HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

ON APPEAL FROM THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA

Proceeding S155/2023

BETWEEN: **Toyota Motor Corporation Australia Limited (ACN 009 686 097)**
Appellant
-and-

10 **Kenneth John Williams**
First Respondent
Direct Claim Services Qld Pty Ltd (ACN 167 519 968)
Second Respondent

AND

Proceeding S157/2023

BETWEEN: **Kenneth John Williams**
First Appellant
Direct Claim Services Qld Pty Ltd (ACN 167 519 968)
Second Appellant
20 -and-
Toyota Motor Corporation Australia Limited (ACN 009 686 097)
Respondent

WILLIAMS APPELLANTS' SUBMISSIONS

Solicitor for the Appellant in S155/2023 and Respondents in S157/2023
Andrew Morrison, **Clayton Utz**
amorrison@claytonutz.com
Telephone No: + 61 3 9286 6000

Solicitor for the Respondents in S155/2023 and Appellants in S157/2023
Matthew Mackenzie, **Gilbert + Tobin**
mmackenzie@gtlaw.com.au
Telephone No: + 61 2 9263 4000

Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Issues

2. There are two appeals arising from the same judgment below: S157/2023, commenced by **Williams**; and S155/2023, commenced by Toyota Motor Corporation Australia Ltd (**TMCA**). The underlying dispute concerns the supply of defective motor vehicles to Australian consumers in contravention of the statutory guarantee of acceptable quality in s 54 of the Australian Consumer Law (**ACL**). Both appeals concern the proper construction of s 272(1)(a) of the ACL, which describes the damages which an affected person is entitled to recover in an
10 action for damages under s 271 against a manufacturer of goods for breach of, relevantly, s 54.

3. Three issues arise with respect to the appeal grounds concerning s 272(1)(a):

   a. first, whether in assessing damages under s 272(1)(a) for non-compliance with the guarantee in s 54, the "reduction in the value of the goods, resulting from the failure to comply with the guarantee..." is *always* to be assessed by reference to the true value of the goods at the time of supply, using information acquired after supply only as a hindsight confirming a foresight;

   b. secondly, whether the use of the term "damages" in s 272(1)(a) imports a discretion, exercisable under a standard of "appropriateness", to assess the reduction in value of the goods by reference to a later state of affairs (up to and including the time of judgment) or
20 make an "adjustment" downwards to the amount of damages to reflect a post-supply event, even if that eventuality was unknown and unknowable at the date of supply; and

   c. thirdly, whether the "availability" of a repair *at the time of trial* bears upon the true value of the goods *at the time of supply*.

4. These construction issues arise in circumstances where it appears to be common ground that the failure of the vehicles to comply with s 54 resulted in a reduction in the value of the vehicles *at the time of supply*.

5. A further issue arises on the Williams appeal, namely whether the Full Court erred in finding error in the trial judge's assessment of a 17.5% reduction in value of the Relevant Vehicles and in its reassessment of the reduction in value.

30 **Part III: Section 78B Notice**

6. Williams considers that no s 78B notice is required in this proceeding.

Part IV: Citations

7. The primary judgment (**J**) is *Williams v Toyota Motor Corporation Australia Limited (Initial Trial)* [2022] FCA 344 (Lee J). The judgment of the Full Court of the Federal Court (**FC**) is

Toyota Motor Corporation Australia Limited v Williams [2023] FCAFC 50 (Moshinsky, Colvin and Stewart JJ).

Part V: Facts

A. Liability

8. Liability under s 54 is not in issue. It was determined by the trial judge, whose findings in that regard were not disturbed on appeal (and are not challenged in this appeal).

9. Between 1 October 2015 and 23 April 2020 (**Relevant Period**), 264,170 defective Toyota motor vehicles were supplied to consumers in Australia (**Relevant Vehicles**): J[6], [15(1)] (JCAB 16, 18); FC[1] (JCAB 264). TMCA was the manufacturer of the Relevant Vehicles, for the purposes
10 of the ACL: FC[2] (JCAB 264).

10. Each Relevant Vehicle was fitted with a diesel engine and supplied with a diesel exhaust after-treatment system (**DPF System**). Each of the Relevant Vehicles was defective at the time of supply because the DPF System was not designed to function effectively during all reasonably expected conditions of normal operation and use: J[6] (JCAB 16).

11. The case was run, and won, as a "propensity" case.[1] By reason of a common flaw in the design of the DPF System, each Relevant Vehicle had, at the time of supply, a propensity to manifest one or more adverse "defect consequences": J[206], [325]-[326], [426] (JCAB 70, 103, 128); FC[19], [163]-[165] (JCAB 267, 299-300). The "likelihood or probability that any given Relevant Vehicle would suffer from one or more defect consequences was relatively high": J[64] (JCAB
20 34). TMCA's internal forecasting "indicated that 50 per cent of Relevant Vehicles would fail [in the sense of experiencing defect consequences] after five years in service; and 94 per cent would fail after 10 years in service": J[64]-[65] (JCAB 34).

12. The defect consequences, if and when they manifested, were "serious", "such as to substantially interfere with the normal use and operation of the Relevant Vehicles": J[21], [75]-[86], [182]-[187], [331], [347], [391] (JCAB 22, 37-40, 63-65, 104, 108, 120); FC[58] (JCAB 276). Each Relevant Vehicle thus failed to comply with s 54 at the time it was supplied: J[177]-[189] (JCAB 62-65); FC[34] (JCAB 271). That was because a "reasonable consumer fully acquainted with the state and condition" of the Relevant Vehicles (including the hidden defect) at the time of supply would not regard the Relevant Vehicles as: acceptably fit for all the purposes for which goods of
30 that kind are commonly supplied (J[177] (JCAB 62)); acceptable in finish (J[181] (JCAB 63)); acceptably free from defects (J[183], [187] (JCAB 63, 65)); or acceptably durable (J[188] (JCAB 65)).

[1] In the same sense as *Medtel Pty Ltd v Courtney* (2003) 130 FCR 182 at [64]-[74], the pacemaker case.

13. It was common ground at trial, and consistent with the authorities, that the question of whether goods fail to comply with the guarantee of acceptable quality is to be assessed as at the time of supply of the goods: J[164] (JCAB 59). Thus, it was irrelevant to the s 54 enquiry whether each vehicle had, by the time of trial, in fact experienced any defect consequences. This was because it was the propensity to manifest one or more adverse consequences that each vehicle had at the time of supply that rendered it not of acceptable quality: J[206]-[207], [325]-[326] (JCAB 70, 103).

14. At the time each Relevant Vehicle was supplied, no effective repair was available, and it was uncertain whether or when an effective repair would become available: J[170] (JCAB 60); FC[45], [122], [128] (JCAB 273, 291, 292). Throughout the Relevant Period, TMCA attempted a number of "countermeasures" for the defect, but none was effective: J[17] (JCAB 21); cf Chronology rows 3-4, 6-7, 10-11, 14, 16-18, 21-22, 29, 31, 36, 43, 45. Some made matters worse, causing the DPF System to malfunction in vehicles that had not previously suffered any defect consequences: J[44] (JCAB 28).

