Civil and Administrative Tribunal
New South Wales

Case Name:	Avci v Inchurch Automotive Pty Ltd t/a Parramatta Motor Group
Medium Neutral Citation:	[2019] NSWCAT
Hearing Date(s):	25 March 2019
Date of Orders:	3 May 2019
Date of Decision:	3 May 2019
Jurisdiction:	Consumer and Commercial Division
Before:	P French, General Member
Decision:	1. Inchurch Automotive Group Pty Ltd t/as Parramatta Motor Group must immediately accept Melisa Avci's return to it of Jeep Compass Limited Edition MY 2018 Registration No. DVY60L. 2. Inchurch Automotive Group Pty Ltd t/as Parramatta Motor Group must pay St George Bank (BSB: 333-291) the sum of $46,234.54 on 3 June 2019 on account of loan no. 836336388 to Melisa Avci. 3. Inchurch Automotive Group Pty Ltd t/as Parramatta Motor Group must pay Melisa Avci the sum of $10,115.05 on or before 3 June 2019. 4. FCA Australia Pty Ltd must pay Inchurch Automotive Group Pty Ltd t/as Parramatta Motor Group the sum of $51,563.86 on or before 3 June 2019. 5. Upon Inchurch Automotive Group Pty Ltd t/as Parramatta Motor Group's performance of Orders 2 and 3 Melisa Avci must do all things necessary to transfer unencumbered title in Jeep Compass Limited Edition MY 2018 Registration No. DVY60L to Inchurch Automotive Group Pty Ltd t/as Parramatta Motor Group within 7 days. 6. Any application for costs is to be filed with the

Registrar and served on the other parties within 14 days of the date of these orders.

7. Any reply to any application for costs is to be filed with the Registrar and served on the other parties within 28 days of these orders.

8. Any costs application and reply is to be limited to 5 pages.

9. The applicant and respondent to any costs application must indicate if they are content for the Tribunal to dispense with a hearing of the application pursuant to section 50(1)(c) of the Civil and Administrative Tribunal Act 2013 and deal with the application on the papers, or if they seek a hearing of the application. If a hearing of the application is sought, submissions must set out the grounds upon which such a hearing is sought.

Catchwords:	MOTOR VEHICLES – failure to comply with the guarantee as to acceptable quality – major failure – where motor vehicle was rejected by consumer – whether motor dealer is still entitled to elect to repair the motor vehicle to remedy the failure – whether reconstitution of the motor vehicle with a new engine is a 'repair'
Legislation Cited:	Australian Consumer Law (NSW): ss 3; 54; 259; 261, 262, 263 Civil and Administrative Tribunal Act 2013: s 36; 50; 60 Civil and Administrative Tribunal Rules 2014: r 38 Fair Trading Act 1987: ss 28; Part 6A Motor Dealers and Repairers Act 2014
Cases Cited:	AB v Western Australia (2011) 244 CLR 390 Alliance Motor Auctions Pty Ltd v Saman [2018] NSWCATAP 137 Azad t/as GT Western Autos v Schaaf [2019] NSWCATAP 99 Briginshaw v Briginshaw (1938) 60 CLR 336 Burton v Chad One Pty Ltd [2013] NSWDC 301 Hadley v Baxendale (1854) 9 Exch 341 Jones v Dunkel (1959) 101 CLR 298 Lam v Steve Jarvin Motors Pty Ltd [2016] NSWCATAP 186 Matumaini v Automobile Industries Pty Ltd [2017] NSWCATAP 93 Medtel Pty Ltd v Courtney [2003] FCAFC 51

	Miller v Minister for Pensions [1947] 2 All ER 372 Munday v Empire Auto Group Pty Ltd [2019] NSWCATAP 52 Safi v Heartland Motors Pty Ltd t/as Heartland Chrysler [2016] NSWCATAP 80 *Waters v Public Transport Corporation* (1992) 173 CLR 349
Category:	Principal judgment
Parties:	Melisa Avci (Applicant) Inchurch Automotive Pty Ltd t/as Parramatta Motor Group (First Respondent) FCA Australia Pty Ltd (Second Respondent)
Representation:	John Hitti (Service Manager) (First Respondent) Shuvhra Kaushic (Manager Customer Care) (Second Respondent) Solicitor: Mal Zraika (Applicant)
File Number(s):	MV 18/36392
Publication Restriction:	Nil

REASONS FOR DECISION

Introduction

1 This is an application by Melisa Avci (**the applicant**) for an order from the Tribunal pursuant to subsection 79N(h) of the *Fair Trading Act* 1987 (**FT Act**) that would require Inchurch Automotive Pty Ltd t/as Parramatta Motor Group (**the first respondent**) to accept the return of a Jeep Compass Limited Edition MY 2018 (**motor vehicle**) she purchased from it on 20 April 2018 and refund her the purchase price she paid, which was $50,437.00 (with inclusions). The applicant also seeks an order pursuant to section 79N(a) of the FT Act that would require the first respondent to pay her a total of $6,622.02 in compensation for consequential losses she claims to have suffered as a result of her purchase of the motor vehicle, being interest she has paid under a loan contract she entered into with a dealer linked credit provider for the purchase of the motor vehicle, establishment and discharge charges she has or will incur in relation to that contract, and insurance costs she has paid in relation to the motor vehicle. This application was made to the Tribunal on 21 August 2018 (**the application**).

2 For the reasons set out following the Tribunal is comfortably satisfied on the evidence before it that the first respondent failed to comply with the guarantee as to acceptable quality contained in section 54 of the Australian Consumer Law (NSW) (**ACL**) when it supplied the motor vehicle to the applicant, and that this was a major failure. It is also comfortably satisfied that the applicant notified the first and second respondents that she rejected the motor vehicle pursuant to section 259 of the ACL within the rejection period specified in

section 262 of the ACL. The applicant was and is therefore entitled to elect to return the motor vehicle to the first respondent and obtain a refund of its purchase price pursuant to section 263 of the ACL (less an allowance for the benefit she received from registration and Compulsory Third Party insurance costs which were included in the purchase price).

3 The applicant is also entitled to take action against the first respondent pursuant to section 259(4) of the ACL to recover compensation for damage and loss that was a reasonably foreseeable consequence of the first respondent's failure to comply with the guarantee as to acceptable quality. Interest and other charges incurred under a loan contract with a dealer linked credit provider, and motor vehicle insurance costs thrown away, totalling $6,163.40, are reasonably foreseeable heads of damage and loss resulting from the first respondent's contravention. The Tribunal has therefore also ordered the first respondent to pay the applicant this amount.

4 The first respondent's contravention arose, on one independent basis, as a result of a manufacturing defect in the motor vehicle's engine for which the second respondent is liable. The first and second respondent acted in concert in refusing to allow the applicant to return the motor vehicle and obtain a refund of its purchase price. It is therefore appropriate that the second respondent is ordered to indemnify the first respondent for motor vehicle's purchase price and the consequential loss that was reasonably foreseeable to it, in the total amount of $51,563.86. This order is made pursuant to section 79P of the FT Act.

Procedural history

5 The application was first listed before the Tribunal for Conciliation and Hearing in a Group List on 12 September 2018. At that stage the second respondent was not a party to the proceedings. Ms Avci attended that listing of the application in person. Mr John Hitti, who is the first respondent's Service Manager, attended the hearing on its behalf. In accordance with the Tribunal's usual practice at the first listing of an application when both parties are present the parties were provided with an opportunity to attempt to resolve the dispute cooperatively with the assistance of a Tribunal conciliator. Those efforts were not successful.

6 When the parties appeared before the Tribunal following conciliation the applicant sought leave of the Tribunal to join the second respondent as a party to the proceedings. The Tribunal granted leave for the applicant to do so, joined the second respondent as a respondent party, and adjourned the proceeding to a further Group List for conciliation and hearing where the parties would have another opportunity to conciliate the dispute with the second respondent present.

7 The application was next listed before the Tribunal in a Group List for Conciliation and Hearing on 13 December 2018. The applicant and Mr Hitti attended that listing of the application in person. Ms Caitlin McKenzie, Customer Tribunal Specialist, attended that hearing on behalf of the second respondent by telephone. The Tribunal, differently constituted, attempted to resolve the dispute by conciliation but this effort was again unsuccessful. After the conclusion of the conciliation the Member adjourned the application to a

Special Fixture hearing and issued directions to the parties for the filing and exchange of their evidence.

