FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Mazda Australia Pty Ltd (No 3) [2024] FCA 83

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| File number(s): |  |
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| Judgment of: | **O’CALLAGHAN J** |
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| Date of judgment: | 14 February 2024 |
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| Catchwords: | **CONSUMER LAW** – imposition of civil penalties following findings and declarations of breach of s 29(1)(m) of Australian Consumer Law by respondent in *Australian Competition and Consumer Commission v Mazda Australia Pty Ltd* [2021] FCA 1493; (2021) 158 ACSR 31 and *Australian Competition and Consumer Commission v Mazda Australia Pty Ltd (No 2)* [2022] FCA 250 – total penalty imposed of $11.5 million – additional ancillary relief also granted  |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) Schedule 2 ss 18(1), 29(1)(m), 224, 224(1)(a)(ii), 224(2), 224(3A), 232(1)(a), 239, 246(1), 246(2)(c), 247, 295, Part 3-1, Part 3-2, Part 5-2, Part 5-4 |
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| Cases cited: | *Australian Competition and Consumer Commission v Mazda Australia Pty Ltd* [2023] FCAFC 45*Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 2)* [2002] FCA 559; (2002) 190 ALR 169*Australian Competition and Consumer Commission v Acquire Learning & Careers Pty Ltd* [2017] FCA 602; [2017] ATPR 42-543*Australian Competition and Consumer Commission v Clinica Internationale Pty Ltd (No 2*) [2016] FCA 62*Australian Competition and Consumer Commission v Dell Australia Pty Ltd (No 2)* [2023] FCA 983*Australian Competition and Consumer Commission v Dodo Services Pty Ltd* [2021] FCA 589*Australian Competition and Consumer Commission v Ford Motor Company of Australia Ltd* [2018] FCA 703; (2018) 360 ALR 124*Australian Competition and Consumer Commission v GlaxoSmithKline Consumer Healthcare Australia Pty Ltd (No 2)* [2020] FCA 724*Australian Competition and Consumer Commission v Mazda Australia Pty Ltd* [2021] FCA 1493; (2021) 158 ACSR 31*Australian Competition and Consumer Commission v Mazda Australia Pty Ltd (No 2)* [2022] FCA 250*Australian Competition and Consumer Commission v Oakmoore Pty Ltd (No 2)* [2018] FCA 1170*Australian Competition and Consumer Commission v Woolworths Limited* [2016] FCA 44; [2016] ATPR 42-521*Australian Competition and Consumer Commission v Z-Tek Computer Pty Ltd* (1997) 78 FCR 197*Australian Securities and Investments Commission v Wooldridge* [2019] FCAFC 172*Flight Centre Ltd v Australian Competition and Consumer Commission (No 2)* (2018) 260 FCR 68*NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285*Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249*Trade Practices Commission v CSR Ltd* [1990] FCA 762; (1991) 13 ATPR 41-076*Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* (2021) 284 FCR 24 |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Regulator and Consumer Protection |
|  |  |
| Number of paragraphs: | 113 |
|  |  |
| Date of hearing: | 6 and 7 December 2023 |
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| Counsel for the Applicant: | NP De Young KC with NJ Hickey and AF Garsia |
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| Solicitor for the Applicant: | Webb Henderson |
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| Counsel for the Respondent: | MR Scott KC with J Lindgren |
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| Solicitor for the Respondent: | Mills Oakley |

ORDERS

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|  | VID 1169 of 2019 |
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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONApplicant |
| AND: | MAZDA AUSTRALIA PTY LTDRespondent |

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| order made by: | O’CALLAGHAN J |
| DATE OF ORDER: | 14 february 2024  |

OTHER MATTERS:

The respondent (**Mazda**), by its counsel, unconditionally undertakes to pay to each of the non-party consumers within 14 days the sum of $3,000 in relation to each of the seven vehicles the subject of this proceeding (being a total sum of $21,000).

THE COURT ORDERS THAT:

Pecuniary penalties

1. Pursuant to section 224(1) of the Australian Consumer Law at Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (**ACL**), Mazda is to pay to the Commonwealth of Australia forthwith the total sum of $11.5 million by way of pecuniary penalty by reason of Mazda’s contraventions of section 29(1)(m) of the ACL as declared by this court on 21 March 2022.

Compliance program

2. Pursuant to section 246(2)(b) of the ACL, Mazda at its own expense is to:

(a) within 90 days, implement the Competition and Consumer Compliance Program (**Compliance Program**) measures in the terms of Appendix A to this order; and

(b) maintain the Compliance Program measures referred to in order 4(a) for three years from the date on which they are implemented.

Injunctive relief

3. Pursuant to section 232 of the ACL, Mazda be restrained, whether by itself, its officers, employees, agents or otherwise, for a period of 5 years from the date of the order, from, in trade or commerce, making false or misleading representations in the course of communication with consumers, concerning the existence or effect of consumer guarantees under Part 3-2 of the ACL, and the rights or remedies available under Part 5-4 of the ACL, and whether it had reasonable grounds for forming an opinion that the consumer was not entitled to a refund or replacement vehicle at no cost to them under the consumer guarantee provisions of the ACL when it had no reasonable grounds for forming such an opinion. (For the avoidance of doubt, the word “agents” in this order does not include any Mazda dealer).

Disclosure order

4. Pursuant to section 246(2)(c) of the ACL, Mazda, at its own expense and within 14 days, is to provide a disclosure notice describing in the terms of Appendix B, the court’s findings of contravention and the effect of the court’s final orders in this proceeding by sending it by email to all Mazda dealers.

5. Within 21 days, Mazda file and serve an affidavit verifying its compliance with order 4.

Adverse publicity order

6. Pursuant to section 247 of the ACL, Mazda, at its own expense and within 14 days, publish a notice for a period of 90 days on the Mazda Support page (at https://www.mazda.com.au/owners/help-and-support/ (under the heading, “Mazda Recalls”)) of the Mazda website located at https://mazda.com.au/ in the terms of Appendix C to this order.

Non-party consumer redress

7. Pursuant to section 239 of the ACL, Mazda is to pay non-party redress as set out below:

(a) within 14 days, the ACCC is to contact each of the consumers referred to in Appendix D to this order in writing (**Relevant Consumers**):

(i) advising them of the making of these orders and the amount proposed to be paid to them by way of redress;

(ii) inviting their written acceptance of the redress amount within four weeks of the date of the letter; and

(iii) seeking their payment account details;

(b) within 7 days of the expiry of the four week period referred to in order 7(a)(ii), the ACCC is to contact Mazda in writing advising which of the Relevant Consumers have communicated their acceptance of the redress pursuant to order 7(a)(ii), and the total amount of redress due to be paid (**Funds**);

(c) within 14 days of the ACCC complying with order 7(b), Mazda is to pay the Funds to the ACCC;

(d) within 14 days of Mazda complying with order 7(c), the ACCC is to distribute to each of the Relevant Consumers who have communicated their acceptance of the redress the amount of the Funds due to be paid in accordance with Appendix D to these orders.

Costs

8. Mazda pay to the Commonwealth of Australia 70% of the ACCC’s total costs of the proceeding up to and including the date of making these orders in a lump sum in an amount to be determined by the Registrar and in accordance with such directions as the Registrar considers appropriate, such costs to be payable forthwith after fixing.

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

APPENDIX A

**COMPETITION AND CONSUMER COMPLIANCE PROGRAM**

**LEVEL 4**

Mazda Australia Pty Ltd (ACN 004 690 804) (**Mazda**) will implement the following requirements into its competition and consumer compliance program (**Compliance Program**):

**Complaints Handling System**

1. Within two months of the orders of the Federal Court of Australia dated 14 February 2024 (**Commencement Date**), Mazda will develop and implement procedures for identifying, classifying, storing and responding to competition and consumer law complaints (**Complaints Handling System**).

2. Mazda will use its best endeavours to ensure the Complaints Handling System is consistent with the Australian/New Zealand Standard ***AS/NZS 10002:2022 Guidelines for complaint management in organizations,*** as in force or existing at the Commencement Date, tailored as required to Mazda’s circumstances.

3. Mazda will ensure that staff and customers are made aware of the Complaints Handling System.

**Whistleblower Protection**

4. Mazda will:

4.1. ensure that it has whistleblower protection mechanisms to protect those coming forward with competition and consumer law complaints.

4.2. use its best endeavours to ensure that these mechanisms are consistent with good practice guidance identified in ***ASIC Regulatory Guide 270: Whistleblower policies***, as in force or existing at the Commencement Date, tailored as required to Mazda’s circumstances.

**Compliance Review**

5. Within one year of the Compliance Program coming into effect, Mazda will, at its own expense, cause an annual review of the Compliance Program (**Review**) to be carried out in accordance with each of the following requirements:

5.1. **Scope of Review** – the Review should be broad and rigorous enough to provide Mazda and the ACCC with:

5.1.1. a verification that Mazda has in place a Compliance Program that complies with each of the requirements detailed in paragraphs 1 to 4 of this Annexure; and

5.1.2. the Compliance Reports detailed at paragraph 6 of this Annexure.