15. In May 2020, *after* the Relevant Period had concluded (and thus after all relevant supplies had occurred), TMCA developed an effective repair for the defect (**2020 field fix**). From May 2020, TMCA "began to offer" the 2020 field fix to owners of Relevant Vehicles. TMCA said it would do so at no cost to owners, but has also asserted that by taking up the offer of a repair (by virtue of s 271(6)) owners forfeit the right to claim damages under s 272(1)(a): J[508] (JCAB 148). By the time of trial, only a fraction of Relevant Vehicles had in fact received the 2020 field fix (around 12% by 31 July 2021): Agreed Facts (**AF**) [8], [179] (WBFM 100, 136).

16. It was common ground at trial that a Relevant Vehicle to which the 2020 field fix had been applied was, from the point of actually being fixed, as valuable prospectively as it otherwise would have been had it not been defective in the first place. This was a matter of limited significance for the cohort of Relevant Vehicles that were the subject of the initial trial. That is because the trial was only concerned with, and 'reduction in value' damages were only awarded in respect of, Relevant Vehicles to which the 2020 field fix had *not* been applied.

B. Trial judge's approach to assessing damages under s 272(1)(a)

17. The parties' positions at trial in relation to the point in time by reference to which reduction in value is to be assessed, and the extent to which after-acquired information can be considered, are described at J[299] (JCAB 95). Williams submitted that reduction in value is assessed by reference to the value of the goods at the time of supply, having regard to events and information coming to light *after* that time only insofar as they bear upon the value of the goods *at the time of supply*. TMCA submitted that reduction in value is assessed by reference to the value of the goods at "the date on which the loss crystallises, including by reference to the condition of the

goods at the time of trial, or events that have occurred since the acquisition of the Relevant Vehicle": J[299(1)] (JCAB 95).

18. Preferring Williams' submission, the trial judge assessed the reduction in value resulting from the failure of the Relevant Vehicles to comply with the guarantee of acceptable quality (taking into account their hidden defect) *at the time of supply*: J[299]-[300] (JCAB 95). This followed, his Honour found, from the proper construction of s 272(1)(a): J[298]-[326] (JCAB 95-103). The conceptual exercise was to determine the price that the hypothetical reasonable consumer fully acquainted with the state and condition of the vehicle (including the hidden defect) would have paid for the Relevant Vehicle at the time it was supplied: J[274]-[276] (JCAB 87-88).

10 19. The trial judge accepted that information acquired *after* the time of supply could be considered in assessing value *as at* the time of supply, but only insofar as it bore upon this value: J[299]-[300], [328] (JCAB 95, 103). In the circumstances of this case, the discovery of an effective repair *after* the Relevant Period (in May 2020) was not information that was relevant to the assessment of the value of the vehicles at the time of supply *during* the Relevant Period. Using the applicants' Relevant Vehicle as an example, as at the time of supply in 2016, the applicants could not have known that an effective repair for the defect would materialise in May 2020: J[328] (JCAB 103). Accordingly, the development of the 2020 field fix was an "extraneous event, irrelevant to the true value at [the time of supply of the applicants' Relevant Vehicle]": J[328] (JCAB 103).

20. The trial judge accepted that a hypothetical reasonable consumer informed of the defect at the
20 time of supply would expect the manufacturer to attempt to develop a repair for the defect, notwithstanding it could not be known whether the manufacturer would in fact succeed in doing so, or when any such repair would become available: J[170] (JCAB 60); see also J[2], [198] (JCAB 16, 67). The most that could be said at the time of supply was that "no fix is presently available, and it is not known when a fix will become available": *id*.

21. His Honour's approach to assessing reduction in value resulting from the failure to comply with the guarantee (for the purposes of s 272(1)(a)) was thus harmonious with the approach to assessing whether or not there was a failure to comply with the guarantee (for the purposes of s 54). Both assessments were conducted as at the time of supply, from the perspective of a hypothetical reasonable purchaser fully acquainted with the true state and condition of the vehicle,
30 having regard to information that was known or knowable at that time: see J[165] (JCAB 59).

22. The trial judge found that the defect reduced the value of the Relevant Vehicles when they were supplied and "each consumer therefore received a vehicle that was less valuable than the one they bargained for, resulting in an overpayment": J[330], [331] (JCAB 104). The trial judge approached the task of *quantifying* that reduction in value as "an exercise in estimation, informed by the Court's findings about the nature of the … [d]efect and the [d]efect [c]onsequences, and

the Court's characterisation of the severity of those matters, judged through the eyes of the hypothetical reasonable purchaser": J[341] (JCAB 106), and see J[391] (JCAB 120). The Full Court appeared to endorse this much of the approach: FC[306] (JCAB 325).

23. While the trial judge had regard to the entirety of the expert evidence (J[392] (JCAB 121)), he did not give it much weight. The valuation evidence of Mr Cuthbert was a "useful guide to valuation" (J[356] (JCAB 111)), the survey evidence of Mr Boedeker was no more than "a very general indicator of a significant reduction" (J[379] (JCAB 118)), and the economic evidence of Mr Stockton was merely "of some use" (J[390] (JCAB 120)). Conscious of the limitations of that evidence, his Honour said (J[392] (JCAB 121)):

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> It makes intuitive sense for the figure to be above that calculated by Mr Stockton and, for the reasons reflected in the evidence of Mr Boedeker and Mr Cuthbert, to be a significant figure. The very nature of the Defect Consequences demands such a conclusion.

24. The trial judge acknowledged that valuation was necessarily "an evaluative and imprecise exercise", and found that a reduction in the range of 15-20% was appropriate: J[393] (JCAB 121). Given the need for an exact figure, his Honour arrived at the mid-point of 17.5%: *id*.

25. Having assessed the reduction in value at 17.5%, his Honour calculated the damages to which the second applicant was entitled, and prescribed a methodology for determining the damages to which certain group members were entitled, having regard to the statutory requirement to consider reduction in value by reference to the lower of the "price paid" by the consumer and the "average
20 retail price of the goods at the time of supply": J[395]-[461] (JCAB 122-137). That feature of the award was not challenged on appeal: FC[310] (JCAB 326).

26. Damages under s 272(1)(a) were awarded only to group members whose claims related to Relevant Vehicles that had *not* been repaired by application of the 2020 field fix. No award of damages under s 272(1)(a) in respect of Relevant Vehicles that had been so repaired was sought at the initial trial, because of an unresolved issue as to whether persons claiming in respect of such vehicles were disentitled to s 272(1)(a) damages by operation of s 271(6): J[163] (JCAB 58); FC[69]-[70] (JCAB 278).

