HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: Biljana Capic
Appellant

and

Ford Motor Company of Australia Pty Ltd ACN 004 116 223
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2. Sections 271(1) and 272(1)(a) of the Australian Consumer Law (**ACL**) entitle an "affected person" in relation to goods "to recover damages for … any reduction in the value of the goods, resulting from the failure to comply with the guarantee" of acceptable quality in s 54(1) of the ACL, below the lower of two reference points, namely the price actually paid or payable by the person for the goods, or the average retail price of the goods at the time of supply.[1]

3. This appeal concerns the construction and application of those provisions in circumstances where the relevant "failure to comply" at the time of supply arose from an unacceptable propensity of a good (a vehicle) to experience a troubling set of behaviours in ordinary driving conditions because of five, partially related, mechanical issues (the **Deficiencies**) affecting the vehicle's transmission system. Each Deficiency was so significant that on its own it would have given rise to a failure to comply with the guarantee of acceptable quality in s 54(1), however because of their interrelationship and commonality of consequences, when present together, the Deficiencies gave rise to a single failure to comply with the guarantee of acceptable quality: FC [268]-[283] (CAB

[1] The appellant, who acquired her good (a motor vehicle) other than for the purpose of re-supply, is an affected person: ACL, s 2.

458-462); *cf* PJ [745]-[752] (CAB238-239). At the time of supply, no fix existed for any of the Deficiencies. After supply, in a piecemeal fashion spanning many years, fixes were developed for some but not all of the Deficiencies and applied to the appellant's (**Ms Capic's**) vehicle. By the time of trial, fewer Deficiencies were present in her vehicle than on supply, but a number of Deficiencies persisted, and were not shown to be capable of remedy: see Part V below.

4. The specific issues are:

(a) **first**, whether s 272(1)(a) of the ACL always requires "any reduction in the value of the goods" to be assessed at the time of supply, or whether it permits a departure from that time or an "adjustment" to avoid "overcompensation" of the claimant: Notice of Appeal (**NOA**), ground 1 (CAB 528); and

(b) **secondly**, whether, and if so for what purpose, evidence of the following may be used in assessing damages under s 272(1)(a): (i) the claimant's use of the good after supply; (ii) where the "failure to comply with the guarantee to which the action relates" is a risk, whether that risk has manifested after supply; (iii) the availability and application, after supply, of a partial remedy for the failure to comply; (iv) the value of the good at a time after supply (NOA, ground 2) (CAB 528).[2]

Part III: Section 78B notice

5. The Appellant does not consider any s 78B notice to be required in this proceeding.

Part IV: Citations

6. The primary judgments are *Capic v Ford Motor Company of Australia Pty Ltd* [2021] FCA 715; 154 ACSR 235 (**PJ**) (CAB 5) and *Capic v Ford Motor Company of Australia Pty Ltd (Revised Common Questions)* [2021] FCA 1320 (CAB 309). The judgment appealed from is *Ford Motor Company of Australia Pty Ltd v Capic* [2023] FCAFC 179 (**FC**) (CAB 391).

Part V: Facts

7. This appeal emerges from a representative proceeding brought by Ms Capic pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth). The proceeding concerns cars – being certain model lines of the Ford Focus, Fiesta and EcoSport – containing Ford's "DPS6" transmission, sold new at dates between 22 September 2010 and 29 December

[2] Any further issues arising from the Respondent's Notice of Contention will be addressed in reply.

2017 (**Affected Vehicles**). Ms Capic bought her Affected Vehicle, a Ford Focus, from a dealership in 2012: PJ [2] (CAB 20-21). The class she represents principally comprises the persons who purchased the Affected Vehicles new, together with subsequent second-hand purchasers between 1 January 2011 and 29 November 2018: FC [6]-[7] (CAB 397). The Respondent is the Australian importer of the vehicles and their "manufacturer" within the meaning of s 7 of the ACL: PJ [605] (CAB 202). The appeal concerns the assessment of Ms Capic's individual damages pursuant to s 272(1)(a); questions of group members' damages have not yet been determined at first instance.

8. **Liability findings.** Each Affected Vehicle failed to comply with the guarantee of acceptable quality in s 54 of the ACL, by reason of deficiencies in the DPS6 (**Deficiencies**) giving rise to a propensity for the Affected Vehicles to exhibit "a troubling range of behaviours": PJ [5], [13], [19], [23], [29], [35] (CAB 21-28); FC [2] (CAB 396). Following the Full Court's extension, on appeal, of the liability findings against Ford made by the primary judge, the position is as follows. Across all Affected Vehicles, there are five Deficiencies: three[3] to do with componentry within the transmission system with a propensity to fail, and two aspects of the overall architecture or design of the system, relating to the management of vibrations and heat. Depending on when they were made and with which components, not all Affected Vehicles have all of the Deficiencies, but all have at least one Deficiency: see the Full Court's amended answers to common questions 1-8, 11 and 11A set out in Annexure A to the orders made 13 December 2023 (**13 December 2023 Orders**) (CAB 477-486). Ms Capic's vehicle has all five Deficiencies: FC [228]-[229] (FC 450); see also PJ [5], [13], [887] (CAB 21, 23, 279). Whether there are one or several Deficiencies in a given Affected Vehicle, they give rise to a single failure to comply with the guarantee in s 54: FC [270]-[271] (CAB 459). In short, all Affected Vehicles failed to comply with the statutory guarantee of acceptable quality.

9. The five Deficiencies give rise to risks of the same, or overlapping adverse consequences: FC [271] (CAB 459). By way of summary, the consequences associated with the risks were as follows:

[3] One Deficiency was separated into two categories, and was treated at some points below as comprising two deficiencies, concerning the clutch lining and clutch alignment, respectively: see PJ [239]-[247] (CAB 88-90).