8 The Tribunal's file reveals that the parties initially did not comply with the Tribunal's directions for the filing and service of their evidence. In an effort to case manage the matter to hearing in accordance with the Tribunal's "guiding principle", which is the "just quick and cheap resolution of the real issues in dispute" (section 36 of the *Civil and Administrative Tribunal Act* 2013 (**NCAT Act**)) a Directions Hearing was conducted on 8 February 2019 where further directions for the filing and exchange of evidence were made.

9 On 15 March 2018 the applicant made an application to the Tribunal to be represented in the proceedings by an Australian Legal Practitioner. The Registrar referred that application to both respondents to ascertain their views. Both respondents indicated that they had no objection to such leave being granted. In view of that, on 18 March 2019, I made orders in chambers by consent granting such leave.

Evidence

10 Each party complied with the Tribunal's directions (as amended) for the filing and exchange of their evidence. Additionally, just prior to the hearing, the applicant filed and served a further bundle of evidence and sought leave to admit it into evidence. As neither respondent objected to the tender of this additional bundle, I accepted it. The applicant's bundles were marked Exhibits A1 and A2 respectively. The first respondent's bundle was marked Exhibit FR1. The second respondent's bundle was marked Exhibit SR1.

11 The applicant attended the hearing represented by her solicitor Mr Zraika. Included in the applicant's bundles of evidence were two signed statements made by Ms Avci dated 23 January 2019 and 15 March 2019. Neither respondent sought to cross-examine Ms Avci in relation to those statements. Ms Avci did not otherwise give evidence at the hearing. Also included in the applicant's evidence was an expert report prepared by Mr Gregory Organ of DGA Engineering Services, which is dated 19 January 2019. The applicant called Mr Organ as a witness. He adopted his report, gave oral evidence under oath, and was subject to cross-examination.

12 Mr Hitti attended the hearing on behalf of the first respondent. He gave oral evidence under affirmation and was subject to cross-examination. Ms Shuvhra Kaushic, who is the second respondent's Manager, Customer Care, attended on its behalf by telephone and gave oral evidence under affirmation. She was also subject to cross-examination. The parties had the opportunity to present their respective cases and to make final submissions to the Tribunal.

Material facts and contentions of the parties

13 The applicant entered into a contract with the first respondent for the supply of the motor vehicle on 10 February 2018 at a total price of $50,437.00. She paid a $500.00 deposit in cash towards the purchase price on that date and later entered into a loan contract with a dealer linked credit provider, St George Bank, which settled the balance of the purchase price, being $49,937.00, with the proceeds on the loan on 20 April 2018. Included in the motor vehicle's sale price was a registration fee (being $358.00) and an Allianz CTP Insurance premium (being $648.00). The applicant collected the motor vehicle from the

first respondent on 1 May 2018. Prior to doing so, she entered into a contract of comprehensive insurance over the motor vehicle with NRMA with an annual premium cost of $1,835.67, which she paid in full on or about 11 May 2018.

14 The applicant's loan from St George Bank in relation to the purchase of the motor vehicle is for $50,808.71 over 60 months at an interest rate of 6.5%. The total amount repayable under the loan is $62,271.69 by 260 monthly instalments of $181.19 and one final lump sum payment of $15,162.29. The total interest payable under the loan contract is $11,071.48. It is convenient to note at this point that if the loan is discharged on or immediately after 3 June 2019, the applicant will have incurred $2,583.35 in interest charges up to and on that date (being 14 months interest).

15 The terms and conditions of the loan impose a number of lender charges on the applicant, which are an "establishment fee" of $500.00 payable on the settlement of the loan, a loan "maintenance fee" of $391.50 if loan repayments are made by way of direct debit (which they are in this case) that is expressed to be payable in full even if the loan is paid out early, a security interest registration fee of $6.80, and an "origination fee" of $500 payable to the first respondent on settlement for introducing the applicant to St George Bank. It is also convenient to note at this point that under the terms of the loan contract the applicant will incur two additional fees on the early termination of the loan contract, being a "loan administration fee" of $100.00 and a "termination fee" of $705.00. In summary, apart from interest, the applicant will incur $2,203.30 in fixed lender charges in the event of the early termination of the loan contract.

16 In her statement of 15 March 2019 the applicant states that she purchased the motor vehicle for her personal use. There was no challenge to this evidence, and there is nothing in the evidence otherwise that contradicts this.

17 The first respondent is a motor dealer licensed under the provisions of the *Motor Dealers and Repairers Act* 2014. For the purpose of these proceedings it was the retailer of the motor vehicle. The second respondent is the manufacturer and importer of the motor vehicle.

18 The terms of the contract for the supply of the motor vehicle included some optional extras that the applicant elected, being added paint and leather protection and an associated warranty which is itemised on the delivery tax invoice as a "Hydro Complete Pack" at a cost of $2,268.18. The applicant complains that when she attended the first respondent's premises to collect the motor vehicle on 1 May 2018 the motor vehicle's paintwork had just been treated with the protective agent and had dust and spray residue embedded in its wet surface. She further complains that the following morning she noticed that there were scratches on the motor vehicle's paintwork on the driver's door, offside rear passenger door, and on the rear of the vehicle, and a stain on the leather of the back seat.

19 The applicant returned the motor vehicle to the first respondent on or about 2 May 2019 to have the scratched and spoiled paintwork, and leather seat, rectified. She complains that she called to collect the motor vehicle on or about 9 May 2018, seven days later, but arrived to find that some scratches and the leather stain remained. As a consequence, the motor vehicle had to be

retained by the first respondent for a further week up to on or about 15 May 2018, while further rectification work was carried out. The applicant complains that the further rectification work included the buffing of the paint work to remove the remaining scratches and surface defects. She contends that this was done without her prior knowledge or permission and had the effect of voiding the paint warranty she had purchased under the Hydro Complete Pack. Neither respondent has contradicted the applicant's account of this issue.

20 In an effort to appease the applicant in relation to these complaints the first respondent offered her a number of benefits including the supply and installation of a DVD player in back seat of the motor vehicle. This was installed while the motor vehicle remained with the first respondent for rectification of the paintwork and leather between 9 and 15 May 2019. The applicant complains that when she collected the motor vehicle on 15 May 2019 the DVD player did not work. This required her to take the motor vehicle to the DVD installer to have the DVD repaired.

21 The applicant contends that after she took delivery of the motor vehicle she noticed that a "knocking" noise emanated from the brakes whenever they were applied. The applicant returned the motor vehicle to the first respondent for its first service on 23 May 2018. She contends that she reported the noisy brakes to the first respondent's mechanic at that time. However, she says that when she returned to collect the motor vehicle she was told by the respondent's mechanic that this fault could not be replicated and that no fault had been found with the brakes. The Tax Invoice generated by the first respondent in relation to this service includes the following notation in relation to this issue:

"check when driving over bumps can here (sic) a knocking noise". There is no notation as to the result of any investigation of this issue carried out by the mechanic.

22 On or about 26 June 2018 the motor vehicle broke down twice while the applicant was driving it. An engine warning light on the motor vehicle's dashboard activated at the time of the break downs. The applicant was able to restart the motor vehicle and drive it to the first respondent's workshop for inspection and repair. It is not in issue that at this time the applicant reported to the first respondent's mechanic that the motor vehicle had just broken down twice, that the oil light had activated, that the motor vehicle stalled when it was turned left or right, that there was a jolt in the transmission that occurred when shifting from drive to reverse, and that there was a "screech" emanating from the drivers' side when the brakes were applied.

23 It appears that the first respondent's mechanic inspected the motor vehicle and that it was returned to the applicant later that day or the following day (it is not clear which on the evidence). It is not in issue that the first respondent's mechanic informed the applicant that he had discovered that the engine's oil level was too low and that this was unusual because there was no oil leak evident. As a consequence, the first respondent advised the applicant that it would perform an oil consumption test. This test was performed by topping up the engine oil and calculating its rate of usage over 1000kms. The applicant was directed to drive the motor vehicle and return it after 1000kms for further inspection. The first respondent's mechanic did not diagnose any other issues with the mechanical function of the motor vehicle at that time.

24 A copy of the repair order generated by the first respondent's technician on 26 and 27 June 2018 is in evidence. It itemises the following in word processed type:

> GENERAL REPAIRS
> VEHICLE BROKEN DOWN TWICE
> Car is only 3000kms old
> When turning left or right, the oil light comes on and car stalls
> Have topped up oil customer to come back in 1000kms for further diagnosis
> ***BRAKE NOISE****
> Check screeching coming from driver side front when applying brakes

Also handwritten onto the repair order is the following:

> * Check transmission takes longer to engage gears from drive to reverse, stays in drive for a couple of seconds

No diagnostic work or outcome is reported on the repair order in relation to the brake noise and transmission issues.