27. The trial judge rejected TMCA's submission that s 272(1)(a) damages awarded to the applicants and group members should be reduced on account of the "availability" or "existence" of the 2020
30 field fix and their failure to obtain that repair: J[501]-[507] (JCAB 147-148). This included a rejection of TMCA's submission "that if the Court found that a loss of value arises from the use of the vehicles prior to August 2020, there would need to be a proportionate reduction in damages by reference to the fraction of the vehicle's working life constituted by the period between

purchase and August 2020": J[501] (JCAB 147).[2] TMCA did not appeal from that aspect of the judgment or otherwise seek to revive that submission on appeal. Nevertheless, as will be seen, that is the approach that the Full Court ultimately adopted, and which approach TMCA now contends is erroneous.

28. The trial judge further rejected the submission that a group member's failure to take up the 2020 field fix constituted a failure to mitigate: J[507]-[508] (JCAB 148). His Honour found that "neither ss 271 nor 272 of the ACL, properly construed, impose upon consumers a so-called duty to mitigate" (J[507] (JCAB 148)), and "[i]n any event, even assuming that there was some obligation to 'mitigate' damage, it cannot sensibly be said that a failure to take up the invitation
10 to have the 2020 Field Fix applied is unreasonable in circumstances where TMCA asserts that to take up that invitation has the effect, under s 271(6), of extinguishing altogether any entitlement to damages under s 272(1)(a)" (J[508] (JCAB 148)). That was a reference to TMCA's contention that this would be the legal effect, for any owner, of taking up the invitation. TMCA did not appeal from those findings.

C. The Full Court's approach to assessing damages under s 272(1)(a)

29. On appeal, TMCA contended that the trial judge erred by finding that damages for reduction in value under s 272(1)(a) "must be assessed by reference to the time of supply, rather than by reference to the date upon which loss crystallises": NOA Ground 4 (JCAB 201). The date upon which loss "crystallises" was said to be the date upon which the group member sold their vehicle,
20 or if the vehicle had not been sold by the time of trial, the loss was to be calculated by reference to the resale value of the vehicle at the time of trial: J[87], [125]-[126] (JCAB 40, 50).

30. The approach that the Full Court ultimately adopted was not one for which TMCA advocated on appeal. After the appeal was reserved, the Full Court sent a letter to the parties in the terms partly set out at FC[95] (JCAB 284): WBFM 230. It described a novel approach to calculating damages that bore no relationship to the statutory method for calculating damages in s 272(1)(a) and which has not been applied previously by any court. The approach was expressed as the equation "*a x b/c*", where: "*a*" equals the "reduction in the value of the vehicle as at the time of supply (in dollars)… assum[ing] that the defect will remain in place for the whole of the effective life of the vehicle"; "*b*" equals "the period of time (in months) that the group member held the vehicle before

[2] As explained in J[500(2)] (JCAB 146), August 2020 was the time at which TMCA sent letters to certain group members (being those who owned Relevant Vehicles that were produced prior to June 2018) purporting to extend the warranties of those vehicles so as to cover DPF repairs for 10 years from the date of delivery of the vehicle: see AF [178] (WBFM 136). Relevant Vehicles sold before 1 January 2019 had a warranty period of 3 years or 100,000km, whichever came first. Relevant Vehicles sold on or after 1 January 2019 had a warranty period of 5 years: see Supplementary Statement of Agreed Facts [10] (WBFM 152) and representative warranty examples for the Prado: FCAFC AB Pt B Tab 12 Items 7 (p.1778) and 139 (p.1360) (JCAB 391, 393).

the 2020 field fix became available (ie the period of months from the date of supply to May 2020)"; and "*c*" equals "the effective life of the vehicle (in months)".

31. The parties made supplementary written submissions in response to the Full Court's letter. Williams contended, *inter alia*, that the approach raised in the letter was wrong as a matter of principle: Williams supplementary submissions dated 3 March 2023, [31]-[41] (WBFM 241-245).

32. The Full Court nevertheless adopted the conceptual approach articulated in the letter: FC[129]-[134] (JCAB 293). Its reasoning in support of this approach begins with an acceptance that "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*" (emphasis in original) (FC[98] (JCAB 286)) such that "in most cases that will be the appropriate approach" (FC[100] (JCAB 286)).

33. The Full Court found, however, that embedded within s 271 and 272 (and stemming from "the use of the word 'damages'") was an "overarching consideration … that the amount of compensation for any reduction in value be *appropriate*" (emphasis added): FC[99] (JCAB 286). It was permissible, where "appropriate", to make "a departure from the time of supply" or an "adjustment" (relevantly downwards) to the amount of damages to which a person would otherwise be entitled under the statute, "to avoid over-compensation": *id*. The overall goal is to arrive at an amount that will "fairly compensate": FC[133] (JCAB 293).

34. This freewheeling discretion to do what was perceived to be necessary to ensure that damages were "appropriate" or "fair" extended to making "[a]n assessment [of reduction in value] at a later time", where that is "a more appropriate way to reflect the actual damage…", or assessing reduction in value "by reference to the price paid … at the time of supply, but taking into account subsequent events if considered appropriate", whether or not those subsequent events actually bear upon the value of the goods as at the time of supply: FC[100] (JCAB 286).

35. In effect, the Full Court treated s 272(1)(a) as providing no more than a guide or an entry point to the appropriate monetary remedy for a failure to comply with a relevant guarantee, which the Court may depart from or modify as it considers "appropriate", depending upon the circumstances of the case. It invoked "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 the appropriate amount of compensation is awarded": FC[102] (JCAB 287). The Full Court cited in support a case concerning the assessment of damages at common law in a claim for negligence causing personal injury: FC[103] (JCAB 287).

36. This search for an "appropriate" remedy – other than the one prescribed in terms by the legislature – led here to an assessment of the reduction in value resulting from the defect

supposedly as at the time of supply, but "factor[ing] in the availability of the 2020 field fix": FC[129] (JCAB 293). Despite correctly acknowledging that, at the time of supply, there was "uncertainty as to whether there would be a fix" for the defect and "uncertainty as to how long it might take for the fix to be designed, tested and made available" (FC[128] (JCAB 292)),[3] the Full Court held that "[r]ather than try to assess the reduction in value based upon expectations at the time of purchase as to what might occur in the future, it is appropriate to use the known information at the time of trial": FC[130] (JCAB 293). On this basis, it held that "the proper conceptual approach" to assessing the reduction in value of each Relevant Vehicle *as at the time of supply* was to bring to account the *subsequent discovery* of the 2020 field fix and "the period
10 of time that the particular consumer held the vehicle before the [2020] field fix became [practically] available": FC[129], [134] (JCAB 293).[4]

37. The Full Court did not explain what is meant by the term "practically available": FC[134] (JCAB 293). No finding was made at trial or on appeal to the effect that the 2020 field fix was "practically available" to those who had not taken up the repair, let alone when it became so. The Full Court remitted those issues to the trial judge: FC[134] (JCAB 293). This was in circumstances where none of the vehicles in question had in fact received the 2020 field fix, the trial judge had found that the 2020 field fix was *not* in fact available to the lead applicants as at trial (J[151] (JCAB 55)) and the trial judge had rejected the contention that it was unreasonable for the applicants and group members not to have taken up the fix (given TMCA's position was that if a consumer were
20 to avail himself or herself of the 2020 field fix, *any* right to damages which that consumer might otherwise have had under s 272(1)(a) would be extinguished by operation of s 271(6)): J[508] (JCAB 148).

