

NOTICE OF FILING

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Details of Filing

Document Lodged: Concise Statement
File Number: VID1169/2019
File Title: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v
MAZDA AUSTRALIA PTY LIMITED
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads 'Warwick Soden'.

Dated: 31/10/2019 10:16:46 AM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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Form NCF1

Concise Statement

No. VID of 2019

Federal Court of Australia
 District Registry: Victoria
 Division: General Division

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

Applicant

MAZDA AUSTRALIA PTY LIMITED (ACN 004 690 804)

Respondent

IMPORTANT FACTS GIVING RISE TO THE CLAIM

- 1 This proceeding concerns unconscionable conduct and false or misleading representations by the Respondent (**Mazda**) to the individual consumers identified at Annexure A (the **Consumers**) who purchased faulty Mazda motor vehicles (the **Vehicles**) and attempted to exercise their rights under the consumer guarantee provisions of the Australian Consumer Law (the **ACL**) to obtain a refund or replacement vehicle, but were repeatedly refused refunds or replacement vehicles and pressured to accept lesser offers made by Mazda only after multiple failures of the Vehicles and repeated attempted repairs.
- 2 Mazda is a manufacturer of motor vehicles which, in trade or commerce, supplies motor vehicles to Mazda dealers (**Dealers**) for sale to consumers in Australia.
- 3 Between May 2013 and June 2017, the Consumers purchased new Vehicles from Dealers, for their own use.
- 4 The Consumers experienced various and often recurring faults with their Vehicles (the **Faults**), as detailed in Annexure A, within 1 to 2 years of purchase. The Faults affected the ability of the Consumers to use their Vehicles, and included a loss of power while some Consumers were driving the Vehicles.
- 5 When the Faults occurred, the Consumers contacted one or more Dealers and took their Vehicles to Dealers on multiple occasions. The Dealers kept the Vehicles for attempted repair and, as a result, the Vehicles were off the road for a significant amount of time. In

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most cases, the Vehicle's engine was replaced, in some cases more than once. In some cases, despite lengthy and repeated attempts to repair the Vehicles, including engine replacements, the Consumers continued to experience the same or other Faults with the Vehicles.

- 6 The Faults made the Vehicles substantially unfit to drive, and in addition, Mazda could not repair the Faults easily and within a reasonable time, or at all.
- 7 Between 2015 and 2019, the Consumers notified Mazda that they rejected their Vehicles and asked for refunds or replacement vehicles (the **Requests**). In many cases, the Consumers made repeated Requests over months and even years, while the Consumers continued to experience Faults with their Vehicles. When making the Requests, some Consumers raised with Mazda their entitlement to a remedy under the consumer guarantee provisions of the ACL, either directly or indirectly, including by reference to there being a "major failure" with the Vehicle.
- 8 The Consumers made the Requests to Mazda directly and/or through its Dealers. Dealers were required to, and did, refer the Requests to Mazda for decision and Mazda assumed responsibility for dealing with the Requests, including making decisions about whether to give the Consumers a refund or replacement vehicle.
- 9 In responding to the Faults and the Requests, as described in Annexure A, Mazda:
 - (a) gave the Consumers insufficient information about the attempted repairs or what caused the Faults, in some cases even when they requested it from Dealers and/or Mazda;
 - (b) told the Consumers that Mazda would repair or was entitled to repair the Vehicle, and required Dealers to attempt to repair the Vehicle, often under the direction of Mazda technical specialists, even when there had previously been lengthy and repeated attempts to diagnose and/or repair the Vehicles;
 - (c) told the Consumers that the Faults were not major failures, including because the Faults were not a failure of a major component of the Vehicle; and/or told the Consumers that a major failure was limited to a failure of a major component of a vehicle;
 - (d) required the Consumers to deal with "case managers" who had no authority to make a decision about the Consumers' Requests;
 - (e) failed to respond in a timely way to the Requests, with the effect that the Consumers were forced to contact Mazda multiple times in order to obtain a response;

- (f) told the Consumers that Mazda would not provide them with a full refund or replacement vehicle at no cost to the Consumers, including because of the age and/or mileage of the Vehicles;
- (g) told the Consumers that Mazda would provide a replacement Mazda vehicle only if the Consumers agreed to make a significant financial contribution towards the replacement vehicle;
- (h) made offers to some Consumers to pay amounts less than a full refund for the Vehicles or to provide replacement vehicles only if the Consumers made a significant financial contribution towards the replacement vehicle, and based these offers on the age and mileage of the Vehicles, with the effect that the offers were less than would have been the case had the offers been made at the time the Consumers first made the Request;
- (i) made offers to some Consumers to provide an extended warranty and other services instead of a refund or replacement of the Vehicles;
- (j) pressured the Consumers to accept the offers made by stating that the offers were final and/or giving the Consumers a short time to accept;
- (k) told the Consumers that if they wanted a refund or replacement vehicle at no cost, they would have to “take the matter further” by legal redress; and/or
- (l) despite requests by the Consumers, failed to provide any or adequate reasons for its decisions in relation to the Requests.