25 The applicant returned the motor vehicle to the first respondent for inspection on 30 July 2018 so that its mechanics could assess the outcome of the oil consumption test. It is not in issue that the first respondent's mechanics concluded following their inspection that the motor vehicle's oil consumption was seriously abnormal and that this indicated a major engine malfunction that would require the engine to be replaced. On that date the motor vehicle's odometer reading was 4,347kms.

26 The applicant contends that in response to the communication of this information to her she instructed the first respondent's mechanic that she intended to collect the motor vehicle and that it was not to be repaired. It appears that she wanted to consider her position. However, the first respondent refused to permit the applicant to collect the motor vehicle, stating

that it was unsafe to drive and driving would cause further damage to the engine. The applicant contends that the first respondent did however undertake not to repair the motor vehicle unless it received a further instruction from her to do so. The applicant has not identified in her evidence with whom she spoke at that time. However, her account of this conversation does not appear to be in dispute.

27 It appears that the applicant attended the first respondent's workshop later on 30 July 2018 in the company of her husband. She met with Mr Mitchell Merry, who identified himself to her as one of the first respondent's managers. In her statements, the applicant says that she told Mr Perry that she had been experiencing issues with the motor vehicle since its purchase and wanted to return it and obtain a refund of the purchase price. In her statement of 15 March 2019, she recounts this conversation as follows:

> Me: Mitchell since I purchased this car, I have had nothing but problems! When I first received it the car had scratches on the body and a stain on the rear seat. It has broken down twice, and this did not get rectified as promised, and the DVD player fitted as part of the compensation provided to me for these issues does not work. When I brought the car in for its first service, I told your staff that there is a noise coming from the brakes and they told me they could not find a fault. Since then the car had transmission problems and later broke down twice with the engine light flashing. When I brought the car back I again told them of the brake noise and transmission problems I was having, and your staff told me that they could not find any issues with these items, but the car needed the engine replaced as it had a major fault. I no longer want this car, I want a full refund.
>
> Mitchell: We can't give you a refund, you will need to discuss that with FCA.
>
> Me: Well the car has major problems, I want a full refund and I will not take the car back.

28 In her statement dated 23 January 2019 the applicant contends that she then asked Mr Merry to replace the motor vehicle or allow it to be traded in for a new motor vehicle. She states that Mr Merry refused both requests.

29 When asked by the Tribunal if he accepted the applicant's account of her conversation with Mr Merry on 30 July 2018, Mr Hitti stated that he did not know if this conversation had occurred or not and that the applicant's account of it was "only hearsay". However, the first respondent has not submitted into evidence any statement made by Mr Merry, or called him as a witness, to contradict the applicant's account.

30 It appears that on or about 30 July 2018 the applicant also contacted the second respondent's "Customer Care" service to complain about the motor vehicle and request its return and a refund of its purchase price. She received an email reply from an unidentified agent using a generic "customer care" address on 1 August 2018. That email states as follows:

> Hi Mrs Avci
> I have attempted to reach you on the phone number provided however I have been unsuccessful.
> I have spoken with the Service Manager at the Parramatta Dealership, they are seeking advice from our Technical Team in Head Office to assist with diagnosing the issues with your vehicle.
> At this stage we are unable to offer a buy back option, before a buy back can be considered there needs to be a major fault with the vehicle which makes it beyond repair.
> FCA also acknowledges that should you be not satisfied with the resolution, you may consider pursuing this matter further through external avenues of recourse such as relevant Fair Trading/Consumer Affairs bodies in your state, the Australian Competition and Consumer Commission (ACCC) and/or seeking legal advice.
> If you have any further questions please don't hesitate to contact our Customer Care Team on 1300 133 079, Monday to Friday between 8:00am to 6:00pm (AEST).

31 The applicant then instituted these proceedings on 21 August 2018.

32 On or about 2 August 2018 the first respondent decided to "repair" the motor vehicle by replacing its engine. It ordered a new engine on that date, which was despatched to it from Melbourne on 3 August 2019 arriving at the first respondent's workshop on 9 August 2018. The work to replace the engine was completed on or about 7 September 2018. Both respondents submit that the motor vehicle was repaired within a reasonable time, being within this period of 40 days. On 2 August 2018 the first respondent generated a Service Tax Invoice in relation to the work to be carried out on the motor vehicle. It itemises two jobs as follows:

> Job # 1 88SHZZGENERAL
> GENERAL REPAIRS
> VEHICLE HAS BROKEN DOWN TWICE
> Car is only 3000kms old
> When turning left or right, the oil light comes on and car stalls.
> Have topped up oil customer to come back in 1000kms for further diagnosis.
> *Customer came back on 30/7/2018*
> Checked and found vehicle had low oil, topped up oil to full mark.
> Car was given back to customer & told to come back in 1000kms for oil usage check
> Vehicle came back after 1000kms running rough, checked oil level found it to be low (half a centimetre under add mark) car is running rough due to low oil level affecting multiair system.
> Checked pvc hose & vent hose off rocker cover, both clean & have no oil, removed spark plugs & checked cylinders have approx. 135-145 psi compression. Spark plugs 1, 2 & 3 are clean, 4 is saturated with oil, used borespcope and took photos.
> Opened techcase no.4970221 have received instructions to replace engine with approval to order parts.
> Offered loan vehicle to customer which was declined, have advised customer that driving the vehicle will cause damage
> Job # 2 02CHZZZZZZ05 BRAKE NOISE
> Check screech coming from driver side front when applying brakes
> Advised not to touch the vehicle any further.

33 It does not appear to be in issue that the applicant did not instruct the first respondent to carry out this work, or that she did not consent to it. In her statement dated 23 January 2019, she states that the first time she learned that this work had been done was in conciliation at the listing of this application

before Tribunal on 13 December 2018. Neither respondent appears to dispute that this was the case. At that hearing, and subsequent to it, the first respondent demanded that the applicant collect the motor vehicle from it. The applicant has refused to do so, persisting with her demand to return the motor vehicle and be refunded its purchase price.

34 When she attended the first respondent's workshop on 30 July 2018 the applicant was provided with a courtesy vehicle (despite what is stated on the Service Tax Invoice dated 2 August 2018). On 13 December 2018 the first respondent requested the return of the motor vehicle. The applicant refused to do so but in response to escalating demands from the first respondent did so on or about 7 January 2019. She has been without a motor vehicle since that time. Both respondents submit that because the applicant was provided with a courtesy vehicle for the period that the motor vehicle was being repaired (and beyond it) she has suffered no compensable loss or inconvenience.

35 On 23 August 2018 Product Safety Australia, which is a division of the Australian Government's Department of Infrastructure, Regional Development and Cities, issued a product recall in relation to a sub-set of FCA Australia Pty Ltd (M6) Jeep Compass motor vehicles. Attached to the recall notice is a list of motor vehicles, identified by their VIN, which are the subject of the recall. The VIN of the motor vehicle that is the subject of these proceedings is included on this list. The defect that is the subject of the recall is a fault in the Power Control Module software that "may affect cruise control, potentially causing the vehicle speed to lock or unexpected vehicle acceleration". The "hazard" identified in the recall as being associated with this defect is stated as follows:

"if the driver does not shift to neutral or apply the brakes to stop the vehicle this may pose an accident risk". The applicant complains that neither the first nor second respondent notified her of this product recall.

36 As noted above, the applicant has submitted into evidence an expert report prepared by Mr Organ, dated 19 January 2019. This report is of limited assistance. It is little more than a recitation of the applicant's complaints interspersed with commentary and speculation that is not directly related to the issues for determination. As I have also noted, Mr Organ gave oral evidence and was subject to cross-examination. Mr Organ's oral evidence was equally unimpressive. He again simply reiterated the applicant's complaints, and offered generalised opinions and speculation not directly related to the quality of the specific motor vehicle that is the subject of these proceedings. These difficulties with Mr Organ's evidence can be illustrated by the following excerpts from his report:

> SUMMARY
> NOTE: THIS SUMMARY IS SYNOPSIS OF THE WARRANTY PROBLEMS WITH THE VEHICLE
>
> S-01 This report was commissioned by Miss Melissa Avci, due to the ongoing and non-rectified warranty problems associated with the Jeep Compass motor vehicle.
> S-02 The FCA Dealership have not rectified the warranty complaints regarding the service and product related problems.
> S-03 During the time from the purchase and until the present date, numerous warranties associated problems have been reported.
> S-04 Unfortunately, the only warranty problem that has been rectified by the dealership is to replace the complete engine (Fan to Flywheel).
> S-05 Miss Avci held FCA responsible for the Major problems with the engine, and FCA replaced the engine.
> S-06 FCA found a few engines had similar problems and the engine was replaced under the O.E.M Warranty.
> S-07 The dealership technicians found a problem with the cylinder bore damaged from piston rings. (FCA case number 4970221 – refer invoice CHCJ1262484).