Part VI: Argument

A. Williams Appeal Ground 1

38. The Full Court's approach to assessing damages under s 272(1)(a) was wrong in law.

39. ***First***, the Full Court erred in failing to find that, properly construed, 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*: FC[98] (JCAB 286). This construction is consistent with the statutory text, which calls for a comparison between the
30 value of the goods, on the one hand, and two comparator prices necessarily pertaining to the time of supply, on the other hand. Construing "the value of the goods" to mean value at the time of supply enables a logical, "apples with apples" comparison: see J[310] (JCAB 98).

[3] To which one must add, uncertainty whether TCMA would provide any such fix at no cost.
[4] While the Full Court had contemplated a mathematical formula in its letter to the parties (FC[95] (JCAB 284)), the reasons eschewed the strict formula, but embraced the same notions: FC[134]-[135] (JCAB 293-294).

40. This construction is also consistent with the purpose of the provision. Section 272(1)(a) reflects a legislative intention to compensate the consumer for having purchased goods for more than they were worth, in an amount equal to the overpayment. "Reduction in value" in this context is not used to describe a progressive process of reduction in value occurring over time. Rather, it is a reference to a reduction in value which is extant at the time of supply, by reason of the true value of the defective goods being less than the wrongly assumed value reflected in the purchase price. Such compensable loss occurs at the time of time of supply: *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514, 537-538.

41. Read together, ss 272(1)(a) and (b) reflect a familiar dichotomy in compensatory damages: 272(1)(a) compensates for performance interests, being a form of loss suffered *at* the time of supply of the non-compliant goods; and s 272(1)(b) compensates for consequential loss, being loss suffered *after* the time of supply of the non-compliant goods: see ***Clark*** *v Macourt* (2013) 253 CLR 1 at [11] (per Edelman J), [108]-[110] (per Keane J); *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326 at [63]-[67] (per Edelman J); *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388 at [48]-[51] (referring to the well-recognised distinction between loss on capital account and loss on revenue account); ***Dwyer*** *v Volkswagen Group Pty Ltd* [2023] NSWCA 211 at [227], [229]-[230]; ***Callinan*** *v Power Equipment Pty Ltd* [2023] QCA 246 at [61]. Consistent with orthodox principles, compensation for the performance interest is measured at the time of supply, disregarding events occurring thereafter: *Clark* 253 CLR 1 at [109] (per Keane J); *Slater v Hoyle & Smith Ltd* [1920] 2 KB 11 at 18 (per Warrington LJ), 22-23 (per Scrutton LJ); see also *Swick Nominees Pty Ltd v Leroi International Inc (No 2)* (2015) 48 WAR 376 at [475]-[477] (per Murphy and Edelman JJ); *Callinan* at [38].

42. ***Secondly,*** the Full Court's approach to using information about events post-supply (FC[107], [130] (JCAB 288, 293)) is inconsistent with general principles. The correct approach is as the trial judge stated: in assessing the true value of goods at a particular point in time, information acquired after the valuation date may be taken into account only insofar as it bears upon the true value of the goods as at that date: J[299]-[300], [328] (JCAB 95, 103): see *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at [39]-[40]; *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281 at 291; see also *Dwyer* at [230]-[232].

43. Assume a case where defective goods are supplied to a consumer, and, at the time of supply, the most that can be said about the defect, assuming full acquaintance with its nature, is that it is possible but not certain that it will be repaired at some unknown, future time (cf. FC[128] (JCAB 292); see J[170] (JCAB 60)). The development of an effective repair *after* the time of supply does not bear upon the value of the goods *at* the time of supply, save for insofar as it confirms the nature of the defect and the fact that it was incapable of repair at the time of supply. It would be wrong to assess value as at supply on the basis that the future repair of the defect was a certainty.

At the time of supply, future repair was a possibility, not a certainty: cf FC[130] (JCAB 293). The subsequent event which in fact occurred (repair) was unknowable at the earlier time. The outcome of a probabilistic event does not affect the original probability of the event occurring. In the present case, the Full Court ought to have found that the value of the Relevant Vehicles at the time of supply was to be assessed on the basis that there was "uncertainty as to whether there would be a fix" for the defect and "uncertainty as to how long it might take for the fix to be designed, tested and made available": FC[128] (JCAB 292). That was the approach the trial judge correctly adopted: see above at [20]. The Full Court erroneously disregarded "those uncertainties" in assessing value as at supply, because they "had resolved by the time of trial": FC[129] (JCAB 10 293).

44. The Full Court incorrectly characterised the trial judge's approach as failing to have regard to the possibility, as at the time of supply, that a repair might become available, and as incorrectly assuming that the defect was incapable of repair and would remain "for the whole life of the vehicle": FC[133] (JCAB 293), see also FC[81], [120], [122], [128] (JCAB 280, 290, 291, 292). The trial judge made no such assumption. His Honour expressly found that the relevant state of affairs at the time of supply was that it was *uncertain* when an effective repair would become available: J[170] (JCAB 60). That finding is inconsistent with the assumption that the Full Court sought to imply (ie that it was *certain* that an effective repair would *not* become available) and consistent with having due regard to a possibility, extant at the time of supply, that a repair might 20 become available. Further indications that the trial judge was alive to the possibility, as at the time of supply, that the defect might subsequently be able to be repaired at no cost may be seen at J[2], [198] (JCAB 16, 67). What the trial judge rejected as improper was the notion that, as at the time of supply of each Relevant Vehicle, it was a *certainty* that an effective repair would become available in or around May 2020: J[170], [328] (JCAB 60, 103).

45. The Full Court apparently perceived that consumers who acquired their Relevant Vehicle closer to the date at which an effective repair became "practically available" should receive less compensation under s 272(1)(a) than persons who acquired their Relevant Vehicle further in time from such date: FC[130]-[134] (JCAB 293). Neither the trial judge nor the Full Court, however, found that the possibility of an effective repair becoming available *increased* as time went on (cf 30 FC[81] (JCAB 280)); nor did TMCA lead evidence to substantiate such a finding. The evidence, as far as it went, in fact pointed the other way: TMCA made repeated attempts to develop an effective repair throughout the Relevant Period but none was successful: J[44] (JCAB 28).

46. ***Thirdly***, the Full Court erred in finding that s 271(1) and 272(1) confer upon the Court a freewheeling discretion to modify or depart from the statute as and when the Court considers it appropriate to do so. Nothing in the text or context of those provisions supports such a construction. Section 272(1)(a) reflects a carefully calibrated remedial regime that the legislature

settled upon as the appropriate response to the statutory wrong, having regard to the overall object of consumer protection. The subsection describes the damages that an affected person is "*entitled* to recover" (emphasis added).[5] It was not open to the Full Court to ignore the legislative choice in favour of the Full Court's own conception of what is "fair" or "appropriate". Section 272 differs from broadly-worded statutory damages provisions such as s 82 of the *Trade Practices Act*. While the authorities there make clear that "the task of assessing damages under s 82 is broad and flexible" and may require the Court to "identify ... solutions best adapted to give the injured claimant an amount which will most fairly compensate for the wrong suffered",[6] those principles have little role to play in assessing damages under s 272(1)(a), which is prescriptive and does not
10 invite the Court to exercise an open-ended discretion as to the proper mode of compensation.

47. It may be accepted (cf FC[99] (JCAB 286)) that the legislature intended that the "damages" referred to in ss 271 and 272(1)(a) are compensatory in character. The text of s 272(1)(a) expressly indicates, however, that any reduction in value resulting from failure to comply with the guarantee is *recognised as* a compensable loss, subject only to s 271(6). That reflects an orthodox approach of compensating for a failure to perform a promise or guarantee: see [41] above. Further enquiry into whether the person has suffered "actual damage" (cf FC[100] (JCAB 286)) distracts from the statutory task and falsely assumes that overpayment upon supply is not itself a form of loss. The absence of "loss or damage suffered" in subclause (a) (as compared to subclause (b)) reinforces the point.

20 48. ***Fourthly***, in exercising what it perceived to be a discretion to depart from the statutory formula in s 272(1)(a), the Full Court adopted an approach that is not only without statutory foundation, but also inconsistent with the regime in Division 2 of Part 5-4. Section 272(1)(a) says nothing about limiting the damages to which an affected person is otherwise "entitled" by reference to the time at which an effective repair becomes "available" or "practically available". Indeed, the concept of a repair being merely "available" is not a concept that appears anywhere in the statute, and the meaning of that criterion is uncertain. The relevance of a manufacturer providing an effective repair subsequent to a failure to comply with the statutory guarantee of acceptable quality is dealt with expressly in s 271(6). Under that provision, the mere "availability" of the repair (as opposed to the actual repair of the goods under warranty within a reasonable time of
30 request) has no significance: see below at [59] to [65]. The Full Court did no more than assert, in

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[5] Compare s 53(3) of the *Sale of Goods Act 1893* (UK), which provided that in the case of breach of warranty of quality the loss in respect of which damages were recoverable was "prima facie" 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.
[6] See eg *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2008) 73 NSWLR 653 at [171] (per Ipp JA) and the authorities there cited.

a single sentence, that there was no inconsistency between its approach and s 271(6): FC[131] (JCAB 293).

49. ***Fifthly***, the Full Court's approach is lacking in coherence. On the one hand, the Full Court correctly accepted that the assessment of whether goods fail to comply with the guarantee of acceptable quality is to be conducted *as at the time of supply*, by reference to the hypothetical reasonable consumer, having regard to information known or knowable about the goods *at that time*: FC[37], [42]-[45] (JCAB 272, 273). The Full Court did not disturb (nor did TMCA seek to challenge) the trial judge's finding that in making that assessment, "it is inappropriate to imbue the 'reasonable consumer' with knowledge that an effective fix *will* ultimately become available": J[170] (JCAB 60) (emphasis added). But on the other hand, the Full Court did not explain why, then, it was appropriate to imbue the reasonable consumer with such knowledge when assessing the *reduction in the value of the goods* resulting from their failure to comply.

50. It may be that the reasoning of the Full Court was driven by its notion of "utility". It repeatedly emphasised that consumer goods in general, and motor vehicles in particular, are purchased to be "utilised" for a limited period of time, giving rise to a "utilisation value (or life-of-use value)": FC[110]-[118], [127]-[136] (JCAB 288-290, 292-294). What is meant by this notion of "utility" is left unexplained; as is the question how "utility" informs the statutory exercise so as to produce a result at odds with the approach to liability under s 54. In any event, in a 'propensity' case, it is no answer to liability or damages to say that in the case of a particular vehicle the propensity for serious defective consequences has not yet come home. Nor is it an answer to say that even though the propensity came home and performance of the goods was diminished, this need not affect the vehicle for its entire useful life because a fix is now available. The correct position is simply that in a propensity case, the reduction in value damages compensate for the loss in value, at the date of supply, arising from the goods *having that unacceptable propensity* to exhibit defective consequences.

51. In this regard, the Full Court failed to address the tension at best, and inconsistency at worst, between its approach and that of the earlier Full Court in *Medtel Pty Ltd v Courtney* (2003) 130 FCR 182 at [64]-[74] and of the Victorian Court of Appeal in *Keys Consulting v CAT Enterprises Pty Ltd* [2019] VSCA 136, [82]-[83].

52. ***Sixthly***, the significance of these errors is further illustrated by the decisions in ***Capic*** *v Ford Motor Company of Australia Pty Ltd* [2021] FCA 715 (Perram J) and *Ford Motor Company of Australia Pty Ltd v Capic* [2023] FCAFC 179 (**Capic FC**) (in relation to which decision special leave to appeal has been sought: S11/2024). *Capic* was another s 54 case concerning defective motor vehicles brought on a 'propensity' basis. It concerned a vehicle which, by reason of several interrelated or overlapping faults in the gearbox, had an unacceptable propensity to exhibit overlapping troubling behaviours at various points in the vehicle's life. At the date of

supply, it was not known whether or when fixes would become available. In relation to some (but not all) of the faults, fixes subsequently became available, albeit at different points in time for different faults. Some faults remained incapable of repair.

53. Like Lee J in the present case, Perram J (correctly) assessed the reduction in value by reference to the difference in value *as at the time of supply* between a defective vehicle (ie with the relevant propensity) and an identical but non-defective vehicle (ie without the relevant propensity): *Capic* [890]. Events occurring after the time of supply – eg the propensity manifesting, or repairs becoming available – did not relevantly bear upon Perram J's assessment of reduction in value damages at the time of supply: *Capic* [880], [884]-[886].

10 54. The Full Court in *Capic FC*, with very little reasoning, said it was bound to follow the Full Court in the present case: *Capic FC* [310]-[314]. It thus remitted the matter (erroneously), so that the exercise required by the *Williams* Full Court could be attempted: *Capic FC* [306]-[308], [315]-[316]. Such exercise would, however, on the facts of *Capic*, require an almost impossibly complex application of the conceptual "*a x b/c*" approach described at FC[95], [134] (JCAB 284, 293). The *prima facie* reduction in value assessed at the date of supply seemingly would receive varying offsets at different points in the life of the vehicle as repairs for certain faults became 'practically available' and value (or 'utility') was progressively 'restored'; albeit each such offset would need to account for the interrelated or overlapping consequences of those faults which had not, at the relevant time, been repaired. Indeed, on one reading of *Capic FC*
20 [308] and [315], it may also be necessary to adjust reduction in value damages (assessed at supply) by reference to the *actual use* of the vehicle over its life, including an assessment of the extent to which the propensity actually manifested in the vehicle – a misreading of even FC[127] (JCAB 292).