5.2. **Independence of Review** – Mazda will ensure that each Review is carried out by a suitably qualified, independent compliance professional with expertise in consumer law (**Reviewer**). The Reviewer will qualify as independent on the basis that he or she:

5.2.1. did not design or implement the Compliance Program;

5.2.2. is not a present or past staff member or director of Mazda;

5.2.3. has not acted and does not act for, and does not consult and has not consulted to, Mazda in any consumer law matters, other than performing Reviews; and

5.2.4. has no significant shareholding or other interests in Mazda.

5.3. **Evidence** – Mazda will use its best endeavours to ensure that each Review is conducted on the basis that the Reviewer has access to all relevant sources of information in Mazda’s possession or control, including without limitation:

5.3.1. the ability to make enquiries of any officers, employees, representatives and agents of Mazda;

5.3.2. documents relating to the review of Mazda’s customer complaint processes undertaken by Mr Michael Robins in 2022 (**Risk Assessment**);

5.3.3. documents relating to Mazda’s Compliance Program, including documents relevant to Mazda’s consumer law compliance policy, Complaints Handling System, and consumer lawstaff training and induction (**Staff Training and Induction**); and

5.3.4. any reports made by Mr Robins to Mazda’s Board or senior management regarding Mazda’s Compliance Program.

5.4. Following the completion of the initial Review, Mazda will ensure that subsequent Reviews are completed within two years and three years of the Compliance Program coming into effect.

**Compliance Report**

6. Mazda will use its best endeavours to ensure that within 30 days of the completion of a Review, the Reviewer includes the following findings of the Review in a report to Mr Robins, or any other person appointed as compliance officer of Mazda at that time (**Compliance Report**):

6.1. whether the Compliance Program of Mazda includes all the elements detailed in paragraphs 1 to 4 of this Annexure, and if not, what elements need to be included or further developed;

6.2. whether the Compliance Program adequately covers areas identified in the Risk Assessment, and if not, what needs to be further addressed;

6.3. whether the Staff Training and Induction is effective, and if not, what aspects need to be further developed;

6.4. whether Mazda’s Complaints Handling System is effective, and if not, what aspects need to be further developed;

6.5. whether Mazda is able to provide protections consistent with good practice guidance referred to in paragraph 4.2 of this Annexure for competition and consumer law whistleblowers, and whether staff are aware of the whistleblower protection mechanisms; and

6.6. whether there are any material deficiencies in Mazda’s Compliance Program, or whether there are or have been instances of material non-compliance with the Compliance Program (**Material Failure**), and if so, recommendations for rectifying the Material Failure.

**Mazda’s Response to Compliance Report**

7. Mazda will ensure that the Compliance Officer, within 30 days of receiving the Compliance Report:

7.1. provides the Compliance Report to Mazda’s Board or senior management; and

7.2. where a Material Failure has been identified by the Reviewer in the Compliance Report, provides a report to Mazda’s Board or senior management identifying how Mazda can implement any recommendations made by the Reviewer in the Compliance Report to rectify the Material Failure.

8. Mazda will promptly and fully implement any recommendations made by the Reviewer in the Compliance Report to address a Material Failure.

APPENDIX B

**Disclosure notice to dealers**

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| **CORRECTIVE NOTICE****PUBLISHED BY ORDER OF THE FEDERAL COURT OF AUSTRALIA****False and Misleading Statements About Consumer Rights**Following action by the ACCC, the Federal Court of Australia has declared that Mazda Australia Pty Ltd (**Mazda**) contravened the Australian Consumer Law (**ACL**) by making false representations to nine consumers: concerning the existence or effect of consumer guarantees and the rights or remedies available under the ACL; and that it had reasonable grounds for forming the opinion that those consumers who had purchased Mazda vehicles were not entitled to a refund or replacement vehicle at no cost to them under the consumer guarantee provisions of the ACL.These representations were false. Motor vehicles purchased by Australian consumers come with consumer guarantee rights under the ACL which cannot be excluded.On 14 February 2024, Justice O’Callaghan of the Federal Court ordered Mazda to pay a penalty of $11.5 million to the Commonwealth for making the false representations referred to above.Authorised motor vehicle dealers are required to adhere to the consumer guarantees as to goods and services under the ACL. Consumers are entitled to remedies when there is a: major failure to comply with a consumer guarantee;  minor failure to comply with a consumer guarantee that cannot be fixed within a reasonable time; or minor failure to comply with a consumer guarantee that can be fixed. **For further information on consumer rights in Australia, visit** [**www.consumerlaw.gov.au**](http://www.consumerlaw.gov.au) **and** [**www.accc.gov.au/consumerguarantees**](http://www.accc.gov.au/consumerguarantees)**.****For further information on the consumer guarantees as they apply to the motor vehicle industry, download the Motor Vehicle Sales and Repairs Guide at:** [**https://www.accc.gov.au/about-us/publications/motor-vehicle-sales-and-repairs-an-industry-guide-to-the-australian-consumer-law**](https://www.accc.gov.au/about-us/publications/motor-vehicle-sales-and-repairs-an-industry-guide-to-the-australian-consumer-law)**A link to the Federal Court judgment appears here: [*hyperlink to be inserted*]** |

APPENDIX C

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| **CORRECTIVE NOTICE****PUBLISHED BY ORDER OF THE FEDERAL COURT OF AUSTRALIA****False and Misleading Statements About Consumer Rights**Following action by the ACCC, the Federal Court of Australia has declared that Mazda Australia Pty Ltd (**Mazda**) contravened the Australian Consumer Law (**ACL**) by making false representations to nine consumers: concerning the existence or effect of consumer guarantees and the rights or remedies available under the ACL; and that it had reasonable grounds for forming the opinion that those consumers who had purchased Mazda vehicles were not entitled to a refund or replacement vehicle at no cost to them under the consumer guarantee provisions of the ACL.These representations were false. Motor vehicles purchased by Australian consumers come with consumer guarantee rights under the ACL which cannot be excluded.On 14 February 2024, Justice O’Callaghan of the Federal Court ordered Mazda to pay a penalty of $11.5 million to the Commonwealth for making the false representations referred to above.**For further information on consumer rights in Australia, visit** [**www.consumerlaw.gov.au**](http://www.consumerlaw.gov.au) **and** [**www.accc.gov.au/consumerguarantees**](http://www.accc.gov.au/consumerguarantees)**.****A link to the Federal Court judgment appears here: [*hyperlink to be inserted*]** |

APPENDIX D

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| **Relevant Consumer** | **Compensation payment** |
| **RC** | $5,990 |
| **CT and MT** | - |
| **SB and KB** | $27,650 |
| **MG** | $14,393 |
| **TK and MK** | - |
| **LC** | $24,408 |
| **EG** | $9,850 |
| **TOTAL** | **$82,291** |

REASONS FOR JUDGMENT

O’CALLAGHAN J

# INTRODUCTION

1 On 21 March 2022, I made declarations that Mazda Australia Pty Ltd (**Mazda**) contravened ss 18(1) and 29(1)(m) of the Australian Consumer Law(**ACL**, being Schedule 2 to the *Competition and Consumer Act 2010* (Cth)), by making false representations concerning consumer guarantees under the ACL. See *Australian Competition and Consumer Commission v Mazda Australia Pty Ltd* [2021] FCA 1493; (2021) 158 ACSR 31 (**Liability Judgment**); *Australian Competition and Consumer Commission v Mazda Australia Pty Ltd (No 2)* [2022] FCA 250 (**Declarations**).

2 Mazda appealed against my orders finding that it had contravened ss 18(1) and 29(1)(m) of the ACL. The Australian Competition and Consumer Commission (**ACCC**) filed a notice of contention in the Mazda appeal. The ACCC also appealed against my dismissal of its claims that Mazda had engaged in unconscionable conduct in contravention of s 21 of the ACL. Mazda filed a notice of contention in the ACCC appeal.

3 The Full Court allowed the ACCC notice of contention but rejected both the ACCC appeal and the Mazda appeal. It was thus unnecessary for the Full Court to address the Mazda notices of contention. See *Australian Competition and Consumer Commission v Mazda Australia Pty Ltd* [2023] FCAFC 45 (Mortimer, Lee and Halley JJ).

4 I then heard submissions on the questions of the pecuniary penalties to be imposed on Mazda and any additional relief. These reasons deal with those questions.