Deficiency	Propensity towards…
Input shaft seals (CD1)	"difficulties with gear selection, sudden deceleration, jerking, grinding noises and appearance of the check engine light…intermittent revving of the engine, slower response times, loss of power and roll back whilst in gear" and "rattling noises, shudder both on launch and during gear shifts, and sudden or delayed gear shifts": PJ [225] (CAB 84).
Clutch lining material (CD2)	"a shuddering sensation" for the driver (PJ[241]); "difficulty changing gears" (PJ [242]-[243]), "harsh and jerky gear shifts, a lack or loss of power, noise, vibration and harshness issues, a degree of clutch odour and green shudder": PJ [251] (CAB 91)
Transmission control module (TCM) (CD3)	"shudder…which may be followed by very brief, but discernible, losses of driving power" and "a loss of driving power for a substantial period of time (in the order of many seconds)": PJ [347] (CAB 121-122)
Architectural issues (AD1 and AD2)	Exacerbating the componentry-related issues: FC [210], [222]-[223], [227], [229] (CAB 445-450). One of the architectural issues – to do with the damping of torsional vibrations – also gives rise to a propensity to exhibit "a slight vibration or shudder at slow speeds or during a coast down as the transmission upshifts or downshifts" and "a slight audible rattle, particularly when operated within an enclosed area such as a carpark": PJ [521], [524], [528]-[530] (CAB 177-179).

10. **Manifestation of the risks in Ms Capic's vehicle after supply.** The adverse consequences, or symptoms, associated with the failure to comply in Ms Capic's vehicle began to manifest within months of her purchase of the vehicle: PJ [6], [13], [537] (CAB 22-23, 182). They recurred over many years, leading Ms Capic to take her vehicle in for servicing on 15 occasions between 14 April 2013 and 11 June 2019: PJ [535] (CAB 181-182). The symptoms she complained of on these occasions included shuddering on acceleration, harsh gear changes, lack of power, and warning lights coming on: PJ [535] (CAB 181-182). The primary judge found that Ms Capic's input shaft seals, clutch lining and TCM all failed; that is, that the risk or propensity of failure associated with each of those components came to pass: PJ [537] (CAB 182).

11. **Repairs to Ms Capic's vehicle.** On the 15 occasions that Ms Capic took her vehicle in for servicing, various procedures were carried out, ranging from software updates to the replacement of components: PJ [535] (CAB 182). The deficiency with respect to the TCM was remedied by replacement of that unit on the 10th service, on 10 February 2016: PJ [536] (CAB 182). The deficiency with respect to the input shaft seals was remedied by their replacement on the 13th service on 30 May 2017: PJ [536] (CAB 182). The

deficiency with respect to the friction material in Ms Capic's vehicle was never remedied (and Ford did not establish that it had developed an effective remedy for it): PJ [8] (CAB 22). The same position applies in respect of the two architecture deficiencies: 13 December 2023 Orders, Annexure A, orders 19-20 (CAB 490-492).

12. The reasons for the delay in replacing the TCM and input shaft seals in Ms Capic's vehicle were not wholly explained in the evidence below. One aspect of the delay, however, was the time taken for the replacement components to be developed or identified as suitable. A significant measure of the evidence led at trial comprised business records from the "lengthy and well documented efforts to identify the cause of the leaking seals" (PJ, [222]) (CAB 83), for example, and to find an effective replacement for them (PJ [213]-[214], [217]-[220]) (CAB 81-83). The same was true with respect to the TCM and the clutch lining. These documents showed "how complex the diagnosis of the problems was": PJ [223] (CAB 84). The new chip contained in the replacement TCM, for example, was not introduced in production vehicles until June 2014 (for some Fiesta vehicles) and November 2014 (for other vehicles, including the Focus), and was not made available as a replacement part for vehicles already in service until sometime later (although Ford did not lead evidence about precisely when): PJ [376], [385] (CAB 131, 134). The replacement input shaft seals, on the other hand, were not introduced in new production vehicles until November 2014, and no finding was made about when they became available for vehicles in service. There was evidence at trial that Ford's parent company, Ford US, had decided not to pursue additional possible remedies for the Deficiencies which continued to inhere in Ms Capic's vehicle: ABFM 1 to 8, in particular ABFM3.12 and ABFM6.20; ABFM13 at [242], [243(d)]; ABFM15 at [139]; AFBM 9 and 10.124.

13. **Reduction in value damages: primary judge.** Ms Capic paid $22,736.36 for her Affected Vehicle. This was used as the statutory reference price for the purposes of s 272(1)(a): PJ [877], [890] (CAB 276). The primary judge found Ms Capic's vehicle to be worth 30% less than that price by reason of it containing all of the Deficiencies he had found, and on that basis awarded reduction in value damages of $6,820.91: PJ [890] (CAB 279).

14. In reaching this finding on reduction in value, the primary judge did not rely on the valuation evidence led by either side. The primary judge rejected the valuation evidence led by Ford from Mr Cuthbert which (i) provided a valuation of Ms Capic's car at the

date of his assessment in January 2020 (years after the supply of the car) but not at the time of supply (PJ [880]-[881]) (CAB 277); and (ii) was based on assumptions which did not reflect the findings on liability nor the findings that the repairs had not fixed all issues: PJ [880]-[881] (CAB 277) and *cf* [766]-[767] (CAB 243); ABFM14. Mr Cuthbert was not asked to assume that the vehicle suffered from any defects, but was instead instructed to value the vehicle on the basis of his own inspection, documents evidencing the car's service history, and another of the Respondent's expert reports, which stated that the vehicle was "mechanically sound and operated normally": PJ, [881] (CAB 277). The primary judge accepted that a valuation in 2020 could in theory assist, in a retrospectant manner, in ascertaining or extrapolating value at the date of supply, but Mr Cuthbert's evidence did not in fact assist, because he had not attempted to do such an analysis, and there was the gulf between his assumptions and the Deficiencies as found: PJ [880]-[881] (CB 277).

