HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD, GLEESON, JAGOT AND BEECH-JONES JJ

Matter No S157/2023

KENNETH JOHN WILLIAMS & ANOR — APPELLANTS

AND

TOYOTA MOTOR CORPORATION AUSTRALIA LIMITED — RESPONDENT

Matter No S155/2023

TOYOTA MOTOR CORPORATION AUSTRALIA LIMITED — APPELLANT

AND

KENNETH JOHN WILLIAMS & ANOR — RESPONDENTS

Williams v Toyota Motor Corporation Australia Limited
Toyota Motor Corporation Australia Limited v Williams
[2024] HCA 38
Date of Hearing: 10 & 11 April 2024
Date of Judgment: 6 November 2024
S157/2023 & S155/2023

ORDER

Matter No S157/2023

1. *Appeal allowed.*

2. *Set aside order 3 of the orders of the Full Court of the Federal Court of Australia made on 27 March 2023.*

3. *Set aside order 2 of the orders of the Full Court of the Federal Court of Australia made on 12 May 2023 but only in respect of the amended answers to questions 26 to 35 posed in Sch 2 to the orders of the Federal Court of Australia made on 16 May 2022.*

4. *In lieu of so much of order 2 of the orders of the Full Court of the Federal Court of Australia made on 12 May 2023 that answers questions 26 to 35 posed in Sch 2 to the orders of the Federal Court of Australia made on 16 May 2022, also order that the primary judge's answers to those questions be set aside.*

5. *The matter be remitted to the primary judge for:*

   (a) *the reassessment of reduction in value damages under ss 271(1) and 272(1)(a) of the* Australian Consumer Law *and damages for excess GST under ss 271(1) and 272(1)(b) of the* Australian Consumer Law *in accordance with the reasons of the High Court of Australia; and*

   (b) *the provision of answers to questions 26 to 35 posed in Sch 2 to the orders of the Federal Court of Australia made on 16 May 2022 in accordance with the reasons of the High Court of Australia.*

6. *The respondent pay half of the appellants' costs of the appeal.*

Matter No S155/2023

1. *Appeal dismissed.*

2. *The appellant pay the respondents' costs of the appeal.*

On appeal from the Federal Court of Australia

Representation

J T Gleeson SC with P A Meagher and T M Rogan for the appellants in S157/2023 and the respondents in S155/2023 (instructed by Quinn Emanuel Urquhart & Sullivan)

B W Walker SC with E Bathurst for the respondent in S157/2023 and the appellant in S155/2023 (instructed by Clayton Utz)

CATCHWORDS

Williams v Toyota Motor Corporation Australia Limited
Toyota Motor Corporation Australia Limited v Williams

Damages – Assessment – Consumer law – Where Mr Williams and Direct Claim Services Qld Pty Ltd ("Williams parties") brought representative proceedings against Toyota Motor Corporation Australia Limited ("Toyota") on behalf of persons who acquired motor vehicles fitted with defective diesel exhaust after-treatment system – Where vehicles had propensity to experience defect consequences – Where effective fix became available in May 2020 free of charge ("repair") – Where primary judge concluded vehicles did not comply with guarantee of "acceptable quality" in s 54(1) of *Australian Consumer Law* ("ACL") at time of supply – Where s 271(1) of ACL provides that if guarantee under s 54 is not complied with, "an affected person in relation to the goods may ... recover damages from the manufacturer" – Where s 272(1)(a) of ACL provides that "an affected person in relation to goods is entitled to recover damages for ... any reduction in the value of the goods, resulting from the failure to comply with the guarantee to which the action relates" – Where primary judge held assessment of damages under s 272(1)(a) to be made at time of supply and information acquired thereafter could only be considered if it bore upon "true value" at time of supply, which did not include knowledge of availability of repair – Where Full Court of Federal Court of Australia held that assessment of damages under s 272(1)(a) may require departure from time of supply or adjustment to avoid "over-compensation" – Where Full Court held that availability and timing of repair should be considered – Whether Full Court erred in permitting an assessment of damages after time of supply rather than only using information acquired thereafter to confirm what could be foreseen at time of supply – Whether Full Court erred in failing to conclude that damages under s 272(1)(a) are recoverable where there is no ongoing reduction in value at time of trial due to availability of repair.

Words and phrases – "affected person in relation to goods", "assessment of damages", "availability of a repair", "compensation", "consumer", "damages", "defect", "defect consequences", "full knowledge of the defect", "guarantee of acceptable quality", "hypothetical reasonable consumer", "inherent features of the defect", "loss-based damages", "loss or damage", "performance-based damages", "reduction in value", "state and condition of the goods", "time of supply", "time of trial".

Competition and Consumer Act 2010 (Cth), Sch 2 (*Australian Consumer Law*), ss 54(1), 271(1), 272(1)(a), 272(1)(b).

1 GAGELER CJ, GORDON, STEWARD, GLEESON AND BEECH-JONES JJ. The motor vehicles the subject of these two appeals were supplied to "consumers" within the meaning of the *Australian Consumer Law*[1] ("the ACL") during the period from 1 October 2015 to 23 April 2020 ("the relevant period"). Toyota Motor Corporation Australia Limited ("Toyota") was the manufacturer of the motor vehicles.[2] The vehicles did not conform with the guarantee of acceptable quality provided for in s 54(1) of the ACL in that each had a (hidden) defect in its diesel exhaust system which carried an unacceptable propensity to cause the diesel exhaust system to malfunction.

2 Section 272(1)(a) of the ACL affords to an "affected person in relation to goods" a remedy in damages for any reduction in the value of the goods resulting from their failure to comply with the guarantee of acceptable quality. The principal issue raised by these two appeals is the relevance to that assessment of the fact that, some years after the time of supply, Toyota developed a means of repairing the defect that was made available free of charge.

3 For the reasons that follow, the assessment to be made under s 272(1)(a) is of the amount by which the value of the goods is reduced at the time of supply to the consumer as a result of the failure of the goods to comply with the guarantee of acceptable quality at that time. The assessment is to be undertaken having regard to all that is known at the time of trial about the "state and condition of the goods"[3] at the time of their supply to the consumer. The effectiveness, cost, inconvenience and timing of any repair of a defect in the goods as known at the time of trial are all characteristics of the "state and condition of the goods" at the time of their supply to the consumer and are therefore all to be taken into account in the assessment.

4 As neither the primary judge nor the Full Court of the Federal Court of Australia assessed the damages payable under s 272(1)(a) in accordance with this approach, the proceedings will be remitted to the primary judge to undertake that task in accordance with these reasons.

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1 *Competition and Consumer Act 2010* (Cth), Sch 2 ("ACL"), s 3.

2 ACL, s 7(1)(e).

3 ACL, s 54(2).

Procedural background

5 Kenneth John Williams and Direct Claim Services Qld Pty Ltd ("Direct Claim Services"), a company of which Mr Williams is the sole director, are the appellants ("the Williams appellants") in one of the appeals ("the Williams appeal"). They are the lead applicants in representative proceedings that were brought against Toyota on behalf of those who had acquired motor vehicles in the Prado, Fortuner or HiLux ranges during the relevant period that had been fitted with a "1GD-FTV" or "2GD-FTV" diesel combustion engine. There were 264,170 such vehicles ("the relevant vehicles"). Toyota is the appellant in the other appeal ("the Toyota appeal").

6 Both appeals concern that part of the judgment of the Full Federal Court (Moshinsky, Colvin and Stewart JJ)[4] that varied the assessment made by the primary judge (Lee J) of the damages payable by Toyota under s 272(1)(a) of the ACL in favour of Direct Claim Services and the group members (except for certain categories).[5] The hearing of both appeals was immediately followed by the hearing of the appeal in *Capic v Ford Motor Company of Australia Pty Ltd*,[6] which raised similar issues in relation to the proper construction of s 272(1)(a) of the ACL. The submissions made by the appellant (Biljana Capic) and respondent (Ford Motor Company of Australia Pty Ltd ("Ford")) in *Capic* concerning the construction of the ACL are addressed in this judgment.

Factual background

7 In an endeavour to comply with national emissions standards, each of the affected Toyota vehicles was supplied with a diesel exhaust after-treatment system ("DPF System"), which was designed to capture and convert the pollutant emissions into carbon dioxide and water vapour through a combination of filtration, combustion (ie, oxidation) and chemical reactions.[7] Two key components of the DPF System are the diesel particulate filter ("DPF") and the

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4 See *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514 ("*Toyota*") at 520-521 [20]-[21], 580 [317].

5 See [15]-[16].

6 [2024] HCA 39.

7 *Williams v Toyota Motor Corporation Australia Ltd* [2022] FCA 344 ("*Williams*") at [6], [15(1)-(2)].

diesel oxidation catalyst ("DOC"). The DPF captures and stores diesel particulate matter in the exhaust gas prior to its release. The captured particulate matter must be burnt off periodically in a process described as "regeneration".[8] The DOC comprises a honeycomb ceramic flow-through monolith substrate with a catalyst coating. One of its functions is to increase the temperature in the DPF during regeneration to enable the captured particulate matter to be burnt off. This process is impeded if the DOC becomes clogged or blocked.[9]

8 The DPF System "was not designed to function effectively during all reasonably expected conditions of normal operation and use in the Australian market" ("the core defect")[10] in that, under certain conditions, the DPF System was ineffective in preventing the formation of deposits on the DOC surface, which prevented the DPF from effective regeneration.[11] The core defect was inherent in the design of the DPF System and was comprised of both mechanical defects and defective control logic and associated software calibrations.[12]

9 The effect of the core defect was that, if a relevant vehicle was exposed to regular continuous driving at approximately 100 km/h ("the High Speed Driving Pattern"), it might experience one or more of various so-called "defect consequences". The defect consequences included: the emission of excessive white smoke and foul-smelling exhaust from the vehicle's exhaust when the engine was running during and immediately following regeneration; the need to have the vehicle inspected, serviced or repaired by a service engineer for the purpose of cleaning, repairing or replacing the DPF System; the display of DPF notifications on an excessive number of occasions or for an excessive period of time, or both; and an increase in fuel consumption and decrease in fuel economy.[13]

10 The primary judge found that, although not every relevant vehicle suffered the defect consequences, because the core defect was present in all the vehicles they each had a propensity to experience one or more of the defect consequences

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8 *Williams* [2022] FCA 344 at [15(3)-(4)].

9 *Williams* [2022] FCA 344 at [15(5)-(6)].

10 *Williams* [2022] FCA 344 at [15(6)]; *Toyota* (2023) 296 FCR 514 at 519 [13].

11 *Williams* [2022] FCA 344 at [15(6)].

12 *Williams* [2022] FCA 344 at [15(6)].

13 *Williams* [2022] FCA 344 at [59].

and there was a high likelihood they would do so.[14] His Honour found that those consequences "substantially interfere[d] with the normal use and operation" of the relevant vehicles.[15]

11 Direct Claim Services acquired a Toyota Prado motor vehicle on 8 April 2016. At that time, Mr Williams was ignorant of the core defect and the defect consequences. Throughout the period that the group members acquired the relevant vehicles, the "market" was not informed of those matters either. The vehicle acquired by Direct Claim Services developed problems relating to the DPF System soon after it was acquired. Sometime around late 2016, Mr Williams first experienced the vehicle emitting foul-smelling, white smoke. The problem reoccurred thereafter despite Toyota attempting to repair it through numerous services of the vehicle. The primary judge found that the defect consequences that manifested had a "substantial impact" on Mr Williams' use and enjoyment of the vehicle.[16]

12 From February 2016, Toyota became aware that vehicles were being presented to dealers by customers who reported concerns about the emission of excessive white smoke during regeneration and the illumination of DPF notifications. Over the following four years, the number of complaints increased dramatically. Toyota attempted a series of countermeasures to fix the problem, which were ineffective.[17]

13 Only in May 2020 did an effective countermeasure ("the 2020 Field Fix") become "available" in the sense of being first available to some group members. It was common ground that, when applied, the 2020 Field Fix was effective and would continue to be effective in remedying the core defect and its consequences in all the relevant vehicles.[18] However, the logistics of its rollout to hundreds of thousands of group members was not explored in the evidence.

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14 *Williams* [2022] FCA 344 at [62]-[64].

15 *Williams* [2022] FCA 344 at [81].

16 *Williams* [2022] FCA 344 at [134].

17 *Williams* [2022] FCA 344 at [16].

18 *Williams* [2022] FCA 344 at [15(10)].

The primary judgment

14 The primary judge concluded that the relevant vehicles were not of an "acceptable quality" within the meaning of s 54(2) of the ACL at the time of supply because they were not: fit for all the purposes for which goods of that kind are commonly supplied;[19] acceptable in appearance and finish;[20] free from defects;[21] and durable.[22] His Honour found that a reasonable consumer fully acquainted with the state and condition of the relevant vehicles at the time of supply, including any "hidden defects", would not have regarded the vehicles as "acceptable", especially having regard to the nature and price of the vehicles.[23] The primary judge found that such a consumer was taken to be fully acquainted with the nature of the core defect, the defect consequences and the manner in which the relevant vehicles would malfunction when exposed to the High Speed Driving Pattern.[24] However, the primary judge concluded that the state and condition of the relevant vehicles at the time of supply was otherwise not determined by anything occurring after that time, such as whether the defect consequences materialised or whether there was any knowledge that an effective fix would ultimately become available.[25]

15 In determining the damages payable under s 272(1)(a) of the ACL to Direct Claim Services and group members (except certain categories such as those who had their vehicle fixed or disposed of during the relevant period), the primary judge considered that an assessment under s 272(1)(a) was to be made at the time of acquisition[26] and that information acquired thereafter could only be considered if it bore upon the "true value" of the relevant vehicle at the time of acquisition.[27]

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19 ACL, s 54(2)(a); *Williams* [2022] FCA 344 at [177]-[180].

20 ACL, s 54(2)(b); *Williams* [2022] FCA 344 at [181].

21 ACL, s 54(2)(c); *Williams* [2022] FCA 344 at [183]-[187].

22 ACL, s 54(2)(e); *Williams* [2022] FCA 344 at [188].

23 ACL, s 54(2), (3)(a)-(b); *Williams* [2022] FCA 344 at [189], [196]-[197].

24 *Williams* [2022] FCA 344 at [166].

25 *Williams* [2022] FCA 344 at [168]-[170].

26 *Williams* [2022] FCA 344 at [309].

27 *Williams* [2022] FCA 344 at [320]-[321].

This did not extend to knowledge of a repair that was only made available four years after the date of acquisition and implemented "more than a reasonable time after being requested".[28] According to the primary judge, because such a repair was not expected at the time of acquisition, it was "an extraneous event, irrelevant to the true value at that time".[29] His Honour found that the reduction in value resulting from the breach of the guarantee of acceptable quality was 17.5% of the average purchase price,[30] with the individual amounts of damages to be determined having regard to the lesser of the average retail price or the price paid by each consumer.[31]

16 The primary judge answered common questions in accordance with these findings. His Honour assessed the damages payable to Direct Claim Services under s 272(1)(a) and (b) to be a total of $18,401.76. His Honour made orders awarding damages to each group member except certain categories including: those who had opted out of the proceedings; those who had received the 2020 Field Fix; and those who had disposed of their vehicle during the relevant period.

The Full Court's judgment

17 The basis upon which the Full Court rejected Toyota's appeal against the primary judge's findings that the relevant vehicles did not comply with the guarantee of acceptable quality is not of present relevance.[32] Toyota also appealed the primary judge's assessment of damages for the reduction in value payable under s 272(1)(a) of the ACL. The Full Court upheld that aspect of Toyota's appeal.[33] The Full Court identified two errors on the part of the primary judge. First, the Full Court found that the primary judge erred in not taking into account the fact that either a repair had become available or a repair might become available.[34] Second, the Full Court found that, in arriving at the figure of 17.5% as the appropriate figure

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28 *Williams* [2022] FCA 344 at [328].

29 *Williams* [2022] FCA 344 at [328].

30 *Williams* [2022] FCA 344 at [393], [513(1)].

31 ACL, s 272(1)(a)(i)-(ii).

32 *Toyota* (2023) 296 FCR 514 at 530 [65].

33 *Toyota* (2023) 296 FCR 514 at 577 [295]-[296].

34 *Toyota* (2023) 296 FCR 514 at 546 [133].

for the reduction in value, the primary judge erred in relying on the evidence of a valuer called on behalf of Mr Williams, Mr Cuthbert.[35]

18 In so finding, the Full Court concluded that the use of the word "damages" in s 272(1)(a) indicates that "the provision is concerned with compensation for loss or damage", that is, "compensation for actual damage suffered".[36] According to their Honours, this meant that "a departure from [assessing damages by reference to] the time of supply or an adjustment to avoid over-compensation" might be required.[37] Their Honours then considered that "in most instances, the intrinsic value of consumer goods to a retail buyer will lie in their utility rather than the price at which they [are sold]",[38] such that the "general law [that] has developed in assessing loss in cases concerning the defective supply of valuable assets ... is not apposite" to consumer goods.[39] According to the Full Court, "the value of many consumer goods ... is more accurately understood to lie in their utilisation value (or life-of-use value) as reflected in the purchase price".[40]

19 Their Honours concluded that, if a repair was not available at the time of the trial, then an assessment of damages for the reduction in value should take into account "the possibility of the availability of a fix", including the uncertainty as to whether there would be a fix and, if so, how long it might take for such a fix to be "made available".[41] However, as a repair was available at the time of the trial (ie, the 2020 Field Fix), the fact of that repair and the time of its availability should be considered in assessing damages for the reduction in value at the time of supply to the consumer.[42]

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35 *Toyota* (2023) 296 FCR 514 at 560 [202]-[204], 577 [295].

36 *Toyota* (2023) 296 FCR 514 at 539 [99]-[100].

37 *Toyota* (2023) 296 FCR 514 at 539 [99].

38 *Toyota* (2023) 296 FCR 514 at 542 [111].

39 *Toyota* (2023) 296 FCR 514 at 543 [118].

40 *Toyota* (2023) 296 FCR 514 at 543 [117].

41 *Toyota* (2023) 296 FCR 514 at 545-546 [128].

42 *Toyota* (2023) 296 FCR 514 at 546 [129]-[131].

20 The Full Court ordered that the assessment of damages for the reduction in value be remitted to the primary judge on the basis that the reduction in value of the relevant vehicles prior to taking into account the availability of a repair (the 2020 Field Fix) was 10%.[43] The balance of the assessment was to be conducted "in a way that takes into account the period of time that the particular consumer held their vehicle before the fix became available".[44] A formula set out in a letter sent to the parties, which was extracted in the Full Court's judgment, suggests that the Full Court contemplated the primary judge determining the damages payable under s 272(1)(a) by multiplying the reduction of 10% by the fraction that the period of time the relevant group member held their vehicle before the repair "became available" bears to the effective life of the vehicle.[45] The Full Court also ordered that the primary judge's answers to the common questions concerning damages under s 272(1)(a) be amended to reflect its judgment.[46]

21 At the hearing of the appeals, attention was focussed on the following finding of the Full Court in relation to the availability of a repair and its effect on the value of the relevant vehicles:[47]

> "[B]y the time of the initial trial [before the primary judge], it was known that the 2020 [F]ield [F]ix was available and the experts agreed that, in consequence, there was no ongoing reduction in value. It may be observed that the prospective reinstatement of value reflected the fact that the fix would *restore* the utility of the vehicle, noting that for some buyers there remained a considerable period when the utility of the vehicle had been diminished." (emphasis added)

22 The Williams appellants challenged this finding. They contended that, contrary to the finding, none of the experts who gave evidence before the primary judge agreed that the application of the 2020 Field Fix had the effect of retrospectively restoring value from the time of supply. They further contended that the expert they relied on (Mr Cuthbert) simply stated that a reduction in value

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43 *Toyota* (2023) 296 FCR 514 at 580-581 [317]-[319].

44 *Toyota* (2023) 296 FCR 514 at 581 [319].

45 *Toyota* (2023) 296 FCR 514 at 538 [95].

46 *Toyota Motor Corporation Australia Ltd v Williams [No 2]* [2023] FCAFC 70 ("*Toyota No 2*") at [8].

47 *Toyota* (2023) 296 FCR 514 at 544-545 [123].

on account of a defect would not be applied if the repair was available *and* carried out and that, even on the Full Court's approach, the time frame over which such repairs to hundreds of thousands of relevant vehicles could take place ("quite a few years") also had to be taken into account. Toyota contended that Mr Cuthbert conceded in cross-examination that the mere availability of a free repair would eliminate any reduction in value. That interpretation of Mr Cuthbert's evidence was not reflected in any finding of the primary judge, who observed and heard the evidence being given.

23 There is considerable force in the Williams appellants' criticisms of the above finding. However, ultimately it is not necessary to resolve their challenge. The Full Court is not to be understood as having found that the supposed "restoration" in value was retrospective to the time of supply, but instead as only removing any reduction in value that was prevalent at the time the repair became "available".

24 Putting aside the difficulty in describing the repair as being "available" when it had to be rolled out to hundreds of thousands of relevant vehicles, the utility of this finding was the support it provided for the Full Court's approach to the assessment of damages payable under s 272(1)(a). That approach was predicated on any ongoing reduction in value ceasing when the repair became available because the vehicle's "utility" was restored. The effect of the Full Court's approach was that the 10% loss in value should be reduced by reference to the proportion of the vehicle's life for which the repair was "available". The precise formula to be applied was to be identified by the primary judge on remitter.

