Civil and Administrative Tribunal

New South Wales

Case Name:	Safi v Heartland Motors Pty Ltd t/as Heartland Chrysler
Medium Neutral Citation:	[2016] NSWCATAP 80
Hearing Date(s):	3 December 2015
Date of Orders:	11 April 2016
Decision Date:	11 April 2016
Jurisdiction:	Appeal Panel
Before:	J Redfern, Principal Member K Rosser, Senior Member
Decision:	Appeal allowed. Decision set aside and proceedings remitted for reconsideration of the damages and loss suffered by the appellants.
Catchwords:	APPEAL – Civil and Administrative Tribunal (NSW) – consumer claim – Australian Consumer Law (NSW) – Remedies for breach of consumer guarantees – Meaning of consumer – fault in transmission – whether Major failure – weight to be given to online articles and websites – Adequacy of reasons – No evidence for findings – Damages claim where trade-in upgrade instead of refund − proceedings remitted
Legislation Cited:	Competition and Consumer Act 2010 (Cth) Trade Practices Act 1974 (Cth) Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010 (Cth) Civil and Administrative Tribunal Act 2013 (NSW) Consumer Claims Act 1998 (NSW) Fair Trading Act 1987 (NSW) Motor Dealers and Repairers Act 2013 (NSW) Consumer Guarantees Act 1993 (NZ)

Cases Cited:	ACCC v Air New Zealand Ltd (No 2) [2012] FCA 1363 ACCC v Air New Zealand Ltd (No 5) [2012] FCA 1479 Australian Rong Hua Fu Pty Ltd v Ateco Automotive [2015] VCAT 756 Bunnings Group Limited (formerly Bunnings Pty Ltd) v Laminex Group Limited [2006] FCA 682 Cary Boyd v Agrison Pty Ltd [2014] VMC 23 Collins v Urban [2014] NSWCATAP 17 Goldiwood Pty Lt v ADL (Aust) Pty Ltd [2014] QCAT 38 Khan v Kang [2014] NSWCATAP 48 Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323 Norton v Hervey Motors Ltd [1996] DCR 427 P v Child Support Registrar [2015] FCA 116 Prendergast v Western Murray Irrigation Ltd [2014] NSWCATAP 69 R v Jayant Mukundray Patel (No 6) [2013] QSC 64 Resource Pacific Pty Ltd v Wilkinson [2013] NSWCA 33 Roach v Page (No 27) [2003] NSWSC 1046 Stephens v Chevron Motor Court Ltd [1996] DCR 1 UGL Rail Pty Ltd v Wilkinson Murray Pty Ltd [2014] NSWSC 1959 Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd [1998] HCA 38; (1998) 192 CLR 603
Texts Cited:	Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010 (Cth) K Tokeley, Consumer Law in New Zealand, (2nd ed 2014, Lexis Nexis NZ Limited)
Category:	Principal judgment
Parties:	Mohammad Safi and Bridget Safi (Appellants) Heartland Motors Pty Ltd t/as Heartland Chrysler (Respondent)
Representation:	Self-representation
File Number(s):	AP 15/52765
Decision under appeal:	
Court or Tribunal:	Civil and Administrative Tribunal
Jurisdiction:	Consumer and Commercial Division

Citation:	Not applicable
Date of Decision:	17 August 2015
Before:	Z Antonios, General Member
File Number(s):	MV 15/31937

REASONS FOR DECISION

Introduction

1 The appellants, Mr Mohammad Safi and Mrs Bridget Safi, purchased a Chrysler Jeep Cherokee Trailhawk from the respondent, Heartland Motors Pty Ltd trading as Heartland Chrysler (Heartland Chrysler) on 20 January 2015. They claimed the Jeep Cherokee Trailhawk had major defects that became apparent after three months. Mr and Mrs Safi sought a refund, which they allege Heartland Chrysler wrongly refused. After further negotiations between the parties, Mr and Mrs Safi agreed to trade-in the Jeep Cherokee Trailhawk and purchase a more expensive vehicle, being a Grand Cherokee Overland, for an additional payment of $26,000.

2 Mr and Mrs Safi contend they had no choice but to accept the deal offered and they commenced proceedings against Heartland Chrysler for compensation said to be attributable to the purchase of the defective Jeep Cherokee Trailhawk. They commenced proceedings in the Consumer and Commercial Division of the Tribunal on 7 May 2015 for losses alleged to have been incurred.

3 On 17 August 2015, the Tribunal, after a contested hearing, dismissed Mr and Mrs Safi's claim. They lodged an internal appeal on 16 September 2015, contending the Tribunal made an error in failing to properly apply the relevant provisions of the Australian Consumer Law. Mr and Mrs Safi also seek leave to appeal.

4 An internal appeal may be made in respect of a decision of the Consumer and Commercial Division as of right on a question of law or with the leave of the Appeal Panel on any other ground: s 80(2)(b) of the *Civil and Administrative Tribunal Act 2013* (NSW) (the Act). Clause 12 of Schedule 4 of the Act

provides that the Appeal Panel may grant leave only if it is satisfied that the appellant may have suffered a “substantial miscarriage of justice” because the decision was not fair and equitable, against the weight of evidence or because significant new evidence had arisen, which was not reasonably available at the hearing.

5 The Appeal Panel has allowed the appeal, set aside the decision under appeal and remitted the proceedings to the Consumer and Commercial Division for rehearing according to law and taking into account the findings of the Appeal Panel.

Background to dispute

6 Mr and Mrs Safi purchased the Jeep Cherokee Trailhawk for $55,302.39. In March 2015 they experienced problems with the vehicle after its first service. It took Heartland Chrysler a few weeks to diagnose the problem but by late March 2015, Mr and Mrs Safi were told there was a problem with the transmission which would need to be completely replaced. This would only take a few weeks. Mr and Mrs Safi considered that this was a major failure for which they were entitled to reject the vehicle. By letter dated 6 April 2015 they did so. At this stage, the vehicle was at the Heartland Chrysler premises to be repaired. Mr and Mrs Safi contend they did not authorise the replacement of the transmission or any repairs at the time they rejected the Jeep Cherokee Trailhawk.

7 On 10 April 2015, Heartland Chrysler refused to provide a refund to Mr and Mrs Safi and did not offer a comparable replacement vehicle. This is not in dispute. Instead Heartland Chrysler offered to resolve Mr and Mrs Safi’s complaints by trading in the Jeep Cherokee Trailhawk for a more expensive vehicle, the purchase price of which they would discount.

8 There were negotiations back and forth between the parties and Heartland Chrysler offered Mr and Mrs Safi $38,000 as a trade-in of the Jeep Cherokee Trailhawk to upgrade to a Grand Cherokee Overland for a changeover price of $26,000. Mr and Mrs Safi contend they were unhappy with this deal and would have preferred a refund but because Heartland Chrysler refused to provide a refund, they decided to proceed with the arrangement. They entered into a

contract dated 13 April 2015 for the purchase of a Grand Cherokee Overland. The purchase price recorded in the contract was $60,535.10 together with costs and charges of $6,512, goods and services tax and a discount of $8,545. The total purchase price was $64,000.01, against which Mr and Mrs Safi were allowed $38,000 for the trade-in of the Jeep Cherokee Trailhawk. This left a balance to be paid by Mr and Mrs Safi of $26,000. They took possession of the Grand Cherokee Overland on 20 April 2015.

9 According to Mr and Mrs Safi, Heartland Chrysler subsequently advertised the Jeep Cherokee Trailhawk for $48,980.

10 Mr and Mrs Safi lodged a claim in the Consumer and Commercial Division of the Tribunal on 8 May 2015 claiming damages which were said to flow from the major failure of the Jeep Cherokee Trailhawk and the refusal of Heartland Chrysler to refund the purchase price. Mr and Mrs Safi contended that this resulted in them purchasing a more expensive motor vehicle which they did not want, and incurring damages which comprised $17,302, representing the difference between the purchase price paid for the Jeep Cherokee Trailhawk and the trade-in, $2,905 for the cost of finance, car loans, and insurance policies, $5,225 for the cost of the change of the garage door to accommodate the larger vehicle and $10,139 for the loss of time and income.

Relevant statutory framework

11 The claim made by Mr and Mrs Safi was pursuant to s 7 of the former *Consumer Claims Act 1998* (NSW) (the CCA), which was repealed effective from 22 October 2015 with the equivalent provisions now incorporated into the FTA.

