HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

Proceeding S155/2023
BETWEEN:

TOYOTA MOTOR CORPORATION AUSTRALIA LIMITED (ACN 009 686 097)
Appellant

-and-

KENNETH JOHN WILLIAMS
First Respondent

and

DIRECT CLAIM SERVICES QLD PTY LTD (ACN 167 519 968)
Second Respondent

AND

Proceeding S157/2023
BETWEEN:

KENNETH JOHN WILLIAMS
First Appellant

and

DIRECT CLAIM SERVICES QLD PTY LTD (ACN 167 519 968)
Second Appellant

-and-

TOYOTA MOTOR CORPORATION AUSTRALIA LIMITED (ACN 009 686 097)
Respondent

TOYOTA'S SUBMISSIONS

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PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the Internet.

PART II CONCISE STATEMENT OF THE ISSUES

2. The appeal in S155/2023 (**Toyota Appeal**) and the appeal in S157/2023 (**Williams Appeal**) concern the proper construction of s 272(1)(a) of the *Australian Consumer Law* (**ACL**).

3. In the Toyota Appeal, the question which arises is whether the statutory provision permits an affected person in relation to goods to recover damages for reduction in value resulting from a defect in the goods if, by the time of trial, the defect can be fully remedied free of charge such that the value of the goods has been restored. The appellant (**Toyota**) contends that the answer to that question is "no". That construction finds support in the text and context of the statute, the legislative history of s 272 of the ACL, as well as the principle of general law that damages are compensatory.

4. The issues which arise in the Williams Appeal are set out at [2]-[3] of the Williams appellants' submissions of 5 February 2024 (**WS**). The Williams appellants contend for a construction of s 272(1)(a) of the ACL to the effect that the reduction in value for the goods is always to be assessed by reference to the true value of the goods at the time of supply, and that the availability of a remedy that fully rectifies the defect in the goods by the time of the trial of the action for damages does not bear on that assessment. Ground 2 of the Williams Appeal raises a question of the quantification of the reduction in value damages in the present case, namely whether the Full Court erred in finding error in the primary judge's assessment of a 17.5% reduction in value of the relevant vehicles.

PART III SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

5. No s 78B notice is necessary.

PART IV JUDGMENTS OF THE COURTS BELOW

6. The reasons of the primary judge are unreported: *Williams v Toyota Motor Corporation Limited (Initial Trial)* [2022] FCA 344 (**J**). The reasons of the Full Court are reported: *Toyota Motor Corporation Australia Limited v Williams* (2023) 296 FCR 514 (**FC**).

PART V FACTS

Liability

7. The proceedings are representative proceedings brought pursuant to Pt IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) and concern 264,170 Toyota motor vehicles in the Prado, Fortuner and Hilux ranges with diesel engines sold to consumers between 1 October 2015 and 23 April 2020 (**Relevant Period**): J[6], [15(1)] (JCAB 16, 18); FC[1] (JCAB 264). Toyota was the manufacturer of the vehicles for the purposes of s 7(1)(e) of the

ACL: FC[2] (JCAB 264). The second respondent (**DCS**) acquired a Prado in April 2016: FC[3] (JCAB 264). Mr Williams is and was at all material times the sole director of DCS: FC[3] (JCAB 264). The group members are consumers who, during the Relevant Period: (1) acquired a relevant vehicle from a dealer or other retailer (including a used car dealer) other than by auction or for the purpose of re-supply; and (2) those who acquired a relevant vehicle from such a consumer other than for the purpose of re-supply: FC[4] (JCAB 264-265). The group members therefore include purchasers of new and used vehicles for household or business use and government and corporate buyers (such as fleet buyers).

8. The vehicles were supplied with a defect, in that the diesel particulate filter (**DPF**) system fitted in the vehicles was not designed to function effectively during all reasonably expected conditions of normal operation and use in the Australian market, specifically, regular continuous driving at approximately 100km/h: J[15(7)] (JCAB 20); FC[13], [15] (JCAB 266). An explanation of how the DPF worked is set out in J[15(3)-(6)] (JCAB 18-20) and FC[11]-[12] (JCAB 266). The consequences of the defect, when experienced, included excessive white smoke and foul-smelling exhaust gas being emitted from the vehicle's exhaust, components becoming blocked or damaged, warning lights illuminating on the dashboard, the need to have the vehicle inspected, serviced and/or repaired more than would otherwise be necessary and an increase in fuel consumption: FC[15] (JCAB 266); J[15(9)] (JCAB 20). The consequences of the defect were likely to manifest in relatively common driving conditions for many (but not all) buyers: FC[306] (JCAB 325). The consequences could be experienced at different times in different degrees for different group members.

9. After attempting a series of countermeasures to fix the problem, in May 2020 Toyota introduced a solution known as the "**2020 field fix**": FC[17] (JCAB 267). The 2020 field fix was offered to all group members at no cost. It was common ground that the 2020 field fix was effective and would continue to be effective in remedying the defect and its consequences in all the vehicles: FC[17] (JCAB 267); J[15(10)] (JCAB 20). From June 2020, all new vehicles of the relevant types were supplied with the countermeasure which prevented the defect from manifesting: FC[17] (JCAB 267); J[15(11)] (JCAB 20). The date by which the 2020 field fix "in fact became practically available" to consumers has been remitted to the primary judge: FC[134] (JCAB 293-294); however, it was a fact that by the time of the initial trial, it was known that the 2020 field fix was available and the experts agreed that, in consequence, there was no ongoing reduction in value in the relevant vehicles: FC[123] (JCAB 291-292). That is, it was not in dispute before the Full Court that the availability of the 2020 field fix restored the value of the vehicles (including those which had not had the 2020 fix installed) by the time of the initial trial: FC[218] (JCAB 309).

10. At the initial trial (the scope of which is described in FC[8] (JCAB 265)), it was determined that each of the 264,170 vehicles, that is including those in which the defect had not

manifested, were supplied in breach of the acceptable quality guarantee in s 54 of the ACL, and that that issue could and should be determined on a common basis: FC[22(1)] (JCAB 268). That finding was unsuccessfully challenged by Toyota on appeal: FC[32]-[51] (JCAB 271-274). At the initial trial, it was also determined that Toyota made representations that the vehicles were free of defects, which representations were misleading or deceptive, and false within the meaning of ss 18, 29 and 33 of the ACL (a matter which Toyota also unsuccessfully challenged on appeal: FC[52]-[65] (JCAB 275-277). However, given that questions of reliance and causation must be determined on an individual basis, any damages resulting from the contraventions of these sections of the ACL is yet to be determined: FC[22(2)] (JCAB 268). S155/2023

Primary judge's approach to assessing damages under s 272(1)(a) of the ACL

11. The Williams appellants sought aggregate damages for reduction in value resulting from the failure by Toyota to comply with the consumer guarantee under s 54. No such award was sought in respect of those group members who had taken up the 2020 field fix: FC[69] (JCAB 278). Further, the approach to those group members who had bought and/or sold a relevant vehicle on the secondary market was reserved for later consideration: FC[69] (JCAB 278). Accordingly, as recorded in FC[70] (JCAB 278), the focus of the primary judge was on the claim for reduction in value made by those group members who had bought their vehicle from a Toyota dealer and who still owned the vehicle when the 2020 field fix was made available at no cost (the **relevant cohort**).