# SUMMARY OF FINDINGS

5 I found that Mazda made 49 false representations to nine consumers in contravention of ss 18(1) and 29(1)(m) of the ACL. The false representations related to seven motor vehicles purchased from Mazda dealers and fell into the following two categories:

(a) false representations concerning the existence or effect of consumer guarantees under Part 3­-2 of the ACL, and the rights or remedies available under Part 5-4 of the ACL; and

(b) false representations concerning whether Mazda had reasonable grounds for forming the opinion that the consumer was not entitled to a refund or replacement vehicle at no cost to them under the consumer guarantee provisions of the ACL when it had no reasonable grounds for forming such an opinion.

6 In its written submissions in relation to penalty and other relief, the ACCC included a short description of the false representations found with respect to each of the consumers; instances where Mazda failed to comply with its own internal processes; and relevant findings of fact. Although these reasons should be read with, and assume an understanding of, the Liability Judgment, the summary that is set out below, which I have adopted largely from the ACCC’s submissions, is sufficient for present purposes.

## Consumer RC

7 In November 2014, RC purchased a Mazda 2 Neo 5 door hatch for $18,990 from Eagers in Queensland, relying on the car to earn an income. In the next three years, RC had ongoing, unresolved issues with the car. The problems escalated in 2017. In June 2017, the car went into limp mode and the engine light came on. In September 2017, the car lost power when RC was driving at 100 km/hour on the Centenary Highway, so she had to pull over in an emergency lane, after which she expressed fears for her safety. The car was towed to the dealer where it remained for more than two months. In January 2018, after her car lost power again in a suburban street, the dealer told RC that there had “likely been a major engine failure” and the engine was replaced. RC rejected the vehicle on 23 January 2018 and again on 24 January 2018 and asked for a refund. On 24 January 2018, Mazda denied RC’s request. She was offered a “partial refund” of $13,000, which she ultimately accepted. As a result, RC had to pay about $4,000 owing on her car loan and an additional “pay out” fee for early termination of the loan. RC then purchased a Holden for about $20,000, borrowing money from her partner for the deposit.

8 I found that Mazda made 12 false representations to RC. She had at least 13 conversations with Mazda representatives from 13 June 2017 to 16 March 2018, some very lengthy. I held in summary that five conversations and two Mazda letters involved contraventions. Further, on 5 February 2018, a Mazda representative told RC that her request for a refund was “under review with management”. No evidence was adduced that this was, in fact, the case.

9 With respect to Consumer RC I also found that:

(a) her rejection of the vehicle was unequivocal (Liability Judgment [268]);

(b) Mazda did not give any proper or genuine consideration to whether RC was entitled to a refund or replacement (Liability Judgment [271]);

(c) Mazda sought to dissuade RC from continuing with her requests, and sought to negotiate a commercial outcome with her, instead of considering her requests under the ACL (Liability Judgment [273]);

(d) Mazda was clearly wrong to tell RC that the age and mileage of her vehicle could be taken into account when providing a remedy under the ACL (Liability Judgment [273]);

(e) RC was in a lesser bargaining position than Mazda (Liability Judgment [274]); and

(f) Mazda’s conduct with respect to RC could be characterised as being “given the run around” and “appalling customer service” (Liability Judgment [279]–[282]).

## Consumers CT and MT

10 In July 2016, CT and MT (a married couple) purchased a Mazda CX-5 Akera diesel for $52,160 from West End Mazda in NSW. Five months later, they began to have problems with the vehicle’s adaptive headlights. Between November to December 2016 they took the car to the dealer four times. Initial repair work took place in January 2017. In mid-May 2017, MT almost hit a suitcase on the highway because she could not see in front of the car at night, leading to further repair attempts. On 30 May 2017, CT and MT took photos of the headlight beams at night to show to the dealer’s service manager. In early June 2017, a family holiday was cancelled because they could not drive the car at night. They rejected the vehicle on 11 June 2017, after CT concluded (from publicly available material on the ACCC website) that the car’s problems were a “major failure” within the meaning of the ACL. They asked for a refund or replacement vehicle from Mazda without success throughout June to August 2017. On 28 August 2017, they rejected the car again. Mazda offered CT and MT two free services and an extended warranty in September 2017. On 17 November 2017, CT and MT commenced proceedings in the NSW Civil and Administrative Tribunal (**NCAT**) seeking a full refund of the purchase price. In December 2017, Mazda offered CT and MT a new vehicle or refund. CT and MT accepted Mazda’s offer of a replacement vehicle.

11 I found that Mazda made 10 false representations to CT and MT. They had at least 12 calls with Mazda personnel (one of which lasted more than two hours), lengthy email exchanges and had to institute proceedings in the NCAT before getting redress. I held that four of the calls with Mazda involved contraventions, as was a letter from Mazda to CT and MT.

12 I also found that:

(a) CT and MT were the victims of appalling customer service (Liability Judgment [400]);

(b) Any reasonable consumer in their position would be justified in thinking they were being “given the run around” (Liability Judgment [401]);

(c) there was limited evidence of any internal consideration by Mazda of CT and MT’s unequivocal request for a refund or replacement (Liability Judgment [354]);

(d) the evidence showed that Mazda never properly explored the question of whether the failure with the headlights was a major failure, in circumstances where CT and MT had taken the vehicle back to the dealer 13 times, and where safety concerns were very real (Liability Judgment [372]); and

(e) it was only when NCAT proceedings were issued that Mazda appeared to take their claim for a replacement vehicle seriously (Liability Judgment [401]).

## Consumers SB and KB

13 In May 2013, SB and KB (a married couple) purchased a Mazda CX-5 Maxx Sport Diesel AWD as a family car, for holidays and SB’s work, for the total purchase price of $42,000. Between 2015 and 2017, they had three engine failures and a starter motor failure. The first time the engine failed, SB was driving along the Pacific Highway on 8 April 2015 at about 110km/hour. The Mazda checklist after replacing the engine stated, “ACL Major Failure: Yes”. The issued happened again at 110km/hour on 18 July 2015. SB/KB asked for the car to be replaced. The dealer said there was “absolutely no way” Mazda would do this. Then the starter motor failed and had to be replaced in April 2016. Further problems led to a second engine replacement in July 2017, and Mazda rejected KB’s request for a new car. The car suffered a further engine failure when their daughter was driving the car along the M1/F3 in February 2018. SB/KB then commenced NCAT proceedings. When the car filled with fumes on the way to the NCAT hearing in April 2018, SB rejected the car a final time, leaving it at the dealer, insisting that “the car is unsafe and I don’t want it”. Mazda rejected SB and KB’s request for a new car. Mazda’s internal consideration lacked the round table / executive panel process. Prior to the NCAT hearing, the most Mazda was prepared to offer SB and KB was $5,000 as part of a “changeover” to a new Mazda vehicle (which SB called a “rubbish offer”). The NCAT proceeding was settled at the first directions hearing. Mazda agreed to pay SB the sum of $16,000. As a result, SB and KB were left with a debt of $21,000.

14 I found that Mazda made eight false representations to SB and KB in four lengthy telephone calls. SB and KB had at least 11 conversations with Mazda representatives from July 2017 to April 2018 as well as attempts to deal with Mazda via its website, emails, correspondence, and the NCAT hearing.

15 I also found that SB and KB were subject to appalling customer service (Liability Judgment [510]).

## Consumer MG

16 In June 2013, MG purchased a Mazda 6 Diesel Touring Wagon from Maitland City Motor in NSW for $46,663, primarily for work purposes. The vehicle had to have, inter alia, three engine replacements over four years, as well as a new turbo-charger and camshaft. On the first occasion in February 2015, MG experienced a “rock hard” brake pedal and warning lights when driving home on the Hunter Expressway at 100km/hour. MG was told there was a recall on the camshaft, which had to be replaced. Mazda opened the Maestro (Mazda’s contact management system) case as, “HEADS UP – CAMSHAFT – ACL”. The post-repair checklist stated, “ACL Major Failure: yes”. After collecting the vehicle, MG inquired with the dealer about getting a refund or replacement and was told this was “pretty unlikely”. In May to June 2015, further issues led to the first engine replacement. In June 2015, MG told Mazda that he wanted the car replaced, which I held to be a rejection. About a year later, further issues led to the second engine replacement in November 2016. About a year after that, in August 2017, the power steering and brakes failed. A third engine replacement was required in September 2018. At this time, MG told the dealer, “[k]eep the car; I don’t want it anymore”. After inspecting MG’s vehicle before the third engine replacement in July 2018, a Mazda FTS (Field Technical Specialist) told the dealer to contact Mazda “as this vehicle has already had two engine replacements for the same issue”. However, two days later, a Mazda Customer Advocate told MG that a replacement car was “unlikely”. Mazda offered MG a 50% contribution to the “changeover costs” in August 2018. Subsequently, Mazda offered MG $17,000 towards a new vehicle, which he accepted. He paid $17,700 himself.

17 I found that Mazda made six false representations to MG in three calls and one email. MG had at least seven conversations with Mazda representatives throughout the relevant period as well as website and email contact.

18 I also found that MG was the subject of appalling customer service, and rightfully frustrated with the situation that he found himself in (Liability Judgment [594]).