55. Apart from its impossible complexity, the approach mandated by *Capic FC* illustrates the error in principle, particularly in a propensity case, of adjusting the value assessed as at the time of supply for post-supply events, such as the relevant propensity having manifested. In such cases, reduction in value is assessed on the basis that the vehicle has an unacceptable propensity upon supply, which fails s 54. Whether or when that propensity subsequently manifests, and whether or when effective repairs subsequently become available, has no impact on that reduction in
30 value (save to the extent they illuminate the nature of the defect present upon supply: cf. [42]-[43] above). Availability of an effective repair after supply cannot change the value of the goods, or mitigate the overpayment made, at the time of supply; it does not put the consumer into the position they bargained for (ie to be supplied with goods that comply with the guarantee of acceptable quality, not goods that are defective but which may later be repaired).

56. In any event, in the present case, the only vehicles for which the trial judge awarded damages under s 272(1)(a) were vehicles that remained unrepaired and defective. The fact that it may *now*

be possible (subject to "practical availability") to repair those defective vehicles does not alter the fact that the vehicles are defective. Their owners have not received anything that could fairly be characterised as "compensation" for having been supplied with defective vehicles.

B. TMCA Appeal Ground

57. TMCA, like Williams, contends that the Full Court's approach to assessing reduction in value damages was erroneous. The proposition underlying TMCA's appeal to this Court is 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). An essential premise of that proposition is that the
10 mere "availability" of the effective repair "restores" the reduction in value that is otherwise compensable under s 272(1)(a). On this basis TMCA contends that if there was no "ongoing reduction in value at the time of trial" then there is no compensable reduction in value for the purposes of s 272(1)(a). These contentions should be rejected.

58. ***First***, TMCA's argument is inconsistent with the text of s 272(1)(a). As explained above, the text of s 272(1)(a) indicates that the "reduction in the value of the goods, resulting from the failure to comply with the guarantee" is to be assessed by reference to the value of the goods *at the time of supply*. TMCA's proposition, by contrast, is premised upon an assessment of the value of the goods *at the time of trial*.

59. ***Secondly***, TMCA's argument is inconsistent with the statutory context of s 272(1)(a), in
20 particular s 271(6). Section 271(6) describes the particular circumstances in which the repair of goods which fail to comply with a relevant statutory guarantee will operate to disentitle an affected person of their right to recover damages under s 272(1)(a). Section 271(6) provides that if the manufacturer of the goods remedies the failure to comply by repairing or replacing the goods within a reasonable time after having been required by an affected person to do so in accordance with an express warranty, the affected person cannot commence an action for reduction in value damages under s 272(1)(a).

60. As is immediately apparent, the mere fact that an effective repair is "available" under warranty is not sufficient to eliminate an affected person's right to damages under s 272(1)(a). If it were, s 271(6) would be otiose. Rather, embedded in s 271(6) are three particular conditions that must
30 be satisfied before a repair has the effect of precluding an affected person from recovering damages under s 272(1)(a).

61. The first condition is that the affected person must have *requested* the repair. Nothing in s 271(6) *compels* an affected person to take up an effective repair under warranty, if one is "available": see *Capic v Ford Motor Company of Australia Pty Ltd* [2021] FCA 715 at [717]-[723] (Perram J) (which construction was not disturbed on appeal). Rather, in relation to actions against

manufacturers (dealt with in Division 2 of Part 5-4 of the ACL, in which s 271 and 272 appear), the legislature has reserved to consumers a right to make an election between requiring the manufacturer to repair the goods, or bringing an action against the manufacturer for damages of the kind described in s 272(1)(a): *id.* This may be contrasted with the approach taken in relation to actions against suppliers (dealt with in Division 1 of Part 5-4). In relation to actions against suppliers for a failure to comply with a guarantee that is capable of being remedied (and is not a "major failure"), the consumer may only reject the goods or seek compensation from the supplier for the cost of remedying the goods if the consumer has first given the supplier an opportunity to remedy the failure and the supplier has failed to remedy the failure within a
10 reasonable time: see s 259(1)-(3). As Perram J explained in *Capic* at [719]:

> The operation of s 271(6) (and s 271(1)) is that one cannot get the benefit of repair or replacement of goods under an express warranty and then, having done so, sue for damages on the very defect which has been remedied. It is one or it is the other. But that dichotomy is mute when there is no express warranty in the first place or, even where there is, where the consumer has not exercised his or her rights under it. This conclusion springs from common sense but also from the fact that the provision begins with the word 'if' combined with the unavoidable fact that one cannot extract from a statement in the form 'If A then B' the proposition A.

62. The second condition embedded within s 271(6) is that the manufacturer must in fact repair the goods. If the goods are not in fact repaired, s 271(6) will not operate. The mere fact that the goods
20 *are able to be* repaired does not prevent the affected person from commencing an action to recover damages for reduction in value under s 272(1)(a).

63. The third condition is that the goods must be repaired "within a reasonable time". If a manufacturer who has been required to remedy non-compliance with the guarantee in s 54 fails to do so within a reasonable time, then it is treated as if it had not done so at all: s 271(6) will not be engaged: cf. *Capic FC* [289]-[290]. That is an important consumer protection. *Even where the defect is actually remedied*, the affected person may still recover reduction in value damages under s 272(1)(a) if the remedy was provided unreasonably late.

64. TMCA's proposition is irreconcilable with the legislative policy reflected in s 271(6). If correct, the mere fact that a manufacturer has made an effective remedy for the defect "available"
30 (whether or not under warranty) would be sufficient to eliminate an affected person's right to recover damages for reduction in value under s 272(1)(a), regardless of whether the affected person elects to take up the repair, regardless of when or if the affected person's goods are in fact repaired, and regardless of whether the repair, if requested, is provided within a reasonable time.

65. Furthermore, as observed above, the criterion of "availability" which lies at the core of TMCA's case on appeal is of uncertain meaning and is foreign to the statutory regime. Whatever particular meaning is given to the concept of "availability", it would be a strange result if a

group member had no right to recover damages under s 272(1)(a) on account of the mere existence of the 2020 field fix by the time of trial, in circumstances where (having regard to the findings of the trial judge not disturbed on appeal): (i) TMCA had failed to disclose the existence, nature and extent of the defect to consumers (J[244]-[266] (JCAB 80-86)); (ii) TMCA had misled consumers as to the existence of the defect (J[232]-[260] (JCAB 77-84)); (iii) TMCA had not made all group members aware of the existence of the 2020 field fix (J[186(b)] (JCAB 65)) and, even for those who were made aware, implementation of the fix was at TMCA's discretion, ie "if required" (J[500(2)] (JCAB 146); AF [173]-[174], [178] (WBFM 135-136)); (iv) at trial, TMCA continued to deny that the Relevant Vehicles were
10 defective (J[76]-[86] (JCAB 37-40)); (v) at trial, TMCA contended that if a group member was to take up the 2020 field fix, that would extinguish their entitlement to damages under s 272(1)(a) (J[508] (JCAB 148)); and (vi) at trial, TMCA's argument that the lead applicants and group members had a duty to mitigate and/or act reasonably, and had failed to comply with such a duty by not taking up the 2020 field fix, was rejected (and not the subject of appeal): J[495]-[508] (JCAB 145-148).

66. ***Thirdly***, TMCA's proposition is inconsistent with the purpose of s 272(1)(a), which is to compensate consumers to whom defective goods have been supplied for deprivation of their expectation of performance in accordance with the statutory guarantee: see above at [40]-[41]. Whether or not there is an "ongoing" reduction in value *at the time of trial* is irrelevant. A
20 subsequent repair cannot compensate for the overpayment at the time of supply. This is plain from the fact that even a consumer who expected, at the time of supply, a subsequent repair as a certainty would not value the goods as highly as identical goods that were otherwise non-defective.

67. ***Fourthly***, the essential premise of TMCA's proposition – namely, that the reduction in value resulting from the defect is "restored" by the mere "availability" of the 2020 field fix – is not supported by the findings of the Full Court, properly understood, or the evidence. At FC[218] (JCAB 309) the Full Court said, "we note Mr Cuthbert accepted the availability of the fix restored the value of the vehicle. This was made abundantly clear in other evidence and was not in issue on the appeal". In context, what the Full Court meant was that the evidence showed
30 that the repair would restore the value of the vehicle *prospectively*, if and when the fix was applied. What was "not in issue on the appeal" was that a Relevant Vehicle to which the 2020 field fix had been applied would become, upon the application of the fix, as valuable at that time as it would otherwise have been if it had not been defective in the first place. This was the effect of the evidence of Mr Cuthbert, expert valuer: Ex 8B (**Cuthbert 3**), p2 (WBFM 200), cf. FC[215] (JCAB 309), Ex 8A (WBFM 198). The Full Court plainly appreciated that there was no common acceptance of a proposition that a defective vehicle that, at the time of trial had not

been repaired had the same value as it would have had if it had been repaired by that time or if it had never been defective.

68. As explained above at [50], the Full Court's approach to assessing value was based upon the concept of "utility" rather than re-sale value: FC[111], [115], [118], [284], [305] (JCAB 289, 290, 322, 325). The Full Court found that "*the fix* would restore the utility of the vehicle" thereby resulting in a "prospective reinstatement of value": FC[123] (JCAB 291) (emphasis added). It is "the fix" (ie the actual remedying of the defect by repair), not the mere *availability* of the fix, that restores utility. This is evident from other findings of the Full Court too: see FC[81] (JCAB 280) (the availability of the 2020 field fix "*made possible* the prospective
10 restoration of value") (emphasis added); FC[118] (JCAB 290) (concerning the need to have regard to "whether repair is available as *a means of* … restoring the value of the consumer goods") (emphasis added); FC[127] (JCAB 292) (the "correct approach" to assessing reduction in value "requires regard to reasonable expectations as to the availability and timing of a repair that *would* restore the utility"); FC[146] (JCAB 296) ("*Repair* may reinstate the utility of the goods wholly or partially"). These findings accord with logic and common sense: a defective vehicle that can be repaired remains defective until it is repaired. The availability of the repair (even assuming it to be "available") does not alter the diminished utility of the defective goods. The Full Court's reasons, read fairly as a whole, do not signify that the mere *availability* of a repair instantly restores the deficit in the value of defective goods.

20 **C. Williams Appeal Ground 2**

69. The Full Court set aside the trial judge's evaluative assessment of the reduction in value at 17.5% based on its approach to s 272(1) of the ACL: FC[136] (JCAB 294). If Appeal Ground 1 succeeds, this basis for setting aside the 17.5% cannot stand. The Full Court also set aside the 17.5% figure on the basis that the trial judge placed too much weight on the expert evidence of Mr Cuthbert, a car valuer, whose evidence the Full Court found tended to overstate the seriousness of the defect and the resultant reduction in value: FC[200]-[205], [296]-[297] (JCAB 306-307, 324). This too was erroneous. The Full Court's reasoning here was intertwined with its erroneous approach to s 272(1)(a) (as dealt with above under Appeal Ground 1). And contrary to the Full Court's conclusion, the trial judge was not led into any error by Mr Cuthbert's evidence (or otherwise).
30 There was therefore no warrant for the Full Court to substitute its own evaluative assessment for that of the trial judge.

70. Mr Cuthbert, an experienced motor vehicle valuer who has conducted over 10,000 motor vehicle valuations (FC[167] (JCAB 300)), gave expert evidence to the effect that the reduction in value of the applicants' Relevant Vehicle resulting from the defect was "in the range of" 23% to 27.5%: J[344(1)] (JCAB 107). His evidence also addressed the exercise of valuing vehicles, which he

described as necessarily "impressionistic" but based on a number of orthodox considerations: FC[168]-[170] (JCAB 300-301).

71. The Full Court expressed concern (based on reviewing transcript of Mr Cuthbert's evidence) that he "may" not have assessed reduction in value consistently with his stated methodology (FC[186] (JCAB 303)) and "appeared" to have overstated the seriousness of the defect (FC[195], [200] (JCAB 305, 306)), leading him to "overstate the reduction in value" of the applicants' Relevant Vehicle resulting from the defect (FC[205] (JCAB 307)). Based on these concerns, it found that the trial judge failed to "treat Mr Cuthbert's percentage reduction in value with considerable circumspection" or make "due allowance" for these concerns: FC[203]-[204] (JCAB 307). This was not a conclusion that Mr Cuthbert's evidence was irrelevant, or that *no* weight ought to have been given to it. It was rather a conclusion that only some weight, albeit limited, could be placed on Mr Cuthbert's evidence. Indeed the Full Court itself gave some weight (albeit only "little weight") to his evidence when re-exercising the discretion: FC[304] (JCAB 325).

72. The Full Court's concern about overstatement was based in part on its view that Mr Cuthbert had ascertained an amount on top of "salvage value" that a person would be prepared to pay in the hope of finding a fix for the defect, and thus appeared to have treated the vehicle as if it was a write-off unless repaired (FC[193], [195], [199]-[200] (JCAB 304, 305, 306)). However, this concern was also based on the Full Court's views as to the proper approach required by s 272(1) (FC[205] (JCAB 307)). The Full Court criticised the evidence on the basis that "the required repair was considered on the basis that it was only a possibility …" (FC[199] (JCAB 306)) and considered that Mr Cuthbert overstated the reduction in value because he did not grapple with *when* the free fix ultimately became available (FC[207] (JCAB 307)). These criticisms reflect the Full Court's view that the availability of the 2020 Field Fix had to be factored into the analysis (FC[133] (JCAB 293)). If Appeal Ground 1 is upheld, these criticisms must fall away and the Full Court's assessment of Mr Cuthbert's evidence cannot stand.