25 In this Court, none of the parties sought to uphold this aspect of the Full Court's approach. They were correct to take that course. As explained later, the Full Court's approach was premised on an incorrect interpretation of the meaning of "damages" in s 272(1) and a mistaken understanding that a court can depart from an assessment at the time of supply to avoid "over-compensation" by considering whether subsequent events transpired to increase or decrease the value of the goods over time. Otherwise, there is no basis in the ACL for adopting the concept of the "utilisation value" of goods referred to by the Full Court.[48] As submitted by the Williams appellants, s 272(1)(a) protects the interest of the consumer in having ownership and control of goods that met the guarantee of acceptable quality at the time of supply. The utility of the goods is simply an aspect of that ownership and control and is reflected in the price paid at the time of supply.

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48 *Toyota* (2023) 296 FCR 514 at 543 [117].

The appeals

26 The Williams appellants and Toyota were each granted special leave to appeal from that part of the Full Court's judgment that concerned the assessment of damages payable under s 272(1)(a) of the ACL. The Williams appellants sought the restoration of the primary judge's orders and answers to common questions, including his Honour's assessment of a 17.5% reduction in value of all the relevant vehicles resulting from the failure to comply with the guarantee of acceptable quality. They contended that the Full Court erred in failing to assess the reduction in the value of the vehicles by reference to the time of supply and only using information acquired thereafter as hindsight confirming what could have been foreseen at the time of supply. The Williams appellants also contended that the Full Court erred in construing s 272(1)(a) so as to permit an assessment at some later time after the date of supply or an "adjustment" of the assessment "to reflect a future event unknown and unknowable at the date of supply". They further contended that the Full Court erred in varying the primary judge's assessment of a 17.5% reduction in value of the relevant vehicles.

27 Toyota contended that the Full Court erred in failing to conclude that damages under s 272(1)(a) were not recoverable in circumstances where there was (supposedly) "no ongoing reduction in [the] value [of the vehicles] at the time of trial due to the availability of a repair free of charge". This contention seeks to take advantage of the impugned finding noted above, although Toyota accepted that there was an inherent difficulty in the concept of the repair being "available" in circumstances where findings about the logistics, especially the timing, of a repair for all the relevant vehicles had not been made. Toyota also propounded an alternative case, namely that damages for the reduction in value should be assessed at the time of supply taking into account what is known at the trial about the capacity to repair the defect, including the time from supply until such a repair would in fact be "available", that is, "implemented".

The *Australian Consumer Law*

28 The ACL has no separate statement of objectives. They are subsumed in a short statement of the object of the *Competition and Consumer Act 2010* (Cth), namely "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection".[49] Both the

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49 *Competition and Consumer Act 2010* (Cth), s 2.

Explanatory Memorandum accompanying the ACL's introduction[50] and a report of the Commonwealth Consumer Affairs Advisory Council referred to in the Explanatory Memorandum[51] emphasised the need for clarity in relation to both consumer guarantees and remedies, including avoiding or minimising the necessity for businesses and consumers to resort to the law of contract to understand consumer rights.[52]

Acceptable quality and knowledge acquired after supply

29 Division 1 of Pt 3-2 in Ch 3 of the ACL is entitled "[c]onsumer guarantees". Subdivision A of Div 1 provides for guarantees relating to the supply of goods in trade or commerce to a "consumer". Subject to exceptions that are presently irrelevant,[53] a person is taken to have acquired particular goods as a "consumer" if, and only if: the amount paid or payable for the goods did not exceed $40,000 or a greater amount if prescribed; the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.[54]

30 Within Subdiv A, s 54(1) provides that if a person supplies, in trade or commerce, goods to a consumer and the supply does not occur by way of sale by auction, "there is a guarantee that the goods are of acceptable quality". Section 54(2)-(3) define the concept of "acceptable quality" for the purpose of the guarantee as follows:

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50 Australia, House of Representatives, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, Explanatory Memorandum.

51 Commonwealth Consumer Affairs Advisory Council, *Consumer Rights: Reforming Statutory Implied Conditions and Warranties*, Final Report (2009) ("CCAAC Report"); Australia, House of Representatives, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, Explanatory Memorandum at 177-178 [7.7].

52 Australia, House of Representatives, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, Explanatory Memorandum at 18, 617 [25.85]; CCAAC Report at 31, 47, 65.

53 ACL, s 3(2).

54 ACL, s 3(1).

"(2) Goods are of *acceptable quality* if they are as:

(a) fit for all the purposes for which goods of that kind are commonly supplied; and

(b) acceptable in appearance and finish; and

(c) free from **defects**; and

(d) safe; and

(e) durable;

as a reasonable consumer fully acquainted with the state and condition of the goods (including any **hidden defects** of the goods), would regard as acceptable having regard to the matters in subsection (3).

(3) The matters for the purposes of subsection (2) are:

(a) the nature of the goods; and

(b) the price of the goods (if relevant); and

(c) any statements made about the goods on any packaging or label on the goods; and

(d) any representation made about the goods by the supplier or manufacturer of the goods; and

(e) any other relevant circumstances relating to the supply of the goods." (emphasis in bold added, emphasis in italics in original)

31 Section 54(4) provides that if goods supplied to a consumer are not of acceptable quality, and the only reason or reasons why they are not of acceptable quality were specifically drawn to the consumer's attention before they agreed to the supply, the goods are taken to be of acceptable quality. Section 54(7) provides that goods do not fail to be of acceptable quality if: (a) the consumer examines the goods before agreeing to their supply; and (b) the examination ought reasonably to have revealed that the goods were not of acceptable quality. The balance of s 54 describes other circumstances in which goods either are taken to be of acceptable

quality or do not fail to be of acceptable quality, which are not relevant to these appeals.

32 Although the primary judge found that each of s 54(2)(a), (b), (c) and (e) was not complied with,[55] the critical conclusion was that the relevant vehicles were affected by a "defect". Neither "defect" nor "hidden defect" as used in s 54(2) is defined in the ACL. The reference in s 54(2) to "hidden defects" and a reasonable consumer being "fully acquainted" with the state and condition of the goods appears to draw on Dixon J's description of the condition that goods be of merchantable quality in *Australian Knitting Mills Ltd v Grant*, namely that the goods be in a "state that a buyer fully acquainted with the facts and, therefore, knowing what hidden defects exist ... would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms".[56] While s 54(2) provides a far more extensive guarantee than the various statutory prescriptions that goods be of merchantable quality,[57] of present relevance is Dixon J's description of a hidden defect as a defect not reasonably discoverable by a buyer on examination at the time.[58] This description coheres with s 54(7)(b) of the ACL and otherwise suffices in the present context. On any view, the core defect was not reasonably discoverable to a consumer from an examination of the relevant vehicles at the time of supply.

33 Section 54(2) posits a hypothetical inquiry as to what a reasonable consumer at the time of supply would regard as acceptable if the reasonable consumer was "fully acquainted with the state and condition of the goods", including any "hidden defects". At least in a case involving a hidden defect, an inquiry into whether the guarantee has been complied with requires attributing to a reasonable consumer, at the time of supply, later acquired knowledge of the defect that renders the goods below an acceptable quality. The attributed knowledge of the defect must be knowledge that would render a reasonable consumer "fully acquainted" with the true state and condition of the goods; it follows that this must include full knowledge of or acquaintance with the defect, including later acquired knowledge of the propensity of the defect to occasion

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55 *Williams* [2022] FCA 344 at [177]-[184], [188]-[189].

56 (1933) 50 CLR 387 at 418.

57 See, for example, *Sale of Goods Act 1923* (NSW), s 64(3); *Trade Practices Act 1974* (Cth) ("TPA"), s 66(2).

58 *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387 at 417-418.

adverse consequences and the nature of those consequences, even if understandings of those matters vary over the period of time leading up to the trial.

34 If such knowledge is attributed to a reasonable consumer at the time of supply, there is no reason why later acquired knowledge of the capacity to repair the defect or ameliorate its consequences, including when, how and at what cost those repairs or ameliorative steps could be undertaken, should not also be attributed. Those matters are characteristics of the nature and seriousness of the defect and, in turn, the state and condition of the goods. Knowledge of those matters cannot be divorced from what constitutes the relevant "defect", even though they may not necessarily preclude the defect from rendering the goods in breach of the guarantee in s 54.

35 The position can be illustrated by reference to *Henry Kendall & Sons v William Lillico & Sons Ltd*,[59] in which the House of Lords considered, inter alia, the relevance of knowledge acquired after the time of supply to a claim that goods were not of merchantable quality at the time of supply by reason of a latent defect.[60] The relevant goods were compounded "feeding stuff" which contained extracted groundnut that was discovered to be contaminated by a toxic substance that rendered the goods unsuitable to be included in food for poultry.[61] It was later discovered that the goods could be included in food for cattle, provided its content did not exceed 5% of the whole.[62] The significance of such a use is that the test for merchantable quality held to be applicable in the United Kingdom required an assessment of whether the goods, in the form in which they were sold, "were of no use for any purpose for which such goods would normally be used".[63]

36 Lord Reid held that, in determining whether the goods were of merchantable quality, it would be "very artificial to bring in some part of the later knowledge and exclude other parts" such that the later acquired knowledge of an acceptable use of the goods affected an assessment of whether they were of

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59 [1969] 2 AC 31.

60 Pursuant to the *Sale of Goods Act 1893* (UK), s 14(2).

61 *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31 ("*Kendall*") at 39, 75.

62 *Kendall* [1969] 2 AC 31 at 75.

63 *Kendall* [1969] 2 AC 31 at 76-77; cf *Sale of Goods Act 1923* (NSW), s 64(3); TPA, s 66(2).

merchantable quality at the time of supply.[64] Lord Guest held that "[t]he defect as ultimately discovered must be taken with its qualifications" and "[i]t is not possible to stop halfway and say '[w]e know there is a defect' without proceeding to say '[a]lthough there is a defect we know it can be cured by a limited rate of inclusion'".[65] According to their Lordships, the later acquired knowledge that the goods could be safely fed to cattle qualified the characterisation of the nature and seriousness of the defect in the goods at the time of supply.

37 Lord Pearce, with whom Lord Wilberforce agreed,[66] took a different view. Lord Pearce did not accept that all "after-acquired knowledge" at the time of trial should be brought to account.[67] His Lordship accepted Dixon J's approach in *Australian Knitting Mills* of assuming knowledge of the hidden defects at the date of delivery but stated as follows:[68]

> "But what additional after-acquired knowledge must one assume? Logic might seem to indicate that the court should bring to the task all the after-acquired knowledge which it possesses at the date of trial. **But I do not think that this is always so**. For one is trying to find what market the goods would have had if their subsequently ascertained condition had been known. As it is a hypothetical exercise, one must create a hypothetical market. Nevertheless the hypothetical market should be one that could have existed, not one which could *not* have existed at the date of delivery. **Suppose goods contained a hidden deadly poison to which there was discovered by scientists two years after delivery a simple, easy, inexpensive antidote which could render the goods harmless. They would be unmarketable at the date of delivery if the existence of the poison was brought to light, since no purchaser could then have known the antidote to the poison**." (emphasis in bold added; emphasis in italics in original)

38 Lord Pearce did not exclude all after-acquired knowledge from being attributed to a purchaser at the time of delivery but confined it to knowledge that

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64 *Kendall* [1969] 2 AC 31 at 75-76.

65 *Kendall* [1969] 2 AC 31 at 109.

66 *Kendall* [1969] 2 AC 31 at 126.

67 *Kendall* [1969] 2 AC 31 at 118-119.

68 *Kendall* [1969] 2 AC 31 at 118-119.

could be utilised in a hypothetical market that could have existed at the time of delivery but did not exist, as opposed to a hypothetical market that could not have existed. Thus, with the example of poisoned goods, the position would have been presumably different if the existence of an antidote to the poison was known at the time of delivery. In that circumstance, knowledge of the poison and the existence of the antidote would be imputed to the purchaser at the time of delivery because a hypothetical market with knowledge of the poison and antidote could have existed, even if it did not exist.

39 The distinction between markets that could have existed but did not and markets that could not have existed does not assist. The indisputable starting point is the attribution of a full acquaintance with the state and condition of the goods at the time of supply to a reasonable consumer, including full knowledge of any hidden defect. Such an exercise is completely hypothetical, and the better inquiry is one that is focussed on bringing to account at the time of supply the best available information that is known about the defect at the time of trial. Lord Pearce's initial suggestion that logic might seem to indicate that a court should bring to account all the after-acquired knowledge it possesses at the time of trial was correct. In the example of poisoned goods, the relevant after-acquired knowledge brought to account as at the time of supply is not just the existence of the antidote but the knowledge that the antidote will not be available for two years such that the relevant hypothetical market is for goods that were poisonous and would remain so for two years. Assuming the goods in the example are consumables such as "feeding stuff", then a conclusion that they were not of merchantable quality at the time of supply would inevitably follow.

40 The primary judge relied on the decision in *Medtel Pty Ltd v Courtney*,[69] in which a heart pacemaker was found not to be of merchantable quality. The pacemaker was manufactured with a yellow spool solder, which had a tendency to attract contaminants that caused partial short circuits and accelerated battery depletion.[70] This created a "superadded risk of premature failure" in the pacemaker.[71] Branson J preferred the view of Lord Pearce in *Kendall* and observed that former s 74D of the *Trade Practices Act 1974* (Cth) "calls for the quality, or fitness for purpose, of the goods to be measured ... in the light of information concerning the goods available at the time of the trial", but said that the ultimate

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69 (2003) 130 FCR 182.

70 *Medtel Pty Ltd v Courtney* (2003) 130 FCR 182 at 189-190 [12]-[13].

71 *Medtel Pty Ltd v Courtney* (2003) 130 FCR 182 at 204 [60].

issue remained "whether the goods were as fit for the relevant purpose as it was reasonable to expect at the time of their supply to the consumer".[72] The latter approach can be accepted but it extends to include such information as is known at the time of the trial about the defect and its capacity to be repaired, as well as when, how and at what cost that repair would take place.

41 In a case such as *Medtel* where the consequences of the "superadded risk" materialising are extreme, it may be that any attribution of later acquired knowledge of a repair, even if it is at no cost, would not affect a conclusion that the goods were not of merchantable, much less acceptable, quality. With other types of goods, it might be that the availability of a free and convenient repair within a short period of time after the supply is such that a reasonable consumer armed with that knowledge and having regard to the matters set out in s 54(3) would regard them as being of acceptable quality.

42 None of the grounds of appeal in the Full Court or in this Court challenged the primary judge's finding that the relevant vehicles failed to comply with the statutory guarantee in s 54(1) of the ACL. Even though the primary judge's analysis of whether the vehicles were of acceptable quality did not involve attributing to a reasonable consumer any later acquired knowledge of the capacity to repair the core defect as well as when, how and at what cost that repair would be undertaken, given his Honour's findings on those topics there is no reason to suggest that they would have affected his Honour's finding that the guarantee of acceptable quality was not complied with. That finding is not to be disturbed. Instead, as explained below, the present relevance of those matters concerns the analysis of the damages payable under s 272(1)(a) of the ACL.

Assessment of damages for reduction in value under s 272(1)(a)

43 Part 5-4 of the ACL provides for remedies relating to consumer guarantees. Subdivision A of Div 1 of Pt 5-4 provides for actions against suppliers of goods. If a supplier's failure to comply with a guarantee specified in Subdiv A of Div 1 of Pt 3-2 of the ACL[73] (which includes s 54(1)) cannot be remedied or is a so-called "major failure",[74] then the consumer may reject the goods or take action against the supplier to "recover compensation for any reduction in the value of the goods

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72 *Medtel Pty Ltd v Courtney* (2003) 130 FCR 182 at 206 [70].

73 Other than ss 58 and 59(1) of the ACL.

74 ACL, s 260.

below the price paid or payable by the consumer for the goods".[75] Irrespective of whether the failure cannot be remedied or is a major failure, the consumer may also recover "damages for any loss or damage" they have suffered because of the failure "if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure".[76]

44 Division 2 of Pt 5-4 of the ACL provides for remedies against manufacturers of goods. Unlike Div 1 of Pt 5-4, these remedies can be invoked by "an affected person in relation to the goods" even though they relate to breaches of guarantees given to consumers by suppliers. An "affected person ... in relation to goods" is defined as: "(a) a consumer who acquires the goods; or (b) a person who acquires the goods from the consumer (other than for the purpose of re-supply); or (c) a person who derives title to the goods through or under the consumer".[77] This is not materially different to the analogous provisions of the former *Trade Practices Act*, which provided remedies for the consumer or a person who acquired the goods from, or derived title to the goods through or under, the consumer.[78]

45 Section 271(1) provides that, if the guarantee under s 54 applies to a supply of goods to a consumer and is not complied with, then "an affected person in relation to the goods may, by action against the manufacturer of the goods, recover damages from the manufacturer". Section 271(2) excludes the application of s 271(1) in circumstances that are not presently material. Section 271(3)-(5) make a similar provision to s 271(1) in relation to other guarantees that may apply to a supply of goods to a consumer, namely s 56 (supply of goods by description), s 58 (repairs and spare parts) and s 59(1) (express warranties).

46 Section 271(6) provides:

> "If an affected person in relation to goods has, in accordance with an express warranty given or made by the manufacturer of the goods, required the manufacturer to remedy a failure to comply with a guarantee referred to in subsection (1), (3) or (5):

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75 ACL, s 259(3).

76 ACL, s 259(4).

77 ACL, s 2(1).

78 TPA, ss 74B(1), 74C(1), 74D(1), 74E(1).

(a) by repairing the goods; or

(b) by replacing the goods with goods of an identical type;

then, despite that subsection, the affected person is not entitled to commence an action under that subsection to recover damages of a kind referred to in section 272(1)(a) unless the manufacturer has refused or failed to remedy the failure, or has failed to remedy the failure within a reasonable time."

47 Section 272 is central to these appeals. It provides:

"**Damages that may be recovered by action against manufacturers of goods**

(1) In an action for damages under this Division, an affected person in relation to goods is entitled to recover damages for:

(a) any reduction in the value of the goods, resulting from the failure to comply with the guarantee to which the action relates, below whichever of the following prices is lower:

(i) the price paid or payable by the consumer for the goods;

(ii) the average retail price of the goods at the time of supply; and

(b) any loss or damage suffered by the affected person because of the failure to comply with the guarantee to which the action relates if it was reasonably foreseeable that the affected person would suffer such loss or damage as a result of such a failure.

(2) Without limiting subsection (1)(b), the cost of inspecting and returning the goods to the manufacturer is taken to be a reasonably foreseeable loss suffered by the affected person as a result of the failure to comply with the guarantee.

(3) Subsection (1)(b) does not apply to loss or damage suffered through a reduction in the value of the goods."

48 An action for damages against manufacturers of goods under Div 2 must be commenced "within 3 years after the day on which the affected person first became aware, or ought reasonably to have become aware, that the guarantee to which the action relates has not been complied with".[79]

"Damages" and the time of assessment

49 Both the Williams appellants and Ms Capic invoked Edelman J's discussion in *Moore v Scenic Tours Pty Ltd*[80] of the equivalent provision to s 272(1)(a) for the suppliers of services. In *Moore*, his Honour treated that analogous provision as conferring a measure of damages similar to that measure of damages in contract, being "the difference between the value of what was promised and the value of what was received".[81] The reduction referred to in s 272(1)(a) does not precisely correspond to that measure in that it is determined by reference to the reduction in the value of the goods resulting from the failure to comply with the guarantee and the lesser of the two figures specified in s 272(1)(a)(i) and (ii).

50 Nevertheless, reference to that contractual measure of damages is germane in that it highlights that Toyota's and Ford's submission that consumers and affected persons will be overcompensated if they obtain both a repaired vehicle and a monetary award under s 272(1)(a) assumes, as the Full Court found, that s 272(1)(a) is directed to compensating for loss or damage resulting from the "reduction in the value of the goods" as a result of the failure to comply with the guarantee.[82] Those submissions and that assumption only beg the question: what are the "damages" in s 272(1)(a) being awarded "for"?

51 "Damages" have been defined as an "award in money for a civil wrong".[83] While this Court has referred to their "fundamental character" as "compensatory",[84] it would be a "mistake" to consider that "damages and

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79 ACL, s 273.

80 (2020) 268 CLR 326.

81 *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326 at 348-349 [64].

82 *Toyota* (2023) 296 FCR 514 at 539 [99].

83 Edelman, *McGregor on Damages*, 22nd ed (2024) at 1 [1-001].

84 *Whitfeld v De Lauret & Co Ltd* (1920) 29 CLR 71 at 80; cf Edelman, *McGregor on Damages*, 22nd ed (2024) at 4-5 [1-008]-[1-009].

compensation are synonymous" given that not all damages awards are compensatory.[85] There is no textual or other support for a construction of s 272(1)(a) that imports a requirement to establish loss or damage in addition to the "reduction in the value of the goods" resulting from the failure to comply with the relevant guarantee. Section 272(1)(a) refers to "damages for ... any reduction in the value of the goods". Section 272(1)(b) confers an entitlement to "damages for ... any loss or damage", which would not make sense if "damages" imported a separate concept of "loss". Other provisions of the ACL distinguish between "damages"[86] and "loss or damage",[87] and use the phrase "damages for any loss or damage".[88] The phrase "loss or damage" is defined to include "a reference to injury".[89] To construe "damages" in s 272(1)(a) as containing an additional element of loss or damage would be inconsistent with that usage. The equivalent provision to s 272(1)(a) for suppliers of goods provides for the recovery of "compensation" for "any reduction in the value of the goods".[90] There is no difference between "compensation" and "damages" in this context. Otherwise, where the statutory regime specifies what the damages and compensation are "for", there is no justification for importing an additional requirement of loss or damage. The statutory provisions provide their own measure of "damages".