S-08 Basically, the (sic) it appears that the problem was pre-sale and related to a production problem.
S-09 Miss Avci has reported several problems with this vehicle and has found the dealership after sales warranty work, not satisfactory and although the dealership has reported the warranty problems to the O.E.M. (sic).
S-10 The problems reported area (sic):
(a) Transmission slow shifting
(b) Electrical problems
(c) Excessive brake wear on pads ad disc
S-11 Although the dealership has carried out some warranty work, these problems are ongoing.
S-11 (sic) It is common knowledge that the A.C.C.C. has warned all O.E.M's and dealerships that their pre-sale and post-sale service work is not to an acceptable standard and vast improvements must put into action.
S-12 Miss Avci, has not confidence with the vehicle nor with the O.E.M and the dealership.
S-13 The Jeep Compass was delivered to Ms Avci on the 24th of April 2018.
S-14 The vehicle has a reading of approximately 4,500kms and at 3,000kms it had broken down twice.
S-15 The problem was the oil light come on (sic) then the vehicle was turning and caused engine to stall.
S-16 Ms Avci found the ongoing problems not acceptable and very frustrating for a new vehicle and made her feelings known to the Dealership sales team in August 2018 and now is looking for a buy back from FCA,
S-17 A new engine has been fitted to the vehicle and will only be completed, prior to Australia Day 2019.
S-18 At the time of my inspection, the vehicle was on a hoist and readied for my inspection
S-19 Both the Dealership salesperson and technician advised that the vehicle had been tested by both staff and found to be working according to specifications.
S-20 The problem with the slow transmission shifting is a frequent problem and may be rectified with a Jeep upgrade
S-21 The braking system is another matter, there is wear and tear on the brake disc and rust from the long time rectification of the engine.
s-22 The electrical problems are an ongoing problem with this model and is the cause of at least 30% of all reported warranty problems.

…
SECTION 3 – TECHNICAL
3-01 In this case, the engine has been replaced with a later model build date.
3-02 The problem with the original engine, was most likely to a be a (sic problem with the production process.
3-03 The dealership technician stated, that there is straightforward evidence that there is a section in the bore that has been damaged by a damaged piston and/or piston rings and the most probable cause/reason was due to a problem in production.

3-04 The engine warranty from FCA would start again, and that this engine is used in various makes and models (sic).
3-05 According to figures from Automotive Consumer Publications, failures related to engine systems failures are approximately 12%.
3-06 FCA would have a program of testing for the replacement engine after a set period of operation.
3-07 I would assume that it would be based on the opinion of a technician, but it should be based on the OEM Data Scan tool results and other specific tests such as oil usage over set periods and kilometres.
3-08 The electrical and electronic problems, could develop into major problems and would require constant monitoring.
3-09 The braking system can be tested under such standards as the R.M.S use for registration and other tests using wheel speed sensors and the ARB systems
3-10 This type of testing can be done independently by Automotive Engineers, using the Sydney Motor Sports Park top track and using the same type system of computer read outs used by the Motorsports.
3-11 The vehicle is not “RACED” as some people think but are programmed using the OEM specifications and carefully controlled.
3-12 The other system would be the owner and the dealership working together to achieve a resolution that could be accepted by both parties.
…
CONCLUSION
C-01 Unfortunately, this type of problem exists throughout the Automotive Sales and Repair Industry
C-02 The consumer firstly relies the salesperson (sic), to supply the correct advice and information about the vehicle they are considering purchasing.
C-03 The Consumer secondly relies on the Dealership service to correctly service the vehicle according the O.E.M (sic) guidelines and industry standards.
C-04 From 2014, a major change in Australian Consumer Law was put into practice.
C-05 Unfortunately, across the industry car dealers have taken a long time accept (sic) the concept and has only just begun to work with the Australian Consumer Law.
C-06 I have been involved in a system, which members of the Institute of Automotive and Mechanical Engineers were given training programs to assist with the operational requirements of the ACL
C-07 NSW Fair Trading has extensive multimedia programs to assist both vehicle sales and repair sections of the Automotive Light & Heavy vehicle industry, understanding the new laws and putting them into practice.
C-08 In this case, the dealership has not been able to communicate with Ms Avic (sic) n the basics of the reported warranty claims.
C-09 Miss Avic (sic), has tried many times to work with the dealership to have the warranty rectification work completed in a timely and acceptable manner.
C-10 Although, there are many aspects that can cause delays the time taken to rectify was too long.
C-14 (sic) Miss Avic (sic), has no confidence that the dealership could carry out service and repair work and just wants to get a refund, under the ACL.

> C-15 It is my expert opinion that the dealership has not carried the service and warranty work to avoid any inconvenience and delays to Miss Avic (sic).
> C-20 (sic) The costs to carry out an operational condition report on the wiring and braking system components around $2,300.

37 I note specifically that Mr Organ comments repeatedly about a defect in the motor vehicle's transmission system. It appears that the only basis for his opinions are Ms Avci's instructions to him about the functioning of the transmission. He did not carry out any direct inspection of the functioning of the transmission to establish the existence of a defect. I also note that Mr Organ comments repeatedly about defects with the brakes. It is not at all clear how Mr Organ has arrived at the opinion that the brakes are defective. It is clear that he inspected the motor vehicle while it was on a hoist at the first respondent's workshop. It may be that he directly observed the wear at that time. He appeared to confirm this in his oral evidence. However, it is also clear from this report (paragraphs 3-09 - 3-12 and C-20 for example) that Mr Organ considers further diagnostic work is necessary to determine if the brake system is defective. Mr Organ also repeatedly refers in his report to the motor vehicle having "electrical problems". It is not at all clear to me what these defects are or how they have been identified by Mr Organ.

Jurisdiction

38 I am satisfied that the Tribunal has jurisdiction to deal with this application as a consumer claim under Part 6A of the FT Act (sections 79I and 79J) in that it seeks an order that would require the first respondent to pay a specified amount of money and an order that would require the first respondent to refund the purchase price of the motor vehicle and require the applicant to return the motor vehicle to the first respondent: subsections 79E(1)(a) and (h). The

applicant is a consumer on the basis that she is a natural person: section 79D. Neither respondent has set out to prove the applicant is not a consumer: section 79H. The first respondent is a supplier of goods on the basis that it supplied the goods (being the motor vehicle) at issue in the dispute in the course of carrying on a business: sections 79D and 79G. The second respondent is not the direct supplier of the motor vehicle but it is nevertheless an indirect supplier of the motor vehicle and is potentially liable to the applicant on that basis by operation of subsection 79E(2). The motor vehicle was supplied in NSW: section 79K(1)(a). The application has been made to the Tribunal within the three-year limitation period specified by section 79L. The claim falls within the new motor vehicle exception to the prescribed $40,000.00 monetary limit on the Tribunal's order making power: subsection 79S(6).

Applicable law

39 The Australian Consumer Law NSW (**ACL**) is part of the law of NSW, and may be applied in the determination of a consumer claim under Part 6A of the FT Act: section 28 of the FT Act. It contains in Chapter 3 a number of guarantees by suppliers of goods and services that are implied into consumer transactions. These include in relation to the supply of goods, a guarantee as to acceptable quality. The Tribunal's jurisdiction under the ACL is not entirely equivalent to its jurisdiction under Part 6A of the FT Act. However, there is no material difference in jurisdiction for the purposes of these proceedings. In this respect I note that there is no issue in the dispute that the motor vehicle is of a kind ordinarily acquired for personal use (section 3(1)(b) of the ACL).