## Consumers TK and MK

19 In May 2017, TK and MK (a married couple) purchased a Mazda BT-50 3.2L dual cab utility XTR for $55,000 to travel around Australia with a new caravan. Their vehicle issues included an engine and turbo replacement within five months of purchase, whilst they were on holiday. In December 2018, the car stalled and lost power while approaching a roundabout. The stalling problem happened four other times, as well as other issues with the electric braking system locking the brakes on the caravan in February 2019. TK notified Mazda of the stalling problems, which led to tests on the vehicle. TK repeated her safety concerns to Mazda representatives many times. Mazda retained the vehicle for lengthy periods, seeking to replicate the fault — the stalling continued. TK and MK had to defer trips because they did not have their vehicle and could not tow their caravan. TK rejected the vehicle on four agreed occasions. However, Mazda’s round table / executive panel deferred TK’s request for a refund several times on the basis that “vehicle diagnosis should continue” even though the problems persisted into 2019. In August 2019, two years after TK and MK first rejected the vehicle, Mazda’s executive panel offered them a full refund, only after TK called into a radio show and Mazda’s PR team intervened. The offer was accepted.

20 I found that Mazda made five false representations to TK in three telephone calls and two letters. TK had at least 38 conversations with Mazda representatives (many lengthy) throughout the relevant period, and other contacts in writing.

21 I also found that:

(a) TK and MK’s concerns were “fobbed off” for a very long time, and they were justified in thinking that Mazda did not believe their word, insisting that whatever the problem with the vehicle may have been, it was not a “manufacturing” concern and therefore did not entitle them to a refund or replacement under the ACL, and nor would any problem be conceded until a dealer could “replicate” it (Liability Judgment [774]);

(b) TK and MK were subject to appalling customer service (Liability Judgment [774]).

## Consumer LC (formerly LS)

22 In August 2015, LC purchased a Mazda CX-3 A 6A Akari Diesel All Wheel Drive for $38,508 (less a $9,208 trade-in) from Grand Prix Sales, Aspley in Queensland. She used the car for personal reasons and work (driving 30,000km/year as a business development manager). Several months after purchase her car started jerking. By November, the jerking was intensive and the car was losing power. The vehicle transmission was replaced in January 2016. Mazda opened a Maestro case with “Heads-up Possible Major Failure. Transmission Failure. PAR approved.” The Customer Advocate entered a note, “AUTO TRANS FAILURE – ACL VOR”. About a year later, the car experienced intermittent power loss again, the problem becoming progressively worse. Sometimes the car jerked or coughed or spluttered when LC was driving uphill. At least once, she lost power when driving at 110km/hour on the highway. By mid-2017 the problems were occurring daily. After doing some online research as to her rights, LC rejected the vehicle in June 2017. On 3 July 2017, the engine was replaced. Two days later she rejected the car again and asked for a replacement pursuant to the ACL. About a week later she rejected the car again during a call with a Mazda Customer Advocate (later found to involve false representations made to her). LC’s pleas for a new car based on “2 MAJOR FAILS” was ignored by Mazda. The most Mazda was prepared to offer LC was an extra year’s warranty and two free services. Mazda failed to follow its internal round table / executive panel processes. In December 2017, she accepted the offer. As at the date of the trial, LC remained in the same car, and could not afford to purchase a new car.

23 I found that Mazda made six false representations to LC in four telephone calls with her. LC had at least eight conversations with Mazda representatives throughout the relevant period, as well as contact by email and many further exchanges with the Mazda dealer.

24 I also found that:

(a) there was no evidence that anyone at Mazda ever gave LC’s request for a vehicle any apparent consideration, which was surely warranted in circumstances where the transmission had failed after four months, and Mazda had noted it as an “ACL” failure (Liability Judgment [823]);

(b) LC was subject to appalling customer service (Liability Judgment [855]); and

(c) LC was justified in remaining disappointed and frustrated at the outcome to which she agreed (Liability Judgment [855]).

## Consumer EG

25 In December 2014, EG purchased a Mazda2 for $17,350, less a $4,000 trade-in from West End Mazda, Blacktown, NSW. The issues included the car going into “rough idle”, an issue which began several weeks after purchase, and limp mode, a problem which began in February 2018. She left her car at a Mazda dealer for repairs in early July 2018. Mazda told the dealer that the rough idle was a “known concern” and the issue was “currently under investigation”. In July 2018 and internally within Mazda, a Mazda case manager was instructed to contact EG. She remained without her car for months. On 30 October 2018, whilst still without her car, it was found that she rejected it. She rejected the vehicle and asked again for a new vehicle on 5 November 2018. On 9 November 2018, the engine was replaced. However, Mazda’s executive panel rejected EG’s request for a new car, made on the basis that she had lost faith in the durability of the vehicle (noted in Mazda’s record), even though the information before it disclosed that she had been without her car “for over 4 months”, that a “solution to the problem could not be found”, that many repairs had been attempted “with no positive outcome” and that the engine had been replaced. The panel concluded (absent any reasoning or reference to the ACL), “[a]greed unable to offer replacement vehicle. Offer extended warranty”. EG instituted NCAT proceedings in January 2019. On 5 February 2019, in advance of the NCAT conciliation, the executive panel resolved to offer EG $500. On the day of the NCAT hearing in February 2019, the matter was resolved with EG accepting $303 (less than the $500 Mazda had internally agreed to offer). She subsequently traded in the vehicle for $7,500.

26 I found that Mazda made two false representations to EG in one telephone call and one letter. EG had at least 17 conversations with Mazda representatives from 17 July 2018 to 27 November 2018, as well as many communications with the dealer, written communications with Mazda, and exchanges during the NCAT proceedings.

27 I further found that:

(a) there was no evidence Mazda ever assessed EG’s requests for a replacement vehicle by reference to the consumer guarantee provisions of the ACL (Liability Judgment [938]);

(b) EG ended up with a “poor customer outcome”, and was justified in feeling worn down and worn out by being given the “run around” (Liability Judgment [956]); and

(c) EG was subject to appalling customer service (Liability Judgment [956]).

# ADDITIONAL EVIDENCE

28 The only additional evidence before me on the question of relief concerned changes made to Mazda’s system in dealing with customer complaints and evidence in relation to the financial position of Mazda and its parent company, Mazda Motor Corporation. That evidence was contained in the affidavits of:

(a) Andrew John Christopher, partner of Webb Henderson and solicitor for the ACCC, sworn on 30 June 2023;

(b) Kathryn Edghill, partner of Mills Oakley and solicitor for Mazda, affirmed on 1 December 2023;

(c) Michael John Robins, Head of Legal and General Counsel for Mazda, affirmed on 22 August 2023;

(d) Michael John Robins affirmed on 28 November 2023; and

(e) Michael John Robins affirmed on 30 November 2023.

29 Mr Robins gave evidence about changes to Mazda’s consumer complaints process since the publication of the Liability Judgment and the making of the Declarations. Mr Robins’ evidence was that Mazda has made significant structural changes to the way in which customer complaints and requests for repair, refund or replacement are assessed. Mr Robins deposed that, following the contravention findings, he undertook a detailed review of Mazda’s existing customer complaint processes.

30 Following the review, Mr Robins concluded that the use of Mazda’s call centre “Customer Advocates” to deal with these complaints had inadvertently created a risk of the contraventions occurring. This was because the Customer Advocates:

(a) were not legally trained or mechanical experts;

(b) relied on incomplete information from dealers;

(c) had to engage in a time-consuming process to collect information;

(d) and were often involved in lengthy discussions with consumers on issues of liability which increased the risk of them making misstatements about consumer rights.

31 Mr Robins also formed the view that Mazda’s executive panel had contributed to the contraventions because of its approach to considering consumer requests based on the data provided by the Customer Advocates. Mr Robins therefore made recommendations to Mazda’s executive team which resulted in implementation of the following changes from August 2022:

(a) Mazda no longer routinely manages consumer requests for refunds, replacements and/or repairs, including under the ACL. Instead, if contacted by a consumer, Mazda call centre staff must immediately direct that consumer to the dealer which supplied the vehicle to deal with the consumer’s requests. Call centre staff have been instructed not to express any views or offer any opinions regarding a customer’s rights or Mazda’s obligations under the consumer guarantees in the ACL. Mazda supports the dealers in the background but does not (with limited exceptions) decide the issue of redress.

(b) Mazda has reduced the scope of its executive panel function. The executive panel role is now largely confined to considering dealer requests for indemnification after the dealer has itself first decided to refund or replace a vehicle. The executive panel will only consider a consumer’s request for redress if that consumer refuses to deal with their selling dealer directly.