52 A consideration of the extrinsic materials referable to s 272(1)(a) supports this construction.[91] The statutory predecessor to Div 2 of Pt 5-4[92] included provisions creating separate rights of action against manufacturers and importers of goods in respect of different non-compliances with various conditions,

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85 Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs*, 4th ed (2019) at 35; see, for example, *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at 231-233 [110]-[117].

86 See, for example, ACL, ss 99(3), 138(3)(a).

87 See, for example, ACL, ss 41(1)(b), 106(7), 239.

88 See, for example, ACL, ss 259(4), 267(4).

89 ACL, s 13.

90 ACL, s 259(3)(b).

91 *Acts Interpretation Act 1901* (Cth), s 15AB.

92 TPA, Pt V, Div 2A.

including goods being of "unmerchantable quality" (as relied on in *Medtel*).[93] Those provisions expressly provided a consumer or a person who acquired the goods from, or derived title to the goods through or under, the consumer with a right of recovery for "loss or damage" for those non-compliances.[94]

53 In describing the effect of s 272(1)(a), the Explanatory Memorandum to the introduction of the ACL noted that the "damages that are recoverable from a manufacturer of goods include the reduction in value of goods below the lower of the price paid or the average retail price of the goods at the time of the supply" and added that "[t]his approach ensures that manufacturers are not required to provide excessive compensation to consumers if suppliers charge high prices for goods".[95] There was no suggestion in the Explanatory Memorandum of any additional requirement to show loss or damage arising from that reduction in value of the goods. If there were such a requirement, it would undermine the simplification of the remedies sought to be achieved by the ACL. It would also undermine the intention to limit the manufacturer's exposure under s 272(1)(a), as the loss or damage resulting from the reduction in value below the lower of the price paid or average retail price could exceed that price.

54 Once it is appreciated that s 272(1)(a) provides its own measure of damages, then the Full Court's concerns about avoiding "over-compensation" by departing from the time of supply in assessing damages under s 272(1)(a) fall away.[96] There is no scope for any alteration of the date at which the reduction in value is to be assessed to avoid "over-compensation".

55 Section 272(1)(a) is exclusively directed to the time of supply to a "consumer". It would be incongruous for s 272(1)(a)(i) to refer to the price paid by the consumer and s 272(1)(a)(ii) to adopt the average retail price at the time of some other supply. Similarly, it would be incongruous for s 272(1)(a)(i) to award damages for the reduction in value of the goods resulting from a breach of a guarantee that occurred at the time of supply to the consumer below a level fixed by reference to that time, yet somehow ascertain that value at some other time.

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93 TPA, s 74D.

94 TPA, ss 74B(1), 74C(1), 74D(1), 74E(1).

95 Australia, House of Representatives, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, Explanatory Memorandum at 205 [7.122].

96 *Toyota* (2023) 296 FCR 514 at 539 [99].

"[T]he consumer" in s 272(1)(a)(i) must be referring to the consumer who acquires the goods described in s 54. The Full Court erred in construing s 272(1)(a) by allowing for the assessment of damages at a time other than the time of supply to the consumer.

"Reduction in value" and repairs to defects

56 In contrast to s 272(1)(b), the measure of damages provided for in s 272(1)(a) of the ACL involves an objective assessment of the "reduction in the value of the goods" as opposed to any particular harm occasioned to the affected person, which, subject to s 272(3), is addressed by s 272(1)(b).

57 The concept of "value" in s 272(1)(a) is not defined. There is a distinction described as "sometimes difficult to draw, but [nevertheless] old and fundamental" between "market value" on the one hand and "real" or "intrinsic" value on the other.[97] Market value is assessed by reference to the price that a purchaser would have paid at the relevant date to a vendor, both of whom are willing but not anxious to trade, with all circumstances subsequently arising ignored.[98] With "real" or "intrinsic" value, assessments are commonly made taking into account all matters known at the trial that illuminate the value of the goods as at the relevant earlier date, which in this context is the time of supply.[99]

58 It was common ground in these appeals and in *Capic* that in ascertaining the reduction in value for the purposes of s 272(1)(a), one attributes knowledge of the relevant hidden defect at the time of supply to a hypothetical reasonable consumer, including the likelihood of its consequences materialising. However, from that point, the parties differed strongly. The Williams appellants contended that the only relevance of the availability of a repair is to confirm the existence of the possibility, rather than availability, of a repair at the time of supply. Ms Capic went further and submitted that, while it might be accepted that a hypothetical reasonable consumer would purchase a vehicle with knowledge that some defects might be repaired, there could be no attribution of any knowledge to the parties of any information known after the time of supply other than the nature of the defect

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97 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at 657 [36] (footnote omitted), citing *Potts v Miller* (1940) 64 CLR 282 at 289, 300.

98 *Spencer v The Commonwealth* (1907) 5 CLR 418 at 440-441.

99 *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281 at 291-296, cited in *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at 658 [39].

and the likelihood of its consequences materialising. Toyota contended that all knowledge concerning the defect, including its capacity to be repaired, should be brought to account as at the time of supply. Ford contended that the effectiveness, cost, availability and timing of a repair is a characteristic of the defect itself and is associated with the "intrinsic quality" of the vehicle, knowledge of which is imputed to a reasonable consumer considering the state and condition of the goods for the purposes of s 54(2) of the ACL.

59 The resolution of this dispute flows from the conclusion that later acquired knowledge of the capacity to repair a defect (including a hidden defect) or ameliorate its consequences as well as when, how and at what cost those repairs or ameliorative steps would be undertaken cannot be divorced from any analysis of what constitutes the relevant "defect". Upon being informed that particular goods had a defect that carried a particular propensity to cause the goods to perform sub-optimally, a hypothetical reasonable consumer acquiring such goods could be expected to inquire whether the defect could be remedied and, if so, the effectiveness, cost, inconvenience and timing of a repair. If that information was known at the time of trial and not brought to account at the time of supply, then there would truly be a risk of the consumer receiving more or less than could be justified on the basis of the facts then known. A consumer would receive less if the court awarded damages on a flawed understanding that, at the time of supply, repair of such defects at a moderate cost was possible when subsequent events revealed the defects were in fact unfixable and would receive more if subsequent events demonstrated that the defects could be fixed quickly at no cost.

60 The result is that, at least so far as a consideration of any defects (including any hidden defects) is concerned, the analysis of the damages for the reduction in value provided for in s 272(1)(a) invokes a concept of "value" that is similar or analogous to the concept of "intrinsic" value referred to in *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd*.[100] The Williams appellants were critical of relying on that concept because it is often invoked in a context where loss or damage is being compensated for,[101] whereas s 272(1)(a) establishes its own measure. So much can be accepted, but the above approach does not follow from a direct translation of the concept of "intrinsic" value referred to in *HTW Valuers* into s 272(1)(a). Instead, it follows from an analysis of what knowledge is attributed to a reasonable consumer as part of the assessment of the extent of non-

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100 (2004) 217 CLR 640 at 657 [36].

101 See, for example, *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281.

compliance with the guarantee of acceptable quality in s 54(1), which is compensated for by the measure of damages provided for in s 272(1)(a).

61 The Full Court correctly observed that it was "appropriate to use the known information as to the availability of a fix at the time of trial to reach a conclusion as to the reduction in value".[102] However, the Full Court was otherwise in error in departing from the time of supply as the appropriate time to assess damages and considering the loss in the utility of the vehicles over their working life until a fix became available. In assessing the reduction in value at the time of supply, it was necessary to take into account the "availability" of the 2020 Field Fix, but that analysis also required taking into account how long after the time of supply that fix would become practically available as well as the inconvenience and cost that would be occasioned to a hypothetical reasonable consumer in the meantime. Any particular cost and inconvenience occasioned to an individual consumer above and beyond that assumed by a reasonable consumer at the time of supply is potentially recoverable under s 272(1)(b).[103] Leaving aside the circumstances in which s 271(6) is invoked, a consumer who refuses to take up an effective repair that is practically available is in no different position to a consumer who did.

62 In this case, leaving aside any particular inconvenience or cost occasioned to Direct Claim Services, it seems inherently unlikely that a hypothetical reasonable consumer of its vehicle in 2016 would have paid the same purchase price as Direct Claim Services had they been informed of the existence and nature of the core defect, the likelihood of the defect consequences materialising, the likely number of attendances that might be required to obtain a fix and the fact that no effective fix would be available until at least four and a half years later. Ultimately, however, this will be a matter for the primary judge to assess. It follows that a remittal may yield different assessments for different group members, although the only factor that is likely to vary is the time between supply to an individual consumer and the practical availability of an effective repair.

Materialisation of the defect consequences

63 Given that the proceedings will be remitted to the primary judge for the reassessment of damages, it is necessary to explain the relevance, if any, of the materialisation of the defect consequences to that process.

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102 *Toyota* (2023) 296 FCR 514 at 546 [130].

103 ACL, s 272(3).

64 The relevant defect in the present case was not the mere propensity for the defect consequences to materialise.[104] Rather, like the yellow spool solder in *Medtel*, the core defect was the design of the DPF System itself and other related faults. In both this case and *Medtel*, the defect and risk of the relevant defect consequences materialising rendered the goods in breach of the relevant statutory guarantee. In such cases, it is irrelevant to an assessment of damages under s 272(1)(a) whether those consequences materialised beyond what subsequent events may demonstrate was the actual propensity at the time of supply. The materialisation of the risks carried by the defect does not add anything to a hypothetical reasonable consumer's knowledge of the defect or the goods at the time of supply.

65 For example, a vehicle may have a defect in the design of its braking system that carries a 50% risk of the brakes failing in five years. All other matters being equal, there will be no difference between the damages payable for two such vehicles under s 272(1)(a) which were purchased for the same amount on the same day even if the brakes subsequently fail on one vehicle but not the other. The fact that the brakes failed on one vehicle but not the other does not of itself affect the conclusion that, at the time of supply, both vehicles were affected by the same defect that carried the same propensity to yield brake failure and rendered both vehicles non-compliant with the statutory guarantee. The owner of the vehicle whose brakes subsequently failed may be able to recover "any loss or damage" suffered from that failure under s 272(1)(b), although those damages would be reduced under s 272(3) by the amount of damages payable under s 272(1)(a) that are referable to the 50% likelihood of the brakes failing.

Section 271(6) and affected persons

66 Both the Williams appellants and Ms Capic contended that s 271(6) of the ACL supported their respective contentions concerning the relevance of a subsequently available repair for a defect to the assessment of damages under s 272(1)(a). They contended that s 271(6) was the exclusive means by which the capacity of the manufacturer to repair the goods might impact on the recovery of damages under s 272(1)(a). That submission should be rejected.

67 Section 271(6) is only engaged if the manufacturer gave an "express warranty". The provision appears to provide manufacturers with an incentive to comply with that warranty in that, if it is invoked by the relevant affected person

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104 See *Protec Pacific Pty Ltd v Steuler Services GmbH & Co KG* [2014] VSCA 338; *Dwyer v Volkswagen Group Australia Pty Ltd* (2023) 381 FLR 32 at 66 [155].

and complied with by the manufacturer within a reasonable time, the manufacturer can avoid exposure to an award of damages under s 272(1)(a) in favour of the affected person who had their goods repaired or replaced (but not under s 272(1)(b)). In a case where there is no such warranty, or the warranty cannot be invoked, then s 271(6) cannot be engaged. There is nothing in the text of the ACL or the extrinsic materials accompanying its introduction that would support attributing to s 271(6) the construction contended for by the Williams appellants and Ms Capic.

68 In support of its submission that s 272(1)(a) is only directed to recovery for loss and damage resulting from the "reduction in the value of the goods" for failing to comply with a statutory guarantee such as in s 54, Ford pointed to an apparent anomaly arising from the conferral of rights to invoke the remedies in Div 2 of Pt 5-4 of the ACL on "affected person[s] in relation to goods". As noted, the definition of an "affected person ... in relation to goods" has three limbs: (a) a consumer who acquires the goods; (b) a person who acquires the goods from the consumer (other than for the purposes of resupply); or (c) a person who derives title to the goods through or under the consumer.[105] Ford contended that, if damages under s 272(1)(a) are not compensatory in the sense that some loss or damage had to be demonstrated in addition to a reduction in the value of the goods, then successive owners of the same goods would each be entitled to recover an award of damages under s 272(1)(a) calculated by reference to the reduction in value arising from the breach of the relevant guarantee at the time of the original supply to the consumer.

69 The assumption behind Ford's submission is that the entitlement to invoke all of the remedies in Div 2 of Pt 5-4 is maintainable by all persons who satisfy the definition of "affected person ... in relation to goods" regardless of whether they have disposed of the goods. If that is so, then the spectre of a manufacturer facing multiple actions for the same reduction in value of the goods from successive owners of the same goods arises regardless of the proper construction of the phrase "damages for ... any reduction in the value of the goods, resulting from the failure to comply" in s 272(1)(a).

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105 ACL, s 2(1).

70 The three limbs of the definition of "affected person ... in relation to goods" are separated by "or".[106] If that definition is read into each of ss 271 and 272,[107] then the provisions are ambiguous as to whether the right to invoke those remedies is only conferred on the affected person who currently has title or ownership of the goods *or* is conferred on all persons who satisfy the definition of affected persons in relation to the same goods. If the position is the former, then all rights of recovery under s 271 for both types of damages referred to in s 272(1)(a) *and* (b) would run with the goods and be lost on disposal. That construction would remove the possibility of indeterminate liability, although, as will be explained, the removal of the right to recover damages for consequential loss under s 272(1)(b) in those circumstances would be inconsistent with the balance of the statutory scheme.

71 The better view is that, within the confines of the definition of an "affected person ... in relation to goods", the right to invoke the remedy for reduction in value of the goods in s 272(1)(a) against a manufacturer runs with title or ownership of the goods but that claims for consequential loss by affected persons in s 272(1)(b) are not tied to the affected person's title or ownership of the goods. There are various textual and contextual matters that support that construction.

72 In the context of s 272(1)(a), the reference to "the value of the goods", when read with the words of the chapeau concerning a recovery of damages by "an affected person in relation to goods", is at least capable of implying that the damages are for the reduction in the value of the *affected person's* goods. On that construction, if the relevant "affected person in relation to goods" does not currently have title or ownership of the goods, then they have no remedy under s 272(1)(a). By contrast, s 272(1)(b) allows claims for "any loss or damage *suffered by the affected person*" (emphasis added). The reference to "the affected person" in this context is to the affected person who invokes ss 271 and 272 and includes all categories of "affected person[s] in relation to goods", even those who no longer have title or ownership of them, provided the affected person has suffered some consequential loss because of the failure to comply with the relevant guarantee. The loss of the right to recover under s 272(1)(a) that accompanies the loss of title or ownership of the relevant goods is consistent with s 272(1)(a) vindicating the interest of the current owner in having goods that conformed with

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106 ACL, s 2(1).

107 *Kelly v The Queen* (2004) 218 CLR 216 at 253 [103]; *Qantas Airways Ltd v Transport Workers' Union of Australia* (2023) 97 ALJR 711 at 725 [80]; 412 ALR 134 at 152.

the relevant guarantee at the time of supply to the consumer. Where a person no longer has title or ownership of the goods but is "an affected person in relation to goods", that person may be able to recover any relevant loss on resale, but that would be pursuant to s 272(1)(b) and would depend on the circumstances of the resale.

73 This construction is supported by s 271(6). As noted, when "an affected person in relation to goods" invokes any express warranty in the circumstances referred to in s 271(6), they are precluded from commencing an action to recover damages of the kind referred to in s 272(1)(a), but not damages of the kind referred to in s 272(1)(b).[108] Section 271(6), in terms, does not preclude an affected person who had their goods repaired or replaced from recovering any consequential loss they suffered under s 272(1)(b). As a practical matter, the only person who could require a manufacturer to repair or remedy the failure is the person who has title or ownership of the particular goods at a particular time. If all rights under ss 271 and 272 cease with loss of title or ownership of the relevant goods, then an affected person who had their goods replaced under s 271(6) would lose their right to recover damages of the kind referred to in s 272(1)(a) *and* (b), as they would have ceased to own the goods. Those consequences could not have been intended.

74 There is a wider problem with the proposition that the capacity to recover damages under s 272(1)(b) ceases with the loss of title or ownership of the relevant goods. It would mean that, in the common example of an affected person whose goods were so defective that they were consumed, destroyed or sold for scrap, that person would lose their right to claim for any consequential loss they may have suffered. Alternatively, an affected person whose goods were defective would be required to retain the goods until the finalisation of the claim against the manufacturer, including any litigation, so as to avoid losing their right to claim any consequential loss. That would not provide a cost-effective and simple remedy.[109] A statutory regime that denies consumers of goods rights of recovery against manufacturers for consequential loss suffered because the goods the manufacturer produced were consumed, destroyed or sold or because they no longer have title or ownership of the goods would be of limited utility.

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108 See *2 Elizabeth Bay Road Pty Ltd v The Owners – Strata Plan No 73943* (2014) 88 NSWLR 488 at 508 [90]-[91].

109 Australia, House of Representatives, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, Explanatory Memorandum at 609-610 [25.56]-[25.57].

75 This construction is also supported by the overall scheme of Pt 5-4 of the ACL. As explained earlier in these reasons, s 271 is found in Div 2 of Pt 5-4, which is concerned with "[r]emedies relating to guarantees". Division 1 of Pt 5-4 is concerned with "[a]ction[s] against suppliers". Section 259(3) relevantly provides that a consumer may reject goods and, by action against a supplier, recover compensation "for any reduction in the value of the goods below the price paid or payable by the consumer for the goods". Then, the liability of the supplier for consequential loss under s 259(4) applies even if the consumer has rejected the goods so that "property in those goods revests in the supplier".[110]

76 Section 274(1) then provides for a right of indemnification of suppliers by manufacturers. The indemnity covers claims made by consumers for consequential loss against suppliers under s 259(4), but only where "the manufacturer is or would be liable under section 271 to pay damages to the consumer for the *same loss or damage*" (emphasis added).[111] If the entitlement to recover consequential loss under s 272(1)(b) were to be lost in circumstances where a consumer who acquired goods from a supplier ceases to have title or ownership of the goods (because, for example, they have been rejected, replaced, sold or destroyed), then the consumer may be able to recover consequential loss from the supplier under s 259(4), but the supplier would be precluded from obtaining indemnity for the consumer's claim from the manufacturer under s 274(1). In that event, the manufacturer would not be "liable under section 271 to pay damages to the consumer for the same loss or damage" (being that provided for in s 272(1)(b)).[112] Such a result would be irrational.

77 Finally, little assistance on this question of construction can be gained from considering the extrinsic materials. The wording "affected person ... in relation to goods" was drawn from earlier provisions in the *Trade Practices Act*. Former s 74D of the *Trade Practices Act* was inserted in 1978 and extended the right to seek redress for any loss or damage from the consumer to "the consumer or person who ... derives title to the goods [through or under the consumer]".[113] In the parliamentary debates concerning that amendment, the relevant Minister stated that its effect was that "a manufacturer's liability, where his goods are of

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110 ACL, s 263(6).

111 ACL, s 274(1)(b).

112 ACL, s 274(1)(b).

113 *Trade Practices Amendment Act 1978* (Cth), s 14.

unmerchantable quality, will be *extended* to the successors in title to a consumer" (emphasis added).[114] The Explanatory Memorandum was in similar terms.[115] This statement is ambiguous as to whether the extension of a manufacturer's liability was at the expense of or in addition to the rights of the original consumer. The same ambiguity attaches to the cognate provisions introduced in 1986, which conferred rights of redress on "the consumer" *or* "a person who acquires the goods from, or derives title to the goods through or under, the consumer".[116]

78 Nothing in the extrinsic materials accompanying the introduction of the ACL reveals that any consideration was given to the interaction between the new remedies conferred by Div 2 of Pt 5-4 and the definition of "affected person". To the contrary, the Explanatory Memorandum to the Bill wrongly described Div 2 of Pt 5-4 as providing that "consumer[s] may recover damages from manufacturers in respect of failures that relate to acceptable quality".[117] Not much can be gained from this reference to "consumers" rather than "affected persons", save to observe that there was no statement that consumers lose all rights against a manufacturer of faulty goods if the goods are replaced, sold or otherwise disposed of.

The Williams appeal

79 In light of the above, the first two of the Williams appellants' three grounds of appeal can be dealt with briefly. The Full Court did not err in failing to assess the reduction in the value of the goods by reference to the true value of the goods at the time of supply and in only using information acquired thereafter as hindsight to confirm what could be foreseen at the time of supply. As discussed above, the correct approach was to assess the reduction in value at the time of supply by reference to all the information that was known at the trial concerning the core defect, including its capacity to be repaired as well as when, how and at what cost a repair might take place. However, the Williams appellants' contention that the Full Court erred in construing s 272(1)(a) so as to permit departing from the time

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114 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 October 1978 at 1922.

115 Australia, House of Representatives, *Trade Practices Amendment Bill 1978*, Explanatory Memorandum on Amendments to the Bill, amendments (5)-(7).