40 Both the FT Act and the ACL are examples of beneficial legislation. Their purpose is the protection of consumers in consumer transactions: *Burton v Chad One Pty Ltd* [2013] NSWDC 301 at [34]. The terms of this legislation are therefore to be given a purposive, fair, large and liberal interpretation that is beneficial to the consumer, and exemptions, exceptions and limitations are to be narrowly construed in favour of the consumer: cf *AB v Western Australia* (2011) 244 CLR 390 at [24]; *Waters v Public Transport Corporation* (1992) 173 CLR 349.

41 The guarantee as to acceptable quality in the supply of goods is found in section 54 of the ACL. If a person supplies goods in trade and commerce (and not by auction) there is a guarantee as to acceptable quality: sub-section 54(1). Goods are of acceptable quality if they are as fit for all the purposes for which goods of that kind are commonly supplied, they are acceptable in appearance and finish, and are free from defects, safe and durable: subsection 54(2)(a) to (e). The test for these qualities is an objective one. It is what 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 nature of the goods, the price paid for them, any statements made about the goods in advertising materials, any representations made about the goods by the supplier or manufacturer of the goods, and any other relevant circumstances relating to the supply of the goods: subsection 54(3).

42 Subsections 54(4) to (7) set out several bases upon which a supplier will not be liable for the supply of goods that are not of acceptable quality. None of these exceptions are applicable in this case.

43 In *Burton v Chad One Pty Ltd* [2013] NSWDC 301 at [38] to [42] Olsson DCJ sets out a useful summary of the approach and the principles to be applied in the construction of section 54:

> 38 The decision of the Auckland Motor Vehicle Disputes Tribunal in *Witton v Taupo Motor Company Limited* 29 November 2010 contains a helpful analysis of the equivalent New Zealand provision of s.54:
> "The guarantee of acceptable quality contained in s.54 is in three parts. A set of quality elements contained in s.54(2)(a) to (e), a reasonable consumer test which applies a consumer's objective evaluation of those quality elements, and a set of factors in s.54(3)(a) to (e) which are to be taken into account by the reasonable [consumer]."
>
> 39 The New Zealand High Court in *Contact Energy Ltd v Jones* [2009] 2 NZLR 830 at [86] and following, said:
> "The quality standard is set by reference to the expectations of a reasonable consumer "fully acquainted with the state and condition of the goods, including any hidden defects." The phrase derives from s 16(b) of the Sale of Goods Act 1908, which established an exception to the warranty of merchantable quality of goods bought by description from sellers dealing in goods of that description. The warranty does not apply where the buyer had examined the goods, as regards defects which such examination ought to have revealed."
>
> 40 The court referred to *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387 and continued at [88]:
> "...s 7(1)(a) of the Consumer Guarantees Act [*the equivalent of s.54 of the ACL]* requires that quality be assessed by reference not only to defects and price but also fitness for purpose. Fitness for purpose is assessed by reference to all purposes for which the goods are commonly supplied, so it does not suffice if the goods are suitable for any one or more of their common purposes (compare *Hardwick Game Farm v Suffolk Agricultural Producers Association* [1969] 2 AC 31). But it is not an absolute requirement, in that the Act does not positively require that the goods be fit for all common purposes."
>
> 41 At [94] the court said:
> "The hypothetical reasonable consumer is taken to be fully acquainted with the "state and condition" of the goods, including any hidden defects. Less obviously, he or she must also be taken to know the nature of the goods, all relevant circumstances of supply and any representations made about the goods by the manufacturer or supplier, so far as relevant. That is so because it is the hypothetical consumer who determines by reference to those considerations whether the goods are acceptable. The test is objective, but it is applied to the particular goods and circumstances.
> Acceptable quality is a composite and context-specific attribute. I adopt the observations of Ormrod LJ, speaking of

> merchantable quality, in *Cehave NV v Bremer Handelsgesellschaft mbH* at page 80:
> 'It is a composite quality comprising elements of description, purpose, condition and price. The relative significance of each of these elements will vary from case to case according to the nature of the goods in question and the characteristics of the market which exists for them. This may explain why the formulations of the test of merchantable quality vary so much from case to case.'"
>
> 42 Applying that to the present situation, it is apparent that such authority as there is on the NZ equivalent provision of s.54(3) makes it clear that all of the matters in that sub-section are to be considered when determining whether or not the goods were of acceptable quality. The use of the conjunctive "and" within the section supports this interpretation.

44 The temporal focus of section 54 is the time the goods are supplied, informed by what is known of their subsequent condition and by what it was reasonable to expect from the type of goods in issue: see generally, *Medtel Pty Ltd v Courtney* [2003] FCAFC 51 per Moore J at [40], Branson J at [70], and Jacobson J agreeing with Branson J at [81]. In this respect, it falls to the applicant to prove on the balance of probabilities that the motor vehicle was not of acceptable quality at the time of supply having regard to what it was reasonable to expect in terms of its future function at that time. To the extent that the applicant contends that this was because the motor vehicle was not free from defects (subsection 54(2)(c)) she must establish that there was an actual or latent defect in the motor vehicle at the time of supply which rendered it of unacceptable quality: *Alliance Motor Auctions Pty Ltd v Saman* [2018] NSWCATAP 137 at [14] to [23]. However, it is not necessary for the applicant to prove the precise nature of the defect: *Matumaini v Automobile Industries Pty Ltd* [2017] NSWCATAP 93 at [73]; *Alliance Motor Auctions Pty Ltd v Saman* [2018] NSWCATAP 137 at [23]; *Munday v Empire Auto Group Pty Ltd* [2019] NSWCATAP 52 at [9].

45 Section 259 of the ACL sets out the remedies that are available to a consumer where a supplier of goods has failed to comply with the guarantee as to acceptable quality. Relevantly to the circumstances of this case, if the failure to comply with the guarantee can be remedied and is not a major failure, the consumer may require the supplier to remedy the failure within a reasonable time: s 259(2)(a). 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 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 subject to section 262, notify the supplier that the consumer rejects the goods and of the ground or grounds for the rejection: s 259(2)(b). If the failure to comply is a major failure, the consumer may, subject to section 262 of the ACL, notify the supplier that the consumer rejects the goods and of the ground or grounds for the rejection: subsection 259(3)(a). The consumer may also, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such failure: subsection 54(4).

46 Section 260 of the ACL sets out the circumstances in which a failure to comply with the guarantee as to acceptable quality will be a “major failure” Relevantly to the circumstances of this case there will be a major failure if the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure (subsection 260(a)) or 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 (subsection 260(d)) or the goods are not of acceptable quality because they are unsafe (subsection 260(e)).

47 In *Safi v Heartland Motors Pty Ltd t/as Heartland Chrysler* [2016] NSWCATAP 80 the Appeal Panel of the Tribunal set out a useful summary of the approach and principles to be applied in the construction of section 260:

> 85 Section 260 of the ACL (NSW) sets out five measures against which non-compliance is to be assessed for the purposes of determining whether there is a "major failure". As observed by the Magistrates' Court of Victoria in *Cary Boyd v Agrison Pty Ltd* [2014] VMC 23 at [50], for there to be a major failure it was not necessary for the claimant to establish each of the matters set out in s 260, establishing one is sufficient. This is clear from the drafting of the section.
>
> 86 The first measure, under s 260(a), is whether "the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure".
>
> 87 Subsection 260(a) applies to a generic "reasonable consumer" who acquires goods. It has the broadest and most general application. In contrast, s 260(d), where goods are unfit for a disclosed purpose, only applies when there have been specific negotiations about purpose between a consumer and a supplier. Similarly, s 260(b) only applies where goods have been acquired by description, sample or as a demonstration model.
>
> 88 Subsections 260(c) and 260(e), namely where goods are "substantially unfit" or where they are "unsafe", direct specific attention to the nature and extent of the failure. Whereas s 260(a) directs attention to the mind of the reasonable consumer, although the nature and extent of the failure is relevant in a contextual sense. There is an overlap between ss 260(a), 260(c), and 260(e). For instance, if it is established that goods are unfit for the purpose for which goods of the same kind are commonly supplied and that they cannot be remedied easily or in a reasonable time, it follows that a reasonable consumer, fully acquainted with this fact, would not have acquired the goods. The same can be said of goods that are found to be unsafe. However, the reverse is not true. Subsections (c) and (e) require proof of specific factual matters in relation to the nature of the failure in the goods, subsection (a) does not.
>
> 89 Subsections (a), (c) and (e) of s 260 are closely linked to the consumer guarantee of "acceptable quality" under s 54. Relevantly, s 54 requires that, among other things, goods be "fit for all purposes which goods of that kind are commonly

> used" and "safe" which is to be adjudged by the "reasonable consumer fully acquainted with the state and condition of the goods". As such, the inquiry as to whether goods comply with the guarantee of acceptable quality and any findings about this matter will be relevant to the inquiry about whether such failure is a major failure for the purposes of s 260.