(c) Where a consumer refuses to deal with a supplying dealer in respect of a refund or replacement, the request is required to be referred without discussion of ACL rights or obligations to Mazda’s Customer Support Manager, Ian O’Day, and Mr Robins. At that point a request will be referred to the executive panel. Where this occurs, it is Mr Robins’ responsibility to ensure that the executive panel considers and correctly applies the ACL.

(d) Mr Robins oversees and manages all tribunal claims made against Mazda and reports findings to the executive team.

# PECUNIARY PENALTY

32 Pursuant to s 224(1)(a)(ii) of the ACL, if the court is satisfied that a person has contravened a provision of Pt 3-1 of the ACL (which includes s 29(1)(m)), the court may order the person to pay such pecuniary penalty in respect of each act or omission by the person to which the section applies, as the court determines to be appropriate.

## Applicable principles

33 The applicable legal principles are nowadays well settled.

34 They were helpfully summarised by Jackman J in *Australian Competition and Consumer Commission v Dell Australia Pty Ltd (No 2)* [2023] FCA 983 at [4]–[18], which to the extent they are relevant here, I gratefully adopt.

35 Deterrence, both specific and general, is the primary, if not sole, objective for imposing pecuniary penalties under s 224 of the ACL. The penalty must be fixed at a level that ensures that neither the contravener, nor would-be contraveners, would regard it as an acceptable cost of doing business. That said, a penalty is appropriate if it is no more than is reasonably necessary to deter further contraventions by the respondent and others.

36 In determining the appropriate penalty under s 224(1), the court must have regard to all relevant matters, including the following matters in s 224(2):

(a) the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission;

(b) the circumstances in which the act or omission took place; and

(c) whether the contravener has previously been found by a court in proceedings under Ch 4 or Pt 5-2 of the ACL to have engaged in any similar conduct.

37 The loss or damage to be considered by the court is not limited to financial harm. It could be non-pecuniary, such as a lost opportunity to make a different purchasing choice with accurate information. The court must assess the nature and extent of the harm even if quantifying the harm is difficult and requires broad or rough estimation.

38 The prescribed maximum penalty is one yardstick that ordinarily must be applied and must be treated as one of a number of relevant factors. Unlike the criminal law, the concept that a penalty must be proportionate to the seriousness of the offence such that the maximum penalty is reserved for the most serious examples of misconduct has no place in the civil penalty context. Considerations such as deterrence and the public interest may justify the imposition of the maximum penalty where no lesser penalty will be an effective deterrent against future contraventions of a similar kind. What is required is a reasonable relationship between the theoretical maximum and the final penalty imposed. That relationship is established where the maximum penalty does not exceed what is reasonably necessary to achieve the purpose of s 224, namely specific and general deterrence of future contraventions of a like kind by the contravener and by others. This may be established by reference to the circumstances of the contravener and the contravening conduct.

39 Two principles or tools of analysis that can assist the court in determining an appropriate penalty for multiple contraventions are the course of conduct principle and the totality principle. These concepts may assist in the assessment of what may be considered reasonably necessary to deter further contraventions.

40 The course of conduct principle is commonly referred to as recognising that where there is an interrelationship of legal and factual elements of multiple contraventions, the court may penalise the acts or omissions as a single course of conduct.

41 In this case the ACCC submitted, and Mazda agreed, that the appropriate approach to the multiple contraventions involving each of the consumers is to treat each series of interactions with the consumers about a vehicle as a single course of conduct, meaning there are seven courses of conduct to be penalised.

42 The totality principle is that the total penalty for related contraventions should not exceed what is proper for the entire contravening conduct involved. This can be used by the Court as a tool of analysis to ensure that the penalty is no more than reasonably necessary for deterrence. The exercise of the totality adjustment is directed to the overall impact of the accumulated effect of otherwise acceptable penalties to ensure that the whole is not greater than the sum of the parts. It is typically used as a “final check”.

43 Other commonly relevant factors to consider in determining a penalty were articulated by French J in *Trade Practices Commission v CSR Ltd* [1990] FCA 762; (1991) 13 ATPR 41-076 at [42]. However, these must not be considered a “rigid catalogue of matters for attention”. In *Australian Competition and Consumer Commission v Woolworths Limited* [2016] FCA 44; [2016] ATPR 42-521 at [123]–[126], Edelman J set out the commonly relevant matters, other than those in s 224(2), as follows:

(a) the size of the contravening company;

(b) the deliberateness of the contravention and the period over which it extended;

(c) whether the contravention arose out of the conduct of senior management of the contravener or at some lower level;

(d) whether the contravener has a corporate culture conducive to compliance with the ACL as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention;

(e) whether the contravener has shown a disposition to co-operate with the authorities responsible for the enforcement of the ACL in relation to the contravention;

(f) whether the contravener has engaged in similar conduct in the past;

(g) the financial position of the contravener;

(h) whether the contravening conduct was systematic, deliberate or covert;

(i) the extent of contrition;

(j) whether the contravening company made a profit from the contraventions;

(k) the extent of the profit made by the contravening company; and

(l) whether the contravening company engaged in the conduct with an intention to profit from it.

44 The size of a contravener is relevant because, all other things being equal, a greater financial incentive will be necessary to persuade a well-resourced contravener to abide by the law than a poorly resourced contravener. In some cases, the circumstances of the contravener may be more significant in terms of the extent of the necessity for deterrence than the circumstances of the contravention. The size of the contravener’s parent company also cannot be ignored when determining the penalty that should be imposed. See *Australian Competition and Consumer Commission v Oakmoore Pty Ltd (No 2)* [2018] FCA 1170 at [105] (Gleeson J), citing *Australian Competition and Consumer Commission v ABB Transmission and Distribution Ltd (No 2)* [2002] FCA 559; (2002) 190 ALR 169 (***ABB***). As Finkelstein J said in *ABB* at [40]:

…While I am not imposing a punishment on the parent, the size of the parent cannot be ignored when assessing the penalty that should be imposed upon its subsidiary. If the position were otherwise, corporations could easily organise their affairs so that if found guilty of criminal conduct, the penalty would be kept to a minimum. For example, there are many markets where the competitors are major public companies. If they combine to engage in anti-competitive behaviour, the penalties imposed upon them will be similar. Is it to be supposed that if one of these public companies establishes a small subsidiary that will trade in the market instead of the parent, it will attract a lesser penalty because it has a lower capital and a smaller turnover? Of course this would be intolerable.

45 The extent to which the conduct was deliberate is relevant because the demands of specific deterrence are greater for deliberate conduct, in contrast to careless, isolated conduct which was not concealed, because the demands or requirements of specific deterrence are generally more acute in the case of contraveners who have engaged in deliberate or systematic conduct over lengthy periods, or where covert or concealed contraventions which are difficult to detect are involved.

46 The extent to which the contravener has conceded liability and cooperated with the investigating authority is relevant to determining penalties and typically results in a discount off the penalty that otherwise would have been imposed. This reflects the fact that such discounts increase the likelihood of cooperation in the future by contraveners and free up the ACCC’s resources.

## Relevant Considerations

47 On the question of the size of the penalties that should be imposed, the ACCC and Mazda were poles apart. The following table summarises the competing positions on the question of penalty:

|  |  |  |  |
| --- | --- | --- | --- |
| **Consumer** | **Number of Contraventions** | **ACCC’s proposed penalty** | **Mazda’s proposed penalty** |
| RC | 12 | $4,500,000 | $500,000 |
| MT/CT | 10 | $2,000,000 | $500,000 |
| SB/KB | 8 | $3,000,000 | $500,000 |
| MG | 6 | $2,500,000 | $500,000 |
| TK\* | 5 | $6,000,000 | $750,000 |
| LC | 6 | $2,000,000 | $125,000 |
| EG\* | 2 | $3,000,000 | $125,000 |
| **Total** | **49** | **$23,000,000** | **$3,000,000** |

 \*Contraventions occurred after the increase to maximum penalty amount on 1 September 2018. See [49]–[52] below.

48 I now turn to deal with the various considerations relevant to the penalties to be imposed in the circumstances of this case.

### Maximum penalty

49 The contraventions here occurred over an extensive period, namely between June 2017 and June 2019. At a point during that period the maximum penalty changed. Pursuant to item 2 in the table in s 224(3) of the ACL, for the period prior to 1 September 2018, the maximum penalty for a body corporate for each contravention of s 29(1)(m) of the ACL is $1.1 million. Pursuant to ss 224(3) and 224(3A), for the period from 1 September 2018 until 9 November 2023 (when maximum penalty amounts were further increased), the maximum penalty for a body corporate for each such contravention was raised from $1.1 million so as to not exceed the greater of:

(a) $10 million; or

(b) if the court can determine the value of the benefit that the body corporate has obtained directly or indirectly and that is reasonably attributable to the act or omission—3 times the value of that benefit; or

(c) if the court cannot determine the value of that benefit — 10% of the annual turnover of the body corporate during the 12 month period ending at the end of the month in which the act or omission occurred or started to occur.