116 *Trade Practices Revision Act 1986* (Cth), ss 40-43.

117 Australia, House of Representatives, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, Explanatory Memorandum at 205 [7.121].

of supply as the time of the assessment should be upheld. As explained, the error in so finding followed in part from the Full Court's erroneous approach to the concept of "damages" in s 272(1)(a). Otherwise, leaving aside the challenge to the Full Court's conclusion that a 10% reduction in value was warranted, the errors in the Full Court's approach, including its reliance on the "utility" of the relevant vehicles, have already been described.

80 The result of the Williams appellants' partial success on these issues does not yield a restoration of the primary judge's orders and findings as his Honour did not assess damages under s 272(1)(a) in accordance with the approach outlined above. Instead, the matter will need to be remitted to his Honour for reassessment in accordance with this judgment.

81 As noted, the Williams appellants also challenged the Full Court's conclusion that the primary judge erred in assessing the reduction in value of the relevant vehicles as 17.5%. Given that both the primary judge's assessment and the Full Court's review of that assessment were not undertaken in accordance with the above approach, it is not strictly necessary to address this challenge. However, to avoid scope for further argument about the status of the Full Court's findings concerning the primary judge's approach, it can be addressed briefly.

82 The Williams appellants identified four errors on the part of the Full Court in overturning this finding of the primary judge. The first error was said to be the Full Court's construction of s 272(1), which, as explained above, was an erroneous construction. The second error was said to be the Full Court's conclusion that the primary judge did not take into account, at the time of the supply of the relevant vehicles, the possibility that a repair for the core defect might have become available. The Full Court erred in attributing that failure to the primary judge.[118] The primary judge correctly described Mr Cuthbert as having had regard to the possibility that there may have existed purchasers who would have purchased Direct Claim Services' vehicle "in the hope that they could find someone to fix the [c]ore [d]efect".[119]

83 The remaining errors contended for by the Williams appellants concern the Full Court's consideration of the primary judge's treatment of the balance of Mr Cuthbert's evidence. The Full Court found that the primary judge erred in not treating Mr Cuthbert's evidence with "considerable circumspection" because

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118 *Toyota* (2023) 296 FCR 514 at 544-545 [123].

119 *Williams* [2022] FCA 344 at [348(3)].

Mr Cuthbert supposedly focussed on the "salvage value" of the relevant vehicles and because of his "associated (implicit) view that the vehicle was so defective it needed to be repaired before it had any real utility as a motor vehicle".[120]

84 In his report, Mr Cuthbert concluded that a reduction in the value of Direct Claim Services' vehicle by approximately 23.5% to 27% was appropriate. The primary judge characterised Mr Cuthbert's report as involving three steps, namely having regard to: various factors affecting the seriousness of the core defect;[121] the possibility that there may have existed purchasers who would have purchased the vehicle "in the hope that they could find someone to fix the [c]ore [d]efect";[122] and the "salvage value" of the vehicle, which would have been approximately 37% to 40% less than the new vehicle price "as a floor price (that is, a price discount that was the absolute maximum)".[123] This characterisation accurately reflected Mr Cuthbert's report. In cross-examination, it was suggested to Mr Cuthbert that he had assumed that the vehicle was so unfit that the "best [the owner] can do is ... send it off to a salvage auction house". Mr Cuthbert denied that was so.

85 The primary judge noted and accepted Mr Cuthbert's rejection of that suggestion.[124] The primary judge observed that Mr Cuthbert's evidence had "some force", but also accepted that "a number of the criticisms directed to its accuracy and reliability also ha[d] merit" before arriving at a range below that suggested by Mr Cuthbert, namely between 15% and 20%.[125]

86 Thus, the primary judge's assessment was in part based on an assessment of Mr Cuthbert's evidence, which his Honour heard as it was given. No proper basis for setting aside the primary judge's acceptance of Mr Cuthbert's denials of what was put to him was attempted in the Full Court.[126] Otherwise, the only basis provided by the Full Court for interfering with the primary judge's assessment was

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120 *Toyota* (2023) 296 FCR 514 at 560 [202]-[204].

121 *Williams* [2022] FCA 344 at [348(1)].

122 *Williams* [2022] FCA 344 at [348(3)].

123 *Williams* [2022] FCA 344 at [348(2)].

124 *Williams* [2022] FCA 344 at [353]-[354].

125 *Williams* [2022] FCA 344 at [393].

126 See *Lee v Lee* (2019) 266 CLR 129 at 148-149 [55].

its incorrect characterisation of the reliance Mr Cuthbert placed on the "salvage value" of the relevant vehicles. The primary judge correctly described the effect of Mr Cuthbert's evidence. Further, his Honour did not simply adopt Mr Cuthbert's evidence. Instead, his Honour only gave it some weight. No error was demonstrated in his Honour's approach.

87 This ground of the Williams appeal should also be upheld.

The Toyota appeal

88 Toyota's sole ground of appeal contended that no damages were recoverable under s 272(1)(a) of the ACL where there was "no ongoing reduction in value at the time of trial due to the availability of a repair free of charge" (ie, the 2020 Field Fix). Leaving aside the difficulty in relying on the finding that the value of the relevant vehicles was "restore[d]", this ground fails because an assessment of the reduction in value at the time of the trial does not address the period of time between the time of supply and when a repair is available as well as the likely effect of the defect on the use of the vehicles in the meantime. As noted, Toyota adopted a proposition to that effect as its alternative case and provided orders in an Amended Notice of Appeal reflecting that alternative. To the extent that alternative case has been accepted, it will be reflected in the remittal order made in the Williams appeal. However, Toyota's sole ground of appeal fails, and thus its appeal should be dismissed.

Relief and costs

89 The orders of the Full Court varying the primary judge's assessment of damages and answering common questions should be set aside. Those matters should be remitted to the primary judge to be determined in accordance with these reasons. Although neither party achieved complete success in the appeals, most of the arguments of the Williams appellants were accepted. The Williams appellants should receive half the costs of their appeal and Toyota should pay the costs of its unsuccessful appeal. The Full Court ordered that each party pay their own costs of the appeal because each party enjoyed "a substantial measure of success" on various issues.[127] That order should not be disturbed.

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127 *Toyota No 2* [2023] FCAFC 70 at [15].

90 The following orders should be made:

In matter S155/2023:

(1) Appeal dismissed.

(2) The appellant pay the respondents' costs of the appeal.

In matter S157/2023:

(1) Appeal allowed.

(2) Set aside order 3 of the orders of the Full Court of the Federal Court of Australia made on 27 March 2023.

(3) Set aside order 2 of the orders of the Full Court of the Federal Court of Australia made on 12 May 2023 but only in respect of the amended answers to questions 26 to 35 posed in Sch 2 to the orders of the Federal Court of Australia made on 16 May 2022.

(4) In lieu of so much of order 2 of the orders of the Full Court of the Federal Court of Australia made on 12 May 2023 that answers questions 26 to 35 posed in Sch 2 to the orders of the Federal Court of Australia made on 16 May 2022, also order that the primary judge's answers to those questions be set aside.

(5) The matter be remitted to the primary judge for:

(a) the reassessment of reduction in value damages under ss 271(1) and 272(1)(a) of the *Australian Consumer Law* and damages for excess GST under ss 271(1) and 272(1)(b) of the *Australian Consumer Law* in accordance with the reasons of the High Court of Australia; and

(b) the provision of answers to questions 26 to 35 posed in Sch 2 to the orders of the Federal Court of Australia made on 16 May 2022 in accordance with the reasons of the High Court of Australia.

(6) The respondent pay half of the appellants' costs of the appeal.

EDELMAN J.

Concurrence with the joint reasons

91 I agree generally with the joint reasons of Gageler CJ, Gordon, Steward, Gleeson and Beech-Jones JJ. These additional reasons address the justifications for, and provide examples that illustrate, the difference recognised by the joint reasons between the two types of remedy provided for by Parliament in s 272(1)(a) and s 272(1)(b) of the *Australian Consumer Law*.[128] A failure to appreciate the difference between these two measures, and to recognise two of the different relevant senses in which "damages" can be used, usually leads to the error of treating damages as concerned only with loss (the subject matter of only s 272(1)(b)). A related failure is the failure to recognise two of the different relevant senses in which "compensation" can be used (the central issue in *Capic v Ford Motor Company of Australia Pty Ltd*[129]). The central point of the reasoning below, and of the examples, is to illuminate this error and to provide, in part, "a much needed emancipation from the curious and cramping notion that compensation for loss is the only thing a victim may reasonably expect of a law of civil wrongs".[130] The examples include those raised in argument, which may have been based upon the many and varied circumstances of group members in this class action.

Two different types of remedy

The context of these appeals

92 The consumer guarantee that was breached in this case, from which the remedial issues arise, is s 54 of the *Australian Consumer Law*, which is the guarantee that goods are of acceptable quality. The nature of the damages remedies against a manufacturer for breach of s 54 can be understood in the broader context in which those remedies appear in the *Australian Consumer Law*. The remedies against a manufacturer for breach of s 54 are contained in Pt 5-4, which is concerned with "Remedies relating to guarantees". Part 5-4 has three Divisions. Division 1 is concerned with "Action against suppliers". Division 2 is concerned with "Action for damages against manufacturers of goods". Division 3 is entitled "Miscellaneous" but, importantly, includes a provision for "Indemnification of suppliers by manufacturers".

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128 *Competition and Consumer Act 2010* (Cth), Sch 2.

129 [2024] HCA 39 at [30]-[32].

130 Birks, "Civil Wrongs: A New World", in *Butterworth Lectures 1990-91* (1992) 55 at 56-57.

93 The statutory consumer guarantees, and the remedies for breach of them in Pt 5-4 of the *Australian Consumer Law*, replaced the scheme of so-called "implied" conditions and warranties that were imposed as terms of consumer contracts by the *Trade Practices Act 1974* (Cth) and State and Territory fair trading legislation. But the scheme of rights arising from the statutory consumer guarantees in the *Australian Consumer Law* was intended to be "broadly similar to those that were implied under pre-existing laws".[131] By setting out the remedies, rather than leaving the remedies to the law of contract (with any extensions of privity of contract such as to provide for liability of manufacturers), the *Australian Consumer Law* aimed to "reduce costs for businesses and consumers when they seek to assert, or defend, their rights".[132]

94 Although the remedies in Pt 5-4 of the *Australian Consumer Law* do not precisely replicate the common law model of damages for breach of contract, the basic architecture concerning breach and remedies is the same, as was intended. For instance, as the joint reasons explain, the notion of a defect in s 54(2) of the *Australian Consumer Law* appears to draw upon the common law approach to hidden defects in the context of breach of contract by supply of goods that lack merchantable quality,[133] albeit without the use of the term "merchantable quality", which was said to be "archaic".[134]

95 Like the remedies for breach of contract upon which Pt 5-4 is based, the consumer has broadly two different types of remedy under Pt 5-4 of the *Australian Consumer Law*.[135] The first is a performance-based remedy to rectify the failure to comply with a guarantee,[136] whilst the second is a loss-based remedy to rectify the consequences of the failure to comply with the guarantee.[137] The difference

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131 Australia, House of Representatives, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, Explanatory Memorandum at 18.

132 Australia, House of Representatives, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, Explanatory Memorandum at 18.

133 *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387 at 417-418, not disturbed in this respect on appeal: *Grant v Australian Knitting Mills Ltd* [1936] AC 85 at 99-100.

134 Australia, House of Representatives, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, Explanatory Memorandum at 18.

135 See also *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326 at 347-349 [62]-[67].

136 *Australian Consumer Law*, ss 259(3), 267(3) and 272(1)(a).

137 *Australian Consumer Law*, ss 259(4), 267(4) and 272(1)(b).

between the two is a difference between attempting to rectify contravening conduct and attempting to rectify the consequences of contravening conduct.[138]

Damages at common law and in s 272(1) of the Australian Consumer Law

96 The term "damages" can mislead people into thinking that it is only a remedy for "damage" or "loss". But "damages", in its legal usage, has never been so confined. Relevantly to these appeals, "damages" can be used to describe a money award for a wrong which serves as a performance-based remedy separate from whether any loss has been suffered. It can also be used to describe other money awards for wrongs which are not concerned with loss, such as "nominal damages", "restitutionary damages", or "exemplary damages".

97 So too, the term "compensation" can be misleading. Although that term is most commonly associated with rectifying or providing an equivalent to loss,[139] "compensation" has also been used to describe a money award for wrongdoing which serves as a performance-based remedy.[140] The genus-like nature of the concepts of damages and compensation should not distract from the existence of the two different species of each that are relevant to these appeals. Importantly, performance-based damages, unlike loss-based damages, are not concerned with any loss suffered by a plaintiff.

98 In the area of defective provision of building work, it is well established at common law that the performance-based remedy of damages can be "the reasonable cost of rectifying the departure or defect" even where the work resulted in a building that is "no less valuable" than that which had been contracted for.[141] As Doyle J observed, the remedy "reflects the importance that the law of contract

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138 *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at 239-240 [140]-[141], citing *Admiralty Commissioners v SS Susquehanna* [1926] AC 655 at 661, *O'Brien v McKean* (1968) 118 CLR 540 at 557, and *Johnson v Perez* (1988) 166 CLR 351 at 386.

139 *Rabot v Hassam* [2024] 2 WLR 949 at 954 [10]; [2024] 3 All ER 1 at 4. See also Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs*, 4th ed (2019) at 35.

140 *Agricultural Land Management Ltd v Jackson [No 2]* (2014) 48 WAR 1 at 64-67 [334]-[349]; *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at 732 [168]; *Interactive Technology Corporation Ltd v Ferster* [2018] EWCA Civ 1594 at [17]-[21], quoting Hayton, Matthews and Mitchell, *Underhill and Hayton—Law Relating to Trusts and Trustees*, 19th ed (2016) at 1149 [87.7], 1151 [87.11] and *Libertarian Investments Ltd v Hall* (2013) 16 HKCFAR 681 at 732 [168], 733 [170].

141 *Bellgrove v Eldridge* (1954) 90 CLR 613 at 617.

attaches to the plaintiff's performance interest".[142] So too, in the area of breach of a contract to supply goods, where replacement has not been provided by the party in breach,[143] an alternative method of rectifying the breach at common law is through the provision of a sum of money as damages, assessed at the time of breach, representing the lost economic value of performance due to the breach. As the Williams appellants correctly submitted, the orthodox approach to the common law award of damages as a performance-based remedy was summarised by Keane J in *Clark v Macourt*:[144]

> "The value to be paid ... is assessed at the date of breach of contract ... to give the purchaser the economic value of the performance of the contract at the time that performance was promised. In this way, the measure of damages captures for the purchaser the benefit of the bargain and so compensates the purchaser for the loss of that benefit".

99 Consistently with this orthodox approach, the *Australian Consumer Law* recognises performance-based remedies, including replacement of goods and performance-based damages. Where the performance-based remedy takes the form of performance-based damages, the award is one of compensation for the monetary difference between the value of the performance that should have been received and the performance that was received. These performance-based damages can therefore equally be described, in the language of the primary judge, as "reduction in value damages".[145]

100 The remedy of performance-based damages or reduction in value damages is assessed by reference to the construct of a "reasonable consumer" who is "fully acquainted with the state and condition of the goods (including any hidden defects of the goods)".[146] This is similar to an approach that has elsewhere been described as concerned with "true"[147] or "intrinsic"[148] value, albeit without clearly

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142 *Stone v Chappel* (2017) 128 SASR 165 at 206 [200].

143 Compare *Moon v Raphael* (1835) 2 Bing NC 310 [132 ER 122].

144 (2013) 253 CLR 1 at 31-32 [109].

145 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [267].

146 *Australian Consumer Law*, s 54(2).

147 *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281 at 291; *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at 661-663 [45]-[50].

148 *Potts v Miller* (1940) 64 CLR 282 at 300.

distinguishing between an assessment of damages that are a performance-based remedy and those that are a loss-based remedy.

101 At common law, where replacement has not been provided by the party in breach, damages amounting to the economic value of the performance of the contract, as a performance-based remedy, are usually assessed at the time of breach,[149] even if later independent events mean that no financial loss is suffered.[150] The time of breach is usually the time at which the price was paid and title passed.[151]

102 The same broad approach is followed by the *Australian Consumer Law*. Under the relevant provisions of the *Australian Consumer Law*, the time for assessment of performance-based damages is the time of supply of the goods for a price that is paid or payable.[152] At the time of supply of defective goods, the state of science might not have permitted anyone to identify the defect. But the full acquaintance of the reasonable consumer is based upon any and all conditions that are "inherent in the thing itself",[153] and not limited to what is known or even knowable at the time of supply. At the time of supply, the state of science might have permitted the defect to be identified but might not have permitted anyone to identify the manner in which the defect could be repaired or the time that it would take to make a repair. Nevertheless, the assessment of performance-based damages is based on the best scientific knowledge at the time of trial, as applied at the date of supply.

103 It follows that where a latent defect exists at the date of supply, and the defect would not have had a known repair if the defect had been patent, the length of time required to develop a repair is attributable to the nature and significance of the defect and is a necessary consideration in the assessment of performance-based damages. But where a later delay in repair arises only from factors not inherent in the defect itself, such as supply chain issues or labour shortages, that delay will not be relevant to the assessment of performance-based damages.

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149 *Johnson v Perez* (1988) 166 CLR 351 at 357, 386.

150 See *Williams Brothers v Ed T Agius Ltd* [1914] AC 510 at 520; *Jamal v Moolla Dawood, Sons & Co* [1916] 1 AC 175 at 179; *Bainton v Hallam Ltd* (1920) 60 SCR 325 at 340.

151 *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 537-538.

152 *Australian Consumer Law*, ss 259(3)(b), 272(1)(a)(i); see also, in relation to supply of services, s 267(3)(b).

153 *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at 659 [40], citing *Potts v Miller* (1940) 64 CLR 282 at 298.

104 By contrast with performance-based remedies, loss-based remedies to rectify the consequences of the breach ("consequential loss"[154]) are necessarily assessed by reference to facts that are proved to exist at any time from the failure to comply with the guarantee until the time of judgment. It has been held in this Court that the damages award in such cases follows the "universal" rule "that a plaintiff cannot recover more than he or she has lost".[155] A loss involves any "adverse effect experienced by the plaintiff either on their mind, on the way they conduct their business or live their life, or on their financial position".[156] For the award of a loss-based damages remedy under the relevant *Australian Consumer Law* provisions, the facts proved must establish that any loss or damage suffered is "because of the failure to comply with the guarantee" and that it "was reasonably foreseeable" that such loss or damage would be suffered "as a result of such a failure".[157] The relevant provisions in the *Australian Consumer Law* for this loss-based remedy thus contain at least two important limits: a causal limit (the failure to comply with the guarantee must cause the loss) and a remoteness limit (the loss or damage must be reasonably foreseeable).

105 There is an obvious potential for overlap between performance-based damages and loss-based damages. For instance, where defective goods are supplied in breach of s 54 of the *Australian Consumer Law*, the difference in value of the goods reflected in an award of performance-based damages will take into account matters such as the cost and inconvenience of repair expected at the time of supply by a reasonable consumer with full knowledge of the inherent features of the defect. But the measure of performance-based damages is not concerned with the actual consequences experienced by the particular consumer after supply, other than as evidence of what might reasonably have been expected at the time of supply by a reasonable consumer with full knowledge of the defect. If cost and inconvenience are experienced by the actual consumer then that is loss that is suffered—albeit loss that is not recoverable unless it exceeds the amount of the award of performance-based damages, since an award of performance-based damages would have the effect of rectifying the actual loss to that extent.

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154 Australia, House of Representatives, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, Explanatory Memorandum at 206 [7.123].

155 *Haines v Bendall* (1991) 172 CLR 60 at 63. See also *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 82.

156 *Lewis v Australian Capital Territory* (2020) 271 CLR 192 at 243 [146].

157 *Australian Consumer Law*, ss 259(4), 272(1)(b).

Suppliers

106 Where the performance-based remedies for breach of a consumer guarantee are available under the *Australian Consumer Law* against a supplier of goods, they apply to a consumer[158] and to a person to whom a consumer has made a gift of the goods.[159] The performance-based remedies available for a breach of s 54 by a supplier include: (i) in various circumstances, the consumer (or the donee) rejecting the goods;[160] or (ii) payment by the supplier of "compensation for any reduction in the value of the goods below the price paid or payable by the consumer [or the donee] for the goods".[161]

107 The assumption underlying each performance-based remedy is that the consumer or donee retains title to the goods. That retention of title provides a connection with the supplier in the absence of any contract. In relation to the remedy of rejection (with an entitlement to a refund or replacement[162]), the consumer or donee is not entitled to reject the goods and obtain a replacement if the consumer or donee loses, destroys or disposes of the goods.[163] The same assumption applies to the compensation remedy for the reduction in value of the goods below the price paid. That performance-based remedy of damages for reduction in value is an alternative[164] to remedies such as rejection and replacement of the goods[165] and naturally includes the same constraints.

108 A further reason that underlies the requirement that a consumer retain title to the goods in order to obtain a performance-based remedy is that s 259(6) provides that a consumer (and, by s 266, a donee) is entitled to accumulate recovery of both (i) the performance-based remedy of reduction in value compensation; and (ii) compensation for loss. In many circumstances, the consequential loss incurred by a consumer or donee will be independent of the reduction in value of the goods. But not always. If the performance-based remedy were not confined to circumstances in which the consumer or donee retained title

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158 For a supply in trade or commerce: *Australian Consumer Law*, s 259(1).