48 The Appeal Panel went on to distil at [101] and [102] the following principles to be applied in determining if there is a major failure to comply with the guarantee as to acceptable quality:

> 101 1. A major failure may be constituted by one defect or a series of specific or individual defects which, when taken as a whole, constitute a major failure;
> 2. The test of whether goods "would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure" is an objective one.
> 3. A "reasonable consumer" would expect teething problems, even in a new vehicle.
> 4. The question to ask is whether the reasonable consumer, given the option of acquiring particular good or alternatively purchasing either nothing or a different model, would not have acquired the good.
> 5. Defects which result in goods failing to comply with the guarantee of acceptable quality will not invariably be a major failure and it will depend on the nature and extent of the failure; and
> 6. The cost of repair, in proportion to the purchase price, and the question of whether the defects can be remedied easily and in a timely manner are relevant considerations.
> 102 In our view, the purchase price for the goods and the nature of the defect are also relevant considerations for a "reasonable consumer".

49 Section 261 of the ACL sets out how suppliers may remedy a failure to comply with a consumer guarantee. If, under section 259(2)(a), a consumer requires a supplier of goods to remedy a failure to comply with a guarantee referred to in section 259(1)(b), the supplier may comply with the requirement, relevantly, by repairing the goods, or by replacing the goods with goods of an identical type, or by refunding any money paid by the consumer for the goods and an amount that is equal to the value of any other consideration provided by the consumer for the goods.

50 Section 262 of the ACL limits the circumstances in which a consumer is entitled to reject goods. A consumer is not entitled to notify a supplier of goods that the consumer rejects goods if, relevantly, the rejection period has ended: subsection 262(1)(a). The “rejection period” for goods is the period from the time of supply of the goods to the consumer within which it would be reasonable to expect the relevant failure to comply with a consumer guarantee to have become apparent, having regard to the type of goods, the use to which the consumer is likely to put them, the length of time for which it is reasonable for them to be used, and the amount of use to which it is reasonable for them to be put before such a failure becomes apparent: subsection 262(2).

51 Section 263 of the ACL sets out the consequences for the consumer and the supplier if the consumer rejects goods. Relevantly, the consumer must return the goods to the supplier: subsection 263(2). The supplier must in accordance with an election made by the consumer either refund and money paid by the consumer for the goods, and an amount that is equal to the value of any other consideration provided by the consumer for the goods, or, replace the rejected goods with goods of the same type, and of similar value, if such goods are reasonably available to the supplier: subsection 262(4). If the property in the rejected goods had passed to the consumer before the rejection was notified, the property in those goods revests in the supplier on the notification of the rejection: subsection 262(6).

52 The test for ‘reasonable foreseeability’ of damage and loss under the ACL is essentially the same as it is in contract. In this respect, it must have been in the

contemplation of the parties at the time the contract was made, or it must be a natural consequence of the breach: *Hadley v Baxendale* (1854) 9 Exch 341.

53 The applicant bears the onus of proving its case on the civil standard of proof, which is the balance of probabilities: *Briginshaw v Briginshaw* (1938) 60 CLR 336. This standard of proof was described by Lord Denning in *Miller v Minister for Pensions* [1947] 2 All ER 372 [at 374] as requiring the Tribunal to be satisfied that an alleged fact was "more probable than not". However, the Tribunal must "feel an actual persuasion of [the alleged fact's] occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality" … [the occurrence or existence of the fact must be established]… to the reasonable satisfaction of the Tribunal": *Briginshaw* [at 361-2].

54 Section 79U of the FT Act requires the Tribunal, when making orders under Part 6A of that Act, to be satisfied that the orders will be fair and equitable to all the parties to the claim: subsection 79U(1). However this provides no warrant for Tribunal to act otherwise than in accordance with law: *Lam v Steve Jarvin Motors Pty Ltd* [2016] NSWCATAP 186 at [134].

Consideration

55 Having regard to the applicant's cause of action, the material facts and contentions of the parties, and the applicable law, the questions the Tribunal must pose and answer in order to determine the outcome of this application are as follows:

(a) Did the first and second respondents fail to comply with the guarantee as to acceptable quality when it supplied the motor vehicle to the applicant?

(b) If so, was this a major failure?

(c) If so, did the applicant reject the motor vehicle within the rejection period?

(d) If so, what remedy is the applicant entitled to?

(e) If a major failure has been established, were the first and second respondents entitled to remedy the contravention by repairing the motor vehicle in spite of the applicant's rejection of it?

(f) If a failure to comply with the guarantee as to acceptable quality has been established, is the applicant entitled to be compensated for the consequential losses she claims to have incurred as a result of the contravention?

(g) What other orders, if any, are necessary to do justice between the parties?

Guarantee as to acceptable quality

56 I am comfortably satisfied on the evidence before me that the first and second respondents failed to comply with the guarantee as to acceptable quality when

they supplied the motor vehicle to the applicant. I make this finding on three bases.

57 First, the first respondent supplied the motor vehicle to the applicant with numerous scratches to its exterior paintwork and with defective exterior paint and interior leather protection which she had paid $2,268.18 to have applied prior to its delivery. It is not in issue that the motor vehicle had to be returned to the first respondent's workshop on two occasions immediately following its' purchase for a period totalling approximately 14 days while attempts were made to rectify these defects. It appears that the defective paint protection could ultimately only be treated by buffing the paint surface to remove visible blemishes. This treatment of the paint surface had the effect of voiding the specific warranty on the paintwork that the applicant had purchased under the Hydro Complete Pack. It does not appear that the stain on the rear seat caused by the application of the leather protection was ever rectified.

58 In these respects the motor vehicle was not supplied with an acceptable appearance and finish, it was not free from defects, and its paint surface was not left durable in that it had been degraded by buffing, and the specific warranty over its durability had been voided. I am satisfied that a reasonable consumer acquainted with this state and condition of exterior paintwork and interior leather would not regard the motor vehicle of acceptable quality having regard to the fact that the motor vehicle was brand new and had been purchased for more than $50,000.00, and that the applicant had specifically purchased a paint and leather protection treatment and warranty for an additional and substantial cost (as a component of the purchase price).

59 Second, the evidence establishes that the first and second respondents supplied the motor vehicle to the applicant with a defective engine which malfunctioned and caused the motor vehicle to break down within two months of purchase with approximately 3,000kms travelled and rendered the motor vehicle totally inoperative within 3 months, when it had travelled only 4,347kms. It is not in issue that the first and second respondents determined that the engine was incapable of repair and that the operation of the motor vehicle could only be restored by removing and replacing it with an entirely new engine. Nor is it in issue that the first and second respondent's considered this malfunction so serious that the first respondent refused to return the motor vehicle to the applicant after diagnosis on the basis that driving the motor vehicle would cause more damage and would be unsafe.

60 In these respects there can be no issue that the motor vehicle's engine was not fit for the purpose for which motor vehicle engines are commonly supplied, was not free from defects, was not safe, and it was not durable. I am satisfied that a reasonable consumer acquainted with the state of the engine, that is, that it would totally fail within three months rendering the motor vehicle inoperative, would not consider it to be of acceptable quality, particularly having regard to the fact that the motor vehicle was brand new, was purchased for more than $50,000.00, and that a purchaser of such a motor vehicle would have a reasonable expectation of several years of relatively trouble free use.

61 Third, the first and second respondents supplied the motor vehicle to the applicant with a defective Power Control Software module that may have affected its cruise control, potentially causing the vehicle speed to lock or

unexpected acceleration, which posed a risk of accident. The motor vehicle is the subject of a Product Recall by Product Safety Australia in relation to this defect. In this respect, the Power Control Software is not free from defects and it is not safe.

62 I am comfortably satisfied that a reasonable consumer acquainted with the defect in the Power Control Software, and the risk associated with this defect, would not consider it of acceptable quality, particularly given that the motor vehicle was brand new, that it was purchased at a cost of more than $50,000.00 and that a purchaser of such a vehicle would have a reasonable expectation of several years for relatively trouble free use.