50 Section 295 provides that the new, higher maximum penalties provided for in s 224(3A) apply only to acts or omissions that occur on or after 1 September 2018.

51 With respect to Mazda’s contraventions on or after 1 September 2018, the ACCC submitted that s 224(3A)(a) applied and did not seek to rely on ss 224(3A)(b) or (c).

52 The parties agreed that there were 49 contraventions of s 29(1)(m), 42 of which occurred before 1 September 2018 and seven occurring after 1 September 2018. The agreed total theoretical maximum penalty is therefore $116.2 million, as set out in the following table:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Time period** | **Maximum per contravention** | **Total number of contraventions** | **Relevant Consumers** | **Total maximum available** |
| Pre- September 2018 | $1.1 million | 42 | RC, MT and CT, LC, SBand KB, MG | $46.2 million |
| September 2018 onwards | $10 million | 7 | TK, EG | $70 million |
|  | **Total** | **49** |  | **$116.2 million** |

### The nature and extent of contravening conduct (s 224(2)(a))

53 The ACCC’s submissions regarding the nature and extent of the contravening conduct largely consisted of the summary of my findings in the Liability Judgment with respect to each of the consumers that has been set out at [7] to [27] above. Mazda criticised this approach on the basis that it did not “distil or seek to characterise the impugned conduct in a way that indicates where in the available penalty range the court should fix a penalty”. Mazda submitted that the following observations were relevant when considering the nature and extent of the contraventions:

(a) While breaches involving misleading or deceptive conduct by their very nature are serious, s 29(1)(m) can be breached in a variety of ways: inadvertently, deliberately, honestly or dishonestly. Merely referring to a breach of the provision is therefore insufficient to properly characterise the nature of the contravention for the purpose of determining the appropriate penalty.

(b) there was no finding that s 29(1)(m) was breached deliberately, nor any allegation that Mazda had acted in bad faith or dishonestly (Liability Judgment [147]);

(c) the number of consumers (ie nine) affected by the conduct was discrete, and very low in the scheme of the number of Mazda vehicles in operation in Australia at any one time, estimated in the evidence of Mr Robins to be approximately 1 million. Nor was there any “system” or “pattern” case brought against Mazda (or any finding to that effect (Liability Judgment [8]-[9])).

(d) In the Liability Judgment, I rejected the contentions that:

(i) Mazda did not take consumers’ safety concerns seriously (Liability Judgment [276]; [509]; [855]; [955]); and

(ii) Mazda placed unfair or unreasonable commercial pressure on consumers to accept offers; and

(e) As to duration, the extent of the contraventions for each course of conduct varied from nine days to five months.

54 In oral argument, Senior Counsel for the ACCC submitted that a number of Mazda’s observations about what was *not found* were irrelevant considerations (for example, that there was no finding of deliberate breach or dishonesty), as the focus should be on “what the conduct did include” rather than what it did not.

55 The contravening conduct in this case consisted of 49 false representations regarding consumer’s rights and remedies under the ACL which, while not found to be deliberate, were plainly serious, a point that Senior Counsel for Mazda conceded when I put the proposition to him in oral argument.

56 The representations affected nine consumers and took place over an extensive period, namely two years. As the parties agreed, Mazda engaged in seven separate courses of contravening conduct. For some consumers, the false representations amounting to one course of conduct were made over a week or so. For other consumers, the contravening conduct took place over a number of months. False representations were predominantly made to consumers during (sometimes lengthy) telephone conversations, and were occasionally also made in writing.

### The nature and extent of any loss or damage suffered as a result (s 224(2)(a))

57 It is not possible precisely to quantify the loss or damage that each consumer suffered as a result of Mazda’s false representations. It is sufficient for present purposes, and it was accepted by both parties as a relevant consideration, that each of the consumers suffered what I described in the Liability Judgment at [138]–[139] as “relevant harm”.

58 This relevant harm included the cancellation of a family holiday; two consumers being forced to abandon their trip to the Birdsville Races and instead stay in a caravan park in Rockhampton due to vehicle failures; and consumers missing work because their vehicle had broken down and they had not been provided with a loan vehicle. I further found that consumers spent a lot of time engaging in interminable phone conversations with Mazda call customer staff , and that all consumers were “were justified in feeling distressed at the disruption that inevitably ensues when one’s motor vehicle repeatedly fails for one reason or another”. See Liability Judgment at [139].

59 As Mazda conceded, “the consumers suffered varying levels of distress, frustration and inconvenience as a result of Mazda’s conduct. This loss is also difficult to quantify, but the Court may nonetheless take it into account despite that difficulty”.

### Circumstances in which the acts or omissions took place (s 224(2)(b))

60 Mazda submitted that the consideration under s 224(2)(b) overlaps with that of s 224(2)(a), and that the relevant circumstances here include the type of representations made, how those representations were made and the general impact of those representations on consumers. Beyond the matters I have already addressed with respect to s 224(2)(a), both parties drew my attention to the general observations I made regarding Mazda’s conduct in the Liability Reasons as being relevant. These general observations included:

(a) While not unconscionable, Mazda’s conduct can accurately be characterised as “appalling customer service” and customers were rightly frustrated at Mazda’s delays and excuses for not squarely addressing their complaints and their requests for a refund or replacement vehicle (Liability Judgment [135]);

(b) At no point did the round table or executive panel processes make any genuine attempt to consider and apply the consumer guarantee provisions of the ACL to the circumstances of the individual consumer. By doing so, Mazda did not comply with its own internal ACL compliance standards and processes. Again, while such failings were not unconscionable conduct, they are appropriately characterised as “very bad management” (Liability Judgment [141]);

(c) In each case the subject of this proceeding, Mazda made no sufficient attempt to seek technical advice about the particular issues experienced by the consumers and then to have regard to such advice in applying the statutory guarantee provisions. Instead, Mazda decided that in most instances, its interests were best served by engaging in commercial negotiations which had no regard to the parameters or requirements of the consumer guarantee provisions (Liability Judgment [142]).

61 Although these observations and my related findings of fact were made in relation to the ACCC’s unconscionable conduct claims, I agree with the ACCC’s submission that they are nevertheless relevant to the determination of penalty as they establish the context in which the false representations took place.

62 I note that, in its written submissions, the ACCC initially appeared to assert that my general observations regarding Mazda’s conduct were “general findings” indicating the existence of a broad “organisational problem” across Mazda extending beyond the relevant consumers. However, Senior Counsel for the ACCC agreed that because it had eschewed a “systems” or “pattern” case, the findings were necessarily confined to Mazda’s conduct in relation to the nine individual consumers. My general observations in the Liability Judgment were similarly confined, as is my consideration of them for the purpose of determining the appropriate penalty.

### Previous findings by a court in proceedings under Ch 4 of Pt 5-2 (s 224(2)(c))

63 Mazda has not previously been found by a court to have engaged in similar conduct in breach of the ACL.

### Size and financial position of the contravening company

64 The ACCC drew my attention to Mazda’s total sales revenue figures for the 2018 to 2022 financial years, summarised in the following table:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| **Revenue** | **FY2018** | **FY2019** | **FY2020** | **FY2021** | **FY2022** |
| Sales of goods - Vehicles | 2,922,941,000 | 2,783,815,000 | 2,411,325,000 | 2,800,850,000 | 3,139,531,000 |
| Sales of Goods - parts | 268,219,000 | 288,689,000 | 313,753,000 | 272,663,000 | 305,858,000 |
| **Total Sales Revenue** | **3,191,160,000** | **3,072,504,000** | **2,725,078,000** | **3,073,513,000** | **3,445,389,000** |

65 Mazda, on the other hand, submitted that the appropriate figures to consider were its net profits. As Mr Robins deposed, in the 2018 to 2020 financial years, Mazda’s net profit after tax ranged from $58,372,000 to $79,569,000.

66 On either measure, however, it is uncontroversial that Mazda is a large and profitable company.

67 The ACCC also sought in addition to rely on Mazda’s parent company, Mazda Motor Corporation, describing it as a “global behemoth”.

68 The relevant financial position of the Mazda Motor Corporation was also in evidence. In summary, Mazda Motor Corporation’s net sales in the 2018 to 2022 financial years ranged from approximately $29 billion to $36 billion. Its net income after tax for those financial years was, on average, around $500 million.

69 Although Mazda Motor Corporation was not involved in the contraventions (something the ACCC accepted), as Bromwich J said in *Australian Competition and Consumer Commission v GlaxoSmithKline Consumer Healthcare Australia Pty Ltd (No 2)* [2020] FCA 724 at [50]:

…It would be artificial not to at least have some cognisance of the ownership and ultimate control of the respondents. The conduct of the respondents does reflect poorly on their ultimate parent companies, not just GSK PLC. The subsidiaries bear the name of their parents…, and to that extent there is some general deterrence, and even almost specific deterrence, by reason of the adverse impact on their reputation.