159 *Australian Consumer Law*, s 266.

160 *Australian Consumer Law*, ss 259(2)(b)(ii), 259(3)(a).

161 *Australian Consumer Law*, s 259(3)(b).

162 *Australian Consumer Law*, s 263(4).

163 *Australian Consumer Law*, s 262(1)(b).

164 *Australian Consumer Law*, s 259(3)(b), an alternative to s 259(3)(a).

165 *Australian Consumer Law*, s 259(3)(a), read with s 263(4)(b).

to the goods, then double recovery might be possible by a consumer or donee recovering compensation for the reduction in value of the goods below the price paid on supply, as well as consequential loss on a resale. Hence, s 259(3)(b) is concerned with "any reduction in the value of the [*consumer's or donee's*] goods".

109 In contrast with performance-based remedies, the loss-based remedy permits recovery of damages for any reasonably foreseeable "loss or damage suffered" by the consumer or donee "because of the failure to comply with the guarantee".[166] Unlike the performance-based remedies, there is no basis for any implication that would confine recovery to circumstances where the consumer or donee retains title to the goods. Indeed, apart from instances of physical inconvenience or loss of amenity,[167] one of the other most likely scenarios where it would be reasonably foreseeable that loss or damage would be suffered by the consumer or donee is where the consumer or donee sells or disposes of the defective goods at a loss due to the defect.

Manufacturers

110 The remedies against manufacturers under Div 2 of Pt 5-4 of the *Australian Consumer Law*, for breach of the guarantee in s 54, follow the same broad pattern as the remedies against suppliers in Div 1. One apparent difference, however, concerns the person who can claim the remedy. As explained above, under Div 1 an action can be brought against a supplier of goods by a consumer or by a donee of a consumer. In broad terms, a supply of goods to a consumer is, with some exceptions, the supply to a person who pays less than a particular sum to acquire the goods, or who acquires goods of a kind ordinarily acquired for personal, domestic or household use or consumption.[168]

111 By contrast, s 271(1) permits an action to be brought against a manufacturer by any "affected person". An affected person, in relation to goods, includes a consumer who acquires the goods but, rather than extending also to a donee who receives a gift from a consumer, it extends to a person who *acquires* the goods from a consumer. An affected person is defined as:[169] (i) "a consumer who acquires the goods"; (ii) "a person who acquires the goods from the consumer (other than for the purpose of re-supply)" (described in the extrinsic materials as a "successor[]

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166 *Australian Consumer Law*, s 259(4).

167 See, for instance, *Arsalan v Rixon* (2021) 274 CLR 606 at 621-623 [22]-[27].

168 *Australian Consumer Law*, s 2(1) definition of "consumer", read with s 3, especially ss 3(1), 3(2) and 3(12).

169 *Australian Consumer Law*, s 2(1) definition of "affected person".

in title to a consumer"[170]); or (iii) "a person who derives title to the goods through or under the consumer" (which extends to a person such as a liquidator whose rights in relation to goods are derived through or under a company's title[171]). A proposal recommended by the 1984 Green Paper on reforms to the *Trade Practices Act* (the statutory predecessor to the *Australian Consumer Law*), that "acquire" should be expanded "to include acquisition by way of gift", was never adopted.[172]

112 The performance-based remedies against manufacturers include repair and replacement of the goods where an express warranty has been given[173] and an alternative[174] claim for damages for any reduction in the value of the goods (although calculated by reference to a slightly different formula to ensure that the manufacturer is not prejudiced by any sale above the average retail price of the goods[175]). For the same reasons as relate to the provisions in relation to the performance-based remedy of damages against a supplier, the assumption underlying the performance-based remedy of damages against a manufacturer is that the claim for a reduction in value can only be brought when the affected person has title to the goods. The text of s 272(1)(a) is concerned with "any reduction in the value of the [*affected person's*] goods".

113 As to loss-based damages claims against a manufacturer, like such claims against a supplier, s 272(1)(b) permits recovery of "reasonably foreseeable ... loss or damage" suffered by the affected person "because of the failure to comply with the guarantee". Again, like the loss-based remedies against suppliers, a claim under s 272(1)(b) could not have been intended to be premised upon an affected person (such as a consumer) retaining title to the goods. For instance, upon sale or destruction of the goods, an affected person does not lose their right to recover

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170 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 October 1978 at 1922; see also Australia, House of Representatives, *Trade Practices Amendment Bill 1978*, Explanatory Memorandum on Amendments to the Bill at 2, amendments (5), (6) and (7).

171 *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 353; *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514 at 552-554 [91]-[94].

172 Evans, Cohen and Willis, *The Trade Practices Act: Proposals for Change* (1984) at 23 [109]; see also at 59 (cl 34(1) definition of "acquire").

173 *Australian Consumer Law*, s 271(6).

174 See *Australian Consumer Law*, s 271(6).

175 *Australian Consumer Law*, s 272(1)(a). See Australia, House of Representatives, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, Explanatory Memorandum at 205-206 [7.122].

reasonably foreseeable consequential losses that have been suffered as a consequence of the manufacturer's breach.

114 Like the condition of holding title to goods that applies to the award of performance-based remedies against *suppliers* of goods, the need for an affected person to have title to the goods to bring a performance-based claim against a *manufacturer* under s 272(1)(a) ensures that the affected person cannot obtain double recovery by an award of performance-based damages for the reduction in value of the goods under s 272(1)(a) combined with recovery of consequential loss on resale under s 272(1)(b). But there remains potential for overlap between performance-based damages under s 272(1)(a) and loss-based damages under s 272(1)(b). For instance, a defect in goods might cause their value to fall because of a loss of amenity which would be expected by a reasonable consumer with full knowledge of all aspects and effects of the defect at the time of supply. When that loss of amenity actually occurs for an affected person with title to the goods, the affected person cannot recover damages for the loss of amenity as consequential loss because the recovery of performance-based damages will already have had the incidental effect of compensating the affected person for that expected loss of amenity. Section 272(3) excludes from s 272(1)(b) any loss or damage arising through a reduction in the value of the goods in order "[t]o avoid doubt" and ensure that the effect of recovering reduction in value damages cannot be duplicated in the recovery of consequential loss.[176]

115 The potential for parallel liability of suppliers and manufacturers for breach of the guarantee in s 54 means that issues of contribution and indemnity can arise between suppliers and manufacturers at least in relation to their overlapping liability to consumers, rather than the particular liability of suppliers to a donee from a consumer or the particular liability of manufacturers to a person who acquires or derives title from a consumer. The *Australian Consumer Law* takes the approach of generally excluding liability of a manufacturer for a breach of the s 54 guarantee of acceptable quality that is not caused, or contributed to, by the manufacturer or an employee or agent of the manufacturer.[177] For instance, where the breach of the s 54 guarantee occurs "only" because of an act of a supplier then the manufacturer is not liable for an action for damages.[178]

116 On the other hand, where the breach is caused, or contributed to, by an act of the manufacturer or its employees or agents, the *Australian Consumer Law* recognises an unfairness in what is described in the Explanatory Memorandum to

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176 See Australia, House of Representatives, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, Explanatory Memorandum at 206 [7.124].

177 *Australian Consumer Law*, s 271(2).

178 *Australian Consumer Law*, s 271(2)(a).

the legislation that introduced the indemnity as the "primary responsibility" that often lies upon a supplier to provide remedies to a consumer "in circumstances whereby fault more properly lies with a manufacturer or importer".[179] Hence, as the joint reasons observe,[180] s 274(1) requires a manufacturer[181] of goods to indemnify a supplier for loss-based damages where the manufacturer and supplier are both liable to the consumer for the same consequential loss. Further, where such concurrent liability does, or could, arise, ss 274(2)(a) and 274(2)(b)(i) require a manufacturer to indemnify a supplier for costs which arise because the supplier is liable for a failure to comply with s 54. Consistently with the purpose of the indemnity as described in the Explanatory Memorandum, those costs can include performance-based damages.

Examples of application of this approach

117 During these appeals and the related *Capic* appeal, a number of examples were given by counsel to illustrate the alleged advantages of their interpretation of the provisions of Pt 5-4, Div 2, concerning damages against manufacturers. Six examples can be given to illustrate the application of the approach taken in the joint reasons, upon which these reasons have further elaborated. Each of these examples also illustrates differences in result from that proposed by Toyota in its appeal. The two largest differences are as follows.

118 First, Toyota's interpretation of the provisions for both performance-based damages[182] and loss-based damages[183] against manufacturers for a breach of s 54 was based upon the proposition that in "an action for damages, it is a universal rule that an affected person may recover only that which is lost". As explained above, that submission is generally correct so far as loss-based remedies are concerned. But it is not correct in relation to performance-based remedies. Performance-based remedies operate in a functionally different way from remedies for consequential loss. And the availability of performance-based remedies is confined by the requirement that the affected person have title to the goods which were supplied in breach of the s 54 guarantee.

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179 Australia, House of Representatives, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, Explanatory Memorandum at 207 [7.130].

180 At [76].

181 Or importer in circumstances where the importer is deemed to be a manufacturer: *Australian Consumer Law*, s 7(1)(e).

182 *Australian Consumer Law*, s 272(1)(a).

183 *Australian Consumer Law*, s 272(1)(b).

119 Secondly, Toyota submitted that the measure of performance-based damages against a manufacturer for a breach of s 54 could be eliminated by "taking into account the subsequent fact that the reduction in value attributable to the defect at the time of supply has been entirely restored" because "the availability of the 2020 field fix restored the value in the vehicle" so that performance-based damages should be "nil". That submission should not be accepted. A reasonable consumer with full knowledge of all aspects of the defect (including its future repairability) in, say, 2016 would have paid considerably less for a car for which a (free) repair would become available only in 2020 than the consumer would have paid for a car which did not possess the defect. That conclusion does, however, have some curious consequences in marginal cases. But the curious consequences are explicable and cannot change the conclusion that performance-based damages for an affected person are based upon the economic value of the performance not received by the affected person rather than what the affected person has lost.

Example 1

Consumer purchases a car from Supplier for $30,000, which is the average retail price. The car is a model that has a major failure to comply with the guarantee of acceptable quality due to omissions by Manufacturer. Although no adverse consequences are experienced by Consumer in relation to that particular car, the result of the defect is that at the time of purchase the value of the new car to a reasonable consumer would have been $20,000. One year after purchase, Consumer discovers the defect and asks Manufacturer to repair the car. Manufacturer refuses to repair the car due to difficulties flowing from global supply chain shortages. Consumer brings an action against Manufacturer for damages under s 272(1)(a). The same supply chain shortages mean that by the time of trial the market value of the defective car has increased to far above the average retail price and the car could be sold almost immediately for a large profit.

120 The point of Example 1 is to illustrate what is plain from the structure and terms of s 272(1), that the liability of Manufacturer under s 272(1)(a) is not based upon loss to Consumer arising from the purchase of the defective car. In Example 1, Consumer is in a *better* financial position than they were before they purchased the car. But Consumer is entitled to performance-based damages of $10,000.

Example 2

Consumer 1 purchases a car from Supplier 1 which has a major failure to comply with the guarantee of acceptable quality arising solely from a fault caused by Manufacturer. Consumer 1 pays the average retail price for the car. A patent consequence of the (latent) defect is later discovered by which the car emits excessive smoke from the exhaust pipe. After discovering this patent consequence, Consumer 1 sells the car to a second-hand dealer,

> Supplier 2, for a reduced price due to this consequence. Supplier 2 sells the car to Consumer 2 for a price that reflects the extent of smoke emitted from the exhaust pipe. The emission of smoke from the exhaust pipe worsens. Consumer 2 sells the car to another second-hand dealer, Supplier 3, for a further reduced price reflecting the worsening consequences of the defect. Supplier 3 sells the car to Consumer 3 for a reduced price reflecting the further emission of smoke. The consequences of the defect worsen further. Consumer 3 sells the car to another second-hand dealer, Supplier 4, for a substantially reduced sale price. The emission of smoke from the exhaust pipe continues to worsen. Later, the latent defect is discovered and it is realised that the defect renders the car liable to explode.

121 The point of Example 2 is to illustrate the functional importance of an interpretation of s 272(1)(a) that confines recovery of performance-based damages to affected persons with title to the relevant goods. Each of Consumer 1, 2 and 3 has suffered loss due to worsening patent consequences of the defect. As explained by the next example, each Consumer can recover for that loss under s 272(1)(b); each suffers a separate loss. But Manufacturer has only failed once in performance. The chain of title could continue, and the number of affected persons could increase, indefinitely in respect of a single car. But this does not increase liability indefinitely. For a single breach by Manufacturer, the liability of Manufacturer for performance-based damages under s 272(1)(a) does not extend to multiple awards of damages for the single "reduction in the value of the [car]" below the average retail price paid by Consumer 1.

Example 3

> Consumer purchases a car from Supplier which has a major failure to comply with the guarantee of acceptable quality arising solely from a fault caused by Manufacturer. The fault causes the car to explode upon impact with another car, destroying Consumer's valuable belongings in the car, a reasonably foreseeable consequence of the major failure. The insurer of the car sells the car for scrap.

122 In Example 3, Consumer has no claim to a performance-based remedy, as Consumer no longer has title to the car. But Consumer, or the insurer of the car by a subrogated claim, has a claim against Manufacturer for the consequential loss arising from the sale of the car for scrap, and Consumer has a further claim against Manufacturer for the consequential loss arising from the destruction of Consumer's belongings. The important point in Example 3 is that Consumer's claim for consequential loss does not require Consumer to retain title to the car. The sale of the car by the insurer for scrap does not destroy Consumer's claims. Likewise, an affected person with a car that was damaged or destroyed due to a defect involving a breach of the guarantee of acceptable quality would not be required to take the bizarre expedient of warehousing the destroyed car for the period of litigation and perhaps any appeals. The same reasoning applies to each of Consumer 1, 2 and 3

in Example 2. Each has suffered loss due to worsening patent consequences of the defect. Manufacturer is directly liable to those Consumers for the loss caused by those consequences to each Consumer.

Example 4

In 2015, Consumer purchases a car from Supplier at the average retail price. The car has a major failure to comply with the guarantee of acceptable quality due to omissions by Manufacturer. The braking system of the car is liable to fail. At the time of purchase, the defect was not known. When it was discovered there was no effective repair or "fix" for the defect, so it could not be repaired within a reasonable time. Following technological innovations engineered by Manufacturer and after several failed attempts at a "fix", in May 2020 Manufacturer developed a repair for the defect. The size and significance of the defect for which the repair will need to be applied mean that it is likely that Consumer will have to wait for six months, until November 2020, for the repair to be freely implemented by Manufacturer. At the time of supply of the car, a reasonable consumer who had knowledge of all the matters above would have paid $15,000 less than the average retail price for the car. Consumer has to wait a further three months due to a backlog of similar and other repairs to be undertaken by Manufacturer before the repair to Consumer's car. The inconvenience of an additional three months' delay is valued at $500. Consumer retains title to the car.

123 In Example 4, Consumer is entitled to performance-based damages from Supplier or Manufacturer measured at the time of supply of the goods by Supplier. The "value of the goods" at the time of supply, from which the $15,000 reduction in value below the average retail price at the time of supply was determined, is based upon the price that a reasonable consumer would pay for the car with knowledge of the defect, knowledge that the defect cannot be repaired until May 2020, and knowledge that the nature and significance of the defect is such that repair will not be likely to be implemented until November 2020. Further loss-based damages of $500 could be recovered for the additional three months' delay.

124 Consumer could seek performance-based damages and loss-based damages from either Supplier or Manufacturer but recovery from either Supplier or Manufacturer would, respectively, restore the economic value of performance or the loss. Since there would be concurrent liability of Supplier and Manufacturer for the consequential loss caused by the inconvenience to Consumer, Supplier has a statutory indemnity against Manufacturer for any performance-based damages and loss-based damages paid to Consumer.

Example 5

In December 2021, Consumer purchases a new car from Supplier for $50,000 (which is the average retail price). The car has a braking defect, which is a major failure to comply with the guarantee of acceptable quality due to omissions by Manufacturer. In January 2022, Consumer sells the car to Acquirer 1 at the second-hand market value of $40,000. In February 2022, Acquirer 1 sells the car to a second-hand dealer for $35,000. In March 2022, the second-hand dealer sells the car to Acquirer 2 at the second-hand market value of $40,000. The major defect in the brakes is discovered in May 2022. A repair for the major defect is developed by Manufacturer in May 2023, only after scientific and technological advances made in 2023 which make the repair possible. If the defect (including the time of its future repairability) had been known in December 2021, the value of the new car to a reasonable consumer would have been $10,000. The value of the second-hand car in March 2022, with knowledge of the defect (including the time of its future repairability), is $5,000.

125 In Example 5, the only person who would have a claim for a performance-based remedy is Acquirer 2 (an "affected person" in relation to Manufacturer, as a consumer who acquired the car in trade or commerce), because they retain title to the car at the time of judgment. The point of Example 5 is to illustrate a curiosity in the operation of the performance-based remedy of damages in s 272(1)(a), to which Mr Finch SC pointed in the related *Capic* appeal. The curiosity is that the measure of the performance-based remedy for Acquirer 2 is calculated by reference to the purchase price paid by Consumer (being damages of $40,000) rather than the purchase price paid by Acquirer 2 (which might suggest damages of $35,000).

126 This consequence is less curious or anomalous than might first appear in light of a central purpose for the introduction of provisions including the performance-based damages remedy in s 272(1)(a). That purpose was to reduce the costs of asserting or defending rights by providing certainty about the legal position of businesses and consumers.[184] Assessment of the quantum of damages available to persons such as Acquirer 2 by reference to the defective performance concerning Consumer creates greater certainty because Manufacturer will know that the quantum of a performance-based remedy against it will not vary according to the identity of the party who brings the claim. After all, from the perspective of Manufacturer, the breach of the guarantee of acceptable quality produces the same effect on the car, regardless of who brings the claim. Further, once a defect becomes known, the likelihood of a performance-based remedy being sought for breach of s 54 by an affected person beyond the first consumer is reduced by

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184 Australia, House of Representatives, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, Explanatory Memorandum at 18.

s 54(4)(b), which provides that there is no breach of s 54 where the only reason or reasons that the goods are not of acceptable quality "were specifically drawn to the consumer's attention before the consumer agreed to the supply".

Example 6

In January 2015, Consumer purchases a new car from Supplier at the average retail price of $30,000. The car had a major failure to comply with the guarantee of acceptable quality due to omissions by both Manufacturer and Supplier. Although unknown and unknowable at the time of supply, it is later discovered that a hidden defect caused the car to overconsume and leak large quantities of fuel. In the meantime, Consumer suffers the effects of increased cost, frustration and inconvenience which are common to all users of a car with this defect, as well as reasonably foreseeable consequential damage to other property of Consumer, which is damaged by a fuel leak. A pecuniary sum of damages for the increased cost, frustration and inconvenience is $12,000. The pecuniary sum of damages for the consequential property damage is $25,000. A repair for the defect is developed, and made freely available, in January 2017. A reasonable consumer in January 2015 would only have paid $20,000 for the car if they had knowledge of the defect in the car causing the overconsumption and leakage of fuel.

127 Since the failure to comply with the guarantee under s 54 is not "only" because of an act, default or omission of Supplier, Consumer has a performance-based remedy of damages against either Supplier or Manufacturer for the reduction in the value of the car, below the average retail price that was paid, calculated by reference to the price that a reasonable consumer, with knowledge that the car being purchased has a defect causing the overconsumption and leakage of fuel which will not be able to be repaired for two years, would pay. The award of performance-based damages of $10,000, reflecting the difference in value between the price paid by Consumer and the price a reasonable consumer would have paid, has the incidental effect of compensating Consumer for part of their losses from the effects of increased cost, frustration and inconvenience which are common to all users of a car with the defect. Consumer can recover additional compensation of $2,000 for the additional expected effects arising from the defect which are not replicated in the performance-based damages award, as well as $25,000 for the consequential property damage.[185]

Conclusion

128 The appeal in matter S155 of 2023 should be dismissed and the appeal in matter S157 of 2023 should be allowed and orders made as set out in the joint

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185 See *Australian Consumer Law*, s 272(3).

reasons. Although the Williams parties sought orders that would have the effect of upholding entirely the reasons of the primary judge, the different orders made by this Court, and the departure from aspects of the primary judge's otherwise compelling reasons (for instance, by recognising that the time necessary to identify, develop and implement a repair for a defect in goods is inherent in the defect itself[186]), may ultimately be to the advantage of the Williams parties.

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186 cf *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [328].

129 JAGOT J. These appeals[187] concern the statutory entitlement of an "affected person"[188] in relation to goods to recover damages from a manufacturer in relation to vehicles which failed to comply with the statutory guarantee of acceptable quality in s 54(1) of the *Australian Consumer Law* ("the ACL").

130 The principal difference between my conclusions and those of Gageler CJ, Gordon, Steward, Gleeson and Beech-Jones JJ ("the joint reasons") concerns the proper construction of the key statutory provision, s 272(1)(a) of the ACL. Section 272(1), as relevant, provides that "[i]n an action for damages under this Division, an affected person in relation to goods is entitled to recover damages for: (a) any reduction in the value of the goods, resulting from the failure to comply with the guarantee to which the action relates, below whichever of the following prices is lower", being "(i) the price paid or payable by the consumer for the goods" or "(ii) the average retail price of the goods at the time of supply".

