bit rough", and "you're using the right fuel but go to another petrol station ... and see if that makes a difference with the rough idle".

871 EG deposed that she put new fuel in the car and notified the dealer in May that the car was still running really rough. EG was going overseas, and booked the car in for repairs on 2 July.

872 EG took the car to West End on 2 July. She was given a loan car, a Mazda3, which was a slightly larger car and was less fuel efficient than EG's Mazda2.

873 Three days later, the dealer told EG that the fourth cylinder was misfiring constantly and that the third cylinder was misfiring intermittently. She was told that the car would have to stay at the dealership until it was fixed. At this point, EG thought that the problem with the vehicle had been identified and would be fixed.

874 Between 5 July and 14 November, Mazda provided instructions on the testing and repairs to be carried out on EG's vehicle.

875 On 11 July, Mazda opened a Maestro case in respect of EG's vehicle, and a case manager was instructed to contact EG, after the dealer had raised the rough idle issue with the technical

department of Mazda which, in turn, raised it with the NCS. Mazda's records showed that, at this time, the vehicle had travelled approximately 65,000 km.

876 Mazda told the dealer that "Idle Harshness" was a "known concern" and that the issue was "currently under investigation" and awaiting an outcome.

877 The dealer undertook various works through July and August.

878 Mazda asked Mr John Moller, an FTS from Mazda, to inspect the vehicle, which he did on 24 July and 12 November, including for carbon build up on the valves of the engine, using a bore scope (which takes a video inside the cylinder). He instructed the dealer to replace the PCV valve and spark plugs.

879 EG deposed that in early September, she had not been told about what the issue was with her vehicle. By this time, the car had been with West End since 2 July. EG contacted Mazda and was told someone would call her back.

880 On 4 September, EG had a telephone call with Mr Ainul Faruquee of Mazda NCS. The conversation included the following exchange:

EG: And I shouldn't, yes, so I want it solved. I don't want people to tell me, "Oh, now it's changed and we think it's an idle problem," and this and that.

Mr Faruquee: Mmm.

EG: No, it's sugar coating it, find out what it is-----

Mr Faruquee: Mmm.

EG: -----and tell me what you're going to do to fix it.

881 EG then said, "You guys need to get on top of it and ... give me a definitive answer of what is wrong with my car. You know, I know two cylinders have been misfiring and I know ... that I've been in [limp] mode at least 40 times ... So I want a definitive answer. If you can't find out in two months what's wrong with my car, well, you shouldn't be doing your job really. The technicians that are working on it, seriously, you know ... where I'm coming from now, you, you ... guys are supposed to know what you're, know your product and know what you're doing".

882 On 5 September, Mr Faruquee asked Mr Jim Vallianos (a Business Analyst – Technical at Mazda), for updates on diagnosis as it progressed. His email to Mr Vallianos included the following:

... Customer has been out of her vehicle for more than 2 months now. Though she has a SLC [State Loan Car], the last time I spoke with her she wanted to know a definitive answer in regards to what is wrong with her vehicle. She also advised that she is getting frustrated with the time it is taking for Mazda to diagnose the problem. For the time being she did not indicate if she wants a replacement vehicle or a buy back, however I believe if there are more delays with this diagnosis, she might come to that point.

883 Mr Faruquee also spoke with EG the same day. The call included the following exchange:

Mr Faruquee: So what I did is, as there is a Help Desk ongoing with Mazda Japan, the head office in Japan-----

EG: Yeah.

Mr Faruquee: -----I asked the person who's been dealing with them to give me a final answer and I also told them-----

EG: Yeah.

Mr Faruquee: -----hey, customer is getting very frustrated with the ongoing process, it's been two months and she-----

EG: Yep.

Mr Faruquee: -----needs a final answer. So what he did in this case, he has asked for a definitive answer from them and-----

EG: Yep.

Mr Faruquee: -----as, as soon as I receive it from him, I'll keep you updated and just seeing how, how we're going to proceed with the repair work.

EG: Okay. Great.

884 On 11 September, Mr Faruquee sent an email to EG, which included the following:

Apologies for getting back to you at a later date regarding your Mazda 2.

I am still waiting for further update in regards to the diagnosis of your vehicle. I have already followed it up and hoping to get a result back by the end of this week or earlier.

I will keep you updated as I go.

Appreciate your patience during this investigation process.

885 After receiving the email, EG contacted NSW Fair Trading, wanting to know what her rights were. EG learned that she could request a replacement vehicle or a refund. She used this information to help draft a letter to West End.

886 On 17 September, EG sent a letter to West End in the following terms:

The vehicle sold to me is not of satisfactory quality or fit for purpose described and it is an expectation of a consumer that:

- Service repairs and maintenance to be provided with exceptional care, skill and technical knowledge of the product.
- Be fit for purpose or give the results that you and the business had agreed to.
- Be delivered to me within a reasonable time when there is no agreed date.