70 I adopt the same approach here.

### Involvement of senior management

71 The annexure to Mazda’s submissions set out a table summarising the employees found to have been involved in each of the contraventions in the Liability Judgment. Mazda emphasised in its submissions that a substantial portion of the false representations were made by call centre staff who were not senior management. The annexure also demonstrates, however, that numerous senior management employees were involved in 15 of the contraventions, which the ACCC submitted was a clearly relevant fact for consideration. Mazda accepted, and I agree, that senior management’s involvement in 15 of the contraventions is an “aggravating factor” for penalty purposes.

### Corporate culture of compliance and corrective measures

72 The ACCC contended that Mazda’s failure to comply with its own ACL compliance documents and policies was an “aggravating factor” in respect of penalty, and that the existence of those documents, rather than demonstrate any culture of compliance at Mazda, highlighted the “inadequacy of the compliance systems in place”. In oral submissions, counsel for the ACCC clarified that Mazda’s asserted failure to demonstrate a culture of compliance was only pertaining to Mazda’s dealings with the nine consumers, and that this should simply be considered as a further relevant circumstance in which the contravening conduct occurred pursuant to s 224(2)(b) of the ACL.

73 As noted at [60](b) above, I accept as a relevant circumstance the fact that, by engaging in the contravening conduct, Mazda did not comply with its own ACL compliance policies. It is telling that the existence of these compliance policies did not prevent the contraventions from occurring.

74 The parties agreed that it is relevant to consider the extent to which Mazda has demonstrated a corporate culture of compliance *after* the contravention findings were made. Mazda submitted that the corrective measures deposed to by Mr Robins demonstrate a culture which is attentive to and conducive to compliance. The ACCC accepted that Mazda’s implementation of these corrective measures could be a mitigating factor, but submitted that a contravener should not receive “much credit on penalty for correcting an inadequate compliance system after the event”.

75 In my view the corrective actions undertaken by Mazda since the contraventions are relevant to the determination of the size of the penalties to be imposed. For the most part, Mazda no longer assumes the dealers’ responsibility under the ACL to provide refunds or replacement to consumers. Consumer requests for refund or replacement are now directed to, and largely handled, by the dealers. Mazda’s call centre has no involvement in the complaints process. In circumstances where a complaint is referred to the executive panel because a consumer refuses to deal with the dealer, Mr Robins now actively manages the complaints process to ensure ACL compliance. Mr Robins’ evidence was that since implementation of the new process, no consumer complaint has been referred to the executive panel. The result is that, as Mazda submitted, the structural changes to the complaints process have significantly reduced the risk of future contraventions occurring. The need for the penalty to achieve specific deterrence is therefore considerably lessened in this case.

### Cooperation with the ACCC

76 The ACCC submitted that Mazda is not entitled to any mitigation of the penalty in recognition of cooperation with the regulator, as there has been no cooperation with the ACCC during the course of proceedings. Mazda observed that this submission did not acknowledge its cooperation in the ACCC’s investigation of Mazda prior to issuing proceedings, but ultimately did not contend – nor could it contend – that it should receive any penalty discount on this basis.

### Contrition

77 As Wigney, Beach and O’Bryan JJ explained in *Volkswagen Aktiengesellschaft v Australian Competition and Consumer Commission* (2021) 284 FCR 24 at [153]:

 … a contravener who has displayed no contrition or remorse, and no insight into their contravening conduct, would generally expect a higher penalty than would a contravener who has shown genuine contrition and remorse and good prospects of rehabilitation. That is because the requirement of specific deterrence is generally considered to be greater in the case of a contravener who has shown no contrition or insight into their offending behaviour.

78 In his affidavit of 22 August 2023, Mr Robins expressed that “[o]n behalf of Mazda Australia, the Executive Team takes responsibility and unreservedly apologises for the contraventions”. The ACCC submitted that beyond this one sentence, Mazda has not indicated any contrition or insight into its contravening conduct and that Mr Robins’ apology should accordingly be afforded no weight.

79 Mazda rejected the ACCC’s characterisation of Mr Robin’s apology as the sole indication of Mazda’s contrition. Mazda submitted that the detailed review undertaken by Mr Robins and the corrective measures the organisation has implemented since the liability findings demonstrates insight into its conduct. As evidence of its genuine contrition, remorse and embarrassment, Mazda also pointed to its willingness to provide redress to the consumers (a matter with which I will deal in further detail below), and the evidence of Mr Robins in his November 2023 affidavit that my observation that Mazda had provided “appalling customer service” to the nine consumers, which has been reported widely, was of “significant concern to Mazda” who “is committed to ensuring that this does not happen again”.

80 It may be accepted that Mr Robins’ brief words of apology in the August affidavit assume little significance on their own. In this case, however, Mr Robin’s words are supported by significant remedial actions. It seems to me that the actions taken by Mazda following the findings of contravention demonstrate that Mazda has at least now — after the trial and an unsuccessful appeal — shown some insight into, and is remorseful about, its conduct.

### Other penalties

81 Mazda submitted there was utility in comparing the penalty imposed in *Australian Competition and Consumer Commission v Ford Motor Company of Australia Ltd* [2018] FCA 703; (2018) 360 ALR 124 (***Ford***). In that case, the parties jointly proposed a penalty of $10 million which was then approved by Middleton J. Mazda submitted that the contraventions found against Ford were of an “objectively more serious nature” than those the subject of this proceeding, and that corporations guilty of “less serious contraventions” should not, ordinarily, receive a penalty greater than that imposed on a corporation of conduct that is “more egregious”.

82 As the ACCC submitted, however, the cases have repeatedly emphasised that, although similar contraventions should incur similar penalties, the differing circumstances of individual cases means that a penalty in one case cannot dictate the penalty in a later case. So comparisons with previous penalties are rarely useful. See *Australian Competition and Consumer Commission v Dodo Services Pty Ltd* [2021] FCA 589 at [69]–[70]; *Singtel Optus Pty Ltd v Australian Competition and Consumer Commission* [2012] FCAFC 20; (2012) 287 ALR 249 at [60]; *Flight Centre Ltd v Australian Competition and Consumer Commission (No 2)* (2018) 260 FCR 68, 86 at [69]; *NW Frozen Foods Pty Ltd v Australian Competition and Consumer Commission* (1996) 71 FCR 285 at 295–6.

83 I do not consider that a comparison with *Ford*, which involved different facts, circumstances and contraventions, is of any benefit in determining the appropriate penalty to be imposed here. During the hearing, counsel for Mazda accepted that it was not appropriate for the court to perform a “parity analysis” between the two cases. Counsel clarified that the reference to *Ford* was only intended to point out that the court should not be completely ignorant of the level at which penalties have been fixed in other decisions. However, as counsel for Mazda also accepted, merely having regard to penalties imposed in other cases in this way is not “particularly informative”. That is especially the case where there have been significant amendments and increases to the maximum penalty under s 224, noting that the penalty in *Ford* was imposed in respect of contraventions that occurred prior to 1 September 2018.

### Profit or benefit from contraventions

84 I accept Mazda’s submission that it is relevant to consider any profit or benefit flowing to the company because of the contraventions, as this informs the appropriate penalty amount to achieve the goal of deterrence and to ensure the penalty is not perceived as merely a “cost of doing business”.

85 Mazda submitted that the contravening conduct in this case has not resulted in any direct or significant financial reward. Any potential benefit to Mazda was said to be “relatively modest” and not exceeding $100,000 (being the total cost of refunds that arguably should have been provided to the consumers where the vehicle experienced a major failure).

86 The ACCC did not seek to contradict that submission, and I accept it. That said, it is a factor that in my view does not assume much significance in a case such as this.

## Conclusion regarding penalty

87 The ACCC contends that the total penalty should be in the order of $23 million. Mazda said that a penalty in the order of $3 million was appropriate.

88 The maximum penalties for each of the contraventions was significantly more. See [52] above.

89 Senior Counsel for Mazda conceded in his oral address that “[t]he seriousness of the contraventions, frankly, speak for themselves”. They were indeed serious, including because, as I found in the Liability Judgment, Mazda:

(a) never made any genuine attempt to consider and apply the consumer guarantee provisions of the ACL to the circumstances of the individual consumer;

(b) did not comply with its own internal ACL compliance standards and processes;

(c) made no sufficient attempt to seek technical advice about the particular issues experienced by the consumers and then to have regard to such advice in applying the statutory guarantee provisions; and

(d) instead decided that in most instances, its interests were best served by engaging in commercial negotiations which had no regard to the parameters or requirements of the consumer guarantee provisions.

90 As counsel for the ACCC submitted, “[i]t is notable that the contraventions occurred in circumstances where members of the Mazda team had an imperfect understanding of the operation of the ACL (to say the least) and any compliance system in place did not prevent the contravention that occurred”. To describe the understanding of “the Mazda Team” as being “imperfect” is indeed a considerable understatement.