63 The applicant has complained that the malfunction of the motor vehicle's DVD system also represents a failure of the first respondent to comply with the guarantee as to acceptable quality in the supply of that component. There are two difficulties with this element of the claim. First, the motor vehicle was not "supplied" with the DVD. It was provided to the applicant by the first respondent after purchase at no cost in an effort to compensate her for the inconvenience associated with the attempted rectification of the exterior paintwork and interior leather finish. I think the gratuitous provision of the DVD later cannot be assimilated to the act of supply of the motor vehicle. However, second, even if I am wrong in that conclusion, there is insufficient evidence before me as to the nature of any defect in the DVD for me to reach a conclusion as whether its supply failed to comply with the guarantee as to acceptable quality. It does not appear to be in issue that the DVD initially did not work, but it appears to have been made operative shortly afterwards. There

is no evidence as to the nature or cause of any malfunction that would enable me to conclude that this pertained to the supply, rather than to user error, for example.

64 The applicant's complaints about the motor vehicle's brakes, transmission, and the unspecified "electrical" problems to which Mr Organ refers are not made out on the evidence. It is clear that the applicant complained repeatedly about the brakes and transmission. It is not clear that these complaints were ever properly investigated by the first respondent. In this respect, as noted above, the Service Tax Invoice generated by the first respondent on 2 August 2018 states with respect to "Job # 2 check screech coming from driver side front when applying brakes": "advised not to touch vehicle any further". Nor is there any entry concerning any investigation of the applicant's complaints about the transmission.

65 However, the applicant bears the onus of proving that the first and second respondents failed to comply with the guarantee as to acceptable quality in relation to the motor vehicle's brakes, transmission and electrical componentry. Apart from her own evidence about the function of the brakes and transmission, the applicant has submitted no satisfactory technical or expert evidence that is capable of proving the substance of her complaints. For the reasons I have stated above, Mr Organ's expert report and oral evidence does not assist the applicant. Even on its most generous assessment it is only capable of proving that Mr Organ observed some wear to the brakes when he inspected the motor vehicle on a hoist at the first respondent's workshop. That bare fact, even if I were to accept it as established, is not sufficient by itself for me to conclude

there was a failure to comply with the guarantee as to acceptable quality in the supply of the brakes. More is required to establish that this wear resulted from some actual or latent defect in the brake system, rather than from ordinary wear and tear.

Was the failure to comply with the guarantee as to acceptable quality a major failure?

66 I am comfortably satisfied that the supply of the motor vehicle with defective exterior paintwork and with a defective engine both constitute a major failure to comply with the guarantee as to acceptable quality (together and independently of each other). A reasonable consumer fully acquainted with the nature and extent of these failures would not have acquired this motor vehicle. A reasonable consumer would have selected a different motor vehicle, whether or not of the same make and model, with an unblemished and durable paint surface, and with an engine that had a reasonable expectation of several years of trouble free use. Additionally, with respect to the engine, the motor vehicle was unfit for the purpose for which goods of that kind (being motor vehicles) are commonly supplied in that it started to malfunction within two months of purchase, and was inoperative within three months. The engine malfunction and failure also rendered the motor vehicle unsafe.

67 The first and second respondents' case rests on the premise that there can be no major failure because the motor vehicle was capable of "repair" within a reasonable time. Before dealing with the substance of this submission, it is important to note that even if it were to be made out on a factual basis, it is only capable of providing an answer to one of the bases on which it is contended

that there was a major failure to comply with the guarantee as to acceptable quality in this case, being section 260(c). It provides no answer to sections 260(a) and (e). That is, sections 260(a) and (e) allow that there will be a major failure if a reasonable consumer fully acquainted with the nature and extent of the failure would not have acquired the goods, or if the goods are unsafe, irrespective of whether the relevant defect can be repaired within a reasonable time.

68 However, to deal with the first and second respondents' submission on its merits with respect to section 260(c), the evidence does not establish that the motor vehicle's defective exterior paintwork was ever satisfactorily remedied. While the scratches and surface blemishes were apparently removed, this was achieved in part by buffing the surface area, degrading it, and thereby rendering the specific and extended warranty over the paintwork purchased by the applicant void.

69 I have some conceptual difficulty in accepting that the removal and replacement of the motor vehicle's entire engine was a "repair". The motor vehicle's engine was "replaced" not "repaired". The engine is the motor vehicle's primary mechanical system. It appears to me that the replacement of the engine rendered the motor vehicle fundamentally different to the motor vehicle the applicant purchased. The ordinary English meaning of the word "repair" is to "restore to good condition". In this case the engine was not repaired, the motor vehicle was reconstituted with a new engine. I am not satisfied that section 260(c) contemplates or permits such an extensive reconstitution of goods. Consistent with the beneficial purposes to the ACL, in my view the word "repair"

must be read somewhat restrictively so as not to frustrate the protective purpose of section 260(c).

70 However, even if I am wrong in this conclusion, I am not satisfied that the motor vehicle was capable of repair within a reasonable time. The time taken from the applicant's initial reporting of the engine malfunction on 26 June 2018 to the completion of the replacement of the engine (on the first and second respondent's evidence) on 7 September 2018 was 74 days or 10.6 weeks. On 7 September 2018, the applicant had only had title of the motor vehicle for 105 days, or 15 weeks. The motor vehicle had been subject to inspection, testing and 'repair' by the first respondent due to its engine malfunction for more than two-thirds of that period up to 7 September 2018. I do not consider such an extended period of 'repair' a "reasonable time" as a proportion of the time the applicant had title to the motor vehicle, or otherwise.

71 The stain to the motor vehicles interior leather, on the limited evidence before me, is not sufficiently serious by itself to constitute a major failure by the first respondent to comply with the guarantee as to acceptable quality. While it does not appear that the stain was ever rectified, the nature and extent of that blemish did not render the motor vehicle unsafe. Nor would it in my view, by itself, result in a reasonable consumer deciding not to acquire the motor vehicle. Of course, this is not to say that the applicant would not have been entitled to an alternative remedy, for example, an order that the affected leather be replaced, if the outcome of the case as a whole had been different. While I acknowledge the disappointment and frustration the applicant must have felt on seeing that the leather seat of her brand new motor vehicle had been stained

when the leather protection agent was applied, this has the character of a "teething problem", not a major failure.

72 I am also not satisfied that the supply of the motor vehicle with a defective Power Control Software module, on the facts of this case, constituted a major failure to comply with the guarantee as to acceptable quality. There is no evidence that the defective software caused any actual malfunction of the motor vehicle up to the date the applicant parted possession with it. The motor vehicle was the subject of a recall on a precautionary basis. It appears that the software is capable of replacement with an upgrade that will eliminate the defect, and that this can be done quickly and at no cost to the applicant. Again, on the evidence in this case, this defect has the character of a "teething problem", not a major failure.

Did the applicant reject the motor vehicle within the rejection period?

73 I am comfortably satisfied that the applicant notified the first and second respondents that she rejected the motor vehicle, stating the grounds upon which she rejected it, within the rejection period. I am satisfied that she did so on 30 July 2018 in respect of the first respondent, and on or about 1 August 2018 in respect of the second respondent.

74 With respect to the rejection period, I am satisfied that it had not ended because the applicant rejected less than three months after taking delivery of it. At that point in time the motor vehicle had travelled only 4,347kms. The manifestation of the major failure was therefore at a very early point in the expected life of the motor vehicle. The applicant was entitled to expect several

years of trouble free operation of the motor vehicle, particularly given that it was brand new, she had paid a purchase price exceeding $50,000.00, and had subjected it to very limited use.

75 I note that in his oral evidence Mr Hitti appeared to dispute that the applicant had notified Mr Merry on 30 July 2018 that she rejected the motor vehicle, describing her evidence to this effect as hearsay. With respect, it is not hearsay, as the applicant is recounting her own conversation with Mr Merry. The first respondent has not filed and served any statement made by Mr Merry to refute the applicant's account of their conversation. Mr Hitti did not indicate that there was any reason the first respondent could not do so. It is therefore open to the Tribunal to infer that if Mr Merry had been called as a witness his evidence would not have assisted the first respondent's case: Jones v Dunkel (1959) 101 CLR 298.

76 In any event, neither respondent sought to cross-examine the applicant in relation to her account of her conversation with Mr Merry, or otherwise. Her evidence as to the substance of this conversation is therefore not impugned. Her account is also consistent with the objective evidence. She states that Mr Merry told her she would have to 'take the issue up with FCA'. That is what she did immediately, resulting in the email from FCA's Customer Care service on 1 August 2018 also refusing to accept the return of the motor vehicle and to refund its purchase price. I am therefore satisfied that the applicant's account of her conversation with Mr Merry, in which she rejected the motor vehicle, stating her grounds for doing so, is truthful.