131 The joint reasons construe s 272(1)(a) to mean "(a) any reduction in the value of the affected person's goods, resulting from the failure to comply with the guarantee to which the action relates ...". That is, the affected person must continue to own the goods to the time of judgment of the action to have an entitlement to recover damages under that provision.[189] Having regard to the text, context, and purpose of the provision, I consider that s 272(1)(a) is to be construed on the basis that: (a) the entitlement being one to "recover" damages only, the object of the provision is compensatory; (b) to ensure the provision operates to achieve its compensatory purpose, it is necessary to recognise that the provision distinguishes between, on the one hand, the entitlement to "recover" damages in the opening part of the provision and, on the other hand, the amounts to which that entitlement may relate in paras (a) and (b) thereafter; (c) the word "recover" confines the *existence and extent* of the entitlement to the recovery of damages to damage (that is, loss) that continues to exist at the time of judgment of the action; (d) paras (a) and (b) determine the *amount* of damages to which that entitlement of recovery relates; (e) in accordance with its terms, para (a) requires the amount for which that paragraph provides to be determined at the time of supply of goods to the consumer to whom the relevant guarantee relates; and (f) that amount, being the relevant reduction in value, is to be understood as an amount equal to the difference between the value that the goods would have had at the time of supply to the consumer to whom the relevant guarantee relates but for the failure to comply with

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187 In addition to the appeal heard immediately thereafter, *Capic v Ford Motor Company of Australia Pty Ltd* (S25/2024), dealt with in separate reasons for judgment, *Capic v Ford Motor Company of Australia Pty Ltd* [2024] HCA 39.

188 Defined in s 2(1) of the *Australian Consumer Law*, Sch 2 to the *Competition and Consumer Act 2010* (Cth).

189 Joint reasons at [71]-[72].

the statutory guarantee (the statutory proxy for which is the price paid or payable or the average retail price of the goods at the time of supply) and the true value of the goods at that time given the failure to comply. On this basis, an affected person in relation to goods may have an entitlement to recover damages in accordance with s 272(1)(a) whether they continue to own the goods at the time of judgment of the action or not.

132 Further, because the word "recover" confines the existence and extent of the entitlement to the recovery of damages to damage (that is, loss) that continues to exist at the time of judgment of the action, the existence and extent of that entitlement is to be determined by reference to all circumstances relevant to that fact (that is, the continued existence of loss) at the time of judgment of the action. In contrast, because of the terms of para (a) of s 272(1), the determination of the amount of that potential entitlement is to be made at the time of supply having regard to "any reduction in the value of the goods, *resulting from* the failure to comply with the guarantee". The words "resulting from" necessarily concern facts, matters, and circumstances occurring after the time of supply, provided that they are facts, matters, and circumstances resulting from the failure to comply with the guarantee. The words "resulting from" in s 272(1)(a) impose a causal requirement. They do not require the facts, matters, and circumstances to be known, expected, or reasonably foreseeable at the time of the supply of the goods.

133 Despite the complexity of the issues of statutory construction, in my opinion the primary judge in the Federal Court of Australia (Lee J)[190] made findings of fact and analysed the amount of the reduction in value of the Relevant Vehicles[191] to yield a substantive outcome unaffected by material error. The primary judge's findings and analysis amply supported his conclusion that the amount of the reduction in value of each Relevant Vehicle resulting from the Core Defect was 17.5 per cent below the purchase price paid by the consumer for the Relevant Vehicle. The Full Court of the Federal Court of Australia (Moshinsky, Colvin and Stewart JJ),[192] while properly recognising that s 272(1)(a) has a compensatory purpose,[193] erred in concluding that the primary judge's assessment of the amount of the reduction in value in accordance with para (a) of s 272(1) was too high.

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190 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344.

191 Terms defined in *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 take the same meaning in these reasons.

192 *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514.

193 *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514 at 539 [99].

134 My reasons follow.

The statutory provisions

135 Section 2(1) of the ACL includes this definition:

"***affected person***, in relation to goods, means:

(a) a consumer who acquires the goods; or

(b) a person who acquires the goods from the consumer (other than for the purpose of re-supply); or

(c) a person who derives title to the goods through or under the consumer."

136 Section 3(1) of the ACL provides that a person is taken to have acquired particular goods as a consumer if, and only if: the amount paid or payable for the goods did not exceed $40,000 or a greater amount if prescribed; the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads. By s 3(2), however, s 3(1) does not apply if the person acquired the goods or held himself or herself out as acquiring the goods for the purpose of re-supply or using the goods up or transforming them, in trade or commerce, in the course of a process of production or manufacture or in the course of repairing or treating other goods or fixtures on land.

137 Section 54(1) of the ACL provides that if a person supplies, in trade or commerce, goods to a consumer and the supply does not occur by way of sale by auction, there is a guarantee that the goods are of acceptable quality. By s 54(2)(c), goods are of acceptable quality if, relevantly to the present case, they are as free from defects as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods) would regard as acceptable having regard to the matters in s 54(3). The matters in s 54(3) consist of the nature and price of the goods, any statements made about the goods on any packaging or label on the goods, any representation made about the goods by the supplier or manufacturer of the goods, and any other relevant circumstances relating to the supply of the goods. Limitations to the guarantee of acceptable quality arising are to be found in s 54(4)-(7). These limitations, in substance, involve the consumer having or being taken to have knowledge of the reason the goods are not of acceptable quality at the time of supply.

138 If the guarantee of acceptable quality under s 54(1) is not complied with, s 271(1) of the ACL gives an affected person in relation to goods a right of action against the manufacturer of the goods, to "recover damages from the manufacturer". By s 271(6), this entitlement to commence an action to "recover" damages is excluded for damages of a kind referred to in s 272(1)(a) in

circumstances where the affected person, in accordance with an express warranty, has required the manufacturer to remedy a failure to comply with a guarantee (unless the manufacturer has refused or failed to remedy the failure, or has failed to remedy the failure within a reasonable time), with the concept of "remedy" here meaning repairing or replacing the goods.

139 Section 272(1) of the ACL provides:

> "In an action for damages under this Division, an affected person in relation to goods is entitled to recover damages for:
>
> (a) any reduction in the value of the goods, resulting from the failure to comply with the guarantee to which the action relates, below whichever of the following prices is lower:
>
> (i) the price paid or payable by the consumer for the goods;
>
> (ii) the average retail price of the goods at the time of supply; and
>
> (b) any loss or damage suffered by the affected person because of the failure to comply with the guarantee to which the action relates if it was reasonably foreseeable that the affected person would suffer such loss or damage as a result of such a failure."

140 Section 272(3) provides that "[s]ubsection (1)(b) does not apply to loss or damage suffered through a reduction in the value of the goods".[194]

Guarantee arising under s 54(1) of the ACL

141 A guarantee of acceptable quality in s 54(1) of the ACL arises only on the supply, in trade or commerce, of goods to a consumer. Because a good may be supplied in trade or commerce to a consumer more than once (that is, as a second-hand good), the same good may be the subject of more than one guarantee of acceptable quality over time. The possibilities in this regard are best explained by way of example.

142 If a person, person A, was supplied with a new Relevant Vehicle with the Core Defect by a Toyota dealer and person A, in acquiring the Relevant Vehicle, was not doing so for the purpose of re-supply or for the purpose of using up or transforming the Relevant Vehicle (which are excluded from the definition of "consumer" by s 3(2)(a) and (b)), then there is a guarantee under s 54(1) that the Relevant Vehicle is of acceptable quality. Whether the Relevant Vehicle is of acceptable quality or not is assessed at the time of that supply from the Toyota

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194 Compare s 259(6) concerning an action by a consumer against a supplier.

dealer to person A in accordance with s 54(2) and (3). Further, the exclusions in s 54(4), (6) and (7) are applicable to that supply to person A.

143 Assume now that person A sells the Relevant Vehicle to a second-hand car dealer, person B. As a second-hand car dealer, person B is not a consumer under s 3 as person B acquired the Relevant Vehicle for the purpose of re-supply. No guarantee of acceptable quality arises on that act of supply by person A to person B for that reason.

144 Assume now that person B, the second-hand car dealer, sells the Relevant Vehicle to another person, person C. Person C, in acquiring the Relevant Vehicle, was not doing so for the purpose of re-supply or for the purpose of using up or transforming the Relevant Vehicle. Accordingly, person C is a consumer. Further, the supply to person C by the second-hand car dealer, person B, is in trade or commerce. Another separate guarantee of acceptable quality under s 54(1) arises on the supply of the Relevant Vehicle by person B to person C. Whether the Relevant Vehicle is of acceptable quality or not is assessed at the time of that supply from person B to person C in accordance with s 54(2) and (3). Further, the exclusions in s 54(4), (6) and (7) are applicable to that supply to person C.

145 Assume, alternatively, that the original consumer, person A, sells the car privately to another person, person D, and person D, in acquiring the Relevant Vehicle, was not doing so for the purpose of re-supply or for the purpose of using up or transforming the Relevant Vehicle. Person D is a consumer. But the sale from person A to person D, being a one-off private sale, is not a supply in trade or commerce. Accordingly, another separate guarantee of acceptable quality under s 54(1) cannot arise on the supply of the Relevant Vehicle from person A to person D. There is no doubt, however, that person D would still be an "affected person" in relation to the Relevant Vehicle within para (b) ("a person who acquires the goods from the consumer (other than for the purpose of re-supply)") or para (c) ("a person who derives title to the goods through or under the consumer") of the definition of that term and, thereby, potentially entitled to the remedies against the manufacturer in Div 2 of Pt 5-4.

The actual consumer in s 54 and the hypothetical reasonable consumer in s 272(1)(a) of the ACL

146 By s 54(1) of the ACL, the guarantee of acceptable quality arises at the time of the supply of the goods, provided the terms of that provision are satisfied. The relevance of the actual consumer's lack of knowledge of the failure to comply with the statutory guarantee at the time of supply is reflected in s 54(2), (4), (6) and (7). The terms of s 54(2), in specifying that goods are of acceptable quality if they are, relevantly, as free from defects "as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard as acceptable having regard to the matters in" s 54(3), both: (a) pre-suppose that the actual consumer does not have that full acquaintance; and

(b) convey that the relevant contrary hypothesis for the purpose of the application of other provisions that depend on s 54 (including s 272(1)(a)) is "a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods)" at the time of supply.

147 In determining the amount of the damages potentially recoverable under para (a) of s 272(1), the actual consumer is irrelevant other than in respect of the price paid for the goods. This may be contrasted with para (b) of s 272(1), which is concerned with a different kind of loss. Determining the amount of damages potentially recoverable under para (a) of s 272(1) requires use of a construct of a hypothetical reasonable consumer at the time of supply, attributed with knowledge that the actual consumer did not have at that time – namely, full acquaintance with the state and condition of the goods (including any hidden defects of the goods). This enables the hypothetical reasonable consumer to function as the relevant price comparator (what would have been paid for the goods at the time of supply if the consumer had the requisite knowledge at that time) for the actual consumer (who paid for the goods without that knowledge). This approach has a long history in consumer protection law. For example, in *Australian Knitting Mills Ltd v Grant*, Dixon J said:[195]

> "The condition that goods are of merchantable quality requires that they should be in such an actual state that a buyer fully acquainted with the facts and, therefore, knowing what hidden defects exist and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonably sound order and condition and without special terms."

148 In *Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association*, in dealing with an implied statutory condition of goods being of merchantable quality, Lord Reid said that "[i]t is quite clear that some later knowledge must be brought in for otherwise it would never be possible to hold that goods were unmerchantable by reason of a latent defect".[196] Lord Guest went further, saying that "[t]he defect as ultimately discovered must be taken with its qualifications. It is not possible to stop halfway and say 'We know there is a defect' without proceeding to say 'Although there is a defect we know it can be cured by a limited rate of inclusion.'"[197] Lord Pearce, referring to the reasons of Dixon J in *Australian Knitting Mills*, said that "Sir Owen Dixon was clearly right in saying ... that in order to judge merchantability one must assume a knowledge of hidden defects, although these do not manifest themselves or are not discovered

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195 (1933) 50 CLR 387 at 418.

196 [1969] 2 AC 31 at 75.

197 [1969] 2 AC 31 at 109.

until some date later than the date of delivery which is the time as at which one must estimate merchantability".[198] In deciding "what additional after-acquired knowledge must one assume", his Lordship said that "[l]ogic might seem to indicate that the court should bring to the task all the after-acquired knowledge which it possesses at the date of trial", but he did not consider this always to be so.[199]

149 In *Medtel Pty Ltd v Courtney*, Branson J (with whom Jacobson J agreed[200]), in considering these cases, observed that a predecessor provision to s 54 of the ACL, s 74D of the *Trade Practices Act 1974* (Cth), "calls for the quality, or fitness for purpose, of the goods to be measured against what it was reasonable to expect in that regard at the time of the supply of the goods to the consumer. That measurement must be undertaken, in my view, in the light of information concerning the goods available at the time of trial."[201]

Chapter 5, Pt 5-4 of the ACL: key concepts and differences

Suppliers and manufacturers

150 Subdivision A of Div 1 of Pt 5-4 within Ch 5 of the ACL, concerning actions against suppliers of goods, contains important differences from Div 2 of Pt 5-4, concerning actions against manufacturers of goods. The most important difference is that Div 1 of Pt 5-4, concerning *suppliers*, vests rights in a "consumer". The rights so vested include, by s 259(4), that "[t]he consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure". In contrast, Div 2 of Pt 5-4, concerning *manufacturers*, vests rights in an "affected person" in relation to goods, not in a "consumer" who has acquired the goods. While a "consumer" is always an "affected person" in relation to goods, an "affected person" in relation to goods is not always a "consumer".

151 It must be taken that the different references to "consumer" and "affected person" in relation to goods in Divs 1 and 2 of Pt 5-4 are deliberate, as they appear consistently throughout the provisions of each Division and have done so since the ACL commenced. This is so even though the relevant Explanatory Memorandum

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198 [1969] 2 AC 31 at 118.

199 [1969] 2 AC 31 at 118-119.

200 (2003) 130 FCR 182 at 209 [81].

201 (2003) 130 FCR 182 at 206 [70]. See also *Dwyer v Volkswagen Group Australia Pty Ltd* (2023) 381 FLR 32 at 42-43 [37].

consistently (and incorrectly) refers to "consumers" having rights (including a right to damages) against both suppliers and manufacturers.[202]

152 There is also no exclusion of the right of a consumer to take action against the supplier to recover damages under s 259(4) comparable to the exclusion of the right of an affected person in relation to goods taking action to recover damages from a manufacturer under s 271(6) (namely, in circumstances where the manufacturer has remedied the failure to comply with the statutory guarantee). A consumer may take action against the supplier even if the consumer has rejected the goods. Section 259(6) makes this clear, by providing that "[t]o avoid doubt, subsection (4) applies in addition to subsections (2) and (3)". This may be contrasted with s 272(3), which ensures that s 272(1)(b) does not apply to loss or damage suffered through a reduction in the value of the goods (which is covered by s 272(1)(a)).

153 The distinction in these provisions between, on the one hand, a "consumer" in an action against a supplier, and, on the other hand, an "affected person" in relation to goods in an action against a manufacturer, most likely reflects that a consumer has a direct contractual relationship with the supplier, not the manufacturer, and that the supplier has no legal relationship with "a person who acquires the goods from the consumer (other than for the purpose of re-supply)" or "a person who derives title to the goods through or under the consumer" (being the extensions beyond the consumer in paras (b) and (c) of the definition of "affected person" in relation to goods). In the ordinary course, moreover, it is the manufacturer, not the supplier, who controls the quality of the goods, so that by placing the goods into the market, it is the manufacturer, not the supplier, who has a potential legal relationship with not only the consumer, but also "a person who acquires the goods from the consumer (other than for the purpose of re-supply)" or "a person who derives title to the goods through or under the consumer".

154 The relevant Explanatory Memorandum records the legislative expectation that, in the ordinary course, the "primary source of remedies" for a consumer will be from the supplier for any failure to comply with one of the statutory guarantees.[203] If s 274(1) is satisfied, the supplier will then have a right of indemnity against the manufacturer.

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202 eg, Australia, House of Representatives, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, Explanatory Memorandum at 198-200 [7.89]-[7.96], cf 205-207 [7.120]-[7.129].

203 Australia, House of Representatives, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010*, Explanatory Memorandum at 205 [7.120].

Consumer and affected person in relation to goods

155 Paragraphs (a), (b) and (c) of the definition of "affected person" in relation to goods in s 2(1) of the ACL should not be read as mutually exclusive but, rather, as creating an ambulatory and cumulative class. That is, in common with the definition of "consumer", there may be more than one affected person in relation to the same goods at the same time.

156 Each of paras (a), (b) and (c) of the definition of "affected person" in relation to goods in s 2(1) is separated by the word "or", which ordinarily indicates that they operate disjunctively. But mutual exclusivity is not always a consequence of disjunctive expressions. Sometimes the use of the disjunctive "or" can operate as creating a non-mutually exclusive class.[204] For example, in *Electricity Trust of South Australia v Krone (Australia) Technique Pty Ltd*,[205] von Doussa J considered a statute that defined "manufacturer" as a person described in para (a), (b), (c) or (d). His Honour said:[206]

> "In my view the Act by defining 'manufacturer' to *mean* (a) ... (b) ... (c) *or* (d) does not intend that each of the four paragraphs be read as mutually exclusive. The definition prescribes a class comprising people falling within the four situations as described in pars (a) to (d). ...
>
> In my opinion the definition should be construed by reading the four pars (a) to (d) as constituting a class of persons who are defined as the 'manufacturer'. The paragraphs should be construed as alternatives, but not as mutually exclusive alternatives. There may be more than one person who comes within the class which is defined."

157 The legislation in issue in that case was an historical source of the ACL.[207] The term "consumer" was defined by that legislation to mean "any person (including a body corporate) who purchases the goods when offered for sale by retail and includes any person who derives title to the goods through or under any such person". Importantly, however, the right to damages for breach of a

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204 eg, Herzfeld and Prince, *Statutory Interpretation Principles* (2014) at 121 [3.120]; *Electricity Trust of South Australia v Krone (Australia) Technique Pty Ltd* (1994) 51 FCR 540 at 547.

205 (1994) 51 FCR 540.

206 *Electricity Trust of South Australia v Krone (Australia) Technique Pty Ltd* (1994) 51 FCR 540 at 547 (emphasis in original).

207 *Manufacturers Warranties Act 1974* (SA).

manufacturer's warranty was vested only in a consumer who had lawful possession of the goods.

158 Therefore, at the time the ACL was enacted, there was statutory precedent both for the extension of the concept of a "consumer" to successors in title and for confining rights of action against a manufacturer to a person who has lawful possession of the goods. While the ACL expressly adopts the former expedient in the definition of "affected person" in relation to goods in s 2(1), it does not confine that definition (or the definition of "consumer") to a person who has lawful possession of the goods. For example, para (a) of the definition of "affected person" in relation to goods does not say "the consumer who first acquires the goods". The indefinite article "a" and the present tense "acquires" indicate that para (a) is ambulatory, from which it is to be taken that paras (b) and (c) must also be ambulatory. Nor, as discussed below, does s 272(1)(a), in terms, say "any reduction in the value of the goods provided the goods are owned by or in the lawful possession of the affected person ..." or "any reduction in the value of the affected person's goods ...".

159 Section 271(6) of the ACL is relevant. Only an "affected person" who controls the goods (that is, has title to or lawful possession of them) can require the manufacturer, in accordance with an express warranty, to remedy the failure to comply with the guarantee by either repairing or replacing the goods. This does not mean, however, that paras (a), (b) and (c) of the definition of "affected person" in relation to goods are mutually exclusive. It means only that, if an affected person can require, and has required, such repair or replacement, that affected person is not entitled to commence an action to recover damages under s 272(1)(a) for any reduction in value of the goods. Such an affected person, however, remains entitled to commence an action to recover damages under s 272(1)(b) for loss or damage suffered in accordance with that provision. Therefore, s 271(6) expressly contemplates that a manufacturer may avoid an action for damages under s 272(1)(a) by, relevantly, replacing the goods, but cannot avoid an action under s 272(1)(b) by such replacement. It follows that an affected person in relation to goods must still be such an affected person after the goods have been replaced (and when the person no longer has title to or lawful possession of those goods). This accords with the position otherwise reflected in the statutory provisions that a consumer or an affected person in relation to goods does not cease to be such merely because they no longer own or lawfully possess the goods.

160 Consistently with this, the history of the provisions indicates a legislative intention to extend the rights arising from the statutory guarantees against manufacturers for the benefit of consumers to successors in title to the immediate consumer, even if those successors are not themselves consumers supplied with the good in trade or commerce. This legislative purpose of an extension of rights beyond the immediate consumer is not the same as a legislative purpose of exclusion of a right of action for a consumer or an affected person who has ceased to own or be in lawful possession of the goods.