73. Another reason why the Full Court's assessment of Mr Cuthbert's evidence cannot stand is because it misinterpreted his evidence. Contrary to FC[199] (JCAB 306), Mr Cuthbert's consideration of "salvage value" did not mean or imply that he had treated the vehicle as if it was a write-off unless repaired in some way. Mr Cuthbert was plainly aware of the condition of the vehicle and the implications of its deficiencies for the valuation exercise: Ex 5 (**Cuthbert 1**) [69]-[88], [99]-[108] (WBFM 167-171, 173-175). He did not regard it as a "write-off" or as having only the same value as a write-off. He had regard to multiple orthodox factors: Cuthbert 1 [111]-[114] (WBFM 175-176); Ex 6 (**Cuthbert 2**) [20] (WBFM 186). Salvage value was explained to be a relevant point of reference – not because the vehicle was a write-off but because salvage value is a logical "floor value", reflecting the lowest amount that a vehicle could be sold for (including if it has an irreparable defect): Cuthbert 1 [114(a)], [121] (WBFM 176, 177); Cuthbert

2 [41] (WBFM 190); Day 2 T126.8-9 (WBFM 219). In light of the defect and its consequences, Mr Cuthbert considered that the value lay *between* salvage value and the new car price: Cuthbert 1 [122] (WBFM 177); Cuthbert 2 [41] (WBFM 190). That is, salvage value merely provided a lower bound for value, and one that in Mr Cuthbert's view was not reached. As such, this did not reflect overstatement of the seriousness of the defect. Mr Cuthbert expressly denied viewing the vehicle as a write-off, not drivable and worth only the sum of its parts: Cuthbert 2 [40] (WBFM 190); Day 2 T126.3-T127.20 (WBFM 219-220).

74. Further, even leaving aside these matters, proper analysis of the trial judge's reasons in several respects shows that his Honour did not make any error of placing substantial and unqualified weight on Mr Cuthbert's evidence. *First*, in rejecting Williams' figure of 25% as "simply too high" (being about the midpoint of Mr Cuthbert's range), the trial judge noted that "although the evidence of Mr Boedeker and Mr Cuthbert has some force, a number of the criticisms directed to its accuracy and reliability also have merit": J[393] (JCAB 121). In other words, the trial judge *did not* adopt Mr Cuthbert's opinion as the appropriate "percentage" reduction in value nor accept his conclusions without qualification. To the contrary, Lee J accepted the force of criticisms as to the reliability and accuracy of the evidence and on that basis treated Mr Cuthbert's evidence with circumspection. This is also clear from J[359] (JCAB 111), where his Honour observed that Mr Cuthbert's opinion as to the appropriate figure for the applicants' vehicle could not "be applied *carte blanche"* to all Relevant Vehicles.

75. *Secondly*, although the trial judge accepted Mr Cuthbert's opinion "as a useful guide to valuation" which "accords with what I consider to be robust common sense" (J[356]) (JCAB 111), that observation has to be viewed in the context of how his Honour approached the expert evidence more generally. The trial judge viewed the valuation exercise as one of "estimation" informed by the Court's findings about the nature of the defect and the Court's characterisation of the severity of the defect: J[341] (JCAB 106). In that context, the trial judge viewed the expert evidence as simply "evidentiary guidance": J[344] (JCAB 107). The guidance which his Honour took from Mr Cuthbert's evidence – in contrast to the valuer called by TMCA, Mr O'Mara – was that the defect in the vehicles resulted in a reduction in value at the time of supply, and that the reduction in value was significant: J[330]-[331], [350], [392] (JCAB 104, 109, 121). While Mr O'Mara resisted that proposition, TMCA now, on appeal to this Court, finally appears to concede it.

76. *Thirdly*, the Full Court erred in concluding that Mr Cuthbert's evidence led the trial judge to be influenced by an erroneous view "that the vehicle was so defective [that] it needed to be repaired before it had any real utility as a motor vehicle" and to therefore seek a "salvage value", as opposed to seeking "the value that a retail purchaser would place on the vehicle given the effect of the defect": FC[203]-[204] (JCAB 307). The trial judge's attitude to the condition of the vehicle was made plain in the judgment. His Honour did not adopt a salvage value or approach

the valuation exercise through the prism of a salvage or even "second-hand" buyer (cf. FC[204] (JCAB 307)). The trial judge made findings about the seriousness of the defect (which were not challenged on appeal) based on the referee's report (WBFM 5) and TMCA's business records (J[174]-[183], [391] (JCAB 61-63, 120)), and sought to ascertain what a reasonable, hypothetical purchaser would have paid for the vehicles *at the time of supply*, in a retail setting, if informed about the defect: see J[2]-[3], [274]-[276], [322], [331] (JCAB 16, 87-88, 101, 104). That explicit reasoning is inconsistent with any suggestion that because of the treatment of salvage value by Mr Cuthbert the trial judge was somehow led into treating the vehicle as a write off, or accepting a valuation that was premised on such a characterisation.

10 77. *Fourthly*, in any event, the trial judge's purportedly erroneous treatment of Mr Cuthbert's evidence did not vitiate his Honour's quantification of the reduction in value at 17.5%: cf FC[294]-[295] (JCAB 323-324). The trial judge arrived at this figure based on assessing the nature and significance of the defect and its consequences, including as borne out by customer complaints: J[392]-[393] (JCAB 121). His Honour had regard to the expert evidence for the limited purpose of confirming his view, arrived at independently, that the reduction in value should be a "significant figure": J[392] (JCAB 121). This reflected the trial judge's reservations more generally about the utility of expert evidence to the statutory valuation exercise: J[331], [338]-[345], [391]-[394] (JCAB 104, 106-107, 120-121). The Full Court appeared to endorse at least this aspect of his approach in principle (FC[304], [311]-[313] (JCAB 325, 326-327)), finding
20 that "the nature of a motor vehicle and its utility to a consumer are matters of ordinary everyday understanding" in respect of which evidence is not required (FC[306] (JCAB 325)).

78. The fact that the Full Court preferred a different percentage reduction in value to the trial judge did not warrant interfering with the trial judge's evaluative assessment in circumstances where no error has been shown in the assessment, and there was no definite preponderance of one view over the other: *Warren v Coombes* (1979) 142 CLR 531 at 546-547, 551; *Aldi Foods Pty Ltd v Moroccanoil Israel Ltd* [2018] FCAFC 93 at [7].

Part VII: Orders

79. The Williams Appellants seek the orders set out in the Williams Appellants' Notice of Appeal.

Part VIII: Estimate

30 80. Williams estimates that it will need 2.5 hours to present its argument.

Dated: 5 February 2024

Justin Gleeson
(02) 8239 0208
clerk@banco.net.au

Stephen Free
(02) 9233 7880
sfree@elevenwentworth.com

Patrick Meagher
(02) 8915 2643
pmeagher@sixthfloor.com.au

Peter Strickland
(02) 8239 0216
peter.strickland@banco.net.au

Annexure – Statute and Statutory Instruments

1. *Competition and Consumer Act 2010* (Cth) (version C2024C00038 in force as at 1 January 2024), Schedule 2, sections 54, 259, 271, 272
2. *Trade Practices Act 1974* (Cth) (version C2010C00331 in force as at 30 June 2010), section 82
3. *Sale of Goods Act 1893* (UK) (version in force as at 30 June 2010), section 53