12. The primary judge's approach to assessing damages under s 272(1)(a) is summarised in FC[72]-[86] (JCAB 278-281). Critically, as described in FC[77] (JCAB 279), the primary judge accepted the contention advanced by the Williams appellants that the reduction in value was to be assessed by reference to the time at which the vehicle was supplied without any reference to the events which occurred subsequently (but with only information which bears upon the assessment of the value of the goods at the time of supply being able to be taken into account): J[298]-[326] (JCAB 95-103). The primary judge reasoned that while evidence of events subsequent to the date of purchase could be adduced to demonstrate the nature of the defect, and the extent of any fall in market price of the goods at a time when the market became informed of the defect, evidence of a repair becoming available four years[1] after the date of acquisition was irrelevant: J[328] (JCAB 103-104). Thus, his Honour treated the possibility of a repair as an extraneous event throughout the whole of the Relevant Period for the purposes of assessing damages under s 272(1)(a) of the ACL. This formed the basis for the conclusion that reduction in value damages be assessed on a common basis,

[1] As the Full Court observed in FC[81] (JCAB 280), this observation was based only on Mr Williams' evidence and there were some group members within the relevant cohort who had bought their vehicles just before the 2020 field fix became available.

because the assessment was based on a propensity common to all the vehicles owned by those within the relevant cohort at the time of acquisition: J[325] (JCAB 103), as recorded in FC[78] (JCAB 279). S155/2023

13. As to the quantification task, the primary judge determined, after a consideration of the expert evidence, that the failure to comply with the guarantee of acceptable quality resulted in a reduction in value of 17.5% of all the vehicles within the relevant cohort: J[393] (JCAB 121), as recorded in FC[22(3)] and [84] (JCAB 268, 280-281). His Honour then proceeded to calculate the damages to which DCS was entitled, and formulated a methodology for determining the damages to which group members within the relevant cohort were entitled: J[395]-[461] (JCAB 122-137), with the result that the primary judge made an order under s 33Z(1)(e) of the FCA Act that damages under s 272(1)(a) of the ACL be awarded to all group members within the relevant cohort: J[447] (JCAB 134); see also orders 2-3 of the orders of the primary judge of 16 May 2022 (JCAB 158-159).

Full Court's approach in assessing damages under s 272(1)(a)

14. Before the Full Court, Toyota challenged the primary judge's construction of ss 271(1) and 272(1)(a) of the ACL and contended that the time of assessment of any damages under s 272(1)(a) is at the time the damage crystallises, for example, upon a sale of a vehicle or, in the absence of a sale of a vehicle, at the time of trial based on all the available information at that point: FC[87] (JCAB 281). The Williams appellants supported the approach adopted by the primary judge: FC[90] (JCAB 282).

15. The Full Court adopted neither party's approach. It determined that damages for reduction in value of goods, resulting from a failure to comply with a consumer guarantee such as s 54, are to be calculated by deducting the value of the defective product from the lower of the original purchase price, or the average retail price at the time of supply. However, the overarching consideration is that the amount of compensation for any reduction in value be appropriate. Depending on the circumstances, that may require a departure from the time of supply or an adjustment to avoid over-compensation. The reasoning of the Full Court may be summarised as follows:

a. Sections 271 and 272 create a right of action for damages against the manufacturer where there has been a failure to comply with (relevantly) the acceptable quality guarantee. The word "damages" in those sections refers to statutory compensation such that it is implicit that the affected person must have suffered loss or damage: FC[97] (JCAB 286).

b. The text and structure of s 272(1)(a) indicate that, at least generally, the point in time for assessing damages for any reduction in the value of the goods is the time of supply. Each of the integers in subparagraphs (i) and (ii) of s 272(1)(a) are referrable to that time: FC[98] (JCAB 286).

c. However, given the provision is concerned with statutory compensation for loss and damage, it is necessary for the Court to assess whether the affected person has suffered actual loss or damage resulting from the failure to comply with the consumer guarantee. This assessment may require a departure from the time of supply or an adjustment to avoid over-compensation: FC[99]-[100] (JCAB 286). S155/2023

d. In the case of a claim against a manufacturer, assessment of reduction in value damages may still be undertaken by reference to the price paid (or the average retail price) at the time of supply, but taking into account subsequent events to reflect the actual damage resulting from the value differential between the price paid (or average retail price) and the value of the goods: FC[100] (JCAB 286). That approach is consistent with general principles regarding the assessment of damages which emphasise that it may be necessary to depart from general rules in the circumstances of a particular case, if this is necessary to ensure no over-compensation is awarded: FC[102]-[106], [131] (JCAB 287-288, 293).

e. Section 272 applies if there has been a failure to comply with a consumer guarantee such as s 54 which only applies to the supply of goods to a consumer. Having regard to the definition of "goods" in s 3 of the ACL, it is apparent that in most instances, those goods will be goods that are acquired to be utilised. Therefore, in most instances, the intrinsic value of consumer goods to a retail buyer will lie in their utility over their useful life rather than the price at which they may be on-sold FC[108]-[111], [117] (JCAB 288-290).

f. Therefore, when it comes to assessing the extent to which a failure to comply with the consumer guarantee at the time of supply resulted in a reduction in value, the approach that the general law has developed in assessing loss in cases concerning the defective supply of valuable assets is inapposite. Rather, to assess the quantum of any damages, it usually will be necessary to focus upon the price that would have been paid if the consumer had known of the defect when purchasing the goods, which requires identification of the component of the price actually paid that could be said to be attributable to the loss in utility arising from the defect: FC[118], [127] (JCAB 290, 292).

16. As to the application of the above approach, the Full Court observed at FC[120] (JCAB 290-291) that the present case was complex because of the position in relation to the repair. As the Court remarked at FC[122] (JCAB 291), this was not a case where there was no possibility of repair. Rather, there was a possibility of a fix being found that would likely be available at no cost, but it might take some time to be made available to a particular consumer. The Full Court also observed that it was to be remembered that the defect did not

mean the vehicles could not be used at all and most of its attributes could be utilised despite the defect.[2] S155/2023

17. Appropriate allowance for these circumstances and future possibilities ought to be taken into account in assessing damages under s 272(1)(a) of the ACL, the Full Court observing that their significance was "exposed by the fact that, by the time of the initial trial, it was known that the 2020 field fix was available and the experts agreed that, in consequence, there was no ongoing reduction in value": FC[123] (JCAB 291-292). Accordingly, the proper conceptual approach was to factor in the availability of the 2020 field fix when determining the reduction in value of the relevant vehicles at the time of purchase. On this approach, the period that the consumer held the vehicle before the fix became available was to be taken into account: FC[129] (JCAB 293). That was appropriate for two reasons. First, it was appropriate to use the known information as to the availability of a fix at the time of trial to reach a conclusion as to the reduction in value, that is, it enabled an assessment of how long the defect applied to the vehicle of the particular consumer and for that information to be used to assess the reduction in value damages as at the time of purchase by that consumer: FC[130] (JCAB 293). Secondly, it ensured against over-compensation (FC[131] (JCAB 293), which was a risk with the primary judge's approach given it treated the defect as one that would remain for the whole life of the vehicle despite the possibility that a fix might be developed and in the face of evidence at trial that the 2020 field fix was in fact available at no cost: FC[130], [133] (JCAB 293).

18. As to the grounds of appeal concerning the primary judge's assessment of the reduction in value of the relevant vehicles, which largely turned on his Honour's assessment of the expert evidence, before considering that evidence in detail, the Full Court made some general observations concerning the assessment or quantification of reduction in value damages in relation to consumer goods, noting that some of the possibilities were: replacement; write off; where a repair is possible; where a repair is not possible but the goods retain diminished utility; and where there is the prospect of resale such that the resale price may be a measure of loss of value: FC[144]-[151] (JCAB 296-297). The Full Court also gave some observations on the use of market expertise as a basis for assessing reduction in value, with the Court cautioning that any assessment by reference to market information as to the effect of the defects on second hand prices "will require the demonstration of a meaningful basis upon which to reason from market observation or understanding to a particular value": FC[152]-[153] (JCAB 297).

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[2] In this regard, it is also notable that expert evidence on sales data in respect of vehicles sold in the used car market did not reveal any decline in prices that might be attributable to the defect and in fact showed that the vehicles affected by the defect had a "higher average value retention" than those that were not: FC[230] (JCAB 311). In other words, the relevant vehicles held their value better (depreciated less) than comparable vehicles.

19. The Full Court then proceeded to consider the expert evidence that was before the primary judge and Toyota's various contentions on appeal. The Full Court upheld grounds 10 and 12 of Toyota's appeal which concerned the primary judge's treatment and acceptance of Mr Cuthbert's evidence (which was to the effect that the reduction in value resulting from the defect at the time of supply to the relevant Prado was in the order of 23-25%) "as a useful guide to valuation". As the Full Court summarised at FC[203] (JCAB 307), the broad brushed view of the primary judge "failed to have regard to the extent of the validity of the main criticisms raised by Toyota, namely the focus upon the salvage value and the associated (implicit) view that the vehicle was so defective it needed to be repaired before it had any real utility as a motor vehicle". The Full Court reasoned that Mr Cuthbert's focus on the salvage value of the vehicle was erroneous in circumstances where the vehicle retained utility, albeit diminished. Accordingly, the Full Court held the primary judge ought not to have treated Mr Cuthbert's evidence as a useful guide to valuation without making allowance for these matters: FC[204] (JCAB 307). It therefore followed that the primary judge's assessment that the reduction in value was 17.5% could not stand: FC[303] (JCAB 324-325). S155/2023

20. The Full Court then proceeded to undertake a reassessment of the reduction in value of the relevant vehicles before taking into account (as it considered was necessary and appropriate) the fact that the 2020 field fix became available: FC[303] (JCAB 324-325). This was because the Full Court considered it did not have sufficient material before it to determine what allowance should be made for the fact that the 2020 field fix became available: FC[303], [319] (JCAB 324-325, 327-328). Ultimately, the Full Court reassessed the reduction in value to be 10%, before taking into account the availability of the 2020 field fix: FC[312] (JCAB 327). It arrived at that reassessment for three reasons. First, it expressed general agreement with the approach of the primary judge which "placed emphasis upon the importance of making an assessment of the extent of the effect of the defect and its consequences on the utility of the vehicle in the hands of the consumer": FC[313] (JCAB 327). Secondly, "much of the utility of the vehicle was unaffected by the defect and its consequences, even on the basis that the vehicle may be expected to exhibit the defect consequence in relatively common driving conditions": FC[314] (JCAB 327). Thirdly, it accepted the merit of Toyota's criticisms of Mr Cuthbert's evidence which over-emphasised the salvage value of the vehicles and accordingly overstated the reduction in value: FC[315] (JCAB 327).

21. The Full Court concluded it was appropriate to remit the matter for the re-assessment of reduction in value damages to take place on the basis that the reduction in value before taking into account the availability of the 2020 field fix was 10%, with the aspect to be determined being what allowance should be made for the 2020 field fix. The Full Court said that this aspect was to be approached in a way that takes into account the period that the consumer held their vehicle before the fix became available.

PART VI ARGUMENT S155/2023

22. By its appeal, Toyota does not challenge the finding by the Full Court that the reduction in value of the vehicles resulting from the defect was 10% before considering the availability of the 2020 field fix. What it challenges is the order of the Full Court remitting the matter to the primary judge for reduction in value damages to be reassessed in accordance with the Full Court's reasons. An application of the Full Court's reasons would result in reduction in value damages being awarded to group members within the relevant cohort, notwithstanding that by the time of the initial trial the 2020 field fix was available such that the loss of value resulting from the defect had been restored. Once that is appreciated, the only conclusion is that there is no basis for the recovery by those group members within the relevant cohort of damages for reduction in value. To award group members reduction in value damages for the "period of time that the particular consumer held their vehicle before the fix became available" would be to over-compensate them.

23. Given the relatively narrow basis on which Toyota's appeal is based, it is appropriate to respond first to the Williams Appeal Ground 1 and the submissions at WS[39]-[56], followed by Toyota's appeal. Williams Appeal Ground 2 is then addressed.

Williams Appeal Ground 1

24. Ground 1 of the Williams Appeal propounds that damages under s 272(1)(a) of the ACL are always to be assessed by reference to the true value of the goods at the time of supply, using information acquired after supply only to the extent it bears on the question of the goods' true value at the time of supply. The proposition underlying that contention is that s 272(1)(a) should be construed to allow an affected person to be awarded damages that exceed that person's actual loss caused by the reduction in the value of the goods. For the reasons set out below, that proposition is inconsistent with the text of the ACL, interpreted in context and in light of its purpose, as well as with the overriding principle that damages are compensatory.

25. *First*, contrary to WS[39], the Full Court did not fail to find that the "reduction in the value of the goods, resulting from the failure to comply with the guarantee" referred to in s 272(1)(a) is to be assessed by reference to the value of the goods at the time of supply. Rather, the Full Court observed at FC[98] (JCAB 286) that, at least generally, the point in time for assessing damages for any reduction in the value of the goods is the time of supply, and that each of the integers in subparagraphs (i) and (ii) of s 272(1)(a) are referrable to that time. However, the Full Court went on to reason that given the provision is concerned with statutory compensation for loss and damage, it is necessary therefore for the Court to assess whether the affected person has suffered actual loss or damage resulting from the failure to comply with the consumer guarantee. This assessment may require, depending on the

circumstances of the case, the general rule to yield so to avoid over-compensation: FC[99]-[100] (JCAB 286). S155/2023

26. That reasoning is consistent with the text of 272(1)(a) which permits an affected person, in an action for damages under s 271(1), to recover damages for any reduction in value of the goods, resulting from a failure to comply with the guarantee. The language of "action for damages" and "recovery" of "damages" invokes the overriding principle that damages are compensatory[3]. The object of an award of compensatory damages is, as far as reasonable, to put the affected person in the position as if the wrong (here the breach of the consumer guarantee) had not occurred; the person may only "recover" what they actually lost[4]. There is no reason to consider that s 272(1)(a) was intended to be inconsistent with that "universal" rule[5].

27. While it may be accepted, as stated in WS[40], that "reduction in value" in s 272(1)(a) is a reference to the reduction in value which is extant at the time of supply, and that such compensable loss may occur at the time of supply[6], the inflexibility of any general rule has been doubted[7] and in any event there is a critical qualification to the rule which alleviates its rigidity. The real value of what the affected person received "must be ascertained in light of the events which afterwards happened"[8], and, depending on the circumstances, those subsequent events may have the effect of reducing the loss or damage recoverable[9].

28. The application, in an appropriate case, of this qualification to the general position that the point in time for assessing damages for any reduction in value is the time of supply, is not undone by the fact that ss 272(1)(a) and (b) resemble, at least to a degree, the two components of compensatory damages available at common law for breach of contract: (1)

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[3] ***HTW Valuers*** *(Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at [63] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ), referring to *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1997] AC 254 at 265 and 284 (Lord Steyn); ***Henville v Walker*** (2001) 206 CLR 459 at [131] (McHugh J); ***Kizbeau*** *Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281 at 296 (Brennan, Deane, Dawson, Gaudron and McHugh JJ; ***Johnson v Perez*** (1988) 166 CLR 351 at 355-357 (Mason CJ), 367 (Wilson, Toohey and Gaudron JJ) and at 386 (Dawson J); ***Dwyer*** *v Volkswagen Group Australia Pty Ltd* [2023] NSWCA 211 at [234] (Gleeson JA, Leeming and White JJA agreeing).

[4] *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635 at [57]; *Dwyer* at [237]-[239] (Gleeson JA, Leeming and White JJA agreeing).

[5] See *Scenic Tours Pty Ltd v Moore* [2023] NSWCA 74 at [43] (Kirk JA), in the context of s 267 of the ACL, and as applied in *Dwyer* at [237]-[238] (Gleeson JA).

[6] ***Potts v Miller*** (1940) 64 CLR 282 at 298 (Dixon J) where his Honour observed that if the cause in the reduction in value is *inherent* in the thing itself, then its existence should be taken into account in arriving at the real value of the thing at the time of the purchase; see also *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 537-538 (Brennan J).

[7] *Stracey v Urquhart* [1930] AC 28 at 67 (Lord Atkin), referred to in *Potts v Miller* at 299 (Dixon J).

[8] *Potts v Miller* at 299 (Dixon J); *HTW Valuers* at [39] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ).

[9] As in *Kizbeau* at 291-296, where in assessing the value of the motel business at the date of acquisition, regard was had to the use that the plaintiff made of the premises between the date of acquisition and the date the planning restriction on the property was removed by the council.

compensation directly for the performance interest, and (2) compensation for consequential losses: *cf* WS[41].[10] S155/2023

29. The consideration of subsequent events in the assessment of damages in contract is not unusual or novel, and none of the authorities referred to in WS[41] support the proposition that in all cases involving compensation for performance interest, post-supply events are to be "disregarded" entirely. In ***Clark v Macourt*** (2013) 253 CLR 1 at [109], Keane J did not say that subsequent events are always to be disregarded in assessing that value. Indeed, his Honour referred to *Johnson v Perez* at 355-356 (also referred to in FC[103] (JCAB 287)) where Mason J observed that the "rule is not universal; it must give way in particular cases to solutions best adapted to giving an injured plaintiff that amount in damages which will most fairly compensate him for the wrong he has suffered". Further, the analogy to breach of contract cases such as *Clark v Macourt* ought to be treated with caution, particularly in the context of statutory provisions which address the liability of the manufacturer, not the supplier. Further, the damages recoverable under s 272(1)(a) (being the difference between the real value of the good supplied and the price of the good (or more particularly, the lower of the price paid by the consumer and the average retail price)) is different to the measure in contract which is determined by taking the difference between the value of the goods as delivered and the value of the goods as promised.[11]

30. *Secondly*, the Full Court's approach to using information about events post-supply is consistent with general principles: *cf* WS[42]. Even the Williams appellants accept that information about events post-supply may be relevant but contend that this information is only relevant "insofar as it bears upon the true value of the goods as at that date". In the present case, the relevant information was an expectation that a repair for any defect would be found, albeit with a delay of uncertain duration, and offered to consumers free of charge: FC[122] (JCAB 291). Further, by the time of trial, a defect existing at the time of supply was capable of being fixed free of charge, such that the experts agreed that there was no longer any reduction in value resulting in the defect: FC[123], [218] (JCAB 291-292, 309). These subsequent events were not a consequence of independent, extrinsic, supervening or accidental factors. They arose from the intrinsic nature of the relevant goods. Given that a vehicle should remain fit for purpose, it is inherent in the nature of a vehicle that upon

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[10] *Dwyer* at [229] (Gleeson JA), referring to *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326 at [64] (Edelman J).
[11] *Clark v Macourt* at [108]-[109]. The difference in the two measures is demonstrated in *Clark v Macourt*. In that case, the contractual damages (being the difference between the value as warranted and the value as delivered) was $1.2 million, with the value of the goods as warranted being $1.2 million (see at [88]) and the value of the goods delivered being nil. The price paid for the goods (some part of the $386,000 paid to acquire the entire medical practice) was immaterial to the assessment of damages: see at [112] (Keane J). However, under s 272(1)(a)(i) the price paid, or alternatively the average retail price of the goods if lower, is an integral aspect of the assessment for damages for any reduction in the value of the goods. Applying s 272(1)(a) to that case, the damages would have been less than $386,000. See also *HTW Valuers* at [34]-[36].

recognising a defect the defective part will be repaired or replaced, that is, the defect in the goods is in fact capable of remedy[12]. Just as the defect (a risk of malfunction) is an intrinsic feature of the vehicle, so too is the repair of the defect, so as to eliminate the risk of malfunction. S155/2023

31. The High Court's acceptance of the relevance of subsequent events to the assessment of damages in *Kizbeau* is analogous to the present case. In *Kizbeau*, the appellant purchased a motel business based on a representation that the business was lawful. Unbeknownst to the seller and the purchaser, the business was unlawful (in part) at the time of sale. There were two subsequent events: (i) the purchaser, oblivious to the problem, conducted the business anyway; and (ii) the law was then changed to make the business lawful. The High Court held that both of those events were to be taken into account in assessing the appellant's loss[13], being the difference between the price paid and the value of the business at the time of the purchase. Here, DCS acquired its vehicle on the basis of the guarantee of acceptable quality. Unbeknownst to Toyota and DCS, the car has a defect at the time of supply. There were two subsequent events: (i) the Williams appellants continued to use the vehicle; and (ii) the 2020 field fix was subsequently made available by the time of the initial trial. Applying *Kizbeau*, those two subsequent events ought to be taken into account in the assessment of damages for any reduction in value of the vehicle at the time of supply.

32. Contrary to WS[43], that the 2020 field fix was developed and made available after the time of supply does not mean that that event should be disregarded in the assessment of damages for reduction in value at the time of supply. Indeed, the events taken into account in *Kizbeau* – the subsequent conduct of the business by the purchaser in blissful ignorance of there being a problem and the subsequent changing of the law to make the business lawful – occurred after the sale of the business. And in *Dwyer*, there was no error in the primary judge's considering the replacement of Professor Dwyer's airbag, at no cost, which also occurred after the supply of the vehicle: on the assumption that there was a breach of the acceptable quality guarantee in that case, that was an event that arose from the nature of the vehicle (at [241]-[244].

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[12] *Dwyer* at [240]-[244] (Gleeson JA) where his Honour observed "[i]f the replacement of the airbag in the appellant's vehicle is as a consequence of intrinsic or inherent factors in the nature of the vehicle, it is an event which must be taken into account in assessing under s 272(1)(a) any reduction in value damages at the time of supply".

[13] *Kizbeau* at 293 (Brennan, Deane, Dawson, Gaudron and McHugh JJ), relying on *National Provincial Bank Ltd v Bradberry* [1943] Ch 35 at 45 where Uthwatt J stated "where facts are available they are to be preferred to prophecies"; *Willis v Commonwealth* (1946) 73 CLR 105 at 109 (Latham CJ) where his Honour observed "where actual facts are known, speculation as to the probability of those facts occurring is surely an unnecessary second-best"; and *Bwllfa & Merthyr Dare Steam Colleries (1891) Ltd v Pontuypridd Waterworks Co* [1903] AC 426 at 431 where Lord McNaughten said "Why should he listen to conjecture on a matter which has become an accomplished fact? Why should he guess when he can calculate? With the light before him, why should he shut his eyes and grope in the dark?".

33. *Thirdly*, contrary to WS[46], the subsection does not assume an entitlement to recover damages for reduction in value of the goods, even if no actual loss was suffered. The language of "entitled to recover damages for" in the chapeau to s 272(1)(a) must be read with the opening words of that chapeau – "in an action for damages under this Division". That then requires recourse to s 271(1) which entitles an affected person, "by action against the manufacturer, to recover damages from the manufacturer". Properly construed, the entitlement is to bring an action for damages, not for an affected person to be entitled to such damages for any reduction in value to the goods, resulting from the breach of the consumer guarantee, even if no actual loss was suffered.[14] Once that is appreciated, in assessing whether the affected person may recover any such damages for reduction in value of the goods, the task of the Court under s 272(1)(a) "is to select a measure of damages which conforms to the remedial purpose of the statute and to the justice and equity of the case"[15]. This does not involve a "freewheeling" discretion. It simply recognises that a court will not award a sum of damages if doing so will result in the claimant being overcompensated: see FC[99], [102] (JCAB 286, 287). S155/2023

34. That recognition is consistent with the common law and statutory antecedents to the ACL.

35. At common law, the general measure of damages for breach of an implied warranty of saleable quality was the difference between the value of the goods as promised and the value of the goods as supplied at the time of supply. In *Jones v Just* (1868) LR 3 QB 197, the plaintiffs purchased hemp which was not of merchantable quality. The market price of the hemp then rose, enabling the plaintiffs to resell the hemp above the market price at which quality hemp had stood at the time of delivery. The general measure of damages was held nevertheless to apply. However, critically, the reason that the subsequent sale of the hemp was not taken into account was that the subsequent transaction was regarded as a consequence of an independent factor – the rise in the market price of the hemp[16]. That is in contrast with the present case where the subsequent event – the availability of the 2020 field fix – arose from the nature of the vehicle: see at [30] above.

36. The common law principles were reflected in the *Sale of Goods Act 1893* (UK) (**1893 Act**)[17]. Section 53(2) of the 1893 Act provided that the measure of damage for breach of warranty was the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty. Section 53(3) provided that in the case of breach of warranty of quality such loss is *prima facie* the difference between the value of the goods at the time of

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[14] See, albeit in a different context, *Grljak v Trivan Pty Ltd (In Liq)* (1994) 35 NSWLR 82 at 86 (Mahoney JA).
[15] *Henville v Walker* at [18] (Gleeson CJ).
[16] See as explained in *Koch Marine Inc v D'Amica Societa di Navigatione, The Elena d'Amico* [1980] 1 Lloyd's Rep. 75 at 88-89 (Robert Goff J), although in the context of mitigation of damage.
[17] See also the *Sale of Goods Act 1895* (SA), s 52; *Sale of Goods Act 1895* (WA), s 52; *Sale of Goods Act 1896* (Qld), s 54; *Sale of Goods Act 1896* (Tas), s 57; *Sale of Goods Act 1923* (NSW), s 54; *Goods Act 1958* (Vic), s 59.

delivery to the buyer and the value they would have had if they had answered to the warranty. S155/2023 In this regard, the Williams appellants rely on ***Slater v Hoyle*** *& Smith Ltd* [1920] 2 KB 11. That reliance is misplaced. In that case, cloth of inferior quality was sold to the buyer who in turn used it to fulfil a subcontract where the subcontract price was higher than the market value at delivery of the inferior cloth. The buyer claimed the normal measure of damages under s 53(3) and contended that the price obtained under the subcontract was irrelevant. The Court of Appeal agreed. Scrutton LJ held (at 23) that the subcontract was a circumstance "'peculiar to the plaintiff', which cannot affect his claim one way or the other"[18]. While in England subsequent doubt has been cast on the approach in *Slater v Hoyle*, favouring an assessment of a claimant's actual loss[19], it is not necessary to resolve that inconsistency here. That is because it is clear from the Court's analysis that the disregard of the subsequent event was because it was a consequence of an extraneous factor. That is distinguishable from the present case where the relevant subsequent event – the availability of the 2020 field fix by the time of the initial trial – arose from the intrinsic nature of the vehicles.

37. The approach under s 53 of the 1893 Act (and its Australian cognates) was followed upon the commencement of the *Trade Practices Act 1974* (Cth) (**TPA**)[20], despite the statute (and the equivalent state and territory legislation[21]) being silent on the measure of damages for breach of warranty of quality[22]. The fact that the drafters of the ACL resolved to specifically set out the applicable remedies in the text of s 272 (with the aim of making the position at law clearer to consumers and business, and not requiring them to have an understanding of remedies under the law of contract to effectively apply implied conditions and warranties to their particular situation[23]) does not mean that the approach to assessing reduction in value damages changed in essence. Contrary to WS[46] and [47], the spelling out of the measure of loss in s 272 does not "entitle" an affected person to damages in accordance with the formula in s 272(1)(a), irrespective of whether that person suffered any actual loss. Nothing

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[18] Warrington LJ (at 18) made the same point, reasoning that the price paid by the buyer "does not enter at all", except that it may be relevant to assessing value.

[19] See *Bence Graphics International Limited v Fasson UK Limited* [1998] QB 87 CA at 102-103 (Auld LJ). See also the discussion of these authorities in Edelman, *McGregor on Damages* (21st ed, 2021) at [2-007] and [25-067]-[25-069], in *Motium Pty Ltd v Arrow Electronics Australia Pty Ltd* [2011] WASCA 65 at [120]-[126] (Murphy JA) and *Swick Nominees Pty Ltd v Leroi International Inc (No 2)* (2015) 48 WAR 367 at [475]-[477] (Murphy JA and Edelman J).

[20] Sections 71(1) and 74D.

[21] *Consumer Transactions Act 1972* (SA), s 6(4); *Manufacturers Warranties Act 1974* (SA), ss 4(2) and 5, *Manufacturers Warranties Ordinance 1975* (ACT), ss 3 and 5; *Fair Trading Act 1987* (WA), ss 38(1); *Fair Trading Act 1987* (NSW), ss 40Q, 40W; *Consumer Affairs and Fair Trading Act 1990* (NT), ss 64. 75; *Fair Trading Act 1999* (Vic); *Fair Trading Act 1987* (WA).

[22] As Kenny J observed in *Lowe v Mack Trucks Australia Pty Limited* [2008] FCA 439 at [268], "the measure of damages for a breach of an obligation created by s 71 of the TPA is the contractual measure, namely, the estimated loss directly and naturally resulting in the ordinary course of events from the breach. The *prima facie* measure of that loss is 'the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty'".

[23] See Explanatory Memorandum to the *Trade Practices Amendment (Australian Consumer Law) Bill (No 2.) 2010* (Cth) at p 18.

in the text, or the consumer protection purpose underpinning the ACL as explained in the extrinsic material, requires the Court, in applying s 272(1)(a) to apply the statutory text so rigidly as to ignore the compensatory principles referred to above or the unfairness that would result from over-compensation[24]. S155/2023

38. To so ignore such principles – and to "recognise" or assume "entitlement" to damages for any reduction in value resulting from failure to comply with the guarantee irrespective of what happened after the date of supply – could lead to anomalous outcomes. For example, it would permit an affected person to recover damages under s 272(1)(a) even if that person had already exercised their rights under the ACL against the supplier, or if the manufacturer had already applied a repair to the goods in the absence of an express warranty (such that s 271(6) did not apply), or if the consumer had sold their vehicle before the defect manifested[25]. Indeed, the flaw in the Williams appellants' approach is revealed by its application in the present case to those group members outside the relevant cohort. For example, and even as the primary judge recognised, the Williams appellants' approach could not be applied to group members who sold their vehicle, nor could it be applied to group members who purchased a vehicle sold by another group member; a person unaware of the defect selling their vehicle to a person who is similarly unaware of the defect will recoup any reduction in value attributable to the defect. Accordingly, while the primary judge held that the "reduction in value" of 17.5% applied to every vehicle, damages in that amount were not awarded to every purchaser: see as recorded in FC[22(4)(b) and (d)] (JCAB 268). The primary judge accepted that doing so could "produce anomalous results" (J[430], JCAB 130). Similarly, damages were not awarded to group members who received a refund from Toyota or a replacement vehicle as part of a redress program conducted by Toyota: see as recorded in FC[22(4)(e)] (JCAB 268). On the Williams appellants' approach, damages under s 272(1)(a) would be awarded to group members regardless of those matters, over-compensating them.

39. *Fourthly*, contrary to WS[48] it is not to the point that s 272(1)(a) does not expressly say anything "about limiting the damages to which the affected person is otherwise 'entitled' by reference to the time at which an effective repair becomes 'available' or 'practically available'". And that s 271(6) deals with the consequences of an actual repair does not mean that the availability of a repair ought not be considered in assessing damages under

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[24] It was acknowledged in the report preceding the ACL, the *Consumer Rights Report of the Commonwealth Consumer Affairs Advisory Council* (4 December 2009) at p 49 that whilst spelling out consumer remedies had the aim, consistent with the *Consumer Guarantees Act 1993* (New Zealand), to "leave consumers and business with much greater certainty about the framework within which their rights and obligations are determined", it was "not possible to cover off in detail on every remedy that will exist in every factual circumstance. In attempting to strike a balance, some things need to be left unsaid."

[25] *Dwyer* at [236] (Gleeson JA).

s 272(1)(a). As was observed in *Dwyer* at [235], these provisions concern separate subject matters: s 271(1) is concerned with the manufacturer's failure to comply with the consumer guarantee of acceptable quality in s 54, and s 271(6) is concerned with the manufacturer's refusal or failure, within a reasonable time, to repair or replace the goods if the consumer has required the manufacturer to do so under an express warranty. That the subject matter of s 271(6) concerns an express warranty by a manufacturer to repair or replace goods, says nothing of the circumstance that in an action under s 271(1) to recover damages of the kind referred to in s 272(1)(a), the prospect of replacement of the goods at no cost may illuminate or indicate or reflect the true value of the goods at the date of purchase, in assessing damages under 272(1)(a). The Full Court recognised as much in FC[131] (JCAB 293). S155/2023

40. As to WS[49]-[51], for the reasons elaborated upon below in respect of Toyota's appeal, Toyota respectfully agrees, to an extent, that the Full Court's approach lacks coherence. But that lack of coherence is not because of its recognition, in accordance with the compensation principle, that subsequent events may need to be taken into account in assessing damages under s 272(1)(a). It is because the Full Court's approach requires the assessment under s 272(1)(a) to be conducted on the basis that some reduction in value damages will be recoverable in respect of the time between purchase and the time the repair became "practically available", despite the fact that by this time any reduction in value had been fully restored. A coherent solution is not, as the Williams appellants would have it, to always assess damages under the provision by reference to the goods at the time of supply and ignore all subsequent events. Rather, a coherent solution here is to conclude that the availability of the 2020 fix by the time of the initial trial was a consequence of intrinsic factor in the nature of the vehicle, such that it is an event which must be taken into account in assessing damages under s 272(1)(a). And, having regard to the fact that the availability of the 2020 field fix restored the value in the vehicle, as the experts agreed, damages under s 272(1)(a) for the relevant cohort were nil.

Toyota Appeal

41. WS[57] mischaracterises Toyota's central proposition advanced on its appeal as "that, upon a proper construction of s 272(1)(a), if, at any time after the defective goods are supplied, a repair capable of wholly remedying the defect becomes 'available' 'free of charge', then no damages are recoverable under s 272(1)(a)". That is not the central proposition. The central proposition is that, on the proper construction of s 272(1)(a), on the evidence in the present case, damages for reduction in value are to be assessed taking into account the subsequent fact that the reduction in value attributable to the defect at the time of supply has been entirely restored.

42. Critically, in the present case, the 2020 field fix was available at the time of the initial trial and "the experts agreed that, in consequence, there was no ongoing reduction in value": FC[123] (JCAB 291). It was "abundantly clear" on that evidence and not challenged on appeal that "the availability of the fix restored the value of the vehicle": FC[218] (JCAB 309). While the Full Court correctly found that the availability of the 2020 field fix was a factor to be taken into account in assessing damages under s 272(1)(a) (FC[129] (JCAB 293)), it erred in the manner in which it explained how the 2020 field fix was to be taken into account, reasoning that the assessment (to be undertaken by the primary judge on the remitter) was to be conducted on the basis that some reduction in value damages will be recoverable in respect of the time period between purchase and the repair becoming available. S155/2023

43. The source of that error lies in the Full Court equating the concept of value with utility. The Full Court held that "the value of the consumer goods lies in their utility over their useful life rather than any resale price": FC[127] (JCAB 292). As to the meaning of "utility", at FC[306] (JCAB 325), the Court said that "the nature of a motor vehicle and its utility to a consumer are matters of ordinary everyday understanding. It is not necessary for a Court to receive evidence as to the nature of the use to which vehicles of the kind the subject of the present claims might be put by a consumer". Why utility should be at the centre of the method of assessment is unclear. That lack of clarity in reasoning is heighted by the Full Court's acknowledgement that where "repair would wholly reinstate the utility of the goods, the cost of repair may be a measure of the reduction in value of the goods that resulted from the defect" because the cost of repair "is a measure of what is required in order to resort the utility of the goods": FC[146] (JCAB 296). If that be accepted, making available free of charge a repair which wholly restores the utility of the goods compensates the consumer for any reduction in value. The Full Court nevertheless said that the cost of repair is not an appropriate measure of loss because it does not have regard to the loss of utility before the repair is available: FC[300] (JCAB 324).

44. While it may be accepted that "value" as a legal concept has no single ascertainable meaning and is "one of those abstract legal words which varies in its import according to its context and its purpose within that context"[26], a value assessment based on the "utility" of the vehicle over the time period between the date of purchase and the date the 2020 fix became "practically available" is amorphous and disconnected with the text and context of the statutory provision. In the context of s 272(1)(a), and a case concerning motor vehicles, "value" is used to denote a price which the goods would fetch if they were offered for sale

[26] A. Ogus, *The Law of Damages* (1983), p 122.

in ordinary market conditions: the "worth of a thing is the price it will bring"[27]. It is that concept of "value" to which the experts were referring when they concluded that upon the 2020 field fix becoming available, there was no ongoing reduction in value. S155/2023

45. The difficulty with equating value with utility is exposed by the fact that the Full Court held that all relevant vehicles suffered the same reduction in value (that is, 10%, subject to accounting for the availability of the 2020 field fix). That finding takes no account of the widely varying uses to which different vehicles are put by different types of consumers (compare a family car with a car used on a mining site). And if "utility" amounts to the convenience and pleasure of the vehicle, the temporary loss of that amenity for the period between the purchase and the availability of the 2020 field fix may be a consequential loss[28], recoverable under s 272(1)(b). If this is what is meant by utility, then the Full Court elided the distinction between this loss and a loss of reduction in value. To the extent that there may have been a temporary reduction in value, that reduction is capable of being restored upon the 2020 field fix becoming available. By contrast, the experience of a loss of amenity cannot be undone.

46. In any event, reliance on the concept of utility does not justify the conclusion that some reduction in value will be recoverable in respect of the time between purchase and the time of the repair becoming available. The Full Court's reasoning that the availability of the repair operated as a "prospective reinstatement of value" such that affected persons within the relevant cohort should be compensated for the "diminished utility" of the vehicle from the time of purchase, does no more than support the conclusion that until the repair is available, there is a reduction in value. It does not alter the simple fact that once the repair became available, the reduction in value no longer existed, such that there ought to be no compensation to such affected persons under s 272(1)(a). That conclusion is supported by the reasoning in *Dwyer*, where the Court of Appeal rejected the concept of a "theoretical" reduction in value. By reason of replacement of the airbag, the car was as valuable at the date of the trial as it would have been had it been supplied originally with a non-defective airbag. As such, the Court took into account the rectification of the defect, at no cost, when assessing damages for any reduction in value[29].

47. As to the Williams appellants' submissions on the Toyota Appeal, they may be dealt with in relatively short compass.

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[27] *The "Clyde"-(James Watt Master)* [1856] 166 E.R. 998 at 999 (Dr, Lushington).
[28] *Arsalan v Rixon* (2021) 274 CLR 606 at [22]-[25] (Kiefel CJ, Gageler, Keane, Edelman and Steward JJ).
[29] *Dwyer* at [244]-[245] (Gleeson JA).

48. *First*, for the reasons outlined in relation to ground 1 above, damages under s 272(1)(a) are not to be universally assessed at the time of supply without reference to subsequent events, particularly those which are not independent of the nature of the good supplied: *cf* WS[59]. S155/2023

49. *Secondly*, contrary to WS[59]-[64], Toyota's argument is not inconsistent with the statutory context of s 272(1)(a), in particular s 271(6). As explained at [39] above, the statutory provisions deal with different subject matters. Moreover, the argument made by the Williams appellants that on Toyota's case, s 271(6) is rendered otiose is based on the false premise that Toyota's case is that the availability of a repair obviates any claim for damages for reduction in value. Toyota's case recognises that a reduction in value may or may not be restored by a repair or the making available of a repair. However, where (as was the case here) the evidence is that the availability of the repair has resulted in a full restoration of the value that was otherwise historically attributable to a particular defect, there are no recoverable damages for reduction in value.

50. *Thirdly*, none of the matters at WS[65] undermines Toyota's argument. The findings that Toyota failed to disclose the existence, nature and extent of the defect to consumers (J[244]-[266] (JCAB 80-86)), and the findings that Toyota had misled consumers as to the existence of the defect (J[232]-[260] (JCAB 77-84)), were made in the context of the misleading or deceptive conduct case for which separate damages were sought under s 236 of the ACL, the primary judge finding that it was not possible at the stage of the initial trial to deal with such damages: J[261] (JCAB 84); FC[22(2)] (JCAB 268). As to the assertion that Toyota had not made all group members aware of the existence of the 2020 field fix, that is to mischaracterise J[186] (JCAB 64-65); the primary judge's observation that any one group member "may not be aware of the availability of the 2020 field fix" was in the context of his Honour rejecting a submission by Toyota that in light of the fact that there were group members who chose not to take advantage of the fix, it could be concluded that those group members did not perceive their vehicles to be significantly affected. The observations made in (iv) to (vi) of WS[65] were all matters that were considered in the context of Toyota's mitigation argument which the primary judge rejected, and it was not taken up on appeal: J[495]-[508] (JCAB 145-148).

51. *Fourthly*, WS[67] is incorrect to assert that the Full Court's findings at FC[218] (JCAB 309) meant that the repair (and not the availability of the repair) would restore the value of the vehicle prospectively. The Williams appellants say that this was the effect of the evidence of Mr Cuthbert, selectively referring to an aspect of Mr Cuthbert's response[30] to six assumptions and three questions posed by the primary judge to the valuation experts during

[30] WBFM 199-200; see answer to question 3 posed by the primary judge.

the initial trial[31]. It is undoubtedly the case that Mr Cuthbert's evidence was to the effect that the implementation of the 2020 fix would prospectively restore the value of the vehicle; however, in his oral evidence Mr Cuthbert went further and accepted that the *availability* of the repair prospectively restored the value of the vehicle[32]. It was this evidence to which the Full Court was referring in FC[218] (JCAB 309) when it recorded that Mr Cuthbert "accepted that the availability of the fix restored the value of the vehicle" in the present case. There is nothing illogical in that factual finding (*cf* WS[68]). There will be cases where even a repair, let alone the availability of a repair, will not necessarily fully restore the value of the vehicle (where, for example, the original defect results in a market perception of a reduction in value that is never fully restored even by a complete repair). Similarly, the availability of a repair will not always fully restore the value of a vehicle, this again depending on the nature of the defect and the repair. What is relevant is that, in this case, where the particular defect gave rise to a risk of specific consequences (most prominently the blowing of foul-smelling white smoke), the availability of the 2020 field fix (the installation of replacement parts) free of charge was accepted by the experts to fully restore the value of the vehicle.

Williams Appeal Ground 2

52. Toyota does not accept that if ground 1 of the Williams Appeal succeeds, then the basis of the Full Court's setting aside of the primary judge's assessment of the reduction in value at 17.5%, and substitution of its own 10% figure, cannot stand. This is because the Full Court's reassessment was conducted before taking into account the 2020 field fix. Toyota also disputes that the Full Court otherwise misinterpreted Mr Cuthbert's evidence, or that the Full Court's concerns about Mr Cuthbert's use of the salvage value of the DCS Prado (not appreciated by the primary judge) were intertwined with its approach to assessing damages under s 272(1)(a) of the ACL. Accordingly, even if ground 1 of the Williams Appeal is allowed, it does not follow that the 17.5% reduction in value ought to be reinstated.

53. Mr Cuthbert's analysis of the value of the DCS Prado consisted of the following steps: (i) referring to the "seriousness" of the defect and the defect consequences and that at April 2016 there was no effective fix for the defect[33]; (ii) identifying a "salvage value" of the DCS Prado[34], being the amount that would be paid if the DCS Prado was "broken up and sold for parts"[35]; (iii) referring to the salvage value ($36,000-$38,000) as being the "floor value" for

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[31] WBFM 198; see in particular assumption 5 and question 3.
[32] T123.41-43 (WBFM 216). See also Report of Graeme Cuthbert (Ex 5) dated 23 July 2021 (**Ex 5**) at [79] (WBFM at 168) and T199.10-20 (Toyota Book of Further Materials (**TBFM**) at 22). The evidence of Toyota's valuer (O'Mara), which was not challenged, was to the same effect: Report of Timothy O'Mara (Ex 8C dated 2 December 2021 (TBFM at 4).
[33] Ex 5 at [113] (WBFM at 176).
[34] Ex 5 at [114]-[119] (WBFM at 176-177).
[35] T108.27-30 (WBFM 202).

the DCS Prado[36]; (iv) working up from that floor value, in some unspecified way, to identify an amount that Mr Cuthbert said a purchaser "would have been willing to pay … on top of the salvage value of the Applicants' Vehicle, in the hope that they would be able to find someone to fix the Defect at a reasonable price"[37]; and (v) concluding that the specified purchaser would have been willing to pay $44,000-$46,000 for the DCS Prado[38]. S155/2023

54. Having regard to the above, the Full Court was correct to be concerned that Mr Cuthbert anchored his analysis in the salvage value of the vehicles which led him to overstate the reduction in value of the vehicles: FC[204] (JCAB 307). As the Full Court explained in FC[186] (JCAB 303), while Mr Cuthbert identified factors he typically considered in deciding how to reduce the value of a vehicle due to a mechanical issue or a problem, which factors are set out at FC[172] (JCAB 301), when it came to undertaking the assessment, Mr Cuthbert did not in fact have regard to these factors, but rather posited a buyer considering the amount on top of salvage value that the buyer would pay on the basis that "purchasers would have existed in the market who would have been willing to pay a further amount on top of the salvage value of the [vehicle], in the hope that they would be able to find someone to fix the [defect] at a reasonable price, despite the absence of a known effective fix at the time": FC[186] (JCAB 303). It was the possibility of a buyer approaching the question of price in that way that caused Mr Cuthbert to reach the opinion that a 23.5-27% reduction was appropriate. The same approach was taken by Mr Cuthbert in his supplementary report which, while it described the salvage value as the outer limit on the extent of the appropriate reduction (FC [194] (JCAB 305)), in fact treated the defect as one so serious that it was appropriate to approach the valuation exercise on the basis that it required ascertainment of an amount on top of salvage based upon the uncertain prospect of being able to find someone who can fix the defect (FC [195] (JCAB 305)).

55. The above concern was expressed irrespective of, and separate from, the concern that the Full Court had with the failure to grapple with the effect on the aggregate assessment of damages of the possibility that a free fix may become available: FC[207] (JCAB 307): *cf* WS [72]. So much is apparent from FC[205] (JCAB 307) where the Full Court identified "two additional conceptual reasons [to the reason at FC[204] (JCAB 307)] for concluding that Mr Cuthbert's approach overstated the reduction in value".

56. Accordingly, even if ground 1 of the Williams Appeal succeeds, this aspect of the Full Court's reasoning remains unaffected, and this Court ought not simply reinstate the primary judge's 17.5% reduction in value. While it may be accepted (as is emphasised in WS[74]-[75]) that the primary judge did not completely accept Mr Cuthbert's range and

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[36] Ex 5 at [121] (WBFM 177).
[37] Ex 5 at [123] (WBFM 177).
[38] Ex 5 at [124]-[125] (WBFM 178).

acknowledged that some of the criticism of Mr Cuthbert "had merit" (J[393] JCAB 121), S155/2023 one such criticism which the primary judge did not accept was that which the Full Court did: see J[353]-[354] (JCAB 110-111). It cannot be said in those circumstances that, had the primary judge accepted that criticism (as the Full Court did), his Honour's quantification of the reduction in value would have remained at 17.5%. This is particularly when the applicant's figure of 25% was regarded by the primary judge as "simply too high" based on the primary judge's "findings as to expert evidence": J[393] (JCAB 121). If the primary judge had made the finding that the Full Court made about Mr Cuthbert's evidence, and regarded the evidence with due circumspection, the inference is that his Honour would have regarded Mr Cuthbert's figure as even more excessive and that may well have changed the ultimate reduction of 17.5% that his Honour settled upon.

57. Finally, as to WS[77]-[78], at the hearing before the Full Court, both parties accepted that if there was a need for the Full Court to redetermine the percentage reduction in value, it was appropriate for the Full Court to do so, rather than remit the matter to the primary judge: FC[303] (JCAB 324-325). The Full Court determined that it ought to and duly completed that assessment. It did so absent any lack of advantage that could be shown to have vitiated the re-assessment of this initial step. In those circumstances, the Williams appellants invocation at WS [78] of the notion that the primary judge had some special advantage in assessing value ought not be accepted. The Full Court applied orthodox principles in shaping relief following the outcome of the appeal. Even had the primary judge accounted for the disputed evidence in the manner contended in WS[74]-[76], the Full Court nevertheless determined that, on the evidence as a whole, a reassessment of the amount to be fixed at the initial trial was warranted. Put another way, the alleged errors of the Full Court identified in WS[74]-[76], even if made out, do not warrant a reinstatement of the 17.5% reduction in value of the vehicles within the relevant cohort.

PART VII ORDERS SOUGHT

58. Toyota seeks the orders set out in its notice of appeal filed on 30 November 2023 (JCAB 412-414).

PART VIII ESTIMATE

59. Toyota estimates it will need 2.5 hours for its oral argument.

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Dated 26 February 2024

Annexure – Statute and Statutory Instruments

1. Competition and Consumer Act 2010 (Cth) (version C2024C00038 in force as at 1 January 2024), Schedule 2, ss 52, 271, 272
2. Federal Court of Australia Act 1976 (Cth) (version C2022C00110 in force as at 18 February 2022), Pt IVA
3. Sale of Goods Act 1895 (SA) (version 12.12.2008), s 52
4. Sale of Goods Act 1895 (WA) (version 05-d0-06 in force as at 11 September 2010),s 52
5. Sale of Goods Act 1896 (Qld) (version in force as at 29 August 2007), s 54
6. Sale of Goods Act 1896 (Tas) (version in force as at 1 February 1997), s 57
7. Sale of Goods Act 1923 (NSW) (version 1923-1 in force as at 30 January 2012), s 54
8. Goods Act 1958 (Vic) (version no 112 in force as at 1 July 2015), s 59