91 The contraventions were also serious because of the distress, disruption, frustration and inconvenience caused to the consumers.

92 Mazda is a large and profitable company, and although specific deterrence is not significant here because of the changes to the complaint handling process that have been made, a large penalty is still required to achieve general deterrence.

93 Mazda did not cooperate with the ACCC after the instigation of the proceeding, so that there is to be no reduction on that score. But as I have explained, Mazda has shown insight by implementing the new regime; and it has not engaged in any previous similar conduct. Both of those considerations weigh in its favour.

94 In all the circumstances, subject to consideration of the totality principle, I consider the following penalties to be appropriate (noting also the increase to the maximum penalties applicable in the cases marked with an asterisk):

|  |  |  |
| --- | --- | --- |
| **Consumer** | **Number of Contraventions** | **Penalty** |
| RC | 12 | $2,000,000 |
| MT/CT | 10 | $1,000,000 |
| SB/KB | 8 | $1,500,000 |
| MG | 6 | $1,500,000 |
| TK\* | 5 | $3,000,000 |
| LC | 6 | $1,000,000 |
| EG\* | 2 | $1,500,000 |
| **Total** | **49** | **$11,500,000** |

95 I have considered whether any reduction is required on the basis of the totality principle. See, by way of example only, *Australian Securities and Investments Commission v Wooldridge* [2019] FCAFC 172 at [26]. I do not consider that any reduction is required. I will therefore impose a total penalty of $11.5 million.

# OTHER RELIEF

96 The ACCC sought further orders for other relief in addition to the pecuniary penalty.

## Compliance Program

97 The ACCC sought orders that Mazda administer and comply with a “competition and consumer compliance program” in the terms that are detailed in a document attached to a draft proposed order and that Mazda maintain this program for three years. In my view, in light of the changes made to the customer complaint systems deposed to by Mr Robins, there is no point to be served in the making of such order, and I decline to make it in the form proposed by the ACCC.

98 Mazda did, however, agree to comply with a more limited compliance program. I have made provision for a compliance program substantially in the form sought by Mazda. It is contained in Appendix A to the orders set out above. In my view, that compliance program is better tailored to the prevailing realities deposed to by Mr Robins.

## Injunctive relief

99 Section 232(1)(a) of the ACL relevantly provides that the court may grant an injunction, in such terms as the court considers appropriate, if the court is satisfied that a person has engaged in conduct that constitutes a contravention of a provision of Chapter 2 (which includes s 18(1)), Chapter 3 (which includes s 29(1)(m)), or Chapter 4.

100 ACCC sought, and Mazda consented to, an order for injunctive relief as follows:

Pursuant to section 232 of the ACL, Mazda be restrained, whether by itself, its officers, employees, agents or otherwise, for a period of 5 years from the date of the order, from, in trade or commerce, making false or misleading representations in the course of communication with consumers, concerning the existence or effect of consumer guarantees under Part 3-2 of the ACL, and the rights or remedies available under Part 5-4 of the ACL, and whether it had reasonable grounds for forming an opinion that the consumer was not entitled to a refund or replacement vehicle at no cost to them under the consumer guarantee provisions of the ACL when it had no reasonable grounds for forming such an opinion.

For the avoidance of doubt, the word “agents” in order 2 does not include any Mazda dealer.

101 I am satisfied that the proposed order is consistent with the three limitations on the courts power pursuant to s 232 of the ACL to grant injunctive relief set out by Merkel J in *Australian Competition and Consumer Commission v Z-Tek Computer Pty Ltd* (1997) 78 FCR 197 at 203–204, and recently applied by Murphy J in *Australian Competition and Consumer Commission v Acquire Learning & Careers Pty Ltd* [2017] FCA 602; [2017] ATPR 42-543 at [98]–[99]. Namely, the proposed injunctive relief is:

(a) designed to deter a repetition of the contravening conduct;

(b) has a sufficient nexus or relationship to the contraventions; and

(c) relates to the case or controversy, or “matter”, that is the subject of the proceeding before the court.

102 I therefore consider it appropriate to order the injunctive relief sought.

## Disclosure order

103 Pursuant to ss 246(1) and 246(2)(c) of the ACL the court may, on application of the regulator, make an order requiring a person who has engaged in contravening conduct to disclose, in the way and to the persons specified in the order, such information as is so specified, being information that the person has possession of or access to.

104 The ACCC sought, and Mazda consented to, an order requiring Mazda to issue a disclosure notice to all Mazda dealers within 14 days. The disclosure notice, which is Appendix B to the orders set out above, informs dealers about the contraventions, sets out the penalty imposed, and states that dealers are required to adhere to the consumer guarantees under the ACL.

105 I accept that this order is appropriate in the circumstances, including that the responsibility of handling consumer requests for repair, refund or replacement now rests almost exclusively with the dealers.

## Adverse publicity orders

106 Pursuant to s 247 of the ACL, the ACCC sought an adverse publicity order requiring Mazda, to publish a notice for a period of 90 days on the Mazda Support page of its website. Mazda consented to this order and the form of notice is Appendix C to the orders set out above. The adverse publicity notice is in substantially the same terms as the disclosure notice to the dealers. I am satisfied it is appropriate to make the adverse publicity order in the form proposed.

## Non-party consumer redress

107 The parties were agreed that payments in the amounts set out below under the heading “compensation payment” should be made to the respective consumers pursuant to s 239 of the ACL. These amounts reflect the difference between the refund or replacement that was sought by each consumer and what they actually received from Mazda. They are, in effect, “top-up” refund payments. For the consumers who ultimately received a replacement vehicle or full refund at no cost, the compensation payment sought is accordingly nil. The ACCC proposed, and Mazda opposed, orders that each of the consumers also receive a payment in respect of non-economic loss, also set out in the table below:

|  |  |  |
| --- | --- | --- |
| **Relevant Consumer** | **Compensation payment** | **Non-economic loss payment** |
| **RC** | $5,990 | $17,500 |
| **CT and MT** | - | $15,000 |
| **SB and KB** | $27,650 | $17,500 |
| **MG** | $14,393 | $17,500 |
| **TK and MK** | - | $15,000 |
| **LC** | $24,408 | $15,000 |
| **EG** | $9,850 | $10,000 |
| **TOTAL** | **$82,291** | **$107,500** |

108 Mazda instead agreed to make an “ex gratia payment” of $3000 to each consumer for each vehicle by way of undertaking, but did not agree that compensation for non-economic loss can be awarded under s 239 of the ACL. On the contrary, it submitted that there is no power under that section to make such an order.

109 Section 239 of the ACL relevantly provides that if a person has engaged in conduct in contravention of applicable provisions of the ACL “a court may, on the application of the regulator, make such order or orders (other than an award of damages) as the court thinks appropriate” against the person who engaged in the contravening conduct. An order made under s 239 must be directed towards redressing, preventing, or reducing the loss or damage suffered by non-party consumers in relation to the contravening conduct.

110 The parties made submissions on the legal question of whether s 239 of the ACL permits the court to make an order in favour of a non-party consumer for the payment of a sum representing non-economic loss. The ACCC contended that the provision does permit the making of such an order. Mazda, on the other hand, contended that such an order is impermissible because it is an “award of damages”. It is not necessary to decide that question in the circumstances of this case because there is insufficient evidence before me to justify payments in those varying sums to each consumer. Even recognising that calculating compensation for emotional distress is not an exact science, it seems to me that the sums contemplated here to be paid to non-parties are speculative, not “clearly identifiable”. Compare *Australian Competition and Consumer Commission v Clinica Internationale Pty Ltd (No 2*) [2016] FCA 62 at [255] (Mortimer J) (“Although the text of s. 239 indicates non-party redress orders are not intended to operate as a substitute for damages, it is clear they are intended to provide a limited form of redress where loss or damage is clearly identifiable, such as in the case of a refund for goods purchased or services paid for, in circumstances of contravening conduct”). On that basis, I decline to make the orders that the ACCC seeks in that regard. I will, however, make orders to which Mazda consented directing it to pay the “compensation payment” amounts.

# COSTS

111 The ACCC sought an order that Mazda be liable to pay to the Commonwealth of Australia 70% of the ACCC’s total costs of the proceeding up to and including the date of making these orders in a lump sum in an amount to be determined by the Registrar and in accordance with such directions as the Registrar considers appropriate.

112 The parties are agreed as to the apportionment.

113 I will accordingly make the following order as to costs:

Mazda pay to the Commonwealth of Australia 70% of the ACCC’s total costs of the proceeding up to and including the date of making these orders in a lump sum in an amount to be determined by the Registrar and in accordance with such directions as the Registrar considers appropriate, such costs to be payable forthwith after fixing.

|  |
| --- |
| I certify that the preceding one hundred and thirteen (113) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O’Callaghan. |

Associate:

Dated: 14 February 2024