12 At the relevant time, the Tribunal had jurisdiction to hear and determine any "consumer claim" brought before it (s 7(1) of the former CCA). Section 3A(1) of the CCA provided that a "consumer claim" included a claim by a consumer for the payment of a specified sum of money that arises from a supply of goods or services by a supplier to the consumer. Mr and Mrs Safi were consumers within the meaning of s 3 of the former CCA and their claim arose out of the supply of goods by Heartland Chrysler, which was a supplier. The Tribunal was empowered under s 8(1) to, amongst other things, make an order requiring a

supplier to pay the claimant a specified sum of money. In exercising this power, the Tribunal was required to "make such orders as, in its opinion, will be fair and equitable to all the parties to the claim" (s 13(1)).

13 The claim made by Mr and Mrs Safi was under the Australian Consumer Law, the text of which is set out in Sch 2 of the *Competition and Consumer Act 2010* (Cth). The Australian Consumer Law, which is a law of the Commonwealth, applies in New South Wales as part of the *Fair Trading Act 1987* (NSW) (the FTA): Part 3 of the FTA and, in particular ss 27 to 32.

14 Section 32 of the FTA provides that the Australian Consumer Law (NSW) (referred to in these Reasons for Decision as the "ACL (NSW)") applies to persons carrying on business in New South Wales, bodies corporate incorporated or registered under the law of New South Wales and persons ordinary resident in New South Wales or otherwise connected with New South Wales.

15 Section 3 of the ACL (NSW) provides the grounds on which a person is taken to have acquired goods as a "consumer". Relevantly, certain remedies in the ACL (NSW), including those relating to consumer guarantees, are only available to consumers. There was no dispute before the Tribunal at first instance or in the appeal that the Tribunal had jurisdiction to hear this claim under the ACL (NSW). For reasons appearing later, this was in fact a threshold jurisdictional issue that was not addressed before the Tribunal at first instance or raised by the parties in the appeal.

16 Subdivision 2A, Division 1 of Part 3.2 of the ACL (NSW) provides for statutory guarantees in relation to the supply of goods. Relevantly, s 54 provides:

> **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

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

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

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

17 Part 5.4 of the ACL (NSW) provides remedies for breach of the statutory guarantees.

18 Section 259(1) of the ACL (NSW) provides that a consumer may take action against a supplier if one of the guarantees that relates to the supply of goods is not complied with. If the failure to comply can be remedied and is not a major failure, the consumer may require the supplier to remedy the failure within a reasonable period (s 259(2)(a)). If the supplier refuses or fails to comply, the consumer may have the failure remedied and recover all reasonable expenses incurred by the consumer in having the failure so remedied or notify the supplier that the goods are rejected (s 259(2)(b)).

19 If the failure to comply with the guarantee cannot be remedied or is a major failure, the consumer may notify the supplier that the consumer rejects the goods or, by action against the supplier, recover compensation for any reduction in the value of the goods below the price paid (s 259(3)).

20 Section 259(4) provides:

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

21 Given the dispute between the parties about whether there was a "major failure" in compliance with the guarantee under s 54, it is convenient to set out s 260, which provides 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) the goods are unfit for a disclosed purpose that was made known to:
>
> (i) the supplier of the goods; or
>
> (ii) a person by whom any prior negotiations or arrangements in relation to the acquisition of the goods were conducted or made;
>
> and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose; or
>
> (e) the goods are not of acceptable quality because they are unsafe.

22 If a consumer requires the supplier to remedy a failure to comply with a guarantee, the supplier may repair the goods, replace the goods with goods of an identical type or by provide a refund for the goods (s 261).

23 Section 262(1) provides that a consumer may not reject the goods if the rejection period has ended, the goods are lost, destroyed or disposed of by the consumer, the goods were damaged after delivery for reasons not related to the state or condition of the goods at the time of supply or the goods have been attached to or incorporated into any other personal or real property and cannot be detached without damaging the goods. 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 comply with a guarantee

referred to in section 259(1)(b) to become apparent" having regard to the factors enumerated in s 262(2).

24 Section 263 contains provisions concerning the consequences of a consumer rejecting goods. As already noted, there are two circumstances when a consumer will be entitled to reject goods. The first is where the supplier has refused or failed to remedy the failure in a reasonable period, or at all (see s 259(2)(b)(ii)). The second is where the failure cannot be remedied or is a major failure (see s 259(3)(a)). If goods are rejected the consumer must return the goods to the supplier and the supplier must refund the money to the consumer (s 263(4)(a)) or replace the rejected goods with goods of the same type, if such goods are reasonably available (s 263(4)(b)).

25 Section 263(5) provides:

> The supplier cannot satisfy subsection (4)(a) by permitting the consumer to acquire goods from the supplier.

26 As noted in the Explanatory Memorandum at [785], this section provides that:

> If the consumer chooses a refund after rejecting goods, the supplier is specifically precluded from providing replacement goods to satisfy the requirement of a refund.

27 In addition to remedies under the ACL (NSW), there are remedies available to consumers under the *Motor Dealers and Repairers Act 2013* (NSW) (MDRA).

28 Under s 3 of the MDRA, the objects of the Act are to, amongst other things, "provide consumer protections and remedies for consumers who purchase motor vehicles form motor dealers or obtain motor vehicle repair services" (s 3(a)).

29 Division 4 contains provisions relating to Defects in motor vehicles sold by motor dealers". Section 67(1) provides that a "defective vehicle" means:

> A motor vehicle that is in such a condition, or has such a defect, that the supply of the motor vehicle would constitute a breach of a guarantee (a ***consumer guarantee***) that applies under sections 54–57 of the *Australian Consumer Law (NSW).*

30 Section 68(1) provides that a motor dealer must, at its own expense, "repair or make good" a defective vehicle (the "dealer guarantee"). Section 71(1)(a) provides that the dealer guarantee is enforceable by the owner of the motor

vehicle as if it were a term of the contract for sale. Section 77 provides that a person has who has enforced the dealer guarantee under Division 4 in respect of a dealer guarantee is not entitled to take action against a motor dealer in the ACL (NSW).

31 In this case, it is clear that Mr and Mrs Safi did not elected to enforce the dealer guarantee and pursued their remedies under the ACL (NSW).

Decision at first instance

32 As already noted, there was dispute between the parties as to whether the transmission failure was a "major failure" which entitled Mr and Mrs Safi to reject the Jeep Cherokee Trailhawk. Heartland Chrysler contended it was not, and therefore refused to refund the purchase price when Mr and Mrs Safi rejected the Jeep Cherokee Trailhawk. Mr and Mrs Safi contended that they were so entitled and Heartland Chrysler wrongly refused provide them with a refund, from which they allege the damages claimed arose.

33 In its Reasons for Decision dated 20 August 2015, the Tribunal set out the background to the dispute, the contentions of the parties and the relevant law. It was "satisfied that each of the mandatory requirements establishing jurisdiction was met". The Tribunal identified the issues as being, first, whether the Jeep Cherokee Trailhawk was of "acceptable quality" and secondly, if not, what remedy was available to Mr and Mrs Safi.

34 The Tribunal also stated as follows:

> It is not disputed that the respondent arranged for the appropriate repairs to the transmission under warranty and there was not is no cost to the applicants in doing so.
>
> It is also not in dispute that the applicants refused to take the vehicle back once the repairs were complete. Instead they first sought a full refund and when that was not forthcoming, negotiated a new sale trading in the first vehicle for a more expensive and apparently larger vehicle.

35 The Tribunal did not make a specific finding on whether there was non-compliance with the guarantee that the Jeep Cherokee Trailhawk should be of acceptable quality, although this may be inferred from the following statement in the Reasons for Decision:

> On the face of it, it might appear the vehicle was not of acceptable quality in that the purchaser of a brand-new vehicle might have a reasonable

> expectation that there would be no problems with a brand-new vehicle purchased within such a short-time frame, as seems evident here. The Tribunal does not accept as submitted by the respondent that solely because the vehicle operated without problem in the first three months indicates necessarily that tit was of acceptable quality. Under section 54 (2) the transmission problem might well have been a latent defect.