10 In most cases, Mazda refused to provide the Consumers with a refund or replacement vehicle at no cost to the Consumers. In one case, Mazda provided a replacement vehicle only after the Consumer commenced legal proceedings against Mazda. In another case, Mazda provided a full refund only after protracted negotiations and repair attempts. In other cases, the Consumers accepted an offer of the kind set out in paragraph 9, after protracted negotiations, repair attempts and/or commencing legal proceedings.

11 In connection with the conduct referred to in paragraphs 3 to 10, Mazda expressly or impliedly made one or more representations to the Consumers (the **Representations**) that:

- (a) the Faults with the Vehicles were not major failures under the consumer guarantee provisions of the ACL;
- (b) the Consumers were not entitled to a refund or replacement vehicle at no cost to the Consumer under the consumer guarantee provisions of the ACL;
- (c) Mazda was entitled to repair the Vehicle regardless of the number of attempts made to repair the Faults or the time it took to repair the Faults, and the Consumers’ rejection of the Vehicles and Requests;

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

12 These Representations were false or misleading because the Faults were major failures for the purposes of section 260 of the ACL, or otherwise were failures to comply with the consumer guarantees that the Consumers required to be remedied and that Mazda had not remedied at all or within a reasonable time for the purposes of section 259(2) of the ACL; and the Consumers were entitled to refunds or replacement vehicles at no cost pursuant to section 263(4) of the ACL. Mazda did not have reasonable grounds for making the Representations.

PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

13 Mazda engaged in the conduct described in paragraphs 3 to 12 directly, through its Dealers who acted on behalf of Mazda, and/or through employees and/or Dealers pursuant to section 84(2) of the *Competition and Consumer Act 2010* (Cth).

14 By engaging in the conduct described in paragraphs 3 to 12, Mazda, in trade or commerce, in connection with the supply of the Vehicles, engaged in conduct that was, in all the circumstances, unconscionable in contravention of section 21 of the ACL. The ACCC relies in particular on the circumstances referred to in sections 22(1)(a), (b), (d), (e), (f), (i) and (l) of the ACL.

15 The circumstances of Mazda's unconscionable conduct included:

- (a) the Consumers were in a substantially weaker bargaining position relative to Mazda with respect to the Faults and the Requests;
- (b) the false or misleading Representations described in paragraph 11;
- (c) Mazda's refusal to provide a refund or replacement vehicle at no cost to the Consumer, even after the Consumer's Vehicle had undergone multiple repairs which had not remedied the issues and where in some cases, Mazda's internal "Post Repair Checklist" indicated that the Fault with the Vehicle was a major failure;
- (d) Mazda's failure to give any proper consideration to whether the Faults made the Vehicles unfit to drive, defective and/or unsafe with the effect that a reasonable consumer would not have regarded the Vehicle as acceptable had they known of the Faults;
- (e) the offers made by Mazda to Consumers to pay amounts less than a full refund for the Vehicles or to provide replacement vehicles only if the Consumers made a

significant financial contribution towards the replacement vehicle, or alternatively to provide an extended warranty and other services instead of a refund or replacement vehicle;

- (f) pressure tactics used by Mazda to have the Consumers accept an offer; and
- (g) Mazda's ongoing refusal to provide a refund or replacement vehicle at no cost to the Consumers.

16 By making the Representations, Mazda:

- (a) engaged in conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the ACL; and
- (b) made false or misleading representations concerning the existence or effect of a guarantee (namely, the consumer guarantees), right or remedy, in contravention of s 29(1)(m) of the ACL.

RELIEF SOUGHT FROM THE COURT

17 The ACCC seeks the relief in the accompanying Originating Application.

ALLEGED HARM

18 As a result of Mazda's conduct, the Consumers suffered economic and non-economic harm. This included inconvenience, distress and frustration about not being able to use their Vehicles for substantial periods of time, having to endure protracted negotiations with Mazda Australia and attempted repairs to their Vehicles, and being refused any or any adequate remedy for the issues they experienced with their Vehicles, as well as being required to make a significant payment in order to obtain a replacement Vehicle.

Date: 30 October 2019



Andrew John Christopher
Webb Henderson
Solicitors for the Applicant

This concise statement was prepared by Nick De Young SC and Anna Lord of Counsel.

ANNEXURE A**Consumer RC – Purchased Mazda Neo 5-door hatch manual in December 2014 for approximately \$19,000**

Between August 2015 and June 2017, the engine warning light in RC's vehicle illuminated intermittently. The vehicle was inspected and/or repairs attempted to address the issue approximately 7 times, including replacement of fuel injectors and spark plugs. Each time, the dealer told RC the vehicle was "good to go". Often the engine warning light would come back on only days after the last repair. RC was concerned that the dealer was not fixing the problem and contacted Mazda. RC told Mazda it was frustrating having to take time off work to take the vehicle in and RC did not want to keep driving the vehicle. Mazda told RC they were "at the mercy of dealerships in doing their diagnosis". Mazda provided an additional one year manufacturer's warranty. RC was nervous driving the vehicle but had to keep driving it for work.

On 8 September 2017, RC's vehicle lost power while driving at high speed on the highway. The vehicle was towed to the dealer, where it remained for about two months. The dealer forgot about the vehicle for the first three weeks. Ultimately the dealer replaced the clutchplate. On 6 October 2017, RC contacted Mazda and said RC felt unsafe in the vehicle, did not want the vehicle and did not trust that Mazda could fix the vehicle. After the vehicle had been with the dealer for about two months, on 31 October 2017 RC asked Mazda what was the next step, because "if it keeps happening it's an issue that isn't fixable". RC told Mazda that RC was too scared to drive the vehicle, and that it was a "ticking timebomb" and asked "where is there an end in sight – a different solution?". Mazda told RC it "can't guarantee" the vehicle wouldn't fail again. When RC asked what would happen if the issue was not fixable, Mazda said that it was fixable, there had never been a vehicle Mazda's technicians couldn't fix, it was just a matter of persistence. RC was not confident that Mazda had repaired the fault, and did not feel safe driving the vehicle, but could not afford to buy a new vehicle and had to continue driving it for work.

On 10 January 2018, the vehicle again lost power while RC was driving. RC told the dealer that RC did not want the vehicle back unless it was fixed. On 18 January 2018, the dealer told RC there had "likely been a major engine failure" and the engine had to be replaced. RC told the dealer that RC rejected the vehicle and wanted a refund. The dealer told RC it was Mazda's problem, and that RC had to call Mazda directly. The dealer said it would have to replace the engine anyway. RC felt pressured to accept the repairs. On 23 January 2018, RC informed Mazda directly that RC rejected the vehicle and requested a refund on the basis that the vehicle was unsafe, unfit to drive and had not been repaired within a reasonable time. On 24 January 2018, Mazda told RC that the engine replacement should fix all the problems and make the vehicle safe to drive. Mazda told RC that "we work in line with the Australian Consumer Laws". On 2 March 2018, Mazda told RC it was "unable to accede" to RC's request and was "prepared to offer" RC \$12,125 for RC's vehicle based on the current valuation, 30 months of good use, and 8 months of problems with the vehicle. RC asked why Mazda was taking into account those factors instead of giving RC a full refund "like any other consumer product"; Mazda said cars are "actually not" like any other consumer product. On 5 March 2018, RC rejected the offer and said RC was entitled to a full refund on the basis of a major failure. On 16 March 2018, Mazda offered RC \$13,000. When RC repeated RC's entitlement to a full refund on the basis of a major failure, Mazda said it was RC's choice whether RC wanted to take the offer or take the matter further.

On 23 March 2018, RC accepted Mazda's offer. RC relied on Mazda's statement that it was working in line with the ACL; RC was not confident about RC's consumer rights, did not know how to "take the matter further" and was concerned that, if RC did, RC might not get a refund, and RC needed the money to buy a new vehicle. RC would not have bought the vehicle had RC known the nature and extent of the faults with the vehicle. RC felt that Mazda did not properly explain what was wrong with the vehicle or why it was in repairs for so long. RC was frustrated and inconvenienced by the length of time the vehicle was in repairs, and felt like RC had to chase Mazda for a response.

Consumers CT and MT – Purchased Mazda CX-5 5-door automatic Akera diesel AWD in July 2016 for \$52,160

On 30 November 2016, the adaptive headlights on the vehicle failed with the angle of the headlights pointing downwards towards the ground and not illuminating the road. An error message on the LCD screen displayed 'problem with forward facing camera'. CT and MT took the vehicle to a Mazda dealership on 1 December 2016, and during 9 to 10 December 2016 and 21 December 2016 to 5 January 2017 the dealer made two repair attempts. During this period, when CT and MT were in possession of the vehicle they did not drive it at night because they did not feel safe doing so without functioning headlights. At this point, CT thought that the problem would be fixed within a reasonable amount of time. CT and MT were not given a detailed explanation of the repair attempts or the parts that had been replaced. After collecting the vehicle on 5 January 2017 CT and MT thought that the headlights did not work the way they had before.

On 15 May 2017, the adaptive headlights failed again with the headlights locked in a downwards position. CT took the vehicle to the Mazda dealer on 19 May 2017, and during 26 May 2016 to 30 May 2016 and 31 May to 16 June 2017 the dealer attempted repairs. When CT and MT were in possession of the vehicle they did not drive the vehicle at night because they did not feel safe driving the vehicle without functioning headlights. CT and MT were frustrated that they had presented the vehicle to Mazda on multiple occasions without it being repaired and without the cause of the failure being diagnosed. They felt that Mazda had taken more than a reasonable amount of time to fix the issue. CT and MT felt that the dealer was unable to provide an adequate explanation of the work being undertaken on the vehicle. On 11 June 2017, CT informed the manager of the Mazda dealership by email that CT and MT rejected the vehicle as they had lost faith that it could be satisfactorily repaired and on 15 June 2017 they requested, in person, a replacement vehicle or a refund from the dealer. The manager told them that it was a warranty issue and that they should contact Mazda directly. Also on 15 June 2017, MT telephoned Mazda and stated that the vehicle had a major failure and that CT and MT no longer trusted the vehicle. Mazda informed MT that as the manufacturer it had the right to fix the vehicle under warranty. On 16 June 2017, CT sent a written request for a refund to the manager of the Mazda dealer and had email and telephone communications with Mazda directly in which CT informed Mazda that CT and MT considered the vehicle had a major failure and requested a refund. In September 2017, Mazda informed CT that it did not believe there was a major failure and offered CT and MT two free services and a one-year extended warranty.

On 16 June 2017 CT collected the vehicle from the dealer to avoid the possibility of storage fees but maintained the request for a refund. The headlights were not in full working order and CT and MT did not drive the vehicle at night because they did not feel safe driving the vehicle without functioning headlights. In August 2017, they took the vehicle to a different Mazda dealership in relation to an oil leak and requested that dealer to look at the headlights. The dealer replaced a part in the headlights. When CT and MT had possession of the vehicle again they were prepared to drive the vehicle at night, even though they were not satisfied that the headlights were functioning as they should. Throughout September 2017 CT and MT were in contact with Mazda and maintained their position that there was a major failure with the vehicle.

In November 2017, the headlights failed again. On 14 November 2017, MT emailed Mazda requesting further action. On 16 November 2017, MT informed Mazda that MT and CT did not want another repair. Mazda told MT that the vehicle should be taken back to a dealer to have it looked at and that Mazda considered that CT and MT were not entitled to a new vehicle. On 17 November 2017, CT and MT filed a claim with the NSW Civil & Administrative Tribunal seeking a full refund of the purchase price. Between November 2017 and January 2018, Mazda negotiated a settlement of the claim with CT and MT. On 18 January 2018, Mazda agreed to provide CT and MT a new (2017 plated) Mazda CX 5 vehicle and to refund them \$265 for the costs of filing the application. Mazda delivered the vehicle two weeks after the scheduled date of delivery. CT and MT would not have purchased their vehicle had they known of the nature and extent of the headlight issues.

Consumers SB and KB – purchased Mazda CX5 Maxx Sport diesel AWD, in May 2013 for approximately \$43,000

On 8 April 2015, the vehicle lost power while SB was driving at speed on the highway, returning from an interstate holiday with SB's children. The vehicle went into "limp mode". The vehicle was towed to a nearby dealership. The vehicle required a replacement engine and radiator. The vehicle was under repair for about four weeks. SB felt like no one properly explained what was wrong with the vehicle. SB was concerned the vehicle was not safe to drive, but the dealer said it was. The "post repair checklist" indicated Mazda considered the issue to be a "major failure".

In mid-July 2015, the vehicle again lost power while SB was driving at speed on the motorway during peak hour. The vehicle was towed to the nearest Mazda dealership. The next day, SB submitted a complaint to Mazda about what happened. About a week later, KB told the local Mazda dealer that KB and SB had no confidence in the vehicle and wanted a replacement. The dealer told KB there was "no way" Mazda would give them a replacement. The vehicle was under repair for about a month and an oil sensor was replaced. On 13 August 2015, SB told Mazda SB was concerned about the safety and reliability of the vehicle and that there was something fundamentally wrong with it. SB could not afford to buy a new vehicle and had no choice but to continue driving the car. SB told Mazda that SB had been told by the dealer that the vehicle was fixed, but if the issue happened again SB thought SB would have a right to demand a replacement or changeover vehicle. Mazda offered to extend the warranty on the vehicle by 12 months, which SB said was not necessary so long as Mazda would look after SB if there were any further issues with the vehicle. Mazda said it would.

On 13 April 2016, the vehicle would not start while SB was away from home. The vehicle was under repair for one week. It required a new starter motor. On 29 April 2016, Mazda offered SB an additional 12 months extended warranty and 2 years premium roadside assistance.

On 21 July 2017, SB noticed a problem with the engine; the dealer advised SB that the vehicle required an engine replacement, at a cost of \$23,000 as it was no longer under warranty. SB was distressed, and told the dealer SB no longer wanted the vehicle. SB considered the vehicle to be unsafe, because of this and the earlier faults. On 28 July 2017, KB requested a replacement vehicle on behalf of SB. Mazda told KB that it would not give KB and SB a new vehicle at no cost. On 4 August 2017, Mazda told SB that the history of the vehicle, SB's previous requests for a replacement, the fact that SB did not feel confident in the vehicle and the age and kilometres of the vehicle would be taken into consideration. The vehicle remained under repair for about three weeks; Mazda paid for the engine to be replaced and told SB to collect it on 8 August 2017. SB thought there was no option but to accept the repairs. On 11 August 2017, Mazda offered SB \$5,000 toward the purchase of a new Mazda vehicle if SB traded in the vehicle. SB was very distressed and told Mazda that SB could not afford to buy a replacement vehicle. On 1 September 2017, KB again requested a replacement vehicle and Mazda told KB that there was "no way" Mazda would agree to a new vehicle at no cost to KB and SB. On 5 December 2017, KB made a complaint to NSW Fair Trading. In response, Mazda reiterated its offer of \$5,000.

On 4 February 2018, the vehicle again lost power when SB and KB's child was driving at speed on the motorway. The dealer replaced the engine wiring harness and engine sensors. The vehicle was under repair for about two weeks.

On 22 February 2018, SB applied to the New South Wales Civil and Administrative Tribunal (**NCAT**), requesting a refund of \$19,000. On 9 April 2018, fumes filled the cabin while SB was driving the vehicle to the NCAT proceedings. SB drove the vehicle to the dealer and rejected it. SB considered the car was unsafe and unfit to drive and that the attempted repairs had been unsuccessful. SB would not have bought the vehicle had SB known of the faults with it. During the NCAT proceedings, Mazda and SB agreed to settle the proceedings for \$16,000.

Consumer MG – purchased Mazda 6 touring 2.2L wagon diesel engine in June 2013 for approximately \$46,663

Between 2014 and 2017, the low oil pressure warning and engine warning light illuminated intermittently; each time MG called the dealer and most times was told to have the vehicle towed to the dealer. The vehicle required repeated repairs including replacement of oil filters and a computer update and/or data reset. MG called Mazda on at least one occasion and was told to contact the dealership; MG also attempted to contact Mazda via its website. MG was frustrated at being passed around. The problem recurred regularly and MG thought the dealership was not able to fix it. MG stopped using the vehicle for long distance work trips.

In February 2015, the low oil pressure warning and engine warning light illuminated, and the brakes stopped working properly, while MG was driving at speed on the freeway. The vehicle was towed to the dealer; the dealer found metal shavings blocking the oil filter and the turbocharger and camshaft required replacement, which took two to three weeks. MG thought the vehicle was unsafe, unfit to drive for long distances, and Mazda was not fixing the problems. The “post repair checklist” completed by the dealer indicated Mazda considered the issue to be a “major failure”. MG asked the dealer what were the chances of getting a refund or replacement; the dealer said such cases were “few and far between” and MG was unlikely to get a refund.

In May 2015, the low oil pressure warning and engine warning light illuminated again. The vehicle was towed to the dealer; the dealer found the oil pickup was blocked with soot and there was significant damage to the engine bearings and crankshaft and the vehicle required an engine replacement, which took about three weeks. MG told the dealer MG wanted the vehicle replaced and was told Mazda would only replace a vehicle if it was less than a year old. MG asked Mazda for a replacement vehicle but was told to take it up with the dealer.

In November 2016, the low oil pressure warning and engine warning light illuminated again. MG took the vehicle to the dealership and was told that it required a partial engine replacement. The vehicle was in repairs for two to three weeks. MG did not pursue the request for a replacement vehicle because MG did not think it would be successful, based on MG’s previous experience. In approximately mid-2017, the power steering and brakes lost power and vehicle went into “limp” mode and had to be towed to the dealership, where it required repairs to the earthing connection which took two to three days. Again, MG did not pursue the request for a replacement vehicle because MG did not think it would be successful, based on MG’s previous experience.

In approximately June 2018, the low oil pressure warning and engine warning light illuminated. The vehicle was towed to the dealership; again the oil pickup was blocked and the vehicle required an engine replacement which took approximately three weeks. MG rejected the vehicle and told the dealer MG wanted a replacement vehicle. MG thought the vehicle was unreliable and unfit to drive and had been in repairs for an unreasonable period of time. MG would not have bought the vehicle had MG known of the problems with it. On 5 July 2018, Mazda told MG that it could not guarantee it would be the last time the vehicle would be in the dealership for an engine replacement given its history. MG told Mazda MG had thought about asking Mazda to replace the vehicle but thought the best MG could hope for was for Mazda to buy the vehicle back at current market value, but then MG would be out of pocket because of MG’s outstanding loan and so felt stuck with the vehicle. In response, Mazda said it was happy to review “something around goodwill” or “some compensation” but that it would “probably be unlikely” that Mazda would “buy back” MG’s vehicle without a financial contribution from MG and it “certainly wouldn’t be a case” of Mazda putting MG in a new vehicle. On 25 July 2018, Mazda offered MG a 50% contribution toward the cost of a new Mazda vehicle based on a “trade in” value of \$15,000. MG was not told on what basis Mazda had made that decision. The offer was open for a short amount of time and MG did not have time to consider it properly. MG told Mazda MG was disappointed that the trade-in value of MG’s vehicle was lower than it would have been at the time of the second engine replacement. MG tried to negotiate, but Mazda did not increase its offer. On 20 August 2018, MG accepted Mazda’s offer of a new Mazda vehicle in exchange for the return of MG’s vehicle and an “additional payment” from MG of \$17,700. MG thought this was MG’s only option.

Consumers TK and MK – purchased Mazda BT-50 S 6A 3.2L Dual Cab Utility 4x4 automatic, in June 2017 for approximately \$55,000 including accessories

Around 15 August 2017, while driving the vehicle on holiday interstate with their caravan, TK and MK noticed a noise coming from the engine. MK drove the vehicle to the nearest dealership; the dealer told them to go on to another dealership. MK drove the vehicle there, where on 21 August 2017, the dealer found metal shavings in the oil sump from the fuel injector, and said the vehicle needed a new engine. The repairs took about 10 days. On 23 August 2017, TK asked Mazda about replacing the vehicle rather than the engine; Mazda said “we don’t do that. We repair cars under the terms and conditions of the warranty.” TK thought Mazda did not properly explain what had caused the engine to fail. TK was angry, disappointed, and no longer had confidence in the vehicle. On 8 September 2017, when TK told Mazda, Mazda offered a letter of assurance to cover repairs for another 12 months after the warranty ended.

Between December 2018 and February 2019, on at least four occasions the vehicle “stalled” and lost power, including twice while MK was towing the caravan and once on a main road during peak hour traffic. On 28 February, TK and MK took the vehicle to a dealer for repairs, where it remained for about four weeks. On 25 February 2019, TK told Mazda that the vehicle was a lemon. On 4 March 2019, Mazda told TK the dealer had to replicate the issue. The dealer told TK they could not replicate the issue, and could not see any fault codes. TK thought the vehicle was unsafe, and unfit to drive, especially towing a caravan. On 8 March 2019, TK told Mazda TK did not want the vehicle back until it was fixed, but Mazda repeated that the dealer had to replicate the issue. On 13 March 2019, TK told Mazda that TK wanted a new vehicle and did not think TK got the vehicle that TK ordered. TK also wrote to Mazda saying TK had no faith in the vehicle, that no amount of repairs or diagnostics would help and that TK wanted the vehicle replaced or a guarantee that the vehicle was safe to drive. On 15 March 2019, TK told Mazda the vehicle was unsafe to drive and was defective. Mazda told TK the vehicle was “definitely not defective” and that it was important for the dealer to find a fault. On 25 March 2019, Mazda told TK that because the dealer could not replicate the issue, Mazda could not confirm there was a concern. TK told Mazda the vehicle had not performed the way they were told it was going to perform, that TK was concerned for their safety, and that the faults with the vehicle were unacceptable. Mazda said TK’s request was still being reviewed but that TK’s vehicle was safe to drive in the interim. TK felt there was no choice but to pick up the vehicle even though TK was scared, felt unsafe, and had requested a replacement. On 4 April 2019, TK again said TK did not feel safe in the vehicle and asked Mazda to rectify the issue or give TK a replacement vehicle.

On 6 and 7 April 2019, the vehicle “stalled” and lost power on two occasions, once while MK was driving uphill in traffic. TK took the vehicle to the local dealership, where it remained for about two months. On 8 April 2019, TK told Mazda TK was too scared to drive the vehicle and TK wanted it replaced or its safety “guaranteed”. On 15 April 2019, TK again asked Mazda about TK’s request and said that TK was too scared to drive the vehicle. On 29 April 2019, TK told Mazda TK would not pick up the vehicle. Mazda and the dealer told TK that the vehicle had stalled at the dealership but Mazda required it to stall while it was connected to the computer system. TK was increasingly frustrated by Mazda’s requirement that the dealer replicate the fault. TK felt that TK had to keep following up Mazda to get a response. On about 20 May 2019, Mazda rejected TK’s request for a refund or replacement vehicle and said it believed there was no manufacturing concern with the vehicle. The dealer told TK they thought the problem was caused by the wiring of a reverse-facing camera on the caravan. On 5 June 2019, Mazda told TK to monitor the vehicle. On 7 June 2019, TK picked up the vehicle but remained scared to drive it.

Between 23 and 26 July 2019, the vehicle again lost power while MK was driving on three occasions. On 26 July 2019, TK took the vehicle to the local Mazda dealer and said TK was never going to drive the vehicle again. TK would not have bought the vehicle had TK known of the problems with it. The dealer said it wasn’t the dealer’s call to make. TK made numerous calls to Mazda in relation to the issues with the vehicle and TK’s request for a replacement. The dealer ultimately replicated the fault and told TK the vehicle needed a new fuel system. On or around 25 August 2019 Mazda agreed to refund TK the purchase price of the vehicle.

Consumer LS – purchased Mazda CX-3 A 6A Akari Diesel All Wheel Drive with automatic transmission, in August 2015 for approximately \$39,000

Between about October 2015 and January 2016, the vehicle intermittently “jerked” and lost power while driving. It became more frequent and intense over time. LS took the vehicle to the local Mazda dealership a few times but was told they could not find anything wrong with it. Around 15 January 2016, LS took the vehicle to the dealership because the issue had become worse. The dealer told LS there was an “internal fault” and the transmission in the vehicle would be replaced. The vehicle was under repair for about two weeks. On 25 January 2016, LS called Mazda and asked “is there anything else? Can I have a new car? What can I do?” and Mazda said that “in regards to the consumer affairs” Mazda had a right to repair the vehicle which is why it had replaced the transmission and “in regards to a new vehicle, if it did fail again, it may be something that could be looked into”. LS felt that Mazda did not properly explain what had caused the problems. LS thought the vehicle was defective and a lemon, and unsafe and unsuitable to drive. Based on LS’s conversations with Mazda, LS felt LS did not have a choice other than to accept the repairs, pick up the vehicle and continue driving the vehicle for work.

Between February and mid 2017, the vehicle again intermittently lost power while driving. On more than one occasion, the vehicle lost power while driving on a highway at high speed. By mid 2017, it was happening around every day and sometimes multiple times a day. LS considered this made the vehicle unsafe, and unsuitable to drive. On most occasions, LS took the vehicle to a dealer. Despite repeated testing, the dealers said they couldn’t find anything wrong with it and it was “ok to go”. The problems got worse.

In June 2017, LS took the vehicle to the dealer and about a week later the dealer told LS the vehicle required an engine replacement. LS was very upset and later called Mazda and asked for a replacement vehicle. Mazda told LS the earlier transmission failure was a major failure, but the engine replacement was not a major failure. LS said the vehicle did not live up to the purpose or expectations for which LS had bought it. On 12 July 2017, Mazda told LS that it was “not entertaining the idea of a buy back”. When LS asked whether “anybody ever gets a buy back”, Mazda said “it does happen but it is very rare” and “it’s normally brand new vehicles”. Mazda offered LS “compensation” of an extended warranty for manufacturing defects and two free services. When LS asked Mazda whether it was worthwhile LS pushing the matter further, Mazda said it wouldn’t want LS to “waste [LS’s] time” and that where people had pushed before there had not been a “great outcome... in regards to personal costs and court time and all the other things that go along with it”. On 16 July 2017, LS informed Mazda in writing that LS had no confidence in the vehicle, LS did not consider that it performed within specification or was trustworthy, and that LS considered the vehicle to have experienced two “major fails”. LS said LS would not have bought the vehicle had LS known of the faults with it. On 17 July 2017, Mazda told LS that it was not able to replace the vehicle but could assist LS with “changeover costs” of a replacement vehicle if LS wanted to trade in LS’s vehicle for another Mazda vehicle. LS was told by Mazda to return the loan vehicle, and LS felt pressured to collect the vehicle even though LS had said LS did not feel safe driving the vehicle. When LS picked up the vehicle from the dealership, the dealership told LS “this is the second major fail” and said LS needed to call Mazda. On 3 August 2017, LS told Mazda that LS considered the vehicle had not lived up to the consumer guarantees and that anyone would consider an engine replacement and transmission replacement to be a major failure. Mazda said it would try to put LS’s case back to the legal team but did not believe they would look into buying the vehicle back but LS was entitled to pursue whatever legal action LS considered necessary. On 8 August 2017, Mazda told LS that “legal” had not changed their position in regards to buying the vehicle back or replacing the vehicle. LS repeated that LS did not think the vehicle had lived up to the original specifications and had no confidence in the vehicle. LS ended up giving up on the request for a refund or replacement and accepting the offer of an extended warranty and services. LS felt like LS had no other option. LS found the process of dealing with Mazda very frustrating.

Consumer EG – purchased Mazda2 Neo 6-speed manual 5-door hatchback, in December 2014 for approximately \$17,350, less a trade-in discount

From the date of purchase, EG experienced a rough idle intermittently. EG raised the issue with the dealership at each scheduled service. EG continued to drive the vehicle despite the rough idle.

Between October 2017 and March 2018, multiple dashboard engine lights illuminated intermittently while EG was driving the vehicle. When the lights came on the first time EG contacted the dealer immediately as EG was worried that the vehicle was not safe to drive. EG was told that if the engine felt normal the vehicle could still be driven while EG waited for an appointment for 2-3 weeks. When the lights stopped illuminating the first time EG informed the dealer and was told not to bring the vehicle to the dealer as it would not be possible to diagnose the problem if the lights were no longer illuminated. The dashboard lights issue recurred every three to four weeks and each time the lights stayed on for about a week.

In around February 2018, the vehicle had no acceleration on starting and the vehicle would not go above approximately 5km/hr for a short time after the engine was turned on. When EG contacted the dealer the next available appointment was in March. In the period waiting for the appointment, the issue reoccurred approximately seven to ten times. On 23 March 2018, the dealer told EG that they identified a misfiring cylinder, although repairs were not carried out on that day. EG was also told that the issue of no acceleration was the vehicle going into 'limp mode' to protect the engine. EG booked the vehicle in for further repairs in April 2018. The vehicle continued to go into 'limp mode' on starting during the time waiting for the repairs. EG continued to drive the vehicle as the dealer had allowed EG to take it back so EG assumed it was safe to drive.

Between 23 March 2018 and 3 December 2018, EG took the vehicle to the dealer for repairs on three occasions. On two of these occasions the dealer held the vehicle for extended periods: from around 16 April 2018 to 28 April 2018; from 2 July 2018 to around 3 December 2018 (although notification of completion of repairs was made to EG on 14 November 2018), totalling approximately 20 weeks. During the periods of attempted repair EG was upset and frustrated as the vehicle had been under repair for months which EG considered to be an unreasonable amount of time. EG had not been properly informed as to what the problem was or why it was taking so long to repair.

Between 18 September 2018 and 2 January 2019, EG requested a new engine or a replacement vehicle, and later a replacement vehicle. During this period EG was in contact with Mazda on numerous occasions. EG told Mazda that the repairs to the vehicle had been ongoing for an unreasonable time and referred to EG's consumer rights.

In late October 2018 Mazda said that it would pay for a partial engine replacement. EG said that EG still wanted a replacement vehicle and that EG considered a partial engine replacement insufficient. The repairs Mazda had foreshadowed were carried out on the vehicle.

On 19 November 2018, Mazda told EG that they could not offer a replacement vehicle and offered a one-year extended warranty. EG was not told the reasons Mazda refused EG's request for a replacement vehicle. EG attempted to negotiate with Mazda and then filed an application with the NSW Civil and Administrative Tribunal seeking a replacement vehicle. EG ultimately accepted an offer including warranties, services and compensation for out of pocket expenses. EG continued to experience problems with a rough idle on the vehicle.

In July 2019 EG traded in the vehicle and purchased a new vehicle.

Certificate of lawyer

I Andrew Christopher certify to the Court that, in relation to the concise statement filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 30 October 2019

A handwritten signature in black ink, appearing to read 'Andrew John Christopher', written over a horizontal dotted line.

Signed by Andrew John Christopher of Webb Henderson
Lawyer for the Applicant