What remedy is the applicant entitled to?

77 The applicant has established on her evidence that the first and second respondents failed to comply with the guarantee as to acceptable quality when the motor vehicle was supplied to her, and that this was a major failure. She has also established on her evidence that she notified the first and second respondents that she rejected the motor vehicle and that she did so within the rejection period. By operation of section 263 of the ACL the applicant is therefore entitled to return the motor vehicle to the first respondent and the first respondent must accept its return. The first respondent must also refund the applicant the purchase price she paid for the motor vehicle which was $50,437.00. These orders will be made pursuant to section 79N(h) of the FT Act.

Are the first and second respondents entitled to remedy the contravention by repairing the motor vehicle in spite of the applicant's rejection of it?

78 The first and second respondents' contention that they are entitled to require the applicant to accept the 'repair' of the motor vehicle, being its reconstitution with a new engine, must be rejected. The terms of section 259(3)(a) and 263 of the ACL are very clear. If there has been a major failure to comply with the guarantee of acceptable quality, the consumer may, at the consumer's election, reject the goods. If a consumer elects to reject the goods, they must be returned to the supplier (subject to exceptions which do not apply in this case), the supplier must accept the return of the goods, and (in the circumstances of this case) the supplier must refund to the consumer the purchase price they paid for the goods. The right of a supplier to repair goods, as an alternative to accepting their return and refunding the purchase price only arises under

sections 259(2) and 261 of the ACL where the failure to comply with the guarantee as to acceptable quality is not a major failure.

Is the applicant entitled to be compensated for the consequential losses she claims to have incurred as a result of the contravention?

79 The applicant is entitled to take action against the first respondent pursuant to sub-section 259(4) of the ACL to recover compensation for any damage and loss she suffered as a result of the first and second respondents' contravention of section 54. In this case the applicant claims compensation for the interest she has paid under the loan contract which the evidence establishes will be $2,583.34 on 3 June 2018, and fixed lender charges she incurred in establishing the loan and will incur in discharging the loan, which the evidence establishes total $2,102.30. The applicant obtained finance to purchase the motor vehicle from a dealer linked credit provider to which she was referred by the first respondent. It was therefore a reasonably foreseeable to the applicant and first respondent that the first and second respondents' contravention of section 54 in the supply of the motor vehicle would result in her suffering this damage and loss. It arises naturally from the dealer linked credit arrangement under which she was able to purchase the motor vehicle.

80 The applicant also claims compensation in the amount of $1,835.62 for the annual premium cost of the NRMA comprehensive insurance policy she took out over the motor vehicle. The motor vehicle was brand new and of substantial value. It was thus reasonably foreseeable at the time the motor vehicle was supplied that the applicant would incur this cost to manage her risk in relation to the motor vehicle. In this respect I also note that such insurance

was a condition of the loan contract she had with the dealer linked credit provider, St George Bank. In both respects, the loss the applicant incurred in taking out the insurance policy was a reasonably foreseeable consequence of the first and second respondents' contravention of section 54. It arises naturally from the circumstances of the contravention.

81 The applicant had very little use of the motor vehicle before it was returned to the first respondent on 30 July 2018, and the use that she did have of it was subject to substantial inconvenience. Nevertheless the insurance policy managed her risk in relation to the motor vehicle for the 91 days between its supply to her on 1 May 2018 and her rejection of it on 30 July 2018. She thus derived some benefit from the insurance policy. I therefore assess her loss as the value of the remaining 274 days of the policy for which she received no benefit. Pro-rating the policy premium for this period, that loss is $1,377.97.

What other orders, if any, are necessary to do justice between the parties?

82 The first respondent's contravention of s 54, in so far as it concerned the motor vehicle's engine, arose as a result of a manufacturing defect for which the second respondent is ultimately liable, rather than as a result of any conduct for which the first respondent was directly responsible. The situation is different with respect to the exterior paintwork of the motor vehicle. The contravention of section 54 with respect to the paintwork was the result of the conduct of the first respondent and not that of the second respondent. Nevertheless, I have found that there was a major failure to comply with the guarantee as to acceptable quality in relation to both the defective paint work and engine failure independently of each other.

83 The first and second respondent acted in concert in refusing to provide the applicant with the remedy she sought. Both refused to accept the return of the motor vehicle and provide the applicant with a refund. I am therefore satisfied that I should order that the second respondent pay the first respondent the motor vehicle's purchase price so as to indemnify it against that component of the amount in must pay the applicant.

84 The position is different however with respect to the compensation the applicant is to be awarded for her consequential loss. I am not satisfied that it was reasonably foreseeable to the second respondent that the applicant would incur interest and fixed loan costs with a dealer linked credit provider. That loss arises directly from the contract for the sale of the motor vehicle which was between the applicant and the first respondent and which involved a first respondent linked credit provider. As the manufacturer of the goods, the second respondent was at arms-length from the sale transaction and could not foresee how the motor vehicle would be paid for. Motor vehicles are purchased under a variety of arrangements. I am therefore not satisfied that the first respondent is entitled to be indemnified by the second respondent for these elements of the compensation order I will make in favour of the applicant.

85 On the other hand, I am satisfied that the second respondent, as manufacturer of the motor vehicle, could reasonably foresee that a purchaser of the motor vehicle would comprehensively insure it to manage their risk given that it was new and of high value. The second respondent should therefore be required to indemnify the first respondent for this element of the compensation order I will make in the applicant's favour.

86 The order requiring the second respondent to indemnify the first respondent is made pursuant to section 79P of the FT Act.

87 As I have noted above the motor vehicle's purchase price included the cost of its registration, which was $358.00, and Compulsory Third Party insurance, which was $648.00. The applicant did receive 91 days benefit of registration and CTP insurance before she rejected the motor vehicle, even taking into account that her use of the motor vehicle was interrupted and inconvenient during this period. The first and second respondents are therefore entitled to an allowance that recognises the benefit the applicant received. Prorating the amounts paid for 91 days, this results in a total of $250.81. This allowance is made pursuant to section 79U of the FT Act to do justice between the parties.

Conclusion

88 For the foregoing reasons, the first respondent must accept the applicant's return of the motor vehicle and it must refund the applicant its purchase price, less an allowance of $250.81 for the registration and CTP insurance costs the applicant had the benefit of before she rejected the motor vehicle. The first respondent must also pay the applicant an additional $6,163.40 in compensation for the consequential losses she has suffered as a result of the first respondent's contravention of section 54.

89 The motor vehicle is the subject of a security interest in favour of St George Bank which loaned the applicant most of the funds required to purchase the motor vehicle. The applicant is required to transfer unencumbered title in the motor vehicle to the first respondent, and to do so the loan in relation to the

motor vehicle must be discharged so that the security interest is extinguished. The Appeal Panel of this Tribunal recently considered the appropriate orders to make in circumstances such as this and has held that the Tribunal is to order the supplier to pay out the residue of the loan to the credit provider, rather than order that the whole purchase price be directly refunded to the consumer, apart from any other orders that may be appropriate: *Azad t/a GT Western Autos v Schaaf* [2019] NSWCATAP 99 at [33] to [37].

90 At my request, the applicant has notified the Registrar that on 3 June 2018 the amount that must be paid to St George Bank to discharge the loan is $46,234.54. I will therefore order the first respondent to pay St George Bank that sum on that date. The balance of the purchase price and compensation I have found the applicant to be entitled to, which is $10,115.05, must be paid by the first respondent to the applicant directly, and I will order accordingly.

91 The second respondent must pay the first respondent the sum of $51,563.86 to indemnify it against the orders made against the first respondent due to the motor vehicle's engine failure. This excepts the compensation I have found the applicant to be entitled to because of the dealer linked finance arrangement under which she purchased the motor vehicle, which is a matter pertaining only to the applicant and first respondent.

Costs

92 At the end of the hearing, the applicant indicated an intention to make an application for costs in the event that she was successful in obtaining the orders she sought, noting that this is a case where the amount in dispute

exceeds $30,000.00 and the usual rule that each party bears its own costs of the proceeding does not apply: section 60 of the NCAT Act and Rule 38 of the *Civil and Administrative Tribunal Rules* 2014. I will therefore also make orders for the filing and exchange of submissions on costs, and any reply.

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I hereby certify that this is a true and accurate record of the reasons for decision of the New South Wales Civil and Administrative Tribunal.

Registrar