36 The reasons why the Tribunal dismissed Mr and Mrs Safi's claim were twofold.

37 Firstly, the Tribunal was not satisfied Mr and Mrs Safi were entitled to reject the Jeep Cherokee Trailhawk and thereby obtain a refund. This was explained as follows:

> Nonetheless, this does not mean the applicant was ever entitled to a refund. Consistent with the legal requirements set out above, it would still be necessary for the applicants to establish a major failure, and that the vehicle was rejected during the rejection period.
>
> In respect of whether or not the fault with the transmission or any other problem represented a major failure as defined, the applicants have not been able to provide any objective material to establish that was the case. From the available documents obtained by summons, once the faulty transmission was replaced, there did not appear to be any ongoing problems with the car. Further, the material the applicants sought to rely on from the internet is not sufficient to assist in determining any facts in relation to the vehicle they originally purchased.

38 Secondly, the Tribunal was not satisfied there was any loss for which Mr and Mrs Safi could be compensated because they freely entered into the compromise arrangement with Heartland Chrysler. The reasons of the Tribunal on this aspect were as follows:

> Additionally, by entering into the new arrangement for the second car, the Tribunal was not satisfied there was any evidence of actual loss incurred by the applicants for which the respondent was liable. There were no actual costs incurred in the first service or subsequent management of the vehicle under warranty. Any costs listed in the applicant's claim are consequential only and/or result from choices the applicants freely made (for example, changing the garage door to accommodate the second larger car purchased). The respondent is not liable to remedy any such costs.

39 The Tribunal concluded:

> It follows from the above, the Tribunal is satisfied the applicant has not in the circumstances of this case established the respondent is liable for any remedy that might arise out of sections 259-263 of the ACL (NSW).

40 The Tribunal dismissed the claim.

Grounds of appeal and reply to appeal

41 The grounds of appeal of Mr and Mrs Safi can be summarised as follows:

(1) The Jeep Cherokee Trailhawk was not of acceptable quality because of the problems with its 9-speed transmission. The Tribunal erred in failing to find that this transmission defect was a major failure under s 260 of the ACL (NSW). There was a known durability issue with the transmission and they were thereby entitled to reject the Jeep Cherokee Trailhawk;

(2) Heartland Chrysler wrongly refused to provide a refund (contrary to their obligations under the ACL (NSW), see page 20 of the transcript of the hearing provided by Mr and Mrs Safi). Conduct of this nature by Chrysler Australia and its dealers was investigated by the Australian Consumer and Competition Commission (the ACCC) and was the subject of an undertaking from Chrysler Australia in September 2015 whereby it agreed to implement a "consumer redress program". This investigation and undertaking evidenced the wrongful conduct of Heartland Chrysler;

(3) Mr and Mrs Safi did not want to enter into the exchange trade-in upgrade transaction but felt compelled to do so because Heartland Chrysler was refusing to provide a refund. They accepted the deal for "practical reasons" because they needed a vehicle for "business purposes". (The fact the vehicle was used for business was also recorded in the letter from Mr Safi to Heartland Chrysler dated 6 April 2015);

(4) Heartland Chrysler should not have asked Mr and Mrs Safi to purchase another vehicle in lieu of the refund. This was not a case where they had simply changed their mind and there was no evidence to support such a finding;

(5) On 3 May 2015, Mr and Mrs Safi discovered that the Jeep Cherokee Trailhawk was advertised by Heartland Chrysler for $48,980 and they were therefore misled about the true value of the vehicle on the trade-in;

(6) The losses claimed would not have been incurred but for the refusal of Heartland Chrysler to provide a refund;

(7) The Tribunal erred in finding that the transmission problems were fixed and that Mr and Mrs Safi sought a refund after this. They elected not to pursue rectification under the dealer's warranty (refer s 77, MDRA). The finding was not borne out by the evidence and is material to their claim; and

(8) The Tribunal failed to take these above matters into account or to make findings on these matters and therefore also failed to correctly apply the relevant provisions of the ACL (NSW).

42 Mr and Mrs Safi also sought leave to appeal on the basis that there may have been a substantial miscarriage of justice because the decision was not fair and equitable and because the findings of fact were either against the weight of evidence or there was no evidence for the findings of fact.

43 Mr and Mrs Safi sought orders that the decision be set aside and substituted with a decision that they be awarded compensation of $30,346, having abandoned the claim for $5,225 for the cost of the change of the garage door.

44 In its Reply to Appeal to the Notice of Appeal, Heartland Chrysler stated that it supported the original orders made by the Tribunal and in response to the section where the respondent is called upon to provide replies to each of the grounds identified in the Notice of Appeal, Heartland Chrysler simply stated:

> Heartland motors outlook remains the same as previous Tribunal hearing.

45 Heartland Chrysler did not provide any written submissions in opposition to the appeal or copies of evidence relied on at first instance, as required by directions made by the Appeal Panel on 8 October 2015. Mr and Mrs Safi said that Heartland Chrysler did not provide any documents for the hearing (other than documents earlier summonsed by them which they provided to the Appeal Panel). Mr Matt Aoun, the sales manager for Heartland Chrysler, attended in person and gave evidence at the hearing at first instance.

46 Heartland Chrysler initially did not attend the appeal hearing at the allocated time and the Appeal Panel significantly delayed the commencement of the hearing to facilitate their participation. The failure to attend at the appointed time was apparently due to an unexplained and less than satisfactory oversight.

Nature and scope of the appeal

47 The Appeal Panel must give effect to the *guiding principle* when exercising functions under the Act, which is to "facilitate the just, quick and cheap resolution of the real issues in the proceedings" (s 36(1)). This is reinforced by s 38(4) which provides that the Tribunal is required to act with "as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms".

48 It may be difficult for self-represented appellants to clearly express their grounds of appeal. In such circumstances and having regard to the guiding principle, it is appropriate for the Appeal Panel to review an appellant's stated grounds of appeal, the material provided, and the decision of the Tribunal at

first instance to examine whether it is possible to discern grounds that may either raise a question of law or a basis for leave to appeal (see *Khan v Kang* [2014] NSWCATAP 48 and *Prendergast v Western Murray Irrigation Ltd* [2014] NSWCATAP 69).

49 Having regard to Mr and Mrs Safi's grounds of appeal and submissions, the Appeal Panel identified the following questions of law:

(1) Whether the Tribunal erred in making the finding that the transmission failure was not a "major failure" which was either not supported by the evidence or was based on a misunderstanding of the ACL (NSW) or, in the alternative, was not adequately explained in its reasons to disclose the reasoning process that led to the conclusion (Ground 1);

(2) Whether the Tribunal erred in making a finding that Mr and Mrs Safi had changed their mind about the Jeep Cherokee Trailhawk or that they had freely made the choice to enter into the exchange trade-in upgrade when there was no evidence to support such a finding (Ground 2);

(3) Whether the Tribunal erred in finding Heartland Chrysler was not liable for the costs/losses claimed by Mr and Mrs Safi in the circumstances, namely whether the Tribunal wrongly applied the test for damages set out in s 259(4) of the ACL (NSW) (Ground 3).

50 Ground 1 raises three questions of law that are related because they each focus on the issue of whether there was a "major failure" by Heartland Chrysler to comply with s 54 of the ACL (NSW). Whether a failure to comply with a consumer guarantee is a "major failure" is a question of fact. Findings of fact are generally not open to scrutiny in an appellant jurisdiction unless the appellant is given leave to appeal or the findings raise a question of law. For instance, the issue of whether the Tribunal identified the wrong issue or the wrong question or applied the wrong principle of law in respect of the findings, is a question of law (see *Prendergast* (supra) at [15 −16] and the cases cited). The issue of whether a decision-maker made findings for which there is no evidence is also a question of law (see *Prendergast* (supra) at [20] and the cases cited). As we understand Mr and Mrs Safi's contentions, they raise both issues. In examining Mr and Mrs Safi's claims, the Appeal Panel identified a further question of law relating to this issue, namely whether the reasons were adequate in explaining why the Tribunal rejected this part of Mr and Mrs Safi's case.

51 Ground 2 raises the question of whether there was evidence to support a critical finding by the Tribunal. This is a question of law.

52 Ground 3 raises the question of whether the Tribunal correctly applied s 259(4) of the ACL (NSW) which also raises a question of law.

53 Grounds 1 to 3 raise questions of law and therefore, Mr and Mrs Safi have a right of appeal. In so far as Mr and Mrs Safi are not able to establish those grounds, they seek leave to appeal on the basis that the decision was not fair and equitable and against the weight of evidence.