15. Although the risks comprising the Deficiencies manifested in Ms Capic's vehicle, the primary judge did not take this into account in assessing reduction in value: PJ [884]-[889] (CAB 278-279). Nor did the primary judge take into account the (partial) repairs effected by the Respondent: PJ [884] (CAB 278). His Honour reasoned that "[i]f it were otherwise the value at the date of acquisition would be conceptually tied to contingent future events and hence theoretically unknowable": PJ [884] (CAB 278). Additionally, the failures to comply being risks or propensities, his Honour reasoned that they "were not altered in their extent when they came to pass just as a person who wins the lottery cannot be said to have had a 100% chance of winning. … [T]he outcome of a probabilistic event does not affect the original probability": PJ [884] (CAB 278).

16. **Reduction in value damages: Full Court.** On appeal, the Full Court rejected a number of challenges made by Ford to the primary judge's assessment of Ms Capic's individual damages (FC [303]) (CAB 467), but upheld two others, being grounds 5 and 8 of the Amended Notice of Appeal: FC [315] (CAB 470).

17. The Full Court summarised the "essence" of the "complaints" in the grounds it upheld as concerning: "the failure by the primary judge to find that events subsequent to the supply of the vehicle were capable of bearing on the proper assessment of reduction in value for the purposes of assessing damages under s 272(1)(a) and that, in the case of Ms Capic's vehicle, the primary judge failed to take into account the fact of particular repairs to Ms Capic's vehicle which had been effected at no cost to her, the value of Ms Capic's

vehicle at the time of trial, and her use of the vehicle up to the time of trial": FC [294] (CAB 464). The "events subsequent to the supply of the vehicle" that the Full Court required to be taken into account include the manifestation of the risks comprising the failure to comply: this is clear from ground 5, which referred specifically to PJ [884] (CAB 278), discussed in [15] above.

18. A critical step in the Full Court's reasoning in upholding grounds 5 and 8 was its application of the holding, by a differently constituted Full Court in ***Toyota*** *Motor Corporation Australia Limited v Williams* [2023] FCAFC 50; 296 FCR 514 at [98]-[99], that the assessment of damages under s 272(1)(a) "may require, depending on the circumstances of the case, a departure from the time of supply or an adjustment to avoid over-compensation": FC [307(1)-(3)]. The reasons of the Full Court in this case did not analyse the correctness of the holding in *Toyota*, save to conclude that the "errors asserted to exist in the reasons … are not clear or patent" and that the Court was not "convinced that the construction adopted" in *Toyota* was "erroneous": FC [314] (CAB 470). Having so concluded, the Court considered itself bound to follow *Toyota*: FC [312]-[313] (CAB 470).

19. The Full Court set aside the primary judge's award of damages to Ms Capic and ordered the remittal of the question of Ms Capic's damages for re-determination by the primary judge in accordance with the reasons of the Full Court and on the basis of the evidence already before his Honour: FC [316] (CAB 471); order 7 made 13 December 2023 (CAB 473-474).

Part VI: Argument

A. First issue: time of assessment and "adjustment"

20. By ground 1 of the NOA, Ms Capic respectfully contends that the Full Court erred in holding that the assessment of damages under s 272(1)(a) may require, depending on the circumstances of the case, a departure from assessment at the time of supply or an "adjustment" to avoid overcompensation: FC [307] (CAB 467-468); see also [306], [308], [310], [314] (CAB 467-470). That conclusion was reached on the basis that this was one of "several critical findings concerning the proper interpretation of s 272 of the ACL" made by the Full Court in *Toyota*, and the Full Court below did not consider that reasoning erroneous, including because they found that the errors Ms Capic asserted to exist in *Toyota* were not "clear or patent": [314] (CAB 470). Ms Capic's submissions on this ground are principally directed to the reasoning in *Toyota* because the substantive

justification given by the Full Court below for its construction of s 272(1)(a) did not travel beyond its summary of the reasoning in *Toyota*[4] and the statement at [309] (CAB 469) that ***Dwyer*** *v Volkswagen Group Australia Pty Ltd* [2023] NSWCA 211 at [230], [234] also showed that subsequent events may be relevant to the measure of damages.[5] For the reasons which follow it is submitted that considerations of text, context and purpose of s 272(1)(a), and regard to its common law and statutory antecedents, confirm that damages pursuant to s 272(1)(a) are to be assessed at the time of supply only. The use of the word "damages" in s 271 and 272 does not supply licence to depart from the statutory measure, either by way of alteration of the time for assessment or by way of other adjustment to its operation.

Damages to be assessed at time of supply: a general or universal position?

21. The Full Court in *Toyota* accepted that, "at least generally", damages for reduction in value should be assessed at the time of supply: *Toyota* [98]; followed at FC [307(1)] (CAB 467). In reaching that conclusion regarding the "general" position, the Court in *Toyota* relied on the "text and structure of s 272(1)(a)", and in particular the calculus for determining reduction in value in that paragraph:[6]

> The provision refers to a reduction in the value of the goods (resulting from the failure to comply with the consumer guarantee) below the lower of "the price paid or payable by the consumer for the goods" and "the average retail price of the goods *at the time of supply*". Each of those integers is a price referable to the time of supply.

22. Ms Capic embraces these observations, although in her submission they indicate that the time of supply *is* (not *is generally*) the time of assessment under s 272(1)(a). That conclusion is further supported by the following four matters of text, context, purpose and legislative history.