161 Before the predecessor provisions to s 54 were inserted into the *Trade Practices Act*,[208] some jurisdictions in Australia had enacted legislation concerning manufacturers' warranties, including the *Manufacturers Warranties Act 1974* (SA) and the *Law Reform (Manufacturers Warranties) Ordinance 1977* (ACT). The *Manufacturers Warranties Act* and the *Law Reform (Manufacturers Warranties) Ordinance* both defined "consumer" to include "any person who derives title to the goods through or under" the consumer.[209]

162 The Second Reading Speech for the *Manufacturers Warranties Act* refers to a report of the Ontario Law Reform Commission as one source for the legislation.[210] This report expressly adverts to the problem presented by successors in title.[211] The problem identified is that a private purchaser from a consumer would not be protected by the legislation (because of requirements equivalent to that in s 54(1) that the supply be in trade or commerce) or by contract (as there would be no privity of contract between a person deriving title from the consumer and the supplier).[212] This is why express provision to extend the warranties to the successors in title to the consumer was considered appropriate.

163 In the Second Reading Speech in the House of Representatives concerning the *Trade Practices Amendment Bill 1978*, which introduced the predecessor provisions to s 54, the Minister for Business and Consumer Affairs said that "a manufacturer's liability, where his goods are of unmerchantable quality, will be extended to the successors in title to a consumer".[213] Similarly, the relevant Explanatory Memorandum said that "[t]hese amendments are to section 74D and

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208 See *Trade Practices Amendment Act 1978* (Cth), s 14.

209 *Manufacturers Warranties Act 1974* (SA), s 3(1); *Law Reform (Manufacturers Warranties) Ordinance 1977* (ACT), s 3(3)(b).

210 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 12 September 1974 at 923.

211 Ontario Law Reform Commission, *Report on Consumer Warranties and Guarantees in the Sale of Goods* (1972) at 74.

212 Ontario Law Reform Commission, *Report on Consumer Warranties and Guarantees in the Sale of Goods* (1972) at 74-75.

213 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 October 1978 at 1922.

extend a manufacturer's liability, where his goods are of unmerchantable quality, to the successors in title of a consumer who originally acquired the goods".[214]

Construing ss 271 and 272(1)(a)

164 The ambiguity of certain provisions of the ACL in respect of damages must be acknowledged. The potential interactions of the provisions may not have been fully resolved. Minds may differ about the interpretative resolution which "is consistent with the language and purpose of all the provisions".[215] The orthodox approach to statutory construction seeks to maintain "the unity of all the statutory provisions" and to give "each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme".[216]

165 Section 272(1)(a) is structured so that the opening part of the provision ("[i]n an action for damages under this Division, an affected person in relation to goods is entitled to recover damages for") concerns the existence and extent of the entitlement in the action, whereas para (a) concerns the assessment of the potential amount of that entitlement by reference to the difference between the true value of the goods at the time of supply and the lower of the two fixed prices at the time of supply (that is, the reduction in value).

166 This structural distinction is supported by the statutory text in that, while "damages" in s 272(1) means a monetary sum, the statutory entitlement is not to "claim", "be paid" or "be awarded" damages of the specified kinds. In ss 271(1), 271(6) and 272(1), the action and entitlement are described as being to "recover" damages. The ordinary meaning of "recover" is "to get again, or regain (something lost or taken away)".[217] The consistent use of the concept of an entitlement to "recover" damages confines the existence and extent of the entitlement, relevantly under s 272(1)(a), to one of recovery of loss – the potential amount of the loss able to be recovered being assessed as an amount equal to the difference between the value that the goods would have had at the time of supply to the consumer to whom the relevant guarantee relates but for the failure to comply with the statutory guarantee (the statutory proxy for which is the price paid or payable or the average

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214 Australia, House of Representatives, *Trade Practices Amendment Bill 1978*, Explanatory Memorandum on Amendments to the Bill at 2.

215 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

216 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [70].

217 *Macquarie Dictionary*, 7th ed (2017), vol 2 at 1254 "recover", sense 1.

retail price of the goods at the time of supply) and the true value of the goods at that time given the failure to comply.

167 That the two fixed prices in s 272(1)(a) (from which there may be a reduction in value) focus on the time of supply means that the statute itself requires the amount of any reduction in value of the goods to be determined at the time of supply. The purpose of the verbal formula in s 272(1)(a) is to require a determination of the reduction in value of the goods below the lower of these two fixed prices at that time. To put it simply, s 272(1)(a), by using as one integer the lower of two fixed prices at the time of supply, necessarily requires any reduction in value to be calculated at the time of supply. It requires an apple to be compared with an apple, not with an orange.

168 In assessing the amount of any reduction in value, s 272(1)(a) requires consideration of both: the hypothetical reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods); and whatever is known to have resulted from the failure to comply with the statutory guarantee up to the date of judgment of the action. But this is not to be done by shifting the date of the valuation under para (a) of s 272(1) to the date of judgment. It is to be done by attributing to the hypothetical reasonable consumer at the time of supply who is fully acquainted with the state and condition of the goods knowledge also of all facts, matters, and circumstances resulting from the failure to comply with the statutory guarantee. This knowledge includes any possibility, probability, certainty or uncertainty, or fact of the manufacturer remedying the failure to comply with the statutory guarantee because that fact, matter, or circumstance results from the failure to comply with the statutory guarantee.

169 Other information arising after the date of supply – that is, information that either does not expose the nature, quality, or extent of the failure to comply with the guarantee or does not involve facts, matters, and circumstances resulting from that failure – is not to be attributed to the hypothetical reasonable consumer at the time of supply for the purpose of determining the amount of the reduction in value which an affected person in relation to the goods may have an entitlement to recover. If, however, such information is relevant to the question whether the affected person, at the date of judgment of the action, continues to suffer damage of a relevant kind to "recover", then that information is to be considered in determining both the existence and the extent of the entitlement to recover damages of the relevant kind.

170 In this latter respect, nothing in the opening text of s 272(1) (or otherwise) suggests that the time for determining the existence and extent of the entitlement to recover damages is at a date other than that of the judgment of the action. It is only if, at that time, there is some subsisting damage (that is, loss) to recover of the relevant kind in para (a) of s 272(1) that the entitlement exists, and the entitlement only exists to the extent of that subsisting loss. The question whether

there is some subsisting damage of the relevant kind to recover is therefore to be answered at the date of judgment of the action by reference to any fact, matter, and circumstance relevant to that question at that time. In this context, the concept of "supervening" or "intervening" events, relevant in other types of cases,[218] is foreign to the operation of s 272(1)(a) of the ACL.

171 Putting it another way, the predicate on which para (a) of s 272(1) operates is that, at the time of supply, the affected person never received the full value of the goods with which they were supplied because of the failure to comply with the statutory guarantee. This predicate regulates the amount of any entitlement to recovery, but not the existence and extent of that entitlement. The predicate on which the opening text of s 272(1) operates is that, at the time of the judgment of the action, that loss of value may subsist in whole or in part and the affected person, to that extent only, may recover that amount. That amount, therefore, may be the full amount of the loss of value assessed under para (a) of s 272(1) or only a part of that amount, depending on the relevant facts, matters, and circumstances at the time of the judgment of the action.

172 For these reasons, s 272(1)(a) imposes two tasks on the judicial valuer. One task is to determine the amount of the damages to which the entitlement relates. The other task is to determine the existence and extent of the entitlement to recover damages of the affected person in relation to the goods. The amount able to be recovered cannot exceed the extent of the entitlement.

173 On this construction of s 272(1)(a), the provision can never yield more than an affected person's actual loss subsisting at that time. As such, this construction fits with the object of the ACL derived from the object of the *Competition and Consumer Act 2010* (Cth) to "enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection".[219]

174 The limitation imposed in s 272(1) by the entitlement being only to "recover" damages also performs two other important functions. First, the limitation excludes a possibility of double recovery not otherwise excluded by s 272(3). Assume, for example, that a consumer, supplied with goods in trade or commerce, took action to recover loss or damage suffered by them against the

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218 eg, *Bwllfa and Merthyr Dare Steam Collieries (1891) v Pontypridd Waterworks Co* [1903] AC 426 at 430-431; *Potts v Miller* (1940) 64 CLR 282 at 289-290, 297-300; *Kizbeau Pty Ltd v W G & B Pty Ltd* (1995) 184 CLR 281 at 291-296; *Marks v GIO Australia Holdings Ltd* (1998) 196 CLR 494 at 510 [38], 514 [48]; *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at 658-659 [38]-[40], 666-667 [63].

219 *Competition and Consumer Act 2010* (Cth), s 2.

supplier of the goods in accordance with s 259(4) of the ACL, including the value of the goods that ought to have been, but was not, received. Assume, further, that the consumer, in that action, recovered all such loss or damage from the supplier. The supplier may then have a right to indemnity from the manufacturer under s 274(1) of the ACL, but the consumer would not also have any entitlement to "recover" the same loss or damage from the manufacturer under s 272(1) of the ACL. Having recovered (in the sense of regained) damages for the specified loss or damage in one action (against the supplier under s 259(4)), to the extent of that recovery there are no damages to recover in another action (against the manufacturer under s 272(1)).

175 Second, the limitation ensures that an affected person in relation to goods, in an action against a manufacturer, cannot be better off by reason of the failure to comply with a statutory guarantee than they would have been had the goods not failed to comply with that guarantee. To explain by example, assume a consumer paid $50,000 for a motor vehicle which, because of a failure to comply with the guarantee of acceptable quality, was worth only $40,000 at the time of supply. Where the consumer continues to own the vehicle and the failure to comply remains, the consumer's entitlement under s 272(1)(a) is to recover $10,000 from the manufacturer. This is so even if the value of the vehicle increases after the supply date – for example, by reason of supply-chain difficulties in obtaining new vehicles.

176 If, in contrast, the concept of "recovery" in s 272(1) does not confine the operation of the provision and the entitlement to recover under s 272(1)(a) requires continued ownership of the goods, then apparent anomalies arise.

177 Assume a failure to comply with the guarantee of acceptable quality which manifests before the consumer sells the goods. If the consumer discloses the failure, or it is otherwise apparent to the purchaser, the reduced value of the goods will be reflected in the purchase price. The consumer will receive only the reduced value while the purchaser will have purchased the goods at their true value. If, however, the entitlement to recovery under s 272(1)(a) requires ownership of the goods and s 272(1)(a) is not confined to the recovery of subsisting loss, then the entitlement to recover under s 272(1)(a) will be vested in the purchaser (as the owner of the goods) not the consumer. The consumer (who has suffered the loss in value) will have no claim against the manufacturer but the purchaser (who has suffered no loss in value) will be entitled to recover the amount of the loss in value to the consumer (not the purchaser) at the time of supply to the consumer (not the purchaser).

178 The prospect that goods may be destroyed is also relevant. Once goods are destroyed, no-one has title to them. If s 272(1)(a) is construed to require an affected person to continue to own the goods at the time of the judgment of the action, an affected person whose goods have been destroyed would be excluded from an

entitlement to recover damages under s 272(1)(a) even if the cause of the destruction is the failure to comply with the statutory guarantee.

179 Latency of the defect is not problematic. If an affected person sells goods affected by a latent defect, the sale price of the goods will be the value of the goods unaffected by the latent defect. The affected person selling the goods would not have any loss to recover under s 272(1)(a), as they will have received the inflated value of the goods on sale. However, the purchaser who paid that price for the goods, on exposure of the defect, will be able to recover for the reduction in value in accordance with s 272(1)(a) – that is, by reference to the time of supply to and price paid by the consumer.

Other construction considerations

180 As noted, the context of s 272(1)(a) includes that the object of the *Competition and Consumer Act*, in s 2, is to "enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection". While it is not to be assumed that the statute pursues these objects at any cost, and the objects of the ACL overall may well potentially conflict with each other, the relevant object is "consumer protection", not protection of manufacturers from potential liability for defective goods.

181 It is also relevant that, to the extent that a manufacturer may be exposed to recovery of damages by multiple affected persons in relation to goods that do not comply with a statutory guarantee if the goods are sold or transferred by the consumer other than in trade or commerce (particularly if the defect is latent), the manufacturer is in the best position to protect itself from that risk. To the extent that the possibility of liability to multiple successors in title for any reduction in value of the goods under s 272(1)(a) encourages manufacturers to ensure their goods meet the guarantee of acceptable quality and, if they do not, to promptly and effectively repair or replace defective goods, that encouragement is consistent with the overall statutory object of consumer protection. Less consistent with that overall statutory object would be the unintentional creation of a new market for the transfer of unrecognised choses in action (for the entitlement to bring an action under s 272(1)(a) of the ACL) from a former owner to a new owner, which construing s 272(1)(a) as requiring continued ownership of the goods would involve.

182 The context of s 272(1)(a) also includes the definitions of "consumer" in s 3(1) and "affected person" in relation to goods in s 2(1) of the ACL. Both definitions are ambulatory. A person does not cease to be a "consumer" or an "affected person" in relation to goods because of destruction or sale of the goods. Given this, and that the relevant right of action and entitlement are vested in an

"affected person in relation to [the][220] goods" in ss 271(1) and 272(1), it is incongruous that, in s 272(1)(a) alone and in no other provision concerning damages, there should be a requirement for the affected person to retain title to the goods.

183 This incongruity is exacerbated by comparison with s 259(3), (4) and (6) of the ACL. A consumer may reject the goods under s 259(3)(a) or "by action against the supplier, recover compensation for any reduction in the value of the goods below the price paid or payable by the consumer for the goods" under s 259(3)(b), *and* "by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure" under s 259(4). Importantly, s 259(6) provides that "[t]o avoid doubt, subsection (4) applies in addition to subsections (2) and (3)" and there is no equivalent to s 272(3) excluding from s 259(4) damages for reduction in value. This does not indicate that s 259(3)(b) is to be construed as meaning "by action against the supplier, recover compensation for any reduction in the value of the consumer's goods below the price paid or payable by the consumer for the goods". Under s 259(3), the remedy of rejection of the goods is an alternative to the remedy of recovery of compensation for any reduction in the value of the goods. It is only the remedy of recovery of damages under s 259(4) which is additional to either rejection of the goods under s 259(3)(a) or recovery of compensation for any reduction in the value of the goods under s 259(3)(b). The control on double recovery under ss 259(3)(b) and 259(4) is the limit imposed by the fact that the right in both cases is one of recovery.

184 Further, s 262(1)(b), which provides that a consumer is not entitled under s 259 to notify a supplier of goods that the consumer rejects the goods if "the goods have been lost, destroyed or disposed of by the consumer", concerns only the circumstances of, relevantly, destruction of the goods by the consumer. It does not deal with goods otherwise destroyed including because of failure to comply with the statutory guarantee.

185 In addition, a supplier may seek indemnity from the manufacturer for its liability to pay damages to the consumer under s 274(1), but such a right of indemnity only exists if "the manufacturer is or would be liable under section 271 to pay damages to the consumer for the same loss or damage". If s 272(1)(a) applies only to an affected person who continues to own the goods, a supplier may be liable to a consumer under s 259(3)(b) or (4) for a reduction in the value of the goods yet not have a right of indemnity from the manufacturer because the consumer did not have title to the goods at the time of the claim against the supplier. While this apparent anomaly could be avoided by construing s 259(3)(b) as meaning "by action against the supplier, recover compensation for any reduction

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220 *Australian Consumer Law*, s 271(1).

in the value of the consumer's goods below the price paid or payable by the consumer for the goods" (analogously to the construction of s 272(1)(a) in the joint reasons), it is less clear how the apparent anomaly can be avoided for s 259(4), which contains no reference to the goods.

186 Section 271(6) also does not support the imposition of a limitation of ownership on s 272(1)(a). In particular, and as noted, the provision contemplates that a person will continue to be an affected person in relation to the goods, to enable recovery under s 272(1)(b), even when the manufacturer has replaced the goods (so the person no longer owns the goods).

187 If it had been intended that an affected person in relation to goods would have the right in s 272(1)(a) only for so long as they retained ownership to the goods, then the structure of s 272(1) is poorly adapted to achieve that object. The provision contains a single opening statement giving no hint that continued ownership of the goods is relevant. Section 272(1)(a) refers to "the goods" simpliciter. In s 272(1)(b), moreover, continued ownership of the goods is manifestly irrelevant.

188 The relevant legislative history (again) does not provide much assistance in resolving the meaning of this aspect of the statutory provisions. As noted, the legislative history exposes that the definition of "affected person" in relation to goods was included in predecessor legislation to extend the reach of the provisions to persons who take title to goods or derive title from a consumer because, otherwise, such persons would be excluded from the provisions and would have no recourse against the supplier of the goods in contract.

189 During debate in the House of Representatives in connection with the Second Reading Speech concerning the *Trade Practices Amendment Bill 1978*, it was observed:[221]

> "The second amendment which I have said we will support relates to a manufacturer's liability where his goods are of unmerchantable quality. That liability will be extended to the successors in title to a consumer. So the liability will not extend only when the first owner of the goods sells them to a second owner; it will remain with those goods when they are passed on, such as in the case of a gift passing from a father to a daughter."

190 This statement is ambiguous, however, because it refers to "extending" liability with the title and liability remaining with the goods, rather than liability being removed as title passes.

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221 Australia, House of Representatives, *Parliamentary Debates* (Hansard), 17 October 1978 at 1924.

191 The Explanatory Memorandum concerning the *Trade Practices Amendment Bill 1978* (as amended) said that "[t]hese amendments are to section 74D and extend a manufacturer's liability, where his goods are of unmerchantable quality, to the successors in title of a consumer who originally acquired the goods".[222] As noted, however, a legislative intention to extend rights beyond the consumer to persons taking title to goods or deriving title through or under a consumer is one thing. A legislative intention to deny rights to a consumer (or a person taking title to goods or deriving title through or under a consumer) by reason of the passing of title is another, as the examples provided above expose.

192 Accordingly, there is insufficient textual, contextual, or purposive support in the statutory provisions to construe s 272(1)(a) as if it includes a requirement that the affected person retain ownership of the goods. As observed above, the significance of the lack of clear textual support in the provisions is reinforced by *Electricity Trust of South Australia v Krone (Australia) Technique Pty Ltd*,[223] which discloses that there was express legislative precedent for confining the right of action to a consumer who continues to have lawful possession of the goods. Despite that, no such limitation is expressed in the ACL.

193 For these reasons, to the extent that "the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed",[224] the discussion above weighs in favour of construing s 272(1)(a) not as requiring the affected person to continue to own the goods in order to have an entitlement to recover damages but, rather, to require effect to be given to the limitation inherent in the concept of an entitlement only to "recover" damages and no more.

Observations about "value" and "valuation"

194 Before considering the reasoning of the primary judge and the Full Court, it is convenient to distinguish between the concepts of: (a) the time of a valuation; (b) the date of a valuation; and (c) the information which may be brought to bear on a valuation – as each concept performs a distinct function. The time of a valuation is the time at which the valuer (judicial or otherwise) conducts the valuation. In the case of a judicial valuer, the time of a valuation is generally the date of judgment of the action. The date of valuation is the date (usually in the

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222 Australia, House of Representatives, *Trade Practices Amendment Bill 1978*, Explanatory Memorandum on Amendments to the Bill at 2.

223 (1994) 51 FCR 540.

224 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69], quoting *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397.

past) to which the valuation relates. The information that may be brought to bear on the valuation at the date of valuation is dictated by the terms of the statute or other instrument or agreement under which the valuation is made.

195 The classic formulation of the common law's conception of "market value" in Australia of Isaacs J in *Spencer v The Commonwealth*[225] is of continuing relevance. Isaacs J said:[226]

> "All circumstances subsequently arising are to be ignored. Whether the land becomes more valuable or less valuable afterwards is immaterial. Its value is fixed by Statute as on that day. Prosperity unexpected, or depression which no man would ever have anticipated, if happening after the date named, must be alike disregarded. The facts existing on 1st January 1905 are the only relevant facts, and the all important fact on that day is the opinion regarding the fair price of the land, which a hypothetical prudent purchaser would entertain, if he desired to purchase it for the most advantageous purpose for which it was adapted. The plaintiff is to be compensated; therefore he is to receive the money equivalent to the loss he has sustained by deprivation of his land, and that loss, apart from special damage not here claimed, cannot exceed what such a prudent purchaser would be prepared to give him. To arrive at the value of the land at that date, we have, as I conceive, to suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land, and cognizant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, the then present demand for land, and the likelihood, as then appearing to persons best capable of forming an opinion, of a rise or fall for what reason soever in the amount which one would otherwise be willing to fix as the value of the property."

196 Even this classic statement of principle, if read literally, is inaccurate, however. For example, it has never been that "all" circumstances subsequently arising are to be ignored in determining market value. Subject to any applicable contrary prescription, it has always been open to a valuer (judicial or otherwise) to have regard to sales after the date of valuation if those sales are "comparable". This

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225 (1907) 5 CLR 418.

226 (1907) 5 CLR 418 at 440-441.

is a logical necessity. For example, the best comparable sale may be a sale that occurs the day after the date of valuation.

197 The common law conception of market value is that of the price point at which a hypothetical, prudent, willing but not anxious, and fully informed buyer and seller would meet to transact the notional sale on the date of valuation. In this context, "fully informed" means "perfectly acquainted with the land [or good], and cognizant of all circumstances which might affect its value".[227] This conception of market value remains relevant in many circumstances, but the extent to which it may be applied will depend on the terms of the statute, instrument, or agreement under which the valuation is made.

The primary judge's reasoning

198 The primary judge correctly attributed to the hypothetical reasonable consumer at the time of supply full acquaintance with the Core Defect and the relatively high prospect of the Defect Consequences manifesting in every Relevant Vehicle in ordinary driving conditions.

199 As judicial valuer, the primary judge: (a) did not accept the entirety of any of the expert evidence relevant to the reduction in value; (b) treated Mr Cuthbert's valuation evidence as no more than a "helpful indication of the likely reduction in value to be applied generally";[228] and (c) treated the economic and related evidence of other experts as no more than "of some limited utility in coming to a landing on a figure for any reduction in value"[229] and as "of some use"[230] respectively.

200 Further, the primary judge: (a) gave weight to "the entirety of the expert evidence and the submissions advanced by the parties in respect of that evidence";[231] (b) recognised the "evaluative and imprecise exercise" which he was

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227 *Spencer v The Commonwealth* (1907) 5 CLR 418 at 440-441.

228 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [359].

229 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [377].

230 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [390].

231 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [392].

performing;[232] (c) considered that, on the whole of the evidence and as a matter of common sense, the reduction in value must be "a figure of significance";[233] and (d) assessed, doing the best he could, the range of any such reduction to be in the order of 15 per cent to 20 per cent, and settled in the middle of that range on 17.5 per cent.[234] Moreover, the primary judge did so in circumstances where, as he said, Toyota's experts did not provide his Honour with "any real analysis of their own as to the reduction in value that was suffered by group members".[235]

The Full Court's reasoning

201 The Full Court's reasons record that "by the time of the initial trial, it was known that the 2020 field fix was available and the experts agreed that, in consequence, there was no ongoing reduction in value".[236] According to the Full Court, "the prospective reinstatement of value reflected the fact that the fix would restore the utility of the vehicle".[237]

202 The Full Court concluded that the primary judge: (a) in applying a "broad brush approach", "failed to have regard to the extent of the validity of the main criticisms raised by Toyota, namely the focus upon the salvage value and the associated (implicit) view that the vehicle was so defective it needed to be repaired before it had any real utility as a motor vehicle";[238] and (b) should have treated "Mr Cuthbert's percentage reduction in value with considerable circumspection" and not used it "as a useful guide to valuation without making due allowance for

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232 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [393].

233 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [393].

234 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [393].

235 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [394].

236 *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514 at 544 [123].

237 *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514 at 544-545 [123].

238 *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514 at 560 [203].

the matters to which"[239] the Full Court had referred (that is, Mr Cuthbert overly relying on salvage value and ignoring "utility value").

203 The Full Court also said that: (a) "assessment of the reduction in value resulting from a failure to comply with the consumer guarantee should not be made on the basis of an unadjusted resale value";[240] and (b) Mr Cuthbert failed "to grapple with the effect on an aggregate assessment of reduction in value damages of the possibility that a free fix may become available" in circumstances where the representative example, Mr Williams' Relevant Vehicle, was purchased in 2016 but other Relevant Vehicles were purchased later in the Relevant Period.[241]

Limits on appellate review of judicial valuation

204 As identified in *Warren v Coombes*,[242] in an appeal under s 24(1)(a) of the *Federal Court of Australia Act 1976* (Cth) the Full Court "is to decide the case – the facts as well as the law – for itself. In so doing it must recognize the advantages enjoyed by the judge who conducted the trial. But if the judges of appeal consider that in the circumstances the trial judge was in no better position to decide the particular question than they are themselves, or if, after giving full weight to [the trial judge's] decision, they consider that it was wrong, they must discharge their duty and give effect to their own judgment."[243]

205 In this case, the primary judge alone had the advantage of seeing and hearing Mr Cuthbert give evidence. Mr Cuthbert gave evidence in a concurrent session with Mr O'Mara, a valuer specialising not in vehicle valuations (as Mr Cuthbert did), but in the valuing of company assets for the purpose of merger and acquisition transactions and bank financing. Mr Cuthbert not only gave an opening statement in the concurrent session, but also was cross-examined at some length. In dealing with valuation evidence of the kind which Mr Cuthbert gave, and which Mr Cuthbert rightly described as "impressionistic", the views the primary judge formed reflected his Honour's distinct advantage in seeing and hearing Mr Cuthbert give evidence. These views included his Honour's acceptance of: (a) Mr Cuthbert's denial in cross-examination that he did not apply his own

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239 *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514 at 560 [204].

240 *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514 at 560 [206].

241 *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514 at 560 [207]. See also 560-561 [208].

242 (1979) 142 CLR 531.

243 (1979) 142 CLR 531 at 552.

methodology;[244] and (b) Mr Cuthbert's explanation in cross-examination that he did not start from the salvage value and work upwards but used salvage value only to "bookend the analysis", as a yardstick to which it was "appropriate to have regard".[245]

206 Moreover, having seen and heard Mr Cuthbert give extensive evidence, the primary judge had a distinct advantage over the Full Court in ascertaining the weight to be given to the fact that Mr Cuthbert was "a professional car valuer with 50 years' experience".[246] That advantage meant that the primary judge did not err in concluding that Mr Cuthbert's evidence could "serve as a helpful indication of the likely reduction in value to be applied generally".[247] As Allsop J said in *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd*, "[t]he advantages of the trial judge may be more subtle and imprecise, yet real, not giving rise to a protection of the nature accorded credibility findings, but, nevertheless, being highly relevant to the assessment of the weight to be accorded the views of the trial judge".[248]

207 The Full Court's conclusion that the primary judge erred in the use he made of Mr Cuthbert's evidence is also difficult to reconcile with the Full Court's (accurate) recognition that the primary judge considered the parties had placed "too much emphasis upon expert evidence when the task that was required to be undertaken involved a much more practical and common sense approach"[249] and (correct) view that the primary judge did not err in considering that reasonable buyers of a Relevant Vehicle would treat the Core Defect as "very significant when reaching a conclusion as to an appropriate percentage reduction" to the sale price at the time of supply.[250]

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244 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [354].

245 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [354].

246 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [356].

247 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [359].

248 (2001) 117 FCR 424 at 437 [28].

249 *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514 at 548 [139].

250 *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514 at 575 [285].

208 The Full Court's ultimate view was that the primary judge erred by not treating "Mr Cuthbert's percentage reduction in value with considerable circumspection",[251] but it is clear from the primary judge's reasons that his Honour treated all the expert evidence, including that of Mr Cuthbert, with a high degree of circumspection. As the primary judge put it, "[a]fter trudging manfully through the expert evidence, it is necessary to recall the basic proposition ... 'valuation is an art, not an exact science'".[252] The same high degree of circumspection is apparent also from the fact that the primary judge's reduction in value of 17.5 per cent, representing the middle of a range of 15 per cent to 20 per cent, is substantially lower than Mr Cuthbert's range of reduction in value of 23.5 per cent to 27 per cent.

209 The primary judge referred[253] to several well-known observations about judicial and other valuations which remain important, including that: (a) "[v]aluation is an art, not an exact science. Mathematical certainty is not demanded, nor indeed is it possible";[254] and (b) valuation is "a jury question, in the sense that it was to be decided, not by a strict adherence to precise arithmetical calculations, but by a commonsense endeavour, after consideration of all the material before the court, to fix a sum satisfactory to the mind of the court as representing the value".[255] To these observations may be added:[256]

> "[I]n all valuations, judicial or other, there must be room for inferences and inclinations of opinion which, being more or less conjectural, are difficult to reduce to exact reasoning or to explain to others. Everyone who has gone through the process is aware of this lack of demonstrative proof in his own mind, and knows that every expert witness called before him has had his own set of conjectures, of more or less weight according to his experience and personal sagacity. In such an inquiry as the present, relating to subjects abounding with uncertainties and on which there is little experience, there

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251 *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514 at 560 [204].

252 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [391].

253 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [339]-[343].

254 *Gold Coast Selection Trust Ltd v Humphrey (Inspector of Taxes)* [1948] AC 459 at 473.

255 *The Commonwealth v Milledge* (1953) 90 CLR 157 at 162.

256 *Secretary of State for Foreign Affairs v Charlesworth, Pilling & Co* [1901] AC 373 at 391.

> is more than ordinary room for such guesswork; and it would the very unfair to require an exact exposition of reasons for the conclusions arrived at."

210 A court also "should be slow to reject any method [of valuation] that, in expert hands, is capable of yielding a result within bounds that are not unreasonable", though "[t]he limitations of every method must, of course, always be kept clearly in mind".[257] The primary judge's approach, of giving some (albeit variable) weight to the entirety of the expert evidence, accorded with this orthodoxy of judicial valuation.

211 The nature of valuation as "an imprecise, opinionative activity involving the consideration of many variables, sometimes with equally legitimate outcomes"[258] explains why, in assessing damages (based on valuation or otherwise), a court must do the "best it can",[259] even if the state of the evidence leaves the court to engage in estimation and even "guess work".[260]

212 Further, given the nature of valuation, judicial or otherwise, and as Gageler J put it, albeit in a different context:[261]

> "The appellate court needs to be conscious that '[n]o judicial reasons can ever state all of the pertinent factors; nor can they express every feature of the evidence that causes a decision-maker to prefer one factual conclusion over another'. The more prominently limitations of that nature feature in a particular appeal, the more difficult it will be for the appellate court to be satisfied that the primary judge was in error."

213 In the context of judicial valuation, provided the valuation is based on the correct legal principles, any appellate urge to quibble, cavil, or nitpick with the

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257 *Bronzel v State Planning Authority* (1979) 21 SASR 513 at 516. See also *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 268 [283]; 167 ALR 575 at 653.

258 *Electricity Commission of New South Wales (trading as Pacific Power) v Arrow* (1994) 85 LGERA 418 at 419.

259 *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 83.

260 eg, *Jones v Schiffmann* (1971) 124 CLR 303 at 308. See also *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* (2003) 77 ALJR 768 at 774 [38]; 196 ALR 257 at 266.

261 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541 at 557 [33] (footnotes omitted). See also *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at 435-436 [24]-[26]; *Costa v Public Trustee of NSW* (2008) 1 ASTLR 56 at 64-69 [14]-[19], 73 [42]-[43], 86 [101]-[102].

value determined must be resisted. The observation of Mason J in *Federal Commissioner of Taxation v St Helens Farm (ACT) Pty Ltd* applies:[262]

> "[O]n a question of valuation an appellate tribunal is not justified in substituting its own opinion for that of the court below unless it is satisfied that the court below acted on a wrong principle of law or that its valuation was entirely erroneous."

214 An "entirely erroneous" valuation should be understood as one where the value determined is outside all bounds of reasonable tolerance. In such a case, the value determined is necessarily wrong.

215 Finally, and as noted in *Capic v Ford Motor Company of Australia Pty Ltd*, a judicial valuer is not bound merely to choose between competing expert valuations or to accept valuation evidence, even if that evidence is based on correct assumptions as to facts and law, but is entitled to their own view of the evidence.[263]

Other matters arising on the reasoning of the Full Court

216 Under s 272(1)(a), there is no separate concept of "utility value" (meaning the value from the use of the goods).[264] There is only the price paid or payable for the goods (or the average retail price of the goods at the time of supply) compared to the true value of those goods resulting from the failure to comply with the statutory guarantee at the time of supply (a difference representing those goods' reduction in value). The entitlement to recover damages of an amount under s 272(1)(a) is not to be reduced by applying a separate concept of utility value because Relevant Vehicles could be used despite the Core Defect. To attempt to separately overlay the concept of "utility" onto the statutory provisions would involve a substantial discount of the mandated entitlement to recover damages that is not permitted by the statutory scheme. Accordingly, it is not the case that, having restored the utility of the Relevant Vehicle, the 2020 Field Fix thereby reinstated the value of the Relevant Vehicle in a manner relevant to the operation of s 272(1)(a).[265]

217 It is also not the case that "by the time of the initial trial, it was known that the 2020 field fix was available and the experts agreed that, in consequence, there

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262 (1981) 146 CLR 336 at 381 (citations omitted).

263 [2024] HCA 39 at [51].

264 cf, eg, *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514 at 542 [111], [114], 544-545 [122]-[123].

265 *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514 at 544-545 [123].

was no ongoing reduction in value".[266] Mr Cuthbert did not agree that the availability of the 2020 Field Fix meant that, at the date of supply, there was no reduction in value of a Relevant Vehicle. The cross-examination on which Toyota relied to support the Full Court's characterisation of the expert evidence concerned a paragraph of Mr Cuthbert's first report. It should be inferred that when Mr Cuthbert referred in that paragraph to not reducing value if a repair was available at no cost, he had in mind a repair that would be (and was in fact) applied to the Relevant Vehicle promptly ("promptly" meaning a matter of days, possibly weeks, but not months). In cross-examination, when Mr Cuthbert agreed with the proposition put to him by Toyota's senior counsel that if he were asked to calculate the reduction in value in the Relevant Vehicles referable to the defect "now" he would not reduce the value at all because of the availability of the 2020 Field Fix, Mr Cuthbert was not referring to value at the time of supply. He was referring to value "now", being the time of his cross-examination, by which time the 2020 Field Fix not only was available but had been applied to some Relevant Vehicles. He was also not asked anything about the effect the time it might take for the 2020 Field Fix to be applied to any Relevant Vehicle would have on his answer.

218 This is exposed in Mr Cuthbert's subsequent report, answering the further questions from the primary judge. Critically, Mr Cuthbert's answer to question two (what is the reduction in value of the Relevant Vehicles attributable to the defect assessed as at the time of purchase, using the information available today?) was that, for Mr Williams' Relevant Vehicle, the reduction in value would be the same, 23.5 per cent to 27 per cent less, as his valuation for question one (what is the reduction in value of the Relevant Vehicles attributable to the defect assessed as at the time of purchase, using only information which was available at the time of purchase?). Mr Cuthbert said this was so because from the time of purchase, April 2016, to the time of the 2020 Field Fix becoming available, May 2020, was a "long period of time" and Mr Williams "was faced with the Defect Consequences for an approximate 4-year period". Therefore, it is not the case that Mr Cuthbert "failed to grapple with the effect on an aggregate assessment of reduction in value damages of the possibility that a free fix may become available".[267] Nor can it be said that Mr Cuthbert's evidence "overstated the reduction in value" because of that alleged failure.[268]

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266 *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514 at 544 [123].

267 *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514 at 560 [207].

268 *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514 at 560 [205].

219 Further, the Full Court's (otherwise correct) proposition that "assessment of the reduction in value resulting from a failure to comply with the consumer guarantee should not be made on the basis of an unadjusted resale value"[269] implies that this is what Mr Cuthbert did. Mr Cuthbert's reduction in value of 23.5 per cent to 27 per cent was not based on re-sale value. It was based on the value that the hypothetical reasonable consumer would have been willing to pay at the time of supply to Mr Williams (that being the representative purchase). Re-sale value was merely one of a multiplicity of factors that Mr Cuthbert considered in assessing the true value of the Relevant Vehicle at the time of supply to Mr Williams.

220 Finally, while the Full Court was also correct to observe that Mr Cuthbert's evidence was based on the circumstances of Mr Williams and other Relevant Vehicles were purchased later in the Relevant Period, the primary judge's findings supported his conclusion that a uniform percentage reduction of value applies to all Relevant Vehicles. The primary judge found that the likelihood or probability of every Relevant Vehicle manifesting one or more of the Defect Consequences was "relatively high"[270] and that the Defect Consequences, if they occurred, were significant.[271] In these circumstances, if an affected person acquired the Relevant Vehicle days or weeks before the 2020 Field Fix became available and the 2020 Field Fix was applied to the vehicle effectively and promptly (within days, possibly weeks, but not months) and with little inconvenience to the affected person, then the entitlement to recover the amount assessed in accordance with para (a) of s 272(1) may be displaced. Mr Williams is not within that category of affected persons. It is not clear if any other group member is within that category. If, however, there are group members within that category, the potential consequences of such a finding are that: (a) there has been no failure to comply with the guarantee in s 54(1) of the ACL, having regard to the matters in s 54(3); (b) s 271(6) applies so that there is no entitlement to bring an action under s 272(1)(a); (c) the affected person has no damages to "recover" within the meaning of s 272(1)(a); or (d) there has been no reduction in value within the scope of s 272(1)(a).

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269 *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514 at 560 [206].

270 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [64].

271 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [85].

Applying s 272(1)(a) in the present case

221 The relevant failure to comply with the statutory guarantee of acceptable quality under s 54(1) of the ACL in this case, being the "Core Defect",[272] is best characterised as a design defect creating a relatively high propensity or risk for the "Defect Consequences"[273] to manifest in every "Relevant Vehicle".[274]

222 Section 272(1)(a) requires attribution to the hypothetical reasonable consumer at the time of supply of the Relevant Vehicle knowledge not only of the Core Defect (being the failure to comply with the guarantee of acceptable quality under s 54(1)), but also of every fact, matter, and circumstance resulting from the Core Defect. Those facts, matters, and circumstances include: (a) the "relatively high" propensity or risk of the Defect Consequences manifesting as a result of the Core Defect;[275] (b) that each Relevant Vehicle was not "suitable for use in all driving conditions";[276] (c) that the Defect Consequences, if they manifested, were of a kind that had "a significant impact upon consumers' use and enjoyment of the Relevant Vehicles";[277] (d) that the 2020 Field Fix only became available in May 2020; and (e) that the 2020 Field Fix had not yet been applied to Mr Williams' Relevant Vehicle (and presumably others), despite Mr Williams (and presumably others) seeking that to occur.

223 As the primary judge evaluated the propensity or risk of every Relevant Vehicle to manifest one or more of the Defect Consequences to be "relatively high",[278] the case: (a) is not one in which the risk of manifestation of the Defect Consequences was sufficiently minor to be disregarded by a hypothetical

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272 As defined in *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [15].

273 As defined in *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [59].

274 As defined in *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [6].

275 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [64].

276 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [83].

277 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [85].

278 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [64].

reasonable consumer at the time of supply of a Relevant Vehicle, with the potential consequence of either there being no failure to comply with the guarantee of acceptable quality under s 54(1) at all[279] or no reduction in value within the scope of s 272(1)(a); and (b) supports the conclusion that no hypothetical reasonable consumer would have paid the same or substantially the same price for a Relevant Vehicle with the Core Defect at the time of supply as they would have paid for a Relevant Vehicle without the Core Defect at the time of supply.

224 Further, given the relatively high prospect of one or more of the Defect Consequences manifesting and the significance of the Defect Consequences, this is not a case in which the manifestation or non-manifestation of any one or more of the Defect Consequences in a Relevant Vehicle affects the reduction in value assessed in accordance with s 272(1)(a). That is, on the facts as found, the hypothetical reasonable consumer attributed with the relevant knowledge at the time of supply would not pay more for a Relevant Vehicle merely because a part of that attributed knowledge is that although the Relevant Vehicle suffers from the Core Defect and has a relatively high prospect of manifesting one or more of the Defect Consequences, no Defect Consequence would manifest during that person's use of the vehicle.

225 Overall, and given the knowledge of the facts, matters, and circumstances required to be attributed to the hypothetical reasonable consumer at the time of supply of each Relevant Vehicle, the primary judge was right to conclude that: (a) it could not be said that Mr Williams' Relevant Vehicle was "as ... free from defects ... as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods), would regard as acceptable having regard to the matters in" s 54(3);[280] (b) as there is "no impediment to determining the issue of acceptable quality on a common basis",[281] there is also no impediment to determining the reduction in value on a common basis; and (c) "when the Defect Consequences manifested, which was a certainty occasioned by the normal use of highway driving, they were serious", so that "the

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279 See, for example, *Dwyer v Volkswagen Group Australia Pty Ltd* (2023) 381 FLR 32 at 57 [100], 65 [147], 65-66 [151]-[156].

280 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [187].

281 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [212].

reduction in value of all of the Relevant Vehicles, which each had the propensity to suffer from the Defect Consequences, was far from insignificant".[282]

226 Accordingly, the primary judge: (a) applied an orthodox approach to the statutory valuation task; and (b) made factual findings (not successfully challenged) that amply supported a reduction in value of 17.5 per cent below the purchase price at the time of supply as the amount of the reduction in value yielded by application of para (a) of s 272(1). The only difference between my conclusions and those of the primary judge is that I would allow that there might be some group member who acquired the Relevant Vehicle days or weeks before the 2020 Field Fix became available and the 2020 Field Fix was applied to the vehicle effectively and promptly (within days, possibly weeks, but not months) and with little inconvenience to the affected person, in which event the entitlement to recover the amount assessed in accordance with para (a) of s 272(1) may be displaced for that person (as explained above). It is not clear whether the orders the primary judge made on 16 May 2022 allow for that possibility (although they may do so given the exclusion of "a 2020 Field Fix Relevant Vehicle" from the order for damages in order 2).

Conclusion

227 For these reasons, grounds 1(b), 2(c) and 2(d) of Mr Williams' notice of appeal should be allowed. Toyota's appeal should be dismissed. Orders 1-3 of the orders of the Full Court of the Federal Court of Australia made on 27 March 2023 should be set aside, as should the Full Court's orders of 12 May 2023. In lieu thereof, it should be ordered that the appeal to the Full Court be dismissed, subject only to order 2 made by the primary judge on 16 May 2022 being varied to the extent necessary to exclude from order 2 any group member who acquired the Relevant Vehicle days or weeks before the 2020 Field Fix became available and the 2020 Field Fix was applied to the vehicle effectively and promptly (within days, possibly weeks, but not months) and with little inconvenience to the affected person, whose claim for compensation may require further consideration. Toyota should pay the costs of the appeal to the Full Court and of the appeals to this Court.

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282 *Williams v Toyota Motor Corporation Australia Ltd (Initial Trial)* [2022] FCA 344 at [391].