54 In dealing with the issues raised by Mr and Mrs Safi, the Appeal Panel identified a further issue.

55 The Tribunal at first instance found it had jurisdiction to determine the claim without setting out the factual and legal basis for its jurisdiction. Mr and Mrs Safi state that the Jeep Cherokee Trailhawk was used for their business but this was not raised as an issue by either the parties or the Tribunal at first instance. It is therefore relevant, at least for completeness, to examine the issue of the jurisdiction of the Tribunal to determine this claim under the ACL (NSW).

56 There was jurisdiction for Mr and Mrs Safi to make a “consumer claim” under the former Consumer Claims Act (and indeed under the equivalent provisions in the FTA) given the broad definition of such a claim (see s 3A of the CCA). However, the ACL (NSW) contains a definition for a “consumer” which is narrower than the “consumer claim” jurisdiction of the Tribunal in some respects. This is a threshold issue that requires determination because if there was no jurisdiction for the Tribunal to determine Mr and Mrs Safi’s claim under the ACL (NSW), it will be futile to determine the issues raised in their appeal.

Issues

57 Having regard to the grounds of appeal, the reply and the Reasons for Decision, the issues for determination are as follows:

(1) Can Mr and Mrs Safi make a claim under the ACL (NSW)?

(2) Did the Tribunal err in failing to find that the failure of the transmission was a “major failure” or was there some other error of law relation to this issue (Ground 1)?

(3) Did the Tribunal err in making the finding that Mr and Mrs Safi freely entered into the exchange trade-in upgrade (Ground 2)?

(4) Did the Tribunal err in finding that Heartland Chrysler were not liable for the losses claimed by Mr and Mrs Safi given they entered into the exchange trade-in upgrade (Ground 3)?

58 Grounds 2 and 3 are related because it is apparent the Tribunal made a finding about the circumstances of the exchange trade-in upgrade that led the Tribunal to find the losses incurred by Mr and Mrs Safi were not recoverable under the ACL (NSW). It is therefore convenient to deal with these grounds together.

Was there jurisdiction for Mr and Mrs Safi to make a claim under the ACL (NSW)?

59 The consumer guarantees under the ACL (NSW) are only available to consumers. Section 3 of the ACL (NSW) relevantly provides as follows:

> **3 Meaning of *consumer***
>
> **Acquiring goods as a consumer**
>
> (1) A person is taken to have acquired particular goods as a consumer if, and only if:
>
> (a) the amount paid or payable for the goods, as worked out under subsections (4) to (9), did not exceed:
>
> (i) $40,000; or
>
> (ii) if a greater amount is prescribed for the purposes of this paragraph--that greater amount; or
>
> (b) the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or
>
> (c) the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.

60 Thus, a person acquires goods as a consumer if the purchase price is $40,000 or less or the goods are of a kind acquired for personal, domestic or household use or consumption (subs (c) is not relevant to this case).

61 This is in contrast to the broad definition of a “consumer claim” under s 3A of the former CCA. As already noted, a “consumer claim” includes “a claim by a consumer for the payment of a specified sum of money”. A “consumer” includes a natural person to whom or to which a supplier has supplied or agreed to supply goods or services (s 3 of the former CCA). Section 7 gives the Tribunal broad jurisdiction to hear and determine consumer claims, although s 14 limits the Tribunal’s jurisdiction to make orders up to a nominated

monetary sum. In this case the relevant monetary limit of jurisdiction was $40,000. Given Mr and Mrs Safi sought compensation under this amount, there was no jurisdictional limit on their claim. However, the question of whether Mr and Mrs Safi could make their claim under s 7 of the CCA, as particularised, was dependent on whether they could make a claim under the ACL (NSW) and, relevantly, whether they were "consumers" within the meaning of s 3 of the ACL (NSW).

62 The purchase price of the Jeep Cherokee Trailhawk was well in excess of $40,000. The question therefore arises as to whether the Jeep Cherokee Trailhawk motor vehicle can be described as goods that were "of a kind ordinarily acquired for personal, domestic or household use or consumption".

63 This issue was considered by Young J, as he then was, in *Bunnings Group Limited (formerly Bunnings Pty Ltd) v Laminex Group Limited* [2006] FCA 682 in construing the meaning and application of the phrase in the context of the *Trade Practices Act 1974* (Cth) (TPA). The TPA was significantly amended by *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* (Cth) to incorporate the new Australian Consumer Law into Schedule 2 and to rename the Act as 'the *Competition and Consumer Act 2010* (Cth)'. The *Bunnings* case and observations of Young J is authoritative because the legislative provisions considered by his Honour are in the same terms as the current provisions relating to consumer guarantees and consumer claims against manufacturers and importers (see also cl 26, Chapter 2 of the Explanatory Memorandum to the Bill).

64 His Honour made the following observations, after considering cases where analogous expressions were used:

(1) The word 'ordinarily' means 'commonly' or 'regularly' not 'principally', 'exclusively' or 'predominantly' at [81];

(2) It is preferable to pose the statutory question as a composite question rather than as a two stage inquiry as to the genus of the goods then whether that kind of goods is ordinarily acquired for personal, domestic or household use or consumption at [82];

(3) Depending on the precise statutory question and the circumstances of the particular case, it will be relevant to inquire into the essential character of the goods in question, which should be determined

objectively, but also having regard to a broader inquiry into the evidence concerning the design, marketing, pricing and potential uses of the type of goods in question at [83 −86];

(4) The question is ultimately a question of fact and degree at [87]; and

(5) The language of the TPA, which focuses on what goods of a kind are ordinarily *acquired for*, not ordinarily *used for,* invites attention to "design features and purposes, cost quality and pricing considerations, and the range of uses and applications for the goods that have been targeted in advertising and promotional material" at [107]. However, it would be a mistake to become too focused on these questions so as to identify the kind of goods "so narrowly that it amounted to little more than a description of particular goods" at [108].

65 Having regard to these observations, we are satisfied that the Jeep Cherokee Trailhawk vehicle is a good of a kind "ordinarily acquired for personal, domestic or household use or consumption".

66 While the Jeep Cherokee Trailhawk vehicle may be used, and in this case was in fact used and acquired, for the purpose of business use, this is not the inquiry directed by s 3(1)(b) of the ACL (NSW). While this issue was not the subject of discussion or evidence before the Tribunal at first instance, it is clear from the material provided that the Jeep Cherokee Trailhawk is a vehicle that is ordinarily acquired for personal use. There is nothing to suggest that such a vehicle is ordinarily acquired for commercial or business purposes, such as, for instance, a truck or a table top utility. It therefore does not matter that Mr and Mrs Safi acquired it for the purposes of their business and, presumably, also personal use.

67 We are satisfied that the Tribunal had jurisdiction to hear and determine the claim made by Mr and Mrs Safi under s 7 of the CCA as a consumer guarantee case pursuant to the ACL (NSW). As such, determining the issues raised by Mr and Mrs Safi in their appeal would not otherwise be futile.

Ground 1: Was there an error of law in respect of the Tribunal's finding that the transmission failure was not a major failure?

Adequacy of the reasons

68 The difficulty in assessing whether there has been an error of law by the Tribunal in rejecting Mr and Mrs Safi's claim is that the Reasons for Decision do not clearly explain the basis on which the Tribunal formed the view that the transmission fault was not a "major failure".

69 Under s 62(3) of the Act, a written statement of reasons must set out the Tribunal's findings on material questions of fact, referring to the evidence on which those findings are based, the Tribunal's understanding of the law and the reasoning process that lead the Tribunal to the conclusions it made.

70 The nature and extent of the obligation to give written reasons under the general law and pursuant to s 62 was also discussed by the Appeal Panel in *Collins v Urban* [2014] NSWCATAP 17 at [43-64]. Relevantly, the Appeal Panel referred to *Resource Pacific Pty Ltd v Wilkinson* [2013] NSWCA 33 in which Basten JA observed at [48] as follows:

> When an appellate court is invited to find that a trial judge provided inadequate reasons, it is important to understand the nature of the function being invoked. It is not the function of an appellate court to set standards as to the optimal, or even desirable, level of detail required to be revealed in reasons for judgment. Rather it is to determine whether the reasons provided have reached a **minimum acceptable level** to constitute a proper exercise of judicial power. Transparency in decision-making is an important value, but it is not cost free, and may involve separate parameters of quantity and quality. [Emphasis added.]

71 It is not necessary for a decision-maker to make a finding on every fact that may be regarded as objectively material but the decision-maker must set out its findings on those questions of fact which it considered to be material to the decision it made and to the reasons it had for reaching that decision (*P v Child Support Registrar* [2015] FCA 116 at [77] citing *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [68]).

72 The Tribunal failed to do this. We have therefore identified an error of law by the Tribunal at first instance in failing to provide adequate reasons as to why it rejected Mr and Mrs Safi's claim on what was a critical issue, being whether the transmission fault was a "major failure" entitling them to reject the Jeep Cherokee Trailhawk.

73 Such an error warrants intervention by the Appeal Panel in this case because the Reasons for Decision, although brief, suggest the Tribunal may have incorrectly applied the test or failed to have regard to relevant evidence. Furthermore, we have formed the view that the material provided by Mr and Mrs Safi, which was not contested by evidence to the contrary by Heartland Chrysler, supported a finding that the transmission failure was a major failure.

Evidence before the Tribunal at first instance about the transmission fault

74 Section 260 of the ACL (NSW) sets out the test for when the failure to comply with a consumer guarantee will be a "major failure". Mr and Mrs Safi rely on s 260(a) which provides that a failure to comply with a consumer guarantee, in this case the guarantee of acceptable quality, is 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".

75 Mr and Mrs Safi gave evidence that if they had known about the transmission problems, which they say was a fundamental flaw in the Jeep Cherokee Trailhawk nine speed gear-box, they would not have acquired the vehicle and would have chosen a different more reliable vehicle. This evidence was consistent with their actions in rejecting the vehicle so promptly.

76 Mr and Mrs Safi provided detailed statements, documents and submissions at the hearing at first instance in support of their claim. They also provided copies of documents produced by Heartland Chrysler under summons. The evidence provided by Mr and Mrs Safi can be summarised as follows:

(1) On 27 March 2015 Mr and Mrs Safi experienced a malfunction in the engine of the Jeep Cherokee Trailhawk while they were travelling on the M5 freeway. The Jeep Cherokee Trailhawk lost power and there was a whirring noise in the motor. The vehicle had done 1300 kilometres at this stage;

(2) They took the Jeep Cherokee Trailhawk to Heartland Chrysler to be fixed. After about three days of examining the vehicle, Mr and Mrs Safi were told by Heartland Chrysler that the problem was a faulty fuse. This was repaired and they picked up the vehicle. The transmission failed soon after they picked up the vehicle so they returned it to Heartland Chrysler immediately. The following day Mr and Mrs Safi were told that the computer module needed to be changed and then the following day they were told that the transmission would need to be replaced. According to Mr and Mrs Safi, when they expressed concern about this a representative from Heartland Chrysler told them that this was normal and they replace a few every week;

(3) Mr and Mrs Safi were not advised at this time that the reason the transmission needed to be replaced was because Fiat Chrysler Automotive (FCA) had identified a problem with the Transmission Control Module (TCM) and the Power Control Module (PCM) software in Chrysler vehicles with a nine speed automatic transaxle. They were not given details of the notification issued by FCA (as referred to in (4));

(4) According to a notification issued by FCA dated February 2015 and headed “Customer Satisfaction Notification R01 Reprogram Transmission and Powertrain Control Modules”, the TCM and PCM software of certain Chrysler vehicles with nine speed transmissions required an update that would “help prevent potential durability issues with the transmission”;

(5) Mr and Mrs Safi produced several “service bulletins” issued by FCA relating to the 9-speed transmission (obtained under summons), the first dated 10 January 2015, which noted as follows:

> The following software enhancement, for the 948TE 9-speed transmission, is being released to change clutch application characteristics to prevent the C-Clutch snap from dislodging.

(6) They also produced copies of further service bulletins, either amending or superseding the previous bulletin, dated 28 March 2015, 7 May 2015 and 20 June 2015. These service bulletins referred to further recommended software updates relating to the nine speed automatic transmissions of Chrysler Jeep Cherokee vehicles;

(7) Mr and Mrs Safi were not aware of the service bulletins or notifications by FCA until they were produced to them under summons from Heartland Chrysler;

(8) When Mr and Mrs Safi were advised the transmission would need to be replaced, they did research on the vehicle and their rights under the ACL (NSW). In particular, they viewed the US National Highway Traffic Safety Authority website “safercar.gov” where complaints about transmission failure with the Jeep Cherokee MY2015 had been reported. According to Mr and Mrs Safi there were cases reported where the transmission had failed and been replaced but there were ongoing problems with shift quality and safety. Mr and Mrs Safi produced extracts from these reports at the hearing at first instance (refer (11) below);

(9) Following this research they decided to reject the vehicle, which they did by letter dated 6 April 2015. The received no written response but had a number of discussions with representatives of Heartland Chrysler after sending this letter and met with representatives of Heartland Chrysler on 13 April 2015;

(10) Heartland Chrysler refused to provide them with a refund and told them that it was not their policy to refund. Mr and Mrs Safi were told they could make a claim in the Tribunal but this would be difficult. They were told that they would be better off compromising by accepting an exchange trade-in upgrade. Mr and Mrs Safi reluctantly accepted this deal but did not sign any release at this time;

(11) Mr and Mrs Safi did not provide an expert report about the Jeep Cherokee Trailhawk but provided documents from the internet which comprised articles and posts by complainants about Chrysler's nine speed automatic transmission. They also produced extracts from the “safercar.gov” website;

(12) The extract from the safercar.gov website was a report dated 27 June 2015 which recorded 122 complaints about the 2015 Jeep Cherokee, of which 20 related to transmission issues;

(13) The posts produced were from websites that were apparently set up by or contributed to by owners of Jeep Cherokee vehicles. These posts record that there were numerous complaints about the transmission and performance of Jeep Cherokee vehicles after service updates;

(14) The various articles produced, which were referenced by the website source, included a product review of the Jeep Cherokee dated 23 December 2014 from *Digital Trends* (a US based technology news, lifestyle, and information website that publishes news and reviews), an article on the software update for Jeep Cherokee nine speed transmissions dated 2 March 2015 from *TopSpeed.com* (a website which publishes news and reviews in relation to the automotive industry), an article dated 2 May 2015 from *Autonews.com* (a US-based online publisher) and an article by Paul Murrell dated March 2015 from *Practical Motoring* (an Australian-based online publisher).

(15) Mr and Mrs Safi produced a total of 20 online articles and website posts about the Jeep Cherokee, in addition to the extracts from the safercar.gov website, for the period October 2013 to June 2015.

(16) In summary, these articles identified complaints about the 9-speed transmission of the Jeep Cherokee, for instance, complaints about hard shifts between gears, disengagement of the transmission, malfunctioning of warning lights and three software upgrades to resolve the problems. In his article "Chrysler's 9-speed headache not going away?" on the Practical Motoring website, Paul Murrell, noted as follows:

> THE REPORTED PROBLEMS with Chrysler's 9-speed auto are proving more difficult to eradicate than the company might have hoped. There has been yet another software update for the troubled transmission, at least the third software revision since the ZF-designed gearbox first appeared in the Jeep Cherokee, and delaying the car's launch by several months.
>
> …
>
> Reported problems have included inadvertent disengagement, lurching, hard shifts and trouble lights illuminating on the dash. Like other testers, Practical Motoring has had varying experiences with the 9-speed ZF-sourced 'box. We've had different behaviour in different vehicles: crisp, sharp gear changes on most occasions, but every now and then, a slurred and delayed change into another ratio. We have also commented before about the eighth and ninth gears that rarely seem to engage, even when using manual over-ride.

Did the Tribunal err in concluding there was no major failure?

77 The Tribunal found that once the faulty transmission was replaced "there did not appear to be any ongoing problems with the car". The Tribunal further

found that the information from the internet was not sufficient to provide any factual basis for Mr and Mrs Safi's assertions. The Tribunal made no reference to the notifications and service bulletins issued by FCA to Heartland Chrysler.

78 This reasoning discloses number of errors.

79 Firstly, there was no evidence to support a finding that "there did not appear to be any ongoing problems with the car" after the transmission was replaced. There was no evidence from Heartland Chrysler about this matter. Nor was there evidence from the summonsed documents to support such a finding. Indeed, there was evidence to the contrary in the articles produced by Mr and Mrs Safi, which were rejected by the Tribunal, wrongly in our view. This disclosed the second error of law.

80 The Tribunal is not bound by the rules of evidence (s 38(1) of the Act) and rejecting material on the basis that it does not satisfy the rules of evidence would be contrary to the Act and a denial procedural fairness. Evidence may be discounted or given little weight if it has little evidentiary value, for instance hearsay or unsubstantiated opinion evidence. However, to reject it entirely would be in error. It is unclear what information from the internet was considered to be "not sufficient to assist" or whether it was considered and given little weight and if so why.

81 In this case, the material provided by Mr and Mrs Safi included articles from specialist online publishing companies based in the United States and in Australia. The articles were apparently authored by journalists with specialist knowledge of the automotive industry. On close review of the articles, it is apparent these online articles are similar to articles in specialty magazines.

82 While this may give the information contained in the articles more credibility and possibly weight than blogs and posts, we accept that insofar as the articles contain statements of fact or opinion, they are hearsay and would not be admissible in a court other than for non-hearsay purposes or as business records (refer *ACCC v Air New Zealand Ltd (No 2)* [2012] FCA 1363; *ACCC v Air New Zealand Ltd (No 5)* [2012] FCA 1479; *Roach v Page* (*No 27)* [2003] NSWSC 1046 and *R v Jayant Mukundray Patel (No 6)* [2013] QSC 64). These articles could not be described as business records and to suggest otherwise

would have “far-reaching and unpalatable consequences” (Perram J at [10] in *ACCC v Air New Zealand (No 5)*).

83 This does not mean the articles should carry no weight. The articles were consistent with the documents provided by Heartland Chrysler under summons and establish that there have been a number of complaints about the Chrysler 9-speed transmission, both before and after Mr and Mrs Safi rejected the Jeep Cherokee Trailhawk. The fact that there have been so many articles on the topic (Mr and Mrs Safi provided no less than 15 articles over a period of 18 months) lends weight to the assertion that the problems with the Chrysler 9-speed transmission have been significant and were ongoing over an extended period. The same can be said for information provided from the safercar.com website.

84 As such, even though Mr and Mrs Safi did not produce an expert report about the nature and extent of the transmission problem, this was not fatal to their claim. They provided the best available material, which included their own evidence of the problems with the vehicle, copies of the notices from Chrysler about the various upgrades and the internet research material, which was identified, sourced and generally credible given most of the articles were from online publishing companies. The material, in its totality, provided sufficiently probative evidence on which the Tribunal would have been able to make findings about whether the transmission issues constituted a major failure.

Application of s 260 of the ACL (NSW)

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.

90 Mr and Mrs Safi rely on s 260(a) of the ACL (NSW).

91 While there have been many cases on consumer guarantees determined in various Australian tribunals, there is little authority on the question of how s 260 is to be interpreted and applied.

92 In *Cary Boyd v Agrison* the court accepted at [51] that a “major failure” might be constituted by a series of specific or individual defects which, when taken as

a whole, constitute a major failure. This construction is not controversial and is the approach that has been taken in a number of cases in Australian tribunals.

93 In *Goldiwood Pty Lt v ADL (Aust) Pty Ltd* [2014] QCAT 38 the Queensland Civil and Administrative Tribunal (QCAT) considered the scope of s 260 when determining a claim for a refund in respect of financial planning software. The Tribunal appeared to accept the notion that non-compliance with s 54 will invariably amount to a major failure and relevantly found as follows at [83−88].

> [83] Software problems of the type experienced here are usually remediable given sufficient time, so they could be remedied. But did these defects amount to a "major failure"? To answer this it is necessary to turn to the provisions in section 260 of the ACL (NSW). In the context of a software problem, a major failure is where "the goods would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure".
>
> [84] The test brings into focus the importance of any finding about acceptable quality in section 54. It is fair to say that no reasonable consumer would ever be willing to acquire goods which were not of acceptable quality and in breach of the guarantee in section 54. It might be said that this is wrong because a reasonable consumer would always be willing to acquire goods which were not of acceptable quality provided they could be obtained at a much lower price than they were being offered. But I do not think that this can be the test intended by section 260 because otherwise no failure could ever be a "major failure".
>
> [85] Thus it would appear that a breach of section 54 will always be one which is a "major failure" permitting a purchaser to reject the goods, provided the entitlement to do so has not been lost under the provisions of section 262. In this respect, the right to reject under the ACL (NSW) has close parallels to the similar rights under the Sale of Goods Act enacted in various jurisdictions.
>
> [86] The position is different with breaches of sections 55 (failure as to fitness for disclosed purpose) and section 56 (failure to correspond with description). As can be seen from the facts in this particular case, such breaches can result from fairly minor infringements which would not affect a reasonable purchaser's decision to proceed with the purchase in the knowledge of such infringements.
>
> [87] If a breach of section 55 and 56 was a serious one it could amount to a "major failure" under section 260 but it would not always do so as is the position with section 54.
>
> [88] In my opinion a reasonable consumer with advance knowledge of the defects in the Adviser Logic software would still have proceeded with the licence agreement. This is because the defects would have little effect on the overall functionality of the software.

94 In *Australian Rong Hua Fu Pty Ltd v Ateco Automotive* [2015] VCAT 756, the Victorian Civil and Administrative Tribunal observed that a reasonable

consumer would expect teething problems with a new vehicle and stated at [42] as follows:

> Returning to s 260(a), again it cannot be said the truck would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failures taken as a whole. I say again the reasonable consumer takes risks when purchasing goods, which are most often addressed by repair of the goods. A reasonable purchaser would take the risk of teething problems, a period of use and then the misfortune of further problems, most addressed under warranty.

95 Guidance can also be found in cases and commentary arising out of the New Zealand jurisdiction, which has had consumer guarantees and remedies similar to those set out in the ACL (NSW) since 1993.

96 Section 54 is identical to s 7 of the New Zealand *Consumer Guarantees Act 1993* (CGA) and Part 2 of that Act contains remedies which are comparable to those set out in Part 5.4 of the ACL (NSW). Relevantly, s 18(3) of the New Zealand legislation is in similar terms to s 259(3), with the exception that the CGA provision refers to a failure of a "substantial character" rather than a "major failure". A failure of substantial character is defined in s 21 of the CGA and, while there is no specific provision relating to goods that are unfit for a disclosed purpose, its terms are otherwise identical to s 260 of the ACL (NSW).

97 In *Stephens v Chevron Motor Court Ltd* [1996] DCR 1, the New Zealand District Court took a similar approach as that taken by the QCAT in *Goldiwood* (supra). The court linked the concept of substantial failure and acceptable quality, stating that if goods are in breach of the guarantee as to acceptable quality under s 7(1)(a) because they are unfit for their common purposes, the failure would also be of a substantial character under s 20(1)(a) in that a reasonable consumer would not have acquired the goods if acquainted with the extent and nature of the failure. The court also held that the proportion of the repair cost of their purchase price may be relevant to the issue of whether or not a defect is of a substantial character. For instance, if the repair cost amounts to a significant percentage of the purchase price it was said that the failure is more likely to be substantial. Despite this, the court also found that if repair costs are only a small part of the purchase price this would not preclude a finding that there has been a substantial failure.

98 In our view, *Goldiwood* and *Stephens v Chevron* go too far insofar as they find that the failure to comply with the guarantee of acceptable quality will always be a major failure (or failure of substantial character). While there are similarities in the legislative tests to be applied, whether non-compliance is a major failure will depend on the nature and extent of the failure. For instance, it is possible that goods may not be of acceptable quality at a given point of time, either because they are not fit for purpose or have defects, but they may be capable of becoming acceptable because the defects can be remedied easily and in a timely manner. Non-compliance would therefore not amount to major failure because a reasonable consumer would be prepared to accept teething problems that can be fixed under warranty.

99 This was the approach taken in *Norton v Hervey Motors Ltd* [1996] DCR 427. In this case the court held that the "reasonable consumer" should be assessed as a purely objective test. It was also noted that a reasonable consumer would expect there would be some problems with a motor vehicle but would be unlikely to acquire a defective vehicle if they knew at the time of purchase another identical vehicle was available for purchase. This was discussed by K Tokeley, *Consumer Law in New Zealand*, (2nd ed 2014, Lexis Nexis NZ Limited) at 102-103, as being unduly narrow. The author posited an alternative formulation as follows:

> Therefore when applying s 21(1)(a) it makes more sense to ask whether reasonable consumers, given the option of acquiring that particular good or alternatively purchasing either nothing or a different model, would have acquired the good if they had been aware of the nature and extent of the failure. In this way the focus is on whether the failure was so bad that the consumers would never have bought the good if they had been aware of it, or whether the failure is less significant and consumers would have been prepared to accept the good even knowing its faults.

100 We accept that this is a more common sense approach, particularly given the ACL (NSW) is beneficial legislation.

101 Having regard to these cases and the commentary, where there is non-compliance with the guarantee of acceptable quality, as alleged in this case, we find that the following matters will be relevant to the question of whether this amounts to a "major failure" under s 260(a):

(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 the 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 that 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 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".

103 In this case, Mr and Mrs Safi formed the view that the Jeep Chrysler Trailhawk was not of acceptable quality because there were problems with the transmission that had to be fixed on several occasions, culminating in the need for the entire replacement of the transmission. While the transmission could be replaced there was no guarantee that this would resolve the issue. This was evidenced by the subsequent requirements for repeated updated software reprogramming and the ongoing issues apparently experienced by other consumers, as evidenced by the high level of online media coverage produced by Mr and Mrs Safi.

104 Having regard to the nature and price of the goods, being an expensive motor vehicle, a reasonable consumer would be likely to regard such a vehicle with a defective transmission as not of acceptable quality (see s 54(2) and (3)). The transmission is a fundamental part of a motor vehicle. This is common knowledge. Even though it was possible the transmission could have been replaced under warranty, Mr and Mrs Safi were justified to be concerned.

105 It does not matter that at the time they rejected the vehicle Mr and Mrs Safi did not know about the RCA service bulletins and had little knowledge of the media

coverage. The test is whether a reasonable consumer "fully acquainted with the nature and extent of the failure" would not have acquired the goods. Accordingly, the question is whether a reasonable consumer who knew that the Jeep Cherokee Trailhawk transmission had problems that may not be fixed by the various software updates which may also lead to durability issues, would have acquired the vehicle when there were comparable vehicles available on the market that could meet their needs but did not have these problems.

106 The answer to the question must be in the affirmative. This is not a case where, for instance, the stitching on the leather seats fell apart or where the battery was faulty. These problems would make the vehicle not of acceptable quality but they could be fixed under warranty with little inconvenience or concern about the potential for ongoing problems. As such, these defects would not be a "major failure" warranting rejection. This is common sense. The same cannot be said of a faulty transmission or any other mechanical, electrical or software malfunction. While much will ultimately depend on the nature of the repair required and the level of assurance that can be provided about the repair, the critical issue will be whether the problem was capable of easy and enduring rectification within a reasonable time.

107 In other words, in this case the fault could not be described as a "teething problem" and it was clearly open on the evidence for the Tribunal to find that the transmission failure was a major failure warranting a refund.

108 The Appeal Panel finds that there was an error of law in the Tribunal failing to make the finding that there was a major failure.

Grounds 2 and 3: Was there error in relation to the Tribunal's findings about the exchange trade-in upgrade and the impact on Mr and Mrs Safi's claim for compensation?

Introduction

109 Having determined that the Tribunal erred in failing to find there was a major failure, the question arises as to whether the Tribunal also erred in finding that Mr and Mrs Safi could not recover compensation in any event.

110 If there is a major failure, the consumer may elect to either reject the goods or retain the goods and take action against the supplier to recover compensation

for the reduction in the value of the goods below the price paid. Mr and Mrs Safi rejected the Jeep Cherokee Trailhawk and requested a refund. As already noted, s 263 of the ACL (NSW) sets out the obligations of the consumer and the supplier if the consumer rejects the goods. The supplier must, subject to the election of the consumer, provide a refund of the purchase price or replace the goods. The supplier is specifically precluded from providing replacement goods to satisfy the obligation to refund (s 263(5)).

111 If a supplier refuses to provide a refund the issue arises as to what remedies are then available to the consumer. This may be difficult at a practical level if the consumer is in need of the goods.

112 If the consumer has elected to seek a refund and the supplier refuses to give a refund, the remedy for the consumer is to take action against the supplier to enforce the refund. The consumer may suffer further damages if there is delay in the recovery, for instance, for the loss of the use of a vehicle if the consumer cannot afford to purchase another to replace the vehicle in the interim. The consumer could seek to recover these damages from the supplier under s 259(4) of the ACL (NSW) on the grounds that such damages would have been "reasonable foreseeable".

113 While there is an obligation on the supplier to refund the purchase price for goods where the rejection is warranted under s 260 of the ACL (NSW), there is no specific remedy for the wrongful refusal of the supplier to refund. For instance, if a supplier, as alleged in this case, wrongfully refuses to refund the purchase price because they do not acknowledge the obligation or wilfully or recklessly disregard the obligation, the redress of the consumer is limited to the remedies under ss 259 and 263 of the ACL (NSW).

114 Mr and Mrs Safi contend they had no options other than to accept the upgrade because a representative of Heartland Chrysler stated the dealer would not refund the purchase price as this was not its practice. There is support for this in the transcript provided by Mr and Mrs Safi of the hearing at first instance, which recorded the following exchange:

> The other thing we were having limited options because they have no policy of return or exchange at all and they make it clear, him, Mr Aoun and Mr Essa the general manager that there is no refund, nothing about refund y'know and

> this is what they said. I said please give us some documentation and they refuse and they said no because you want anything in writing to take it to Fair Trading I said yes I will take it because I am a consumer you know and the only paper they give you was the sales contract that's it they never ever they refuse at all him and Nick Essa and he's on oath under oath he should say the truth y'know. He did tell me no way you will get refund no way we can give you anything in replacement.
>
> Respondent: Yes we cannot refund the car.

115 If Heartland Chrysler had made representations to Mr and Mrs Safi that there was no obligation to provide a refund where there was a major failure or otherwise made misrepresentations to Mr and Mrs Safi about their rights, this would have been in breach of s 18 and s 29(1)(m) of the ACL (NSW). Breach of s 29(1)(m) is a civil penalty provision under the ACL (NSW) and may also be an offence under s 151 for which Heartland Chrysler may have been liable to prosecution. If Mr and Mrs Safi had relied on such representation to their detriment, Heartland Chrysler would also have been liable for damages under s 236. However, it is apparent from the transcript that this was not the case. Mr and Mrs Safi were not misled. They understood their rights but, on their evidence, they were faced with few practical options and made a pragmatic decision because they believed the discount offered would provide redress for the loss.

116 Mr and Mrs Safi did not seek the upgrade. It was offered as an alternative to resolve the dispute. Given the circumstances that led to the compromise arrangement, we are not satisfied this could not be described as a choice "freely made" by them.

Was there an error by the Tribunal in finding that Mr and Mrs Safi could not recover damages?

117 The Tribunal found that Heartland Chrysler was not liable for any of the costs claimed by Mr and Mrs Safi.

118 While the basis for this is not clear, the inference is that the Tribunal found these costs were incurred as a result of the exchange trade-in upgrade and not as a result of the breach. This raises either a causation issue or a finding that the damages claimed were too remote. This may explain why the Tribunal rejected the claim for the difference between the trade-in and the purchase price and the changes to the garage door but does not explain why the

Tribunal rejected the other claims, for instance, the claim for the loss of time and income. This discloses an inadequacy in the Reasons for Decision. It appears that the Tribunal rejected the claim, and indeed did not analyse it in any detail, because it was not satisfied Mr and Mrs Safi has suffered any damages attributable to the transmission failure.

119 In our view, this conclusion and the reasoning of the Tribunal discloses an error of law for the reasons that follow.

120 As already noted, there was evidence before the Tribunal to support Mr and Mrs Safi's contention that the failure of the transmissions was a major failure, entitling them to reject the Jeep Cherokee Trailhawk and to seek a refund from Heartland Chrysler. Heartland Chrysler refused to refund, mistakenly, either intentionally or under a misunderstanding of the obligations as a supplier under the ACL (NSW), relying on the dealer warranty provisions in the MDRA.

121 At this stage, Mr and Mrs Safi's available remedy was to enforce their rights under s 263(4)(a) of the ACL (NSW) for a refund. Given the purchase price of the Jeep Cherokee Trailhawk and the fact the vehicle was being used for business purposes, Mr and Mrs Safi may not have been able to obtain orders for a full refund from the Tribunal and they may have needed to commence proceedings in a court (see s 14 of the CCA and reg 4 of the Consumer Claims Regulation 2014 (NSW), now repealed, which limited the Tribunal's jurisdiction to make orders in such cases to $40,000).

122 Mr and Mrs Safi did not take this action and reluctantly accepted an alternative arrangement. The question therefore arises as to whether they can still pursue damages against Heartland Chrysler under s 259(4) of the ACL (NSW).

123 Mr and Mrs Safi claim damages which they say resulted from the failure of Heartland Chrysler to accept their obligation to refund the purchase price of the Jeep Cherokee Trailhawk. However, this is not the critical question for determination. Section 259(4) directs attention to the failure to comply with the statutory guarantee of acceptable quality. This question turns on whether the damages claimed by Mr and Mrs Safi were:

(1) suffered because of the failure of Heartland Chrysler to provide a vehicle that was of acceptable quality; and

(2) reasonably foreseeable as being a result of the failure.

124 As such, losses will only be recoverable if there is a causal connection between the breach and the loss which is reasonably foreseeable.

125 The Tribunal concluded the losses were not recoverable because they were costs that "resulted from choices the applicants freely made". In other words, the Tribunal was not satisfied the costs were attributable to the Jeep Cherokee Trailhawk not being of acceptable quality.

126 Mr and Mrs Safi provided detailed accounts of their dealings with Heartland Chrysler. Heartland Chrysler provided no documentation or statements to refute their claims. According to a statement provided to the Tribunal by Mr Safi at the time proceedings were commenced, he negotiated with representatives of Heartland Chrysler over a period of a few days after they rejected the Jeep Cherokee Trailhawk on 7 April 2015. On 13 April 2015, after initially rejecting the offer, Mr Safi accepted the deal and explained why (at p 15, document 1C to the claim) as follows:

> I accepted that I could not get them to agree to refund the price of the car and that this was the only remedy available to me. The final offer was $26,000 to the Overland on top of the trail hawk trade-in set at $38,000. Matt agreed all extras would be included in the price and would be equivalent to those on the trail hawk. Matt want me to sign the contract immediately then and there…..
>
> We took the trade-in offer as it was the only remedy available to us. The dealer had been so confident that the tribunal would not rule in our favour for a refund, and we have not had experience with these matters before and we could risk going to the tribunal and potentially losing the full price of the car, and ending up having to take the repaired defective vehicle……..We have a professional mobile service business and we need a reliable new car, in acceptable condition and at least the Overland with an 8 speed transmission would suit our needs though it was more expensive and over budget. We can't afford to the car to be tied up in a long running dispute as the vehicle is used to business purposes.

127 It is clear from the material provided to the Tribunal at first instance, which was also provided to the Appeal Panel, that Mr and Mrs Safi entered into the further transaction with Heartland Chrysler on 13 April 2015 but after sighting the advertisements for the sale of their Jeep Cherokee Trailhawk and making enquiries about their rights with NSW Fair Trading, commenced proceedings just over two weeks later in the Tribunal. It is also clear that Mr and Mrs Safi accepted the exchange trade-in upgrade deal but they did so because the only other option was for them to commence proceedings against Heartland

Chrysler, subject themselves to litigation risk and be without the use of a car, which was used for business purposes, for an extended period. They did not sign a release.

128 While it cannot be said that the exchange trade-in upgrade was induced by misrepresentation or duress, it cannot be concluded the arrangement was "freely made". Heartland Chrysler claimed there was some level of compromise because they offered a discount of $8,545.55. However, they had previously offered a discount of $6,307.19 on the Jeep Cherokee Trailhawk. It is therefore not clear whether this discount was offered as compensation or whether it is a discount that would be generally allowed on most sales as part of the usual negotiation process. The latter appears to be the most likely.

129 There are three ways to characterise what happened when Mr and Mrs Safi accepted the exchange trade-in upgrade deal.

130 The first is that Mr and Mrs Safi rejected the Jeep Cherokee Trailhawk and requested a refund but Heartland Chrysler refused to accept the rejection or to give them a refund. Mr and Mrs Safi accepted this refusal, albeit reluctantly, and sold the Jeep Cherokee Trailhawk to Heartland Chrysler for $38,000, which was alleged to be the value of the vehicle at the relevant time. Mr and Mrs Safi, when they commenced proceedings, were thereby exercising their rights under s 259(3) of the ACL (NSW) to retain the vehicle and take action against the supplier for the reduction in value, as evidenced by the trade-in price.

131 Alternatively, it could be argued that Mr Mrs Safi rejected the Jeep Cherokee Trailhawk, sought a refund but abandoned this claim when they accepted the exchange trade-in upgrade deal. On this second characterisation, it could be argued that any losses would not be sufficiently causally connected to the breach of the statutory guarantee but rather to the freely negotiated compromise. This was the argument raised by Heartland Chrysler and apparently accepted by the Tribunal.

132 A third characterisation is that Mr and Mrs Safi exercised their right under s 259(3) to reject the vehicle and Heartland Chrysler impermissibly (under s 263(5)) required, or permitted, them to enter into the exchange trade-in

upgrade in discharge of their obligations under s 263(4). Sections 263(4) and 263(5) are clear and strongly worded. The supplier *must* provide a refund or replace goods where there is a major failure of a consumer guarantee and the supplier cannot discharge this obligation by *permitting* the consumer to acquire goods from the supplier.

133 On this characterisation, the transaction was therefore vitiated and was either liable to be set aside by Mr and Mrs Safi or properly the grounds for a damages claim under s 259(4). Where a supplier does not have an appropriate policy to refund or replace goods, it would be reasonably foreseeable by the supplier that consumers would suffer loss and damage as a result of any wrongfully refusal. The position is equally, if not more obvious, where the supplier effectively requires a consumer to enter into an exchange trade-in upgrade deal to satisfy the obligation under s 263(4). Accordingly, any damage suffered by a consumer in entering into such a transaction would be reasonably foreseeable and therefore recoverable under s 263(4): see *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* [1998] HCA 38; (1998) 192 CLR 603 where it was held that a reasonable compromise of an arguable defence to a third party claim may be a foreseeable result of breach of contract and the discussion by Ball J in *UGL Rail Pty Ltd v Wilkinson Murray Pty Ltd* [2014] NSWSC 1959 at [205-220].

134 This does not mean that all such transactions would be actionable. It will depend on the circumstances giving rise to the “compromise”. If there is a genuine dispute about whether there is a breach of the consumer guarantee and a dispute about whether the breach is a major failure, the dispute may be resolved by a compromise arrangement but this should be clear from the outset. Otherwise, the supplier may be exposed to a claim in any event and consumers may be misled or confused about their remedies. Where there is a properly negotiated compromise, any causal connection between the breach and the loss would clearly be broken.

135 In this case, we are not satisfied that this transaction was a freely negotiated compromise that yielded benefits for both parties. When the exchange trade-in upgrade is examined it is clear that there was no real compromise by Heartland

Chrysler. The discount in the upgrade vehicle was comparable to the previous discount allowed for the Jeep Cherokee Trailhawk and the trade-in price was significantly reduced from the original purchase price, which was said by Heartland Chrysler to represent market value.

136 Heartland Chrysler, given the findings of breach, sought to discharge their obligation under s 263(4) by permitting the exchange trade-in upgrade. Moreover, Mr and Mrs Safi did not give up their right to take action. As such, their claims for damages, or at least some of them, would have been recoverable and the Tribunal erred in failing to properly consider the claims. This was either an error of law in failing to exercise jurisdiction by determining a critical matter or a failure in not properly applying the appropriate legal principles. Either way, it was apparent that there was an error of law in the Tribunal failing to provide adequate reasons for the basis of its finding.

Conclusion

137 For the foregoing reasons we allow the appeal and set aside the decision made on 17 August 2015.

138 We remit the proceedings for reconsideration according to law and having regard to the findings of the Appeal Panel. In particular, in rehearing the proceedings, the Tribunal is to determine what loss and damage Mr and Mrs Safi suffered as a result of:

(1) Heartland Chrysler's failure to provide a refund or replacement of the Jeep Cherokee Trailhawk; and

(2) Heartland Chrysler's attempt to discharge their obligation under s 263(4) by permitting the exchange trade-in upgrade.

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