23. **First**, there is the contrast between subs (1)(a) and subs (1)(b), *each* of which is a head of damages an affected person is "entitled" to recover under subs (1). Subsection (1)(b) permits recovery of any "loss or damage suffered by the affected person because of the

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[4] Save for its reasoning on the separate issue of whether – if it had accepted any of Ms Capic's contentions that the *Toyota* reasoning involved error, it could refrain from following the decision of another Full Court having regard to the timing of the delivery of the decision during the hearing of the appeal below: [310]-[314].

[5] Relevantly, Gleeson JA at [215]-[218] (with whom Leeming and White JJA agreed) did not consider it necessary to consider the qualification stated in *Toyota* that a "departure" from assessment of damages under s 272(1)(a), at the time of supply, is appropriate in some cases.

[6] *Toyota* [98], emphasis in original.

failure to comply" – that is, consequential loss[7] – and, consistent with its focus on loss unfolding over time, limits recovery by reference to what is "reasonably foreseeable". Subsection (1)(a), on the other hand, focuses only on the goods and their value, and makes no reference to the position of the affected person (see *Toyota* [165]), nor contains any remoteness rule. This is a strong indication that damages under s 272(1)(a) are to be assessed at the point of supply and not at some later date, when matters in the history of the good peculiar to its particular owner and not foreseeable by a manufacturer may affect its value.

24. **Secondly**, there is s 272(3), which recognises a distinction between any reduction in the value of the goods (recoverable per se under subs (1)(a)) and any consequential loss suffered "through" such a reduction in value (which would be recoverable under subs (1)(b), but for subs (3)): *cf Toyota* [97]. This is a further indication that s 272(1)(a) is concerned with making good, by a money award, the difference between what was paid for and what was received at the point of supply, rather than any losses that the affected person may have suffered over time, including those suffered "through" a reduction in value, such as lost profits on re-sale.

25. **Thirdly**, there are the purposes of the consumer guarantees in the ACL, which include the provision of clear, accessible, timely and cost-effective remedies for consumers in tribunals as well as courts, without the need for expert assistance: Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010, [25.22], [25.57], [25.94] (**EM**). A comparison between price paid and value received at the date of supply permits a straightforward remedy, which is consonant with these purposes. The reduction in value can be determined in round numbers, as a matter of judicial evaluation and without the assistance of expert evidence (as occurred in this case, and in part in *Toyota*: see [13] above and *Toyota*, [311]-[316]). There is no need, as there would be in many cases if reduction in value were assessed at a later date, to undertake the difficult and potentially costly exercise of separating the result of the failure to comply from other factors which may affect the value of the goods over time, such as depreciation or changes in market conditions.

26. **Fourthly**, there is the existing state of the law at the ACL's enactment, in which:

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[7] See Explanatory Memorandum to the Trade Practices Amendment (Australian Consumer Law) Bill (No.2) 2010, [7.123].

(a) there was – and still is – a long recognised a distinction between damages that compensate directly for the non-performance of an obligation and damages that compensate for the consequences of that non-performance: see, eg, ***Baltic*** *Shipping Co v Dillon* (1993) 176 CLR 344, 365 (Mason CJ, Toohey and Gaudron JJ agreeing on this point), 369-371 (Brennan J), 381-382 (Deane and Dawson JJ); *Marks v GIO Australia Holdings Limited* (1998) 196 CLR 494, [13] (Gaudron J); ***Moore*** *v Scenic Tours Pty Ltd* (2020) 268 CLR 326, [45] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), [63]-[64] (Edelman J); *Lewis v Australian Capital Territory* (2020) 271 CLR 192, [142]-[150] (Edelman J); and

(b) in the case of the sale of defective goods, the direct measure of damages was – and still is – generally the difference between the value of the goods as promised and the value of the goods as delivered, at the time of delivery (***Jones v Just*** (1868) LR 3 QB 197, 200-201; *Sale of Goods Act 1893* (UK), s 53(3) (**1893 Act**) (which states this is the "prima facie" measure); ***Slater v Hoyle*** *& Smith Ltd* [1920] 2 KB 11; ***Clark*** *v Macourt* (2013) 253 CLR 1, [9]-[13] (Hayne J), [28] (Crennan and Bell JJ), [108]-[109] (Keane J)) while consequential losses are also recoverable: *Randall v Raper* (1858) EB & E 84; 120 ER 438; *Wagstaff v Short-horn Dairy Co* (1884) Cab & E 324; *Re R & H* ***Hall****, Ltd and WH Pim & Co's Arbitration* [1928] All ER 763; 1893 Act, ss 53(2), 54.

27. As Edelman J observed in *Moore* at [63]-[67], these two familiar components of compensation are reflected in the two heads of recovery in s 267(3) and (4) of the ACL. The same is true of s 272(1)(a) and (b), the wording of which is similar: PJ [891] (CAB 280).[8]

28. This is not to say that the previous law governs the interpretation of s 272(1)(a). That would be a perverse result, given that one of the central mischiefs at which the ACL was directed was the difficulty consumers and businesses faced in navigating the tangled legacy of the common law and statute comprising the status quo: EM, [25.5], [25.22], [25.25], [25.28], [25.34], [25.37]. One of the ACL's central aims was the creation of a charter of rights and remedies comprehensible on its face without expert assistance: EM,

[8] The similarity is not coincidental: the ACL's line of descent from the common law on the sale of goods, the 1893 Act, and other legislation descended from the 1893 Act is made explicit in the EM and other extrinsic materials: see EM, [25.11]-[25.10], [25.24]-[25.25]; Commonwealth Consumer Affairs Advisory Commission, Consumer Rights: Reforming statutory implied conditions and warranties, Final Report (Canberra, 2009), Pt 1, referred to in EM, [25.7].

18, [23.8], [25.48], [25.94]. It would also be at odds with the small but significant divergences between the ACL and earlier laws, in particular (i) that reduction in value in s 272(1)(a) is measured beneath the *price* of the goods or their average retail price, rather than beneath the goods' *value* at the time of supply (*cf* [26((b))] above), and (ii) that s 272(1)(a) is a defined "entitle[ment]" (s 272(1)) rather than a "prima facie" measure, as under the 1893 Act and cognates. What the pre-existing law demonstrates, however, is that a measure of damages representing reduction in value at the time of supply was a well-recognised measure of loss in the sphere regulated by the consumer guarantees, which the Court would comfortably infer formed a model, with some statutory modifications, for s 272(1)(a).

"Damages": cause to depart from the time of supply or make "adjustments"?

29. As noted above, the Full Court in *Toyota* (and in this case, following *Toyota*) accepted 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. The *Toyota* Full Court also stated, citing *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388 at [44], that "the authorities on statutory remedy provisions establish that it is wrong to approach such provisions by beginning with general law analogies (such as damages for breach of contract)": [101]. Notwithstanding, and without regard to the general law background canvassed in [26]-[28] above, the *Toyota* Full Court purported to invoke "general principles regarding the assessment of damages (including for breach of contract)" ([102]) to conclude that the assessment of damages under s 272(1)(a) "may require, depending on the circumstances, a departure from the time of supply or an adjustment to avoid over-compensation": [99]. This reasoning in *Toyota* proceeded in three stages, each of which involved error.

30. **First**, the Full Court focused on the word "damages" in s 272(1). It considered that that word "makes clear that the provision is concerned with compensation for loss or damage", so that it is "necessary … for the Court to assess whether or not the applicant has suffered loss or damage": *Toyota,* [99]. The Full Court did not refer to the fact that subs (1)(b), but not subs (1)(a), invites that very assessment, by the words "loss or damage suffered by". In any event, the Full Court read too much into the word "damages". At general law, "damages" are not necessarily compensatory but may be punitive[9] or restitutionary.[10]

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[9] *Lewis*, [110].

[10] *Allianz Australia Insurance Ltd v Delor Vue Apartments CTS 39788* [2022] HCA 38; 406 ALR 632, [64] (Kiefel CJ, Edelman, Steward and Gleeson J).

According to the leading common law text, the word means "an award in money for a civil wrong".[11] Further and importantly, even where damages are compensatory at general law, they are not necessarily concerned with making good "loss or damage suffered by" the claimant, beyond non-receipt of the benefit bargained for: see *Baltic*, 382; *Marks*, [13]; *Moore*, [64]; *Lewis*, [143]; *Clark*, [10]-[11], [109].[12] From a technical legal perspective, the word "damages" does not of itself require assessment of compensation at the time of trial, or an adjustment to take account of factual improvements in the claimant's position after the time of supply: this is evident in the sale of goods cases mentioned in [26((b))] above, including *Clark*, and [31] below. From the perspective of a consumer approaching the statute, the word "damages" is even less likely to be understood as providing this sort of limitation on the ordinary meaning of the words used in s 272(1)(a).[13]

31. **Secondly**, the *Toyota* Full Court referred to passages from ***Johnson*** *v Perez* (1988) 166 CLR 351, to the effect that assessment of damages at the date of breach "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": *Toyota* [103] (quoting *Johnson* at 355-356), [104]-[105]. Nothing in *Johnson*, however, cuts across the many sale of goods cases in which claimants have been awarded reduction in value damages despite suffering no financial loss due to events after supply, including *Clark*, *Jones v Just*, *Slater v Hoyle*, *Williams Brothers v Ed T Agius Ltd* [1914] AC 510, *Jamal v Moolla Dawood Sons & Co* [1916] 1 AC 175 and *Bainton v John Hallam Ltd* [1920] 60 SCR 325. Rather, the relevant obiter dicta in *Johnson*, and the cases cited therein, show that where an innocent buyer, acting reasonably, has suffered loss *beyond* the direct measure after the date for performance, that loss may be claimed instead of (or, subject to double recovery, as well as) direct compensation for the performance interest, if not too remote: see *Johnson* at 356-358 (Mason CJ), 386-387 (Dawson J); *Wenham v Ella* (1972) 127 CLR 454; *Asamera Oil Corp v Sea Oil & General Corp* (1978) 89 DLR (3d) 1; *Radford v de Froberville* [1977] 1 WLR 1262, 1285-8; *Johnson v Agnew* [1980] AC 367, 400-401; *Ogle v Earl Vane* (1867) LR 2 QB 275; see also *Hall*; *Randall*;

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[11] J Edelman, ***McGregor*** *on Damages* (Sweet & Maxwell, 21st ed, 2021) [1-001]; see also D **Winterton**, *Money Awards in Contract Law* (Hart, Oxford, 2015) 117.

[12] See also *McGregor*, [3-009]-[3-010]; Winterton, 107-109, 117-18.

[13] *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249, [82] (Kirby J).

Wagstaff. This measure of recovery is broadly reflected in s 272(1)(b), albeit subject to the limitation on recovery of consequential loss suffered "through" a reduction in value in s 272(3), discussed in [24] above.

32. **Thirdly**, the *Toyota* Full Court referred to ***HTW*** *Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 and ***Kizbeau*** *Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281, 291-6, observing that "in many fields of law, assessments of compensation made as at one date are commonly made taking into account all matters known at a later date when the court's assessment is being carried out". Ms Capic raises no challenge to this statement of principle. Information that comes to light by the time of trial may be taken into account *so far as relevant* to the assessment of compensation in a particular case having regard to the particular provisions of the statute or the principles applicable to the particular type of claim brought: see, eg, ACL s 54(2); *Ashworth v Wells* (1898) 14 TLR 227. In other words, the after-occurring information that will be relevant in a particular case depends on the measure of compensation to be assessed. This matter is addressed in Ms Capic's submissions on issue 2 / NOA ground 2, below.

B. Second issue and NOA ground 2: use of evidence

Ms Capic's use of the vehicle

33. The Full Court below held, at FC [315(2)] (CAB 470-471), that the primary judge erred by failing to take into account, when assessing the damages payable to Ms Capic under s 272(1)(a), "the use by Ms Capic of her vehicle up until the time of trial". In so holding, the Full Court erred.

34. The Full Court's reasons for requiring Ms Capic's use of her vehicle to be taken into account are, with respect, not clear. The Full Court's reasoning may lie in FC [307(7)] (CAB 468), where it drew from *Toyota* the principle that "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", citing *Toyota* at [110]-[111], [127]. However, at [127] of *Toyota*, the Court held that, while the value of a consumer good lies in its expected utility, that value is to be determined "objectively". This was explained further at [165] of *Toyota*, to which the Full Court in this case did not refer:

> [T]he legislative provisions concerning the guarantee require an objective approach that does not take into account the particular circumstances of the consumer when determining whether there has been a failure to comply with the guarantee. So, even a consumer who does not use the goods in a way that will manifest the defect will have purchased goods that fail to comply with the guarantee. The statutory language in s 272(1)(a) does not refer

> to the reduction in value of the goods to the particular consumer. Consistently with the terms of the guarantee, it provides for a statutory action for damages "for … any reduction in the value of the goods, resulting from the failure to comply with the guarantee". There will be a reduction in the value of the goods for all consumers because the goods supplied lack utility, albeit in a respect that may not have any significance for the consumer. The consumer still has a good with less value as a consumer good than goods without the defect.

35. That the Full Court in *Toyota* did not take into account the applicant and each group member's particular use of their vehicle is evident from the result in that case: the Full Court assessed the reduction in value of all relevant vehicles at the same level – 10% – before taking into account the "2020 field fix": *Toyota*, [312].

36. This "objective" approach to valuation, and the reasoning at [165] of *Toyota*, is correct. As the passage at [165] explains, s 272(1)(a) values the "goods", not the use the affected person derives from the goods. A vehicle has the same value at supply whether it is then used daily or left undisturbed in a garage. There is nothing in the text, context or purpose of s 272(1)(a), or the reasons of the Full Court below or in *Toyota*, which provides support for the Full Court's holding at FC [315(2)]. Respectfully, the Full Court appears to have misconstrued and misapplied the decision in *Toyota*, by which it considered itself to be bound, leading itself into error.

Manifestation of the defect

37. At [315(2)] (CAB 470-471), the Full Court stated that "ground 5 [of the Amended Notice of Appeal (CAB 361)] should be upheld, as the primary judge ought to have held that subsequent events were capable of bearing on the proper assessment of reduction in value damages". As noted in [16] above, ground 5 involved an appeal to PJ [884] (CAB 278), in which the primary judge held that neither the manifestation of the defects in Ms Capic's vehicle nor the (partial) repairs effected to it should be taken into account in assessing her s 272(1)(a) damages.[15] By upholding ground 5, the Full Court required the manifestation of the defects in Ms Capic's vehicle to be taken into account in assessing her reduction in value damages.

38. In upholding ground 5, the Full Court erred. That is so for two reasons.

39. The **first** is that given by the primary judge: that the reduction in value to be assessed under s 272(1)(a) is that "resulting from the failure to comply with the guarantee to which the action relates". That failure to comply, on the findings of both the primary judge and

[15] Ground 5 is reproduced at CAB, vol 2, p. 361.

the Full Court, was a risk or propensity to display certain behaviours (*cf Medtel Pty Ltd v Courtney* (2003) 130 FCR 182 at [64]-[74]). As the primary judge reasoned (PJ [884] (CAB 278), quoted at [15] above), it is flawed logic to value a risk by how the risk turns out. The later manifestation of the propensity does not change the nature of the propensity. Importantly, like *Toyota*, this is not a case where there is a risk that goods contain defective components (*cf Toyota*, [162]); rather, it is a case where the goods are *known* to have defective components, and the defects are risks of (or propensities to) certain misbehaviours. If and when the symptoms manifest, nothing further is learned about the goods or the defects comprising the failure to comply.

40. The **second** reason is that given by the Full Court in *Toyota*, for not taking into account the manifestation of the propensity in assessing s 272(1)(a) damages in that case: [165], [306]-[307]. The objective approach to valuation (correctly) adopted in *Toyota* means that "even a consumer who does not use the goods in a way that will manifest the defect will have purchased goods that fail to comply with the guarantee" and "[t]here will be a reduction in the value of the goods for all consumers because the goods supplied lack utility, albeit in a respect that may not have any significance for the [particular] consumer": *Toyota*, [165]. The fact that Ms Capic drove her vehicle so as to experience the symptoms is an accident of her ownership of it; for the reasons given in *Toyota*, her vehicle would have the same value at supply if it were acquired by someone who went on to rarely use it and so experienced no or lesser symptoms.

Availability and application of partial remedy

41. The Full Court held, at FC [315(2)], that the primary judge erred by failing to take into account the repairs to Ms Capic's vehicle, which were carried out at no cost to her, when assessing the damages payable under s 272(1)(a). In so holding, the Full Court erred.

42. On this point, as on others, the Full Court applied the reasoning in *Toyota*: FC [308] (CAB 468). In *Toyota*, the Full Court reasoned that in circumstances where the timing and availability of a "fix" were known by trial (including whether there would be a complete, partial or no fix), those facts should be taken into account: [129], [146]-[150]. The Full Court held that this step was appropriate for two reasons: *first*, that it is "appropriate to use the known information at the time of trial" ([130]) and *secondly*, that "it is necessary to ensure that there is no over-compensation given the circumstances known at the time of trial": [131].

43. The *Toyota* Full Court's second reason was in error for the reasons explained under issue 1 above. On its proper construction, s 272(1)(a) requires any diminution in value to be calculated at the time of supply. In its plain terms it specifies this as the measure of damages to which an affected person is "entitled", and it leaves no room for adjustment. Even if it were appropriate in principle to read down the terms of s 272(1)(a) by reference to general law principles, not expressed in the statute, regarding what constitutes "compensation" (and therefore "over-compensation"), those general law principles neither require nor support such a reading down. To the contrary, measuring diminution in value at the time of supply is an orthodox way of compensating a claimant for deprivation of the performance interest in a sale of defective goods, even where the claimant later derives value or even profit from the goods.

44. The *Toyota* Full Court's first reason – that it is "appropriate to use the known information at the time of trial" – requires some further explanation. It appears to stem from the Full Court's reliance on *HTW* and *Kizbeau*, referred to in [32] above. It is consistent with those cases to take into account after-acquired information where such information is relevant to the measure of damages applicable in the particular case. Self-evidently, however, this requires close attention to the measure for which the statute (or other law) provides.

45. *Kizbeau* and *HTW* concerned claims under ss 52 and 82 of the *Trade Practices Act 1974* (Cth) (**TPA**), so the measure of compensation was the loss or damage suffered "by" (that is, because of[16]) misleading or deceptive conduct. In each of those cases the claimant sought damages representing the difference between the price paid for an asset that was acquired because of misleading conduct and the "true value" of the asset at the date of acquisition, and in each case events had occurred after the date of the acquisition which both (i) affected the value the claimant derived from the asset; and (ii) reflected the outplaying of the very thing about which the claimant was misled. These events had to be brought to account in assessing the loss or damage the claimants suffered "by" the contravening conduct (*Kizbeau*, 296; *HTW*, [44]-[45]); as put in *Kizbeau*, the events were not "supervening or extraneous to the fraudulent inducement": at 291.

46. The (seeming) difficulty in *Kizbeau* and *HTW*, giving rise to the point of principle in those cases, was that these events were yet to occur at the date of acquisition, so were irrelevant

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[16] *Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514, 525. See later ACL, s 236, which provides: "If: (a) a person (the claimant) suffers loss or damage because of the conduct of another person…".

to *valuation* at that date. Valuation is not a task conducted with hindsight: *HTW* [44]. As the Court explained in *HTW*, however, this did not matter. Determining "true value" in such cases is not merely an exercise in valuation, but an assessment of loss: *HTW* [44]-[45], [65]. Because the Court's ultimate task was to assess the loss or damage caused "by" the misleading conduct, it was necessary to take into account all of the consequences of that conduct known at trial, for better orworse. This is consistent with the general law measure of damages for loss caused by deceit, from which the "price paid less true value" measure is derived: *HTW* [35]. At general law, the "measure of damages in an action of deceit consists in the loss or expenditure incurred by the plaintiff in consequence of the inducement upon which he relied, diminished by any corresponding advantage in money or money's worth obtained by him on the other side": *Potts v Miller* (1940) 64 CLR 282 at 297 (Dixon J). Advantages (in *Kizbeau*) and losses (in *HTW*) occurring after the time of acquisition thus related back to the (perhaps fictitious, or at least notional) "true value" of the asset at the date of acquisition. This reflected the statutory requirement to assess the loss suffered "by" the contravening act.

47. By contrast, as has been submitted above, s 272(1)(a) provides a specific and focused measure of damages, for any reduction in value at the time of supply. There is neither a statutory requirement (as in s 82 of the TPA) nor statutory licence to assess damages under s 272(1)(a) by reference to the consequences for the affected person as they play out after that time. As noted, this is a position consistent with the many authorities on the sale of goods at general law, some of which are referred to in [31] above, in which reduction in value is assessed at the date of supply and the principles in *Kizbeau* and *HTW* are not applied.[17] The transference to s 272(1)(a) by the NSW Court of Appeal in *Dwyer* of the principles decided in *Kizbeau* and *HTW* in respect of s 82 of the TPA (which were derived, by analogy, from the principles applicable in tort for deceit as distinct from contractual measures for the performance interest), is, respectfully, incorrect:[18] it is not the case that in the sale of goods at general law, after-occurring events may be taken into account in assessing damages for the performance interest wherever they are a consequence of an intrinsic or inherent factor in the nature of the good (*cf Dwyer* [240]).

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[17] Indeed, a further reason for the distinction between these different categories of case is identified in *Kizbeau* at p. 290: "*Actions based on s 52 are analogous to acts for torts. It follows that, in assessing damages under s 82 of the Act, the rules for assessing damages in tort, and not the rules for assessing damages in contract, are the appropriate guide in most, if not all, cases*".

[18] *Dwyer,* [229]-[232], [240].

48. Further, even if it were appropriate, in assessing damages under s 272(1)(a), to take into account "consequences", occurring after the time of supply, of an "inherent factor in the nature of the good", a repair is not inherent in the nature of the good: the *defect* is inherent in the nature of the good; the repair is an *alteration* of the good, post-supply, by forces external to it.

49. This construction of s 272(1)(a) is further supported by the policy choices and incentives reflected in the terms of s 271(6). That provision: (i) incentivises manufacturers to give an express warranty of sufficient scope; and (ii) incentivises manufacturers to repair a non-compliant good under such a warranty within a reasonable time of any request to do so. Both incentives are to the benefit of consumers generally, including subsequent owners included in the definition of "affected person" in s 2 of the ACL. They are also to the benefit of down-stream suppliers having regard to suppliers' exposure to remediate for non-compliance: ss 259, 261; see also s 274. That the legislation exposes manufacturers to s 272(1)(a) damages if they have not provided a manufacturer's warranty (at all or of sufficient scope), or not provided a remedy within a reasonable time, reflects the out-workings of that legislative policy choice, the incentives embedded in the provision, and a real-world understanding of the relationship between consumers, suppliers and manufacturer warranties. It provides a statutory lessening of the consequences for manufacturers of exposure to damages for the performance interest, but on terms which operate to incentivise outcomes favourable to consumers and suppliers.

50. **Alternatively**, even if, the *capacity* for repair, or capacity for partial repair, may, on the proper construction of s 54, be relevant to the value of the good at the time of supply, on the basis that it is a latent feature of the good at that time,[19] in Ms Capic's case such a consideration would not have any impact. A reasonable consumer at the point of supply would not be especially moved to hear that a repair for one component (or some, but not all, components) of a multifaceted failure to comply with s 54 was *in principle* repairable, provided years would be spent by the manufacturer (or someone else) in problem solving, research and development: and see, eg ABFM12, [19]-[63]; ABFM11, [15], [16], [18], [21], [23], [25], [28], [30]-[31]; AFBM9 and 10.124. Such information would say nothing about a number of matters which would be important to the consumer but are on no view

[19] The construction is not without difficulty, because in the long list of matters to be considered in s 54(2) and (3), capacity for repair does not feature.

latent within the good at the time of supply, including (i) whether, and if so when, the capacity for repair would actually be exploited in this manner by the development of a repair; (ii) whether, and if so when the repair, if developed, would be made available to vehicles in service, and particularly the claimant's vehicle; and (iii) at what cost, if any, the repair would be made available. As the facts of this case illustrate, these are not small questions. Despite a large and growing number of customer complaints (ABFM 11, [32]-[38]), it took Ford many years to make repairs available for Affected Vehicles in service, even after those repairs had been developed: see [11] above. As also noted above, Ford did not develop repairs for all of the Deficiencies, but simply rebranded the misbehaviours some could cause as "normal operating characteristics": ABFM11 [17]; PJ [652]-[665], [673] (CAB 214-219).

51. A further point regarding repairs is this: that the complex repair history of Ms Capic's vehicle illustrates a profound methodological difficulty with the Full Court's approach, insofar as it requires reduction in value damages to be assessed by reference to the period during which a vehicle, post-supply, was in a state of diminished utility by reason of the failure to comply with the guarantee: *cf* FC [308](4) (CAB 469), citing *Toyota* [127]-[147]. Ms Capic's vehicle has had repairs attempted and applied to it on many occasions, reducing the number of Deficiencies present in it by the time of trial but not remedying the non-compliance with the s 54 guarantee: see [11] above. The various procedures the vehicle underwent, over the course of 15 services prior to trial, are summarised in PJ [535] (CAB 181-182). The highlights of these were the replacement of the input shaft seals (curing the input shaft seal Deficiency) more than 2 years after Ms Capic acquired the vehicle, and the replacement of the TCM (curing the TCM Deficiency) about 4.5 years after she acquired the vehicle: PJ [535]-[536] (CAB 181-182). Ms Capic's evidence, accepted by the primary judge, was that the same problems persisted after these partial repairs (PJ [539]-[545]) (CAB 183-184), and this is unsurprising, as the symptoms of the various Deficiencies, including those that were not fixed, were the same or overlapping: FC [271] (CAB 459). Even accepting that assessment of damages in this area is "inherently impressionistic" (PJ [884]) (CAB 278), it is not at all clear how this complex history could be related back to the concept of the "value of the goods" in s 272(1)(a). While the approach may have held a beguiling appeal in *Toyota* – where it was accepted that "the availability of the fix restored the value of the vehicle" ([218]) – it breaks down quickly (or cannot be applied) in a case where there is no simple and complete "fix".

Value of the good at a time after supply

52. The Full Court held, at [315(3)] (CAB 471), that the primary judge erred at PJ [880] (CAB 277) in rejecting Mr Cuthbert's evidence and should have taken into account "evidence as to the value of the vehicle at the time of trial" because it was "relevant information which would have enabled the primary judge to ensure that Ms Capic was not over-compensated". In doing so, the Full Court erred.

53. For the reasons given under ground 1 above, the value of Ms Capic's vehicle at the time of trial was not directly relevant to the assessment of damages under s 272(1)(a), and Ms Capic was not "over-compensated" by having her damages assessed, in accordance with the statutory measure, at the time of supply.

54. In any event, there is a further difficulty to which the Full Court's ruling gives rise. As noted in [14] above, the primary judge accepted that a later valuation could theoretically be used as a data point to seek to ascertain or extrapolate value at an anterior date: PJ[880]-[881] (CAB 277). But he rejected Mr Cuthbert's evidence as irrelevant because Mr Cuthbert had not attempted to extrapolate value at supply from the later valuation date such that he was not directed to the statutory question and, further, had assumed that the vehicle was in good mechanical condition contrary to the findings on liability: PJ [881] (CAB 277). The Full Court did not engage with these reasons why the primary judge rejected Mr Cuthbert's evidence, but the effect of its decision is to require the primary judge to re-assess Ms Capic's s 272(1)(a) damages on the basis of evidence that is irrelevant to the facts on liability, as found by both the primary judge and the Full Court.

Part VII: Orders sought

55. Ms Capic seeks the orders set out in her Notice of Appeal.

Part VIII: Estimate

56. Ms Capic estimates that she will need 1.5 to 2 hours to present her argument.

Dated: 8 March 2024

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ANNEXURE

List of statutes and provisions referred to in the Appellant's submissions

1. *Competition and Consumer Act 2010* (Cth) Sch 2, ss 2, 3, 7, 54, 236, 269, 261, 267, 271, 272, 274 (version C2024C00038 in force as at 1 January 2024).
2. *Trade Practices Act 1974* (Cth), ss 52, 82 (version C2010C00331 in force as at 30 June 2010).
3. *Federal Court of Australia Act 1976* (Cth), Pt IVA (version in force at 17 May 2016).
4. *Sale of Goods Act 1893* (UK), ss 53, 54 (as made).