Taking all of the above into consideration and to resolve this problem I request that you either fit a new engine to my existing vehicle or offer a replacement vehicle.

887 EG spoke with Mr Faruquee the next day, after which she forwarded a copy of her letter to Mazda. She referred to the consumer legislation and that:

EG: ...you guys should know your product, you should have the skill, you know, part of the consumer legislation is that you should know your products ... You know, a, a reasonable time, even though an end date wasn't provided ... When we get to two and a half months, that's now reached an unreasonable time.

Mr Faruquee: Definitely.

...

EG: Look, I'm, I won't shoot the messenger, it's you know, there's no point being angry at you, it's not your fault, you know, it's-----

Mr Faruquee: Yeah.

EG: -----if the team can't, if the technical team can't resolve it.

Mr Faruquee: Yeah.

EG: You know, there's got to be a determination made by higher management.

Mr Faruquee: Yes.

EG: Either they, you know, either they, you know, replace the vehicle or they replace the engine, you know, but something has to be determined. We can't just go on open ended like this indefinitely.

Mr Faruquee: Yep.

888 On 21 September, Ms Miller wrote to Mr Faruquee, as follows: "Steve from West End Blacktown Mazda called, customer has requested replacement engine or vehicle. Email sent to NCS Dealer just now. Please call Steve when you receive the information in NCS dealer".

889 On 24 September, Mr Moller reported his findings to Mr Faruquee:

Hello Ainul,

This relates to PSS MA85090.

The same procedures were performed on this car as with other Mazda2 at Blacktown (refer MA84482). This included removal of inlet manifold to inspect inlet ports, found carbon build up on inlet valves.

Removed carbon with cleaner, refit manifold. Tested vehicle and determined rough idle still evident.

The concern with this vehicle is the same as MA84482. When engine is warm, idle drops to 550 RPM, and at this time engine idles roughly. As soon as engine speed rises above 600 RPM, idle becomes smooth.

As per PSS, we are still awaiting a resolution.

Regards,

John.

890 On 24 September, Mr Moller reported (in response to a question whether the mounts had been checked) that EG's vehicle and another inspected at the same time had had the same symptom, and similar severity of idle roughness at 550 RPM. He stated that both vehicles had lots of carbon on the inlet valves, and both had evidence of some leakage via the PCV.

891 A round table review was conducted that day to consider EG's case. Mr Faruquee entered the following note in Maestro:

Ian [O'Day], Chooi [Han] and Peter [Caruso]: Has been advised to check if a FTS inspection was done, if yes then what was the outcome. Advise Peter of the update and FTS needs to contact Peter.

892 On 9 October, EG called Mr Mathew, who in turn told Mr Faruquee that EG had called to get an update on the case and that she had been waiting three weeks for it.

893 The next day, EG called Mr Faruquee, who told her that he had referred her case to senior management "as per protocol" because EG had asked for a replacement engine or replacement vehicle, and that Mazda was "not sure what's the problem. I called [the] dealership twice yesterday and the day before as well because they were supposed to attach a new inspection session to the current tech case, which I can see they haven't done yet, so at this moment that's what I'm waiting on".

894 Mr Faruquee recorded in Maestro that he was still waiting for an update from the dealership but had not yet received it, noting that "[EG] advised that as it has been nearly 3 months her car is VOR, she will contact fair trading if [Mazda] does not provide her an update by the end of the week. I advised that I will give her a call back on Friday". He informed his superiors

by email of that, and asked, “Can you please advise what I should advise customer as there has not been any update to the case since 25/09/18”.

895 In response, Mr O’Day asked his colleague Mr Peter Caruso, “Can we confirm yes/no whether this vehicle has an issue. Based on the delay I expect the customer will no longer let this one go. So we absolutely need to tie down our position”.

896 EG and Mr Faruquee spoke again on 12 October. Mr Faruquee told EG that the matter had been reviewed by “higher management” that morning; that the vehicle was getting a number three engine mount that day; and the FTS was monitoring the work. Mr Faruquee also told EG that Mazda’s FTS believed that this would improve the feel of the idle so it would not be there anymore, and “that will be kind of the final thing we’ll try to see if it, like we can solve the problem. If not ... then I believe that they’ll be [audio drops out] kind of a replacement vehicle, replacement engine, as per your request”. Mr Faruquee said that he would come back to EG on Monday to which EG replied, “Yeah, fabulous. Great”.

897 EG and Mr Faruquee spoke again on 16 October. He told EG that “the FTS changed the number three engine mount to your vehicle on Friday” and “I’m just currently waiting from their end for an update and once I have it, I’ll give you a call back as soon as possible”. EG requested details about the fault that had been identified. Mr Faruquee responded, “Like what they’re because it’s something ... like that we don’t see normally, so they are just doing everything that’s possible like that might cause an issue, and they’re changing and to see if it’s you know, it’s kind of a process of elimination to tell you a bit easily, yeah. They also ... changed a few O-rings in the engine, so they’re, they’re doing more work or less every day to ... see if it solves the problem”.

898 On 24 October, Mr Faruquee asked Mr Stuart of Mazda to provide an update on the vehicle: “As the customer has been VOR 3.5 months, I believe the customer will take matter further if we do not give her an outcome by the end of this week”.

899 The engine mount in EG’s vehicle was replaced in late October and the vehicle was assessed. Compression testing was undertaken and comparisons to other Mazda2 vehicles were made. The replacement of the engine mounts had not improved the situation and in late October, after these further compression tests were undertaken by the dealer at the direction of the FTS, Mazda determined that a partial engine replacement should be undertaken.

900 On 29 October, Mazda instructed West End to carry out an engine replacement. Mazda's technical department also told the dealer that the vehicle fell within Mazda's post warranty support guidelines (bulletin NW008_16), and that a PAR for the partial engine replacement should be submitted by the dealer. The dealer did so, and Mazda covered the costs under warranty.

901 Mazda then "escalated" the matter to Mazda Corp. Although the cause of the problem could not definitively be confirmed, the vehicle "displayed inconsistent compression readings between cylinders" which affected the stability of the idle.

902 The engine replacement occurred on 9 November. The engine was checked and there was no misfire count.

903 EG deposed that she had two telephone calls with Mr Faruquee on 30 October.

904 The first, in the morning, was not recorded. EG deposed (but Mazda denied) that an exchange along the following lines took place:

Mr Faruquee: It has now been determined there is something wrong with the cylinder compression in your vehicle and so it has been decided that they will do a partial engine replacement. I will be forwarding an email to management. What option would you prefer; a new vehicle or the partial engine replacement?

EG: I would prefer a new vehicle as Mazda has had possession of my vehicle for 4 months, not including the two weeks previously trying to determine the fault in April. I would be prepared to pay the difference for an upgraded navigation system in the new vehicle.

Mr Faruquee: You wouldn't have to pay that as the replacement model would be upgraded to latest Mazda2. It will take a couple of weeks to organise a new vehicle.

EG: I am okay with that waiting period.

Mr Faruquee: I will contact you by Friday 2nd November 2018 regarding an outcome.

905 I accept EG's evidence that a conversation along those lines occurred. She swore that it did, and I have no reason to disbelieve her, as Mazda invited me to, including in circumstances where Mazda did not call Mr Faruquee. I accept, therefore, that EG rejected the vehicle on 30 October.

906 The second call between EG and Mr Faruquee was in the afternoon of that day. It was recorded, and included the following exchanges:

Mr Faruquee: So the partial engine replacement has been approved with no cost to you obviously, Mazda will proceed with that one.

EG: Yeah.

Mr Faruquee: However, they said that you have already asked for a replacement vehicle so as per your protocol I'll advise management that you know, like as you said, you're happy with both, but I'll just get their opinion as well if they want to, you know, go forward with the replacement vehicle or just with the partial engine replacement and if it's only the partial engine replacement, then if like, what kind of compensation we can offer to you as well.

EG: Okay then, yep.

Mr Faruquee: Are you happy with that?

EG: Yeah, yeah. As I said, look, I would really prefer a new car-----

Mr Faruquee: All right.

EG: -----get it out of the way, get it happening quickly.

Mr Faruquee: Yep.

EG: Because yeah, I'd just really like this resolved but anyway, leave it up to you guys, you make, I guess management make the executive decision, let's-----

Mr Faruquee: Yep.

EG: -----see what goes on.

Mr Faruquee: Perfect. Like, just to give you a timeframe, like with the engine replacement I'm quite sure it will happen very quickly and you will, you will get this [paper] back at least and then with the replacement vehicle request it takes about two to three weeks to confirm everything of-----

EG: Mmm - hmm.

Mr Faruquee: -----the whole process to go forward, but, yeah, we'll, I will do both at the same time-----

EG: Yeah.

Mr Faruquee: -----see which one sticks.

EG: Yeah.

Mr Faruquee: All right.

EG: Preferably because, I, I, look, I guess the reason I'm saying "new car" is because I'm, I feel apprehensive, I feel like I got-----

Mr Faruquee: Yeah

EG: -----a lemon in that poor baby.

Mr Faruquee: Yeah.

EG: And I, I don't want to come into problems again, you know what I mean?

Mr Faruquee: No, no, no.

EG: I'm just-----

Mr Faruquee: I understand.

EG: Yeah. Yeah.

Mr Faruquee: Okay.

EG: So you understand, great.

Mr Faruquee: Yeah.

EG: All right.

Mr Faruquee: Leave it with me, I will get the ball rolling on that one and yeah, I'll keep you updated.

EG: Great, thank you Ainul.

907 Mr Faruquee made the following note of that call:

Spoke with [EG]: She wanted to know if there is any update. I advised her that [Mazda] is proceeding with a partial engine replacement request and currently awaiting approval. She was happy with the outcome. However, I asked if she is happy with the new engine or she wants to get a replacement vehicle as per her request earlier. She advised that she is will be [sic] happy to get a new vehicle as it will give her assurance that it will not break down but she is ok with getting her old car back as well with some form of compensation. She requested to know the update once I have it.

908 Mazda submitted that EG did not reject the car in this call either, but that is hair-splitting. It is clear that Mr Faruquee knew that EG had already rejected the car, because he said to her "they [Mazda] said that you have already asked for a replacement vehicle".

909 On 5 November, EG told Ms Carmen McDonald, in the absence of Mr Faruquee (who was sick at the time) by telephone that she refused the engine replacement and wanted a new vehicle. During the call, Ms McDonald said that she believed that Mr Faruquee needed to have a chat with "one of our, someone from our legal team". EG said "... there was only two decisions. He offered me a new car ... or a partial engine ... replacement and I refused the partial engine replacement. ... Because you know, it's been four months now and if I'm, if they're only going to build part of the, the engine ... I'm not convinced that it's going to fix it. In my original letter I actually stated a full engine replacement or ... a new car. So he's offered me either, either. ... And he was actually waiting for a determination from management so yeah".

910 On 7 November, Mr Faruquee had two calls with EG. In the first he told EG that her request for a replacement vehicle would be required to be reviewed by him with management before going to Mazda’s executive panel for decision, but that he was seeking to have the matter go straight to the executive panel.

911 The same day, Mr Faruquee sent an email to Ms Han, as follows:

Case update: Vehicle is getting a partial engine replacement as per advise [sic] from [Mazda] Technical and a PAR has been approved. Customer, however is not willing to take the vehicle back after repair as she is VOR for over 4 months and has lost faith on the durability of the vehicle. She has requested a replacement vehicle.

Would you like me to arrange another round table review or this can go straight to Exec panel for review? Please advise.

912 At that time, no decision had been made regarding EG’s request for a replacement vehicle.

913 Mr Faruquee prepared the following executive panel review template for a replacement vehicle request:

Vehicle VOR since 04/07/2018 (4 months) due to a rough idle issue. [Mazda] tech case MA85090 has been ongoing since 05/07/2018 as a solution to the issue could not be found. During this process, PCV valve, oil separator, spark plugs and #3 engine mount was replaced with no positive outcome.

Vehicle is now getting a partial engine replacement as dealer found inconsistent compression readings between cylinders. As per latest advice from technical, dealership submitted PAR 377463 for partial engine replacement, which has been approved.

Customer is not willing to pick up the vehicle after it is repaired as she has been VOR for 4 months, though [Mazda] has provided an SLC to her. She has also lost faith on the durability of the vehicle and possible loss with resale value.

914 Ms Han then asked Mr Faruquee to find out the “ETA” for the engine repair, and that, after the engine replacement, FTS would need to test the vehicle to confirm the engine had resolved the concern. In response, she was told that the vehicle was “on the hoist”.

915 On 13 November, Mr Faruquee told EG that the replacement engine had been installed and that the car was being tested by the FTS.

916 The next day, Mazda reported internally, after the vehicle had been driven for a test following the engine replacement, “Tested OK and idle was acceptable”. Mr Faruquee then told EG that although the dealer had informed EG that her car was ready to be picked up, Mazda’s decision about a replacement vehicle had not yet been made.

917 The executive panel review took place two days later, and determined that a replacement vehicle would not be offered.

918 The executive panel summary recorded that the FTS had advised the vehicle “looks good, virtually no misfire count”. It stated, among other things:

Request: Replacement vehicle

Recommendation: ?

...

Customer’s concern is rough idle in vehicle. Vehicle VOR since 04/07/2018 (over 4 months) due to this concern. [Mazda] tech case MA85090 has been ongoing since 05/07/2018 as a solution to the issue could not be found. During this process, PCV valve, oil separator, spark plugs and #3 engine mount was replaced with no positive outcome.

Vehicle is now getting a partial engine replacement as dealer found inconsistent compression readings between cylinders. As per latest advice from technical, dealership submitted PAR 377463 for partial engine replacement, which has been approved. Customer has been in loan vehicle throughout diagnosis and repair period.

FTS Peter Stuart has test driven the vehicle after the partial engine replacement, tested all OK and idle is acceptable. IDS Session was sent to Peter Caruso, he advised that it looks good, virtually no misfire count.

Customer is not willing to pick up the vehicle after it is repaired as she has been VOR for 4 months. She has also lost faith on the durability of the vehicle and possible loss with resale value.

OUTCOME: Agreed unable to offer replacement vehicle. Offer extended warranty.

919 On 19 November, Mr Faruquee told EG that the executive panel had made a decision on the replacement vehicle request and “[u]nfortunately, they have advised that they won’t be able to offer a replacement vehicle but ... give you one year of extension of warranty on the car”. EG responded “... well, let them know that I’ll be requesting intervention from Fair Trading. Okay?” Mr Faruquee said, “Thank you ... I’m sorry that this has happened but, yeah”. EG responded, “Okay. All right. I, I will instigate action as of this evening. Okay?”

920 EG reported her issues to NSW Fair Trading, which then raised them with Mazda on about 21 November.

921 Mr Groves instructed that NSW Fair Trading should be told inter alia, “These repairs were covered by Mazda Australia and are covered by a two year / 40,000 km warranty”. This led to a repetition by Mazda of its earlier offer. EG rejected it. EG’s file note of her conversation with the NSW Fair Trading representative recorded Mazda’s reasons for rejection: “It is

unlikely that you will get a replacement vehicle because Mazda Australia would take into account the age and number of kilometres on the car and the depreciation in value”.

922 On 22 November, NSW Fair Trading reported to Mazda EG’s concern, inter alia, that she was misled into thinking she would get a replacement vehicle, and also referred to the time it took Mazda to repair her vehicle.

923 Mr Groves told Mr Faruquee to contact NSW Fair Trading and advise of the case status, including as follows:

The issue relates to a rough idle concern only.

...

The customer has been in a courtesy Mazda3 during this whole process.

These repairs were covered by Mazda Australia and are covered by a two year/40,000 km warranty.

The matter was further reviewed at an Executive level and we have also offered the customer a 12 month warranty on the entire vehicle, which she has rejected.

The vehicle is fully repaired and currently waiting to be collected by the customer.

924 On 27 November, Mr Faruquee spoke with EG by telephone. EG said she was not willing to speak with him as, “I’m not happy with the, the way you’ve misled me”. He said he would arrange for his supervisor to call back.

925 This led to an escalated call follow up by Mr Andrew Sholakis of Mazda on the same day. EG was offered two free services and a 12 month extended warranty by way of compensation.

926 During the call, Mr Sholakis explained that a “partial engine replacement” meant that the whole engine block was to be replaced. The conversation continued:

EG: But you, you know, he, I, I did raise my queries about you know, having a partial motor replacement and that the car had been a lemon, and that you know, I, I wasn’t convinced that it was going to necessarily resolve the, the issues with the motor-----

Mr Sholakis: Mmm-hmm.

EG: -----with just a partial engine replacement. He did come back to me a couple of days later and say that, oh you know, it’s, it’s all new parts and what have you and, and-----

Mr Sholakis: Yeah, when they say, “partial engine”, I’ll just clarify that-----

EG: Yeah.

Mr Sholakis: -----one little thing, it’s only a little thing but at least it makes more sense.

EG: Yeah.

Mr Sholakis: The whole engine, the, the block, the whole engine gets replaced. With the term “partial engine” it refers to the ancillary parts around the engine. So for example, your problem was inside the engine so-----

EG: Yeah.

Mr Sholakis: -----they pull that engine out, put the new, new engine in, so you did-----

EG: Yep.

Mr Sholakis: -----you did get a new engine, the whole engine, but things like the hoses that run in and out, the compressor for the air conditioning, the generator, alternator, all that sort of stuff.

EG: Yep, yep.

Mr Sholakis: That all gets reused because that’s not, that wasn’t the problem. So-----

EG: Yeah, yeah.

Mr Sholakis: So you do get a new engine but the terminology, “partial engine,” makes it sound like you, you, you’re getting half, you know the top half or the bottom half, that’s actually-----

EG: Yeah.

Mr Sholakis: -----not the case, it is a full engine replacement.

EG: Mmm-hmm.

Mr Sholakis: But the ancillaries or all the other bits and pieces around it, they don’t replace those because they weren’t an issue, there was no fault with those parts.

EG: Yeah.

Mr Sholakis: So just to clarify that. So you have got a whole brand new engine, but obviously anything that you know, if there was, he just said it was the hose that had wear and tear, that would get replaced, but as a rule, all the, the distributor and all that sort of, all those things, like the electronic fuel injection and all that sort of stuff, that’s all just gets reused because there’s nothing wrong with that.

927 Mr Sholakis then said:

Any of those situations where you’re out of pocket, if it’s found, if an issue’s found to be a manufacturing issue and obviously you’ve now been given an engine so there’s definitely at no cost to you, there’s definitely been an issue with the engine. ... But we’ve replaced for you, so we’re more than happy to look at any invoice or anything you could produce to support a case with regards to compensation or the replacement of fuel costs or anything like that, but we need documentation and explanation so it’s a little bit arduous but at the end of the day, we can’t just say to Finance, just give this person money because they said they’re out of pocket, we need to, you know, dot the I’s and cross the T’s, as they say ... But everything gets reviewed, so there’s no, there’s no yes or no at this point in time but certainly when we see what you present, if there’s merit there, we’re we’re more than happy to look at anything like that.

928 Mr Sholakis then offered to have the vehicle transported to EG, and to collect the loan vehicle (which occurred).

929 Mr Sholakis also said:

Mr Sholakis: But if the car's going into limp mode, so, my, my opinion and again, maybe I shouldn't be saying this but my opinion would be that-----

EG: It's unsafe.

Mr Sholakis: -----if you're going to yeah, if you're going into limp mode and you're on a freeway and all of a sudden your car drops down to 20 kilometres an hour and everyone else is going 100, I would say that's not a good position to be in.

...

Mr Sholakis: If we believe the issue's a manufacturing issue, regardless of the warranty date, we'll get involved and we'll fix it.

930 EG deposed that this was the first time anyone from Mazda had explained to her what a partial engine replacement was. It did not change EG's decision to seek a replacement vehicle.

931 On 28 November, Mazda confirmed its offer in writing, as follows:

Thank you for contacting Mazda Australia regarding recent repairs to your Mazda2. We confirm your vehicle has been repaired at West End Mazda. In recognition of the inconvenience you have experienced, we offer to support you with any further manufacturing concerns on your vehicle until 27 November 2019. We will also cover the cost of the next two maintenance services on your Mazda2, which we understand to be the 70,000 km and 80,000 km services.

932 On 3 December, EG rejected the offer. She provided a counter-offer: 12 months new car warranty, two year warranty on new engine and parts, and four free services and out of pocket expenses compensation. EG's vehicle was delivered to her house that day.

933 EG deposed that she continued to experience the rough idle issue. She also deposed that she took the vehicle to West End on 7 December and spoke with the head mechanic about the ongoing problem. EG also contacted Mazda the same day.

934 The next day, Mazda conducted a "compensation review" in respect of EG's case. Mr Groves entered the following note in Maestro:

COMPENSATION REVIEW:

[Mazda] has already offered 70/80 km services at \$762 according to Service Price Calculator.

This would offset [sic] her requests for \$225 [sic] for private number plate, \$78 for A/L and \$453.51 for additional petrol costs for SLC Mazda3. Total is \$756.51.

We have also offered her 12 month warranty assurance until 27 November 2019 on the entire vehicle.

We can confirm that the new parts recently replaced are covered for 2 years/40,000 km from date of repairs.

935 On 11 December, Mazda responded to EG's counter-offer in writing, saying that it was prepared to agree to a 12 month new car warranty and two year warranty on new engine and parts, but not to financial compensation or four free services. The letter included the following (emphasis in original):

We have considered your counter offer and advice [sic] of the following:

- Request for 12 Month New Car Warranty: **Applied to the vehicle and valid till 27th November 2018.**
- Request for 2 Years Warranty on the new engine and all new parts recently replaced in the vehicle: **We confirm these components will be covered by factory warranty for 2 years/40,000 km from the date of the repairs.**
- Request for reimbursement of additional loan vehicle fuel costs (\$453.51), annual leave (\$78) and private number plate (\$225): **The 70,000 km and 80,000 km maintenance services already offered to you have a monetary value of \$762.00. This compensates for all of these costs.**
- Request for reimbursement of 60,000 km service cost performed at West End Mazda: **This was a scheduled maintenance service which included many items as detailed on the invoice. Mazda Australia is unable to reimburse the cost as these items were required to be performed on your vehicle.**

Consideration of representations 1 and 2

936 The ACCC alleged that Mazda's two refusals to provide EG with a replacement car, first on 19 November orally by Mr Faruquee and secondly on 28 November in writing (see [0] and [0] above) each conveyed, in the nature of an opinion, the misleading or deceptive representation that EG was not entitled to a refund or replacement vehicle at no cost to her under the consumer guarantee provisions of the ACL.

937 Again, Mazda disagreed, contending that both refusals were merely "a statement of position", not "a statement of rights".

938 I agree with the ACCC that the representations are made out. Again, there is no evidence that Mazda ever assessed EG's requests for a replacement vehicle by reference to the terms of the consumer guarantee provisions of the ACL. This is evident from Mazda's own summary of its executive panel meeting at [0] above, in which no reference is made to the ACL (or any key concepts such as a "major failure"). Instead, Mazda appears to have justified its decision on the basis that EG's vehicle had been test driven, and Mazda's view was that the vehicle "tested

all OK”, the idle was “acceptable”, and that the vehicle “look[ed] good” with “virtually no misfire count”. For the same reasons as similar representations in respect of the other consumers, I find that the representations are made out because Mazda had no reasonable basis for expressing an opinion that EG was not entitled to a refund or a replacement vehicle at no cost to her.

Remaining facts – 2019

939 EG continued to have contact with Mazda in 2019. The ACCC did not allege that any false or misleading representations arose from those further interactions. I have set them out below because they are necessary to understanding the unconscionable conduct case.

940 On 2 January 2019, EG commenced a proceeding in NCAT, seeking a full refund of \$17,350.

941 In preparation for the conciliation hearing, on 4 February, Ms Chiera summarised Mazda’s (internal) position:

Our position:

What is the customers [sic] actual loss? Vehicle depreciation over approx. 6 months (VOR for 4 months)

Customer remains in SLC Mazda 3 CP06PK allocated from 18/7/18

The customer is focused on the depreciated loss of her vehicle after being off road for 4 months however continues to drive a loan vehicle (no accountability for depreciation of loan vehicle)

Our offer:

Extended warranty on the whole vehicle we are confident in the repairs completed and we don’t have any concerns in the repairs or durability of the vehicle (2 years warranty from date of engine replacement).

942 On 4 February, Ms Chiera sent an email to West End outlining Mazda’s position on EG’s NCAT application.

943 On 5 February, Ms Chiera entered the following “Red Book Valuations” for EG’s vehicle into Maestro:

RED BOOK VALUATION

Valuation Prices

*Private Price Guide \$7,900 - \$9,400

*Trade In Price Guide \$5,800 - \$7,300

*Average Km 80,000 - 130,000

Price When New \$14,990

Price Guide (EGC)

This vehicle has approx. 70,000 kms

50,000 km difference equals approx. \$1,500 difference

944 Ms Chiera then instructed Ms Han on the executive panel summary for presentation at the conciliation. In addition to matters set out above, the summary stated:

Pickles Auction have valued the vehicle between \$5500 - \$6500. Pickles advised it the difference in price from July to now to be \$500 due to lower Kms, but it wouldn't be a massive difference.

Red Book Valuation indicates approximate \$300 difference in the cost between 10,000 km variance of this vehicle (approximate value for 80,000 km is \$9,400.00).

945 Mazda's executive panel considered EG's request for a refund on the same day. The executive panel review summary recorded that Mazda was "able to offer \$500", explaining among other things as follows:

Request: Refund

Recommendation: NO to refund request however offer \$500 being approx. depreciated value of vehicle taking into account it was VOR for 4 months

...

Vehicle concern/repair:

Customer's concern is rough idle in vehicle. Vehicle VOR since 04/07/2018 (over 4 months) as a solution to the issue could not be found. During this process, PCV valve, oil separator, spark plugs and #3 engine mount was replaced with no positive outcome. Vehicle as [sic] now received a partial engine replacement as dealer found inconsistent compression readings between cylinders. Dealer submitted PAR 377463 for partial engine replacement, which has been approved. Customer has been in loan vehicle throughout diagnosis and repair period. FTS Peter Stuart has test driven the vehicle following the partial engine replacement and reported no concerns, noting idle as acceptable. IDS Session was sent to Peter Caruso of [Mazda] Technical and he advised that it looks good, virtually no misfire count. The vehicle was presented to West End Mazda on July 2018 and repairs were finalised in November 2018. The customer remains in the SLC and refuses to collect her vehicle.

Customer position:

Customer is not willing to pick up the vehicle after repair as it has been VOR for 4 months.

Customer has lost faith on the durability of the vehicle and possible loss of resale value

On the 16th November 2018, [Mazda] offered customer extended warranty. This was not accepted.

Customer is requesting \$17,350.00 (full refund)

Previous Executive Panel Review 16/11/2018: Agreed unable to offer replacement

vehicle. Offer extended warranty. Customer lodged NCAT Application.

Our position:

What is the customers [sic] actual loss? Vehicle depreciation over approx. 6 months (VOR for 4 months/refusal to collect vehicle for 3 months)

Customer remains in SLC Mazda 3 CP06PK allocated from 18/7/18. The Customer is focused on the depreciated loss of her vehicle however continues to use the SLC 7 months (vehicle has been ready since November)

Extended warranty on the whole vehicle - we are confident in the repairs completed and we don't have any concerns in the repairs or durability of the vehicle (2 years warranty from date of engine replacement).

Pickles Auction have valued the vehicle between \$5500 - \$6500. Pickles advised it the difference in price from July to now may be \$500 due to lower Kms, but it wouldn't be a massive difference.

Red Book Valuation indicates approximate \$300 difference in the cost between 10,000 km variance of this vehicle (approximate value for 80,000 km is \$9,400.00)

[X] ACL considerations taken into account.

OUTCOME : Speak to Michael R re repossession of vehicle. Do we need to put this in writing. Agreed unable to provide full refund. Able to offer \$500 to resolve, taking into account diagnosis/repair took 4 months.

946 A NCAT conciliation hearing took place on 8 February, without resolution.

947 The NCAT hearing took place on 22 May. The agreement was documented in an NCAT order, which included a payment to EG of \$303.

948 EG deposed that she agreed to those orders because she was "fed up". She deposed: "I felt like my life was revolving around file notes, NCAT hearings and phone calls with Mazda Australia and West End Mazda. I also thought by this time that there was no chance I would get a new vehicle". As she said in the course of her cross-examination:

But by the time the second NCAT hearing came around I had had enough of it all, to be fair. I had had enough of Mazda, I was disappointed that the vehicle couldn't be fixed, the idle was still rough, they - Mazda Australia actually said to the NCAT member that they were a bit concerned that if they couldn't fix the rough idle that I would bring them back, straight back to NCAT. I just told them to do whatever they had to do with it to fix it because, seriously, I wasn't keeping that car for any longer than I had to. I had had enough with it at that point, I was going to get rid - I wasn't - I had lost all faith in Mazda, didn't want another Mazda.

...

So you were content to run it all the way to a final hearing to see what you could get. Is that right? Once you start the hearings and - it's, yeah. Can you re-question that, please? Because that sounds like you're making an insinuation against me and I'm not - I don't think, that is not the reason. The reason I didn't continue it is because I didn't have the money to have legal support and emotionally, after going through something

like that for so many months and living your life around it, you become emotionally drained and you just, yeah. Let's just let it go. Let's, you know, kiss by-gones by-gones.

949 On 30 July, EG traded in the vehicle, for \$7,500, for a Hyundai i30.

Unconscionable conduct – EG

950 The ACCC alleged that Mazda engaged in unconscionable conduct in its dealings with EG in respect of her request for a replacement vehicle under the ACL. It pointed to the following considerations.

951 The ACCC submitted that “EG had a clear and cogent request for a replacement car or refund under the ACL. She had experienced faults which Mazda were unable to fix for a period of at least 4 months. This led to the engine replacement, being a major failure in Mazda’s training guidelines”. It submitted that Mazda:

- (1) summarily rejected EG’s requests without consideration on the merits;
- (2) sought to dissuade EG from continuing with her requests, including by making offers for limited compensation which implied that she was not entitled to a refund or replacement at no cost;
- (3) did not escalate EG’s requests in accordance with Mazda’s processes;
- (4) never gave any proper or genuine consideration to whether EG had a right to a refund or replacement vehicle under the ACL;
- (5) obfuscated EG’s requests, including by responding to complaints about symptoms relating to limp mode with the claim that it was just a “rough idle”; and
- (6) did not take EG’s safety concerns seriously, including in circumstances where it knew that her vehicle had gone into limp mode “numerous times before [it] made serious attempts to repair the vehicle”.

952 The ACCC also alleged that Mazda’s conduct involved “unfair pressure tactics”, and that it “wore EG down to accept an offer of \$303, an extended warranty and some free services instead of a refund or replacement vehicle ... after she had sought to pursue her rights at NCAT”. It also pointed to the fact that EG could not afford a lawyer and “decided to take a pragmatic approach in resolving the matter”.

953 The ACCC also submitted that “EG’s circumstances bear comparison with RC’s circumstances. Both drove Mazda2 Neo vehicles. Both had engine replacements. The

arbitrary nature of Mazda’s conduct is demonstrated by the differing outcomes: \$303 for EG; \$13,000 for RC”.

954 It also submitted that:

The poor consumer outcome reflected the bargaining position between the parties. Mazda is a very large and well-resourced organisation by comparison to ... EG. Mazda had the technical expertise and legal resources she lacked. There was information asymmetry between the parties. Mazda did not share its information with ... EG. [EG] had outlaid significant amounts of money in purchasing the car. She relied on Mazda to address the serious and recurring faults she had experienced with their car. However, during the period the car was off the road for 4 months, she was not provided with a briefing about the precise nature of the issues and Mazda’s attempts to fix. Instead, she was met with limited information and continuing delay. Rhetorically, is it any wonder she lost faith in the durability of the [v]ehicle in these circumstances? EG was required to trust Mazda at its word when they told her that the car had been fixed, and that she had to take it back. [Her] apprehension in these circumstances was not acknowledged by Mazda at all.

955 I do not accept that the evidence showed that Mazda did not take EG’s safety concerns seriously. The rest of the ACCC’s propositions concerning EG may be accepted – but, again, I do not regard Mazda’s conduct as rising to the level of the unconscionable.

956 The ACCC is correct to say that EG ended up with a “poor consumer outcome”. And I have no doubt that EG was justified in feeling worn down and worn out by being given “the run around”. Again, however, it seems to me that the outcome and Mazda’s conduct generally was appalling customer service, not conduct that can be characterised as unconscionable.

DISPOSITION

957 I will hear the parties as to orders.

I certify that the preceding nine hundred and fifty-seven (957) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O’Callaghan.

Associate:

Dated: 30 November 2021