

FEDERAL COURT OF AUSTRALIA

Toyota Motor Corporation Australia Limited v Williams [2023] FCAFC 50

Appeal from: *Williams v Toyota Motor Corporation Australia Limited (Initial Trial)* [2022] FCA 344

File number: NSD 462 of 2022

Judgment of: **MOSHINSKY, COLVIN AND STEWART JJ**

Date of judgment: 27 March 2023

Catchwords: **CONSUMER LAW** – representative proceedings – alleged defect in motor vehicle by reason of defective exhaust system – where primary judge found breach of guarantee of acceptable quality pursuant to s 54 Australian Consumer Law – consideration of proper construction of s 54 – where appellant claims statute requires regard to subjective circumstances of claimant – where appellant submits there is heterogeneity of group members – where s 54 references a reasonable consumer – appeal ground unsuccessful

CONSUMER LAW – where appellant contends defect only in a component system and not in vehicle – where appellant alleges error by the primary judge in finding defect in vehicle – where defect rendered vehicles to be of unacceptable quality – appeal grounds unsuccessful

DAMAGES – representative proceedings – where primary judge found reduction in value damages on an aggregate basis – where appellant submits primary judge’s construction of ss 271 and 272 was incorrect – where appellant submits primary judge erred by assessing reduction in value damages at time of supply rather than at later date when loss was alleged to crystallise – where appellant alleged this error resulted in failure take into account certain evidence and matters relevant to the assessment of damages – where fix available for defect by time of trial at no cost to vehicle owner – where experts agree that fix restores value to vehicle prospectively – consideration of proper conceptual approach to reduction in value damages – consideration of appropriate time to assess reduction in value damages – consideration of whether information available at a later date can be taken into account – consideration of proper approach to assessment of reduction in value damages where a defect may be able to be remedied – matter remitted for re-assessment of reduction in value damages under ss 271(1) and 272(1)(a)

and damages for excess GST under ss 271(1) and 272(1)(b) in accordance with reasoning of Court

DAMAGES – representative proceedings – where appellant submits primary judge erred in use of expert evidence as to willingness to pay to assess the reduction in value damages – where appellant submits expert evidence as to resale market price for vehicles with defect flawed – where appellant submits expert evidence provided an insufficient foundation to undertake a common sense assessment of the reduction in value of the goods – where alleged insufficiency of foundation for primary judge’s common sense assessment – where appellant contends in alternative that damages should be assessed taking account of resale information and cost of fix – some grounds upheld – revised common sense assessment undertaken by Court subject to further adjustment on remitter

Legislation: *Competition and Consumer Act 2010* (Cth), s 131A, Schedule 2 (Australian Consumer Law), ss 2, 3, 7, 18, 29, 33, 54, 236, 260, 271, 272, 273, Pt 3-2 Div 1, Pt 5-2 Div 3, Pt 5-4 Div 2

Cases cited: *Capic v Ford Motor Company of Australia Pty Ltd* [2021] FCA 715; 154 ACSR 235
Dwyer v Volkswagen Group Australia Pty Ltd [2021] NSWSC 715
Ethicon Sàrl v Gill [2021] FCAFC 29; 288 FCR 338
Fernando v Commonwealth of Australia [2014] FCAFC 181; 231 FCR 251
Henville v Walker [2001] HCA 52; 206 CLR 459
HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd [2004] HCA 54; 217 CLR 640
Johnson v Perez [1988] HCA 64; 166 CLR 351
Kizbeau Pty Ltd v WG & B Pty Ltd [1995] HCA 4; 184 CLR 281
Medtel Pty Ltd v Courtney [2003] FCAFC 151; 130 FCR 18
Merck Sharp & Dohme (Australia) Pty Ltd v Peterson [2011] FCAFC 128; 196 FCR 145
Murphy v Overton Investments Pty Ltd [2004] HCA 3; 216 CLR 388
Owners – Strata Plan No 87231 v 3A Composites GmbH (No 5) [2020] FCA 1576; 148 ACSR 445
R v Carroll [2010] NSWCCA 55; 77 NSWLR 45
Vautin v By Winddown, Inc (formerly Bertram Yachts) (No 4) [2018] FCA 426; 362 ALR 702

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Sub-area: Regulator and Consumer Protection

Number of paragraphs: 323

Date of last submissions: 14 March 2023

Date of hearing: 14, 15 and 16 November 2022

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ORDERS

NSD 462 of 2022

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

AND: **KENNETH JOHN WILLIAMS**
First Respondent

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

ORDER MADE BY: **MOSHINSKY, COLVIN AND STEWART JJ**

DATE OF ORDER: **27 MARCH 2023**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. Paragraphs 1 to 5 of the orders made by the primary judge on 16 May 2022 be set aside.
3. The matter be remitted for re-assessment of reduction in value damages under ss 271(1) and 272(1)(a) of the Australian Consumer Law (**ACL**), being Sch 2 to the *Competition and Consumer Act 2010* (Cth), and damages for excess GST under ss 271(1) and 272(1)(b) of the ACL, in accordance with the reasons of the Full Court.
4. Within 14 days, each party file a written submission on consequential orders and costs.
5. Within 28 days, each party file any responding written submission on consequential orders and costs.
6. Subject to further order, the issues of consequential orders and costs be determined on the papers.

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

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REASONS FOR JUDGMENT

THE COURT:

INTRODUCTION

1 Between 1 October 2015 and 23 April 2020 (referred to as the **relevant period**), 264,170 Toyota motor vehicles in the Prado, Fortuner and HiLux ranges and fitted one of two particular models of diesel combustion engine were supplied to consumers in Australia. Each of the vehicles was supplied with a diesel exhaust after-treatment system (**DPF system**). The DPF system was defective because it was not designed to function effectively during all reasonably expected conditions of normal operation and use of the vehicle.

2 The appellant, **Toyota** Motor Corporation Australia Pty Ltd, is the “manufacturer” of the vehicles for the purpose of s 7(1)(e) of the *Australian Consumer Law (ACL)*, being Sch 2 to the *Competition and Consumer Act 2010 (Cth) (CCA)*. Toyota also marketed the vehicles in Australia, and in doing so made representations about the quality and characteristics of those vehicles and the DPF system to prospective consumers.

3 The respondents in the appeal, Mr Williams and Direct Claim Services Qld Pty Ltd (**DCS**), are the cited applicants in a representative proceeding against Toyota arising from the supply of the vehicles with the defect. Mr Williams is the sole director of DCS through which he conducts his business as a motor vehicle accidents assessor. DCS acquired a Prado during the relevant period and paid the associated tax, financing and fuel costs. The Prado suffered problems associated with the defective DPF system. The parties accept that DCS is the proper claimant in respect of the vehicle which may be referred to as Mr Williams’s Prado.

4 The group members whom Mr Williams and DCS represent are consumers who, during the relevant period: (1) acquired a relevant vehicle from a dealer or other retailer (including a used car dealer) other than by auction or for the purpose of re-supply, and (2) those who acquired a relevant vehicle from such a consumer other than for the purpose of re-supply.

5 The claims made by DCS on its own behalf, and by both Mr Williams and DCS on behalf of group members, are, in summary, that:

- (1) the relevant vehicles as supplied were not of “acceptable quality” and therefore failed to comply with the consumer guarantee in s 54 of the ACL; and

(2) Toyota made misleading representations and omissions about the vehicles, in contravention of ss 18, 29(1)(a) and (g), and 33 of the ACL.

6 Relief is sought in the representative proceeding under Pt 5-4, Div 2 of the ACL, which provides for remedies relating to the acceptable quality guarantee (including an action for damages against manufacturers of goods), and Pt 5-2, Div 3 of the ACL, which provides for an action for damages (relevantly because of a contravention of the general protections in Ch 2 of the ACL).

7 More particularly, “damages” are sought by Mr Williams and DCS for themselves and on behalf of group members pursuant to:

(1) ACL s 272(1)(a), for “any reduction in the value of the [relevant vehicles], resulting from the failure to comply with the guarantee”, calculated pursuant to the statutory formula prescribed in that provision;

(2) ACL s 272(1)(b), for “any loss or damage suffered by the [group member] because of the failure to comply with the guarantee ... if it was reasonably foreseeable that the [group member] would suffer such loss or damage as a result of such a failure”, which was said to include excess taxes, excess financing costs, excess fuel costs and costs incurred in having the relevant vehicle serviced or repaired on account of the defect; and

(3) ACL s 236, for loss and damage suffered “because of” Toyota’s conduct in contravention of ACL ss 18, 29 and 33.

8 The initial trial of the representative proceeding was relevantly limited to, in summary, the following issues:

(1) whether there was a failure to comply with the s 54 acceptable quality guarantee and whether that could be determined on a common basis;

(2) whether there was a contravention of ss 18, 29 and/or 33 and whether that could be determined on a common basis;

(3) whether, if there was a finding of a failure to comply with the s 54 acceptable quality guarantee on a common basis, there could be a quantification of s 272(1)(a) damages, i.e., reduction in value damages, on a common basis – the respondents sought an award of aggregate damages, whether in the form of a total aggregate amount or a specified

formula applicable to each group member, for any reduction in value resulting from the failure of the vehicles to comply with the consumer guarantee;

- (4) whether group members had suffered damages in paying excess GST on the purchase of their vehicles and whether such damages pursuant to s 272(1)(b) could be awarded on a common basis – again, the applicants sought an award of aggregate damages; and
- (5) what damages were suffered by DCS.

9 To be clear, because any damages available under ACL s 272(1)(b) (other than for excess GST) would depend on the particular circumstances of each group member, the claims for an assessment of such damages for all group members other than DCS was not to be determined at the initial trial. It was recognised that those claims would have to be determined on an individual basis. Also, other than for DCS, no damages could be determined under ACL s 236 in respect of any breaches of ss 18, 29 and 33 because questions of reliance, causation and damage would have to be determined on an individual basis.

10 Following the adoption of two reports of a referee and the parties' agreement on a detailed statement of facts, the primary judge made a number of factual findings about the alleged defect in the vehicles: *Williams v Toyota Motor Corporation Australia Limited (Initial Trial)* [2022] FCA 344 (J). Save where indicated, none of these is challenged in the appeal. For present purposes they can be summarised as follows.

11 The diesel combustion engines in the vehicles generate pollutant emissions. The DPF system is designed to capture and convert the pollutant emissions into carbon dioxide and water vapour through a combination of filtration, combustion (i.e., oxidation) and chemical reactions. The DPF system is necessary because the vehicles are required to comply with national emissions standards.

12 The DPF system has two core components, the diesel particulate filter (**DPF**) and the diesel oxidation catalyst (**DOC**), which sit together in the DPF assembly. The DPF is designed to capture diesel particulate matter in the exhaust gas prior to its release, and to store it. The DPFs have a finite capacity to capture and store particulate matter. The particulate matter captured by and stored in the DPF must therefore be burned off periodically in a process called regeneration. Regeneration requires the exhaust temperatures to increase to the level required for the particulate matter to oxidise.

- 13 The referee described the **core defect** to be that the DPF system was not designed to function effectively during all reasonably expected conditions of normal operation and use in the Australian market. In particular, under certain conditions deposits and/or coking of the DOC prevented the DPF from effective automatic or manual regeneration.
- 14 When regeneration does not occur, or is ineffective, the DPF becomes blocked with particulate matter, and the vehicle experiences a range of problems. These include excessive white smoke and foul-smelling exhaust gas during regeneration and/or indications from the engine's on-board diagnostic system that the DPF is "full". The defect was inherent in the design of the DPF system. The design defect comprised both mechanical defects and defective control logic and associated software calibrations.
- 15 A key occurrence which caused the core defect to manifest was the exposure of the vehicle to regular continuous driving at approximately 100 km/h, referred to as the **high-speed driving pattern**. The effects of the core defect, when experienced, included excessive white smoke and foul-smelling exhaust gas being emitted from the vehicle's exhaust during regeneration, and DPF notifications displaying on an excessive number of occasions or for an excessive period of time.
- 16 From February 2016, Toyota was aware that some relevant vehicles were being presented to dealers by customers who reported concerns with, among other things, the emission of excessive white smoke during regeneration and the illumination of DPF notifications.
- 17 Toyota attempted a series of countermeasures to fix the problem. Ultimately, only one such countermeasure was effective. It was introduced from May 2020 (**the 2020 field fix**). The 2020 field fix was effective and will continue to be effective in remedying the core defect and its consequences in all the vehicles. From June 2020, i.e., a month or so after the end of the relevant period, all new vehicles of the relevant type were supplied with the countermeasure which prevented the core defect from manifesting.
- 18 If a relevant vehicle was exposed to the high-speed driving pattern, it would experience one or more of the following consequences by reason of the core defect (referred to as the **defect consequences**):
- (1) damage to the DOC;
 - (2) the flow of unoxidised fuel through the DPF and the emission of white smoke from the vehicle's exhaust during and immediately following regeneration;

- (3) the emission of excessive white smoke and foul-smelling exhaust from the vehicle's exhaust during regeneration;
- (4) partial or complete blockage of the DPF;
- (5) the emission of foul-smelling exhaust from the exhaust pipe when the engine was on during and immediately following automatic regeneration;
- (6) the need to have the vehicle inspected, serviced and/or repaired by a service engineer for the purpose of cleaning, repairing or replacing the DPF or DPF system (or components thereof);
- (7) the need to have the vehicle inspected, serviced and/or repaired more regularly than would be required absent the core defect;
- (8) the need to program the engine control module (ECM) more often than would be required absent the core defect;
- (9) the display of DPF notifications on an excessive number of occasions and/or for an excessive period of time;
- (10) blockage of the fifth fuel injector in the relevant vehicles (the additional injector) due to carbon deposits on its tip;
- (11) the additional injector causing deposits to form on the face of the DOC, causing white smoke; and
- (12) an increase in fuel consumption and decrease in fuel economy.

19 The primary judge found that although the defect consequences had not *actually manifested* in all of the relevant vehicles, they all had the *propensity* to suffer those consequences if exposed to the identified high-speed driving pattern. On that basis, his Honour found that all of the vehicles suffered from the defect.

20 In the initial trial the applicants did not seek relief under ACL s 272(1)(a) on behalf of those group members who received the 2020 field fix (referred to as the **2020 field fix group members**). That was because in respect of those group members there was a live issue, to be resolved at a later date, as to the application of s 271(6). That section provides that an affected person is not entitled to commence an action to recover damages under s 272(1)(a) if they had, in accordance with an express warranty given or made by the manufacturer, required the manufacturer to remedy a failure to comply with a guarantee by repairing or replacing the

goods, unless the manufacturer refused or failed to remedy the failure or failed to remedy the failure within a reasonable time.

21 Also, the claims to reduction in value damages by any group member who bought and/or sold a relevant vehicle on the secondary market (referred to as **partial period group members**), were excluded from assessment in the initial trial. That was because of the complexity of determining how an award in respect of a particular vehicle might be allocated between different group members who owned the vehicle at different times during the relevant period.

22 In summary, the primary judge found as follows:

- (1) all the relevant vehicles, even those in respect of which the defect had not manifested, were supplied in breach of the acceptable quality guarantee, which issue can and should be decided on a common basis;
- (2) on a common basis, Toyota made representations with regard to the vehicles being free of defects which were misleading, deceptive and false within the meaning of ACL ss 18, 29 and 33, but given that questions of reliance and causation still have to be determined on an individual basis it is not possible at the stage of the initial trial to deal with any damages resulting from the contravention of those sections;
- (3) the failure to comply with the guarantee of acceptable quality resulted in a reduction in value of all relevant vehicles of 17.5%, meaning that their true value was 82.5% of their average retail price, and that should be decided on a common basis;
- (4) group members:
 - (a) who had not opted out;
 - (b) whose vehicle had not previously been supplied to a consumer;
 - (c) whose vehicle had not received the 2020 field fix prior to 15 May 2022 (i.e., 2020 field fix group members were excluded);
 - (d) who had not disposed of their vehicle during the relevant period (i.e., partial period group members were excluded); and
 - (e) whose vehicle had not been returned, after the relevant period, to Toyota or a dealer in exchange for a replacement vehicle or as part of a redress program conducted by Toyota,are entitled to recover reduction in value damages;

- (5) how reduction in value damages should be assessed or distributed in respect of the vehicles excluded from the reduction in value damages referred to above should be left for later determination;
- (6) damages be awarded to each group member who had not opted out for excess GST paid by the group member in connection with acquiring any vehicle to which the group member's claim relates in an amount equal to 10% of the amount calculated as set out in (3) above; and
- (7) there be judgment for DCS for its damages in the sum of \$18,401.76.

23 The notice of appeal identifies 16 grounds of appeal, of which the last was not pressed. The remaining 15 grounds of appeal can be grouped and summarised as follows:

- (1) Grounds 1 to 3 challenge the primary judge's findings on liability, and in particular contend that the primary judge erred in finding that ACL s 54 had been contravened in respect of all the relevant vehicles because such a finding depends on the circumstances of supply specific to each group member, and that the defect was a defect in the DPF system and not in the vehicle.
- (2) Grounds 4, 8 and 9 contend that the primary judge incorrectly construed and applied the statutory test under ACL ss 271(1) and 272(1)(a), in particular by finding that reduction in value damages must be determined with reference to the date of supply of the relevant vehicle and not with reference to the date on which any loss crystallises, and in particular without reference to the availability of the 2020 field fix. These grounds of appeal concern the primary judge's construction of the relevant provisions and his conceptual approach to reduction in value damages.
- (3) The remaining grounds concern the primary judge's approach to the *assessment* of the reduction in value of the relevant vehicles. They deal with the evidence in support of the primary judge's finding that there was a reduction in value of all relevant vehicles of 17.5%.

24 After outlining the statutory scheme, the balance of these reasons will be structured around these three groups of appeal grounds.

25 For the reasons that follow, we have concluded that the appeal fails in relation to the liability issues, but that it succeeds on the question of the proper construction and conceptual approach

to the assessment of reduction in value damages, and in relation to the primary judge's assessment of the reduction in value damages.

THE STATUTORY SCHEME

26 The specifics of ACL ss 18, 29 and 30 are not pertinent to the issues raised by the appeal. In broad outline, those sections prohibit conduct that is misleading or deceptive or is likely to mislead or deceive, or which is false, regarding, amongst other things, the nature, quality and characteristics of goods supplied in trade and commerce.

27 Part 3-2, Div 1 (the consumer guarantees, including s 54) and Pt 5-4 (the remedy provisions, including ss 271 and 272) were introduced when the ACL was first enacted in 2010: see *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010* (Cth). The explanatory memorandum to that Bill indicates that the Pt 3-2, Div 1 provisions were couched in terms broadly similar to the *Consumer Guarantees Act 1993* (NZ): see the explanatory memorandum at [7.9].

28 Insofar as the acceptable quality guarantee claim is concerned, s 54 provides for one of several guarantees relating to the supply of goods (in ACL Pt 3-2, Div 1, Sub-div A). Relevantly for present purposes, s 54 provides as follows:

54 Guarantee as to acceptable quality

(1) If:

- (a) a person supplies, in trade or commerce, goods to a consumer; and
 - (b) the supply does not occur by way of sale by auction;
- there is a guarantee that the goods are of acceptable quality.

(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.

29 Sections 271 and 272 are relevantly in the following terms:

271 Action for damages against manufacturers of goods

- (1) If:
 - (a) the guarantee under section 54 applies to a supply of goods to a consumer; and
 - (b) the guarantee is not complied with;
 an affected person in relation to the goods may, by action against the manufacturer of the goods, recover damages from the manufacturer.

...

- (6) 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):
 - (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.

...

272 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 repairing 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.

30 Section 271(1) provides that an “affected person” in relation to the goods may recover damages from the “manufacturer”. “Affected person” in relation to goods is defined in s 2 as meaning a consumer who acquires the goods, or 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. It is by the operation of this definition that purchasers of relevant vehicles from other consumers are also group members.

31 Section 7 deals with the meaning of “manufacturer”. As mentioned, it is uncontroversial that Toyota is a manufacturer within the meaning of s 7(1)(e), i.e., a person who imports goods into Australia who is not themselves the manufacturer of the goods and, at the time of importation, the manufacturer of the goods does not have a place of business in Australia.

ISSUES RELATING TO LIABILITY

Ground 1: can s 54 liability be determined on a common basis?

The substance of ground 1

32 By appeal ground 1, Toyota contends that the primary judge erred in finding that he could determine whether s 54 had been breached with respect to each and every group member on a common basis. Toyota contends that the primary judge should have found that whether s 54 has been contravened in the context of the supply of a vehicle is not capable of being determined as a common question because it depends on the circumstances of supply specific to each group member.

33 At the heart of this ground of appeal is s 54(3)(c)-(e) which provides that among the matters to which regard must be had in determining whether the goods are of acceptable quality are 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. Toyota contends that those mandatory considerations direct attention to the particular circumstances of “the” supply in each case, and those circumstances could differ from one incident of supply to the next.

The primary judge's reasoning

34 The primary judge first considered the factors identified in s 54(2) and concluded on the basis of them that the relevant vehicles did not comply with the guarantee as to acceptable quality (J[189]). His Honour then turned to the s 54(3) matters.

35 With reference to s 54(3)(d) and the statement of agreed facts, his Honour found that Toyota marketed all of the relevant vehicles throughout the relevant period as non-defective, good quality, reliable and durable vehicles that were suitable for all conditions of normal operation and use in the Australian market. Further, Toyota marketed the relevant vehicles as having a DPF system that was non-defective, of good quality, reliable, durable, without a propensity to fail and was sufficient to prevent the DPF from becoming partially or completely blocked (J[191]).

36 Although noting a “superficial attraction” to Toyota’s submission that the Court cannot determine the question of acceptable quality on a common basis because it is required to inquire into the individual circumstances of each instance of supply, his Honour identified two reasons pointing against that conclusion (J[208]).

37 First, his Honour identified that the relevant inquiry is objective, to be assessed by reference to the reasonable consumer who is taken to be “fully acquainted with the state and condition of the goods (including any hidden defects of the goods)”: s 54(2) (J[209]).

38 Secondly, his Honour reasoned that in circumstances where: (1) it is alleged that the goods are not of acceptable quality by reason of a common characteristic of the goods; and (2) there is no evidence of some material difference between characteristics such as the price of the goods, the packaging or labelling of the goods, representations made about the goods by the manufacturer or supplier of the goods, or the circumstances relating to the supply of the goods, nothing in s 54 prevents the Court from assessing the quality of the goods, having regard to the matters in s 54(3), on a common basis. His Honour noted that Toyota led no evidence of, or pleaded, any material difference that is capable of bearing upon the question of whether a reasonable consumer would regard a relevant vehicle as being of acceptable quality (J[210]).

Toyota's submissions

39 Toyota submits that there is a heterogeneity of group members, including individuals who made a one-off purchase and fleet purchasers who bought scores of relevant vehicles over the relevant period. It submits that in any particular case a purchaser may have been provided with

specific information about Toyota’s warranty scheme and the fact that any defects are covered by that scheme, or a fleet purchaser may have been content to purchase its 500th vehicle with the knowledge that the DPF system defect in the previous 499 vehicles had not caused it any real difficulty. With reference to *Owners – Strata Plan No 87231 v 3A Composites GmbH (No 5)* [2020] FCA 1576; 148 ACSR 445 at [28]-[30], it submits that it is necessary to focus on the circumstances of each specific supply.

40 With regard to the primary judge placing some reliance on the fact that Toyota had not led evidence of any “material difference” between the supply of different vehicles with reference to the characteristics referred to in s 54(2)(d)-(e), Toyota submits that the primary judge was in error because there was such evidence and because it reflects an incorrect approach to the determination of common questions. In the latter regard, Toyota submits that it is simply not realistic, and would defeat the purpose of a representative proceeding, to expect Toyota to adduce evidence about the individual circumstances of the purchase of a quarter of a million vehicles.

41 Toyota emphasises that this ground of appeal is not merely a question of statutory construction. It accepts that it is not a consequence of s 54 that a breach of the acceptable quality guarantee can never be decided on a common basis. It says that it is the statutory requirement that the relevant circumstances of “the supply” must be considered, taken together with the circumstances of this case – in particular, the very substantial number of supplies over a long period of time to consumers in potentially very different circumstances who may be subject to different information and who might have different levels of tolerance for any defect – that has the result that breach of s 54 cannot be decided on a common basis *in this case*.

Consideration

42 There can be no doubt that the assessment of whether goods are of acceptable quality within the meaning of s 54(2) is to be conducted objectively, not subjectively. That arises inescapably from the statutory inquiry being whether “a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects of the goods)” would regard the quality of the goods as acceptable. Thus, the inquiry is made with reference to a hypothetical reasonable consumer and not with reference to the particular individual consumer to whom the goods are supplied in any particular case.

43 Consideration of the matters in s 54(3), each of which is required to be considered by the injunction in s 54(2), is necessarily also undertaken from the perspective of a hypothetical

reasonable consumer. That means that any idiosyncratic subjective understanding of the state and condition of the goods in issue or any idiosyncratic attitude to what is or is not acceptable, is irrelevant to the assessment required by s 54(2). As the primary judge correctly recognised, “the statutory test does not operate by reference to what a particular individual consumer knew or *subjectively* believed about the condition of the goods” (J[209]). Since, by the wording of s 54(3), the hypothetical reasonable consumer is taken to be fully acquainted with the state and condition of the goods including any hidden defects of the goods, it is equally of no moment whether one or other consumer amongst the group members was aware to one degree or another about the defect in the vehicles.

44 It also bears emphasising that by s 54(3)(e), it is “any other relevant circumstances relating to the supply of the goods” that must be considered. There are two implications from that wording. First, it is only circumstances relating to the supply of the goods *that are relevant to the question at hand*, namely whether a hypothetical reasonable consumer as described in s 54(2) would regard the goods to be of acceptable quality, that are required to be considered. Thus, it is not *anything* said, done or known at or about the time of supply that must be considered. Secondly, from the word “other”, the matters for consideration set out in s 54(3)(a)-(d) are subject to the same relevance requirement.

45 In those circumstances, the examples provided by Toyota do not advance the argument. The first, which postulates a purchaser having been provided with specific information about Toyota’s warranty scheme and the fact that any defects were covered by the scheme, is not a circumstance relevant to whether a reasonable consumer who had knowledge of the defect would regard the vehicle as being of acceptable quality. That is because during the relevant period there was no fix for the defect, so the postulated information cannot be a statement to the effect that the defect would be fixed under the warranty. It can only be some broader statement about the warranty which is not relevant.

46 The second example, being the fleet-owner purchaser who was indifferent to the defect, is not relevant because, as explained, the idiosyncratic attitude of what is or is not acceptable is not to the point. The inquiry is objective.

47 The principal difficulty with Toyota’s argument on this ground of appeal is that it allows for a situation where two identical vehicles are subject to different conclusions with regard to their being of acceptable quality based on what the particular purchaser in each case knew or did not

know, or cared about or did not care about. That form of subjectivity is exactly what s 54 eschews.

48 With regard to the authorities, it is to be noted, as it was by the primary judge (J[207]), that in several cases the question of acceptable quality has been decided on a common basis: *Medtel Pty Ltd v Courtney* [2003] FCAFC 151; 130 FCR 18; *Ethicon Sàrl v Gill* [2021] FCAFC 29; 288 FCR 338; *Capic v Ford Motor Company of Australia Pty Ltd* [2021] FCA 715; 154 ACSR 235. As acknowledged by the primary judge (J[201]-[202]), there are also cases in which the question of acceptable quality has been held not to be susceptible to determination on a common basis. *Owners – Strata Plan*, particularly relied on by Toyota, is one. *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* [2011] FCAFC 128; 196 FCR 145 is another. It is not necessary to consider those cases in detail because even accepting that on the facts of those cases there may have been circumstances particular to an individual group member that was relevant to the question at hand, that has not been shown to be the case in the present matter.

49 That takes us to the outstanding matter to consider, which is Toyota's submission that the primary judge was wrong to have held that the onus lay on Toyota to adduce evidence of any relevant circumstances peculiar to one or other group member in order to establish a foundation for its argument that the question of acceptable quality cannot be decided on a common basis. His Honour identified that Toyota had not pleaded or otherwise raised any relevant, material difference between the circumstances of any given instance of supply of a relevant vehicle capable of bearing upon the question of whether a reasonable consumer would regard the vehicle as acceptable (J[211]). Toyota does not cavil with that characterisation of how the case was run. Clearly enough, the issue of whether the relevant vehicles were of acceptable quality could and should be determined on a common basis was one of the issues squarely identified by the parties as arising for determination at the initial trial, and it was identified by the primary judge as such (J[199]).

50 As submitted on behalf of the respondents, if Toyota wished to demonstrate through evidence, as opposed to mere speculation, that there was a sound basis in fact for the Court to refrain from determining the issue on a common basis, it could and should have led relevant evidence. As identified by the primary judge (J[193]), that need not have been of the circumstances of every one of the quarter of a million supplies; evidence of materially different relevant circumstances of even one supply may have been sufficient, but not even that was done. In the absence of that, and in light of the compelling generalised evidence in support of a finding that

the vehicles were not of acceptable quality (canvassed at J[15], [32]-[86], [173]-[198]), there was no error in the primary judge's approach to, and conclusion on, the question of commonality.

51 It follows that ground 1 fails.

Grounds 2 and 3: was there a defect in the vehicles?

The substance of grounds 2 and 3

52 By these grounds of appeal, Toyota contends that the primary judge erred in finding that there was no distinction between a defect in the DPF system and a defect in the vehicles. It is said that the primary judge erred in his treatment of the evidence on this question. It is also said that a consequence of the primary judge's error on this question is that the primary judge erred in concluding that Toyota had made representations about the vehicles in contravention of ACL ss 18, 29 and 33, i.e., the representations about the vehicles were not in contravention of those provisions because there was nothing wrong with the vehicles – the problem was with the DPF system.

The primary judge's reasoning

53 The primary judge reasoned that Toyota's efforts to divorce issues with the DPF system from the relevant vehicles is entirely superficial. The DPF system is in the vehicles in order to ensure that the vehicles comply with Australian emissions rules, and is therefore a critically important component of the vehicles, the proper functioning of which is likely to be of concern to a reasonable consumer. His Honour found that even though the vehicles could still be driven from A to B, the consequences of the core defect are such as to substantially interfere with the normal use and operation of the vehicles (J[80], [81]).

54 His Honour identified the warning notifications to the driver in the event of the DPF becoming full or blocked, directing the driver to take the vehicle to an authorised dealership, failing which if the vehicle continued to be operated it would go into "limp mode". Also, his Honour reasoned that plumes of dense white smoke being emitted from the vehicle are not conducive to a safe driving environment. His Honour also referenced tens of thousands of customer complaints that illustrate the obvious point that the defect consequences are not trivial and have a significant impact upon consumers' use and enjoyment of the vehicles (J[81]-[85]).

55 Finally, the primary judge reasoned that Toyota's attempt to downplay the significance of the core defect is inconsistent with its contemporaneous conduct and internal communications.

Those showed that Toyota had significant concerns about how the problems experienced by the vehicles would impact on Toyota's brand and reputation, and it apprehended that the issues with the vehicles were of a serious nature and materially affected consumers' use and enjoyment of them (J[86]).

Consideration

56 Toyota submits that the primary judge's "key error" was to hold that although the DPF system was in the vehicles to ensure compliance with emissions rules, it "does not matter" whether the respondents sought to prove that the vehicles in fact failed to comply with those rules. The answer to that is that his Honour's finding about the reason for the DPF system being in the vehicles is about the DPF system being "a critically important component" of the vehicles, and hence a defect in the DPF system is properly regarded as a defect in the vehicles. Because of the need for the vehicles to comply with emissions rules for them to be supplied in Australia, and that the DPF system was designed to ensure such compliance, the DPF system is an inherent and incorporated component of the vehicle – it is not an accessory. It can have a defect of such a nature as to render the vehicles not of acceptable quality within the meaning of s 54 whether or not the defect affected the vehicles' compliance with the emissions rules.

57 As the respondents submit, complex goods such as motor vehicles are manufactured from innumerable components. It is conceptually flawed, and would render s 54 essentially inoperative in respect of most consumer goods, if a failure of a component could not as a matter of construction be regarded as a defect in the vehicle. The question has to be approached by asking whether the defect is such as to cause the relevant goods to be of an unacceptable quality within the meaning of s 54. It cannot be directed at the level of individual components which were not supplied separately or individually but rather form an inherent part of the goods as a whole.

58 The statutory standard embodied in s 54 accommodates the situation of minor defects in goods through the element of degree, which is the appropriate way to analyse a scenario where the defect affects only minor component parts such that it would be of limited significance to the hypothetical reasonable consumer. The present case is far removed from that. As mentioned, the presence of the defect in the DPF system in the vehicles meant that a vehicle could not be exposed to regular highway driving without malfunctioning and triggering serious consequences. It is hard to conceive of a scenario in which the hypothetical reasonable consumer would not regard such consequences as unacceptable.

59 Toyota submits that the evidence does not support the primary judge’s finding that the core defect “substantially interfered” with the normal use and operation of the vehicles. That is because the consequence of the defect, if it manifested, was that the vehicle would provide warnings that it required “unscheduled maintenance” and it was only if the user did not have that maintenance undertaken that the vehicle would go into limp mode. On that basis, Toyota submits that the vehicle going into limp mode is a consequence that is remote from the occurrence of the defect in the DPF system which means that it is not a defect in the vehicle that a reasonable consumer is likely to regard as unacceptable.

60 Toyota’s focus on the limp mode ignores the myriad other defect consequences found by the referee and agreed by the parties which, when they manifest, substantially interfere with the use and enjoyment of the vehicle. These include the defect consequences identified above at [18].

61 Next, Toyota submits that the primary judge erred (at J[84]) in relying on Mr Williams’s evidence about white smoke being “dangerous” when the respondents had not mounted any case that the defect gave rise to any safety issue and Mr Williams could not provide expert evidence of that nature. However, although his Honour referred to Mr Williams’s evidence that white smoke entering the cabin of the vehicle was “dangerous”, the finding was that “plumes of dense white smoke are hardly conducive to a safe driving environment”. There is no error in that finding – the primary judge was plainly in a position to make that assessment based on the evidence that was adduced. In any event, his Honour recorded that he placed “minimal weight on this factor” in reaching his conclusion on the s 54 question.

62 Toyota submits that the primary judge was wrong (at J[85]) to rely on “tens of thousands of customer complaints” and Mr Williams’s evidence to conclude that the consequences of the defect in the DPF system were “not trivial”. Although accepting that tens of thousands of customers had difficulties with the consequences of the defect and they made complaints or had repairs carried out under Toyota’s warranty program, Toyota submits that without analysing each complaint or warranty claim individually it is not possible to conclude that they all related to vehicles with the DPF system defect. For example, it is said that a large number of complaints related to the fact that the DPF system was not able to automatically regenerate if the vehicle is driven consistently at low speeds or for short trips – which was not a design defect. Also, some white smoke was a consequence of the ordinary operation of the DPF system. Toyota submits that it is not possible to disentangle which customer complaints or

warranty repairs were carried out because of the low-speed driving pattern or the vehicle's ordinary operation.

63 As submitted on behalf of the respondents, the primary judge relied on the customer complaints as probative of the fact that, when vehicles experience issues consistent with the defect consequences (for example, the emission of excessive white smoke, malodorous exhaust and irregular servicing), those issues tend to impact significantly on the owners' use and enjoyment of the vehicles (J[183]). The probative value of the evidence was not dependent on proof that the issues the subject of the customer complaints were caused by the defect in the DPF system. Rather, it was sufficient that the issues complained of were consistent with the defect consequences, regardless of the cause.

64 Also, it was not necessary for the primary judge to review each of the tens of thousands of customer complaints, the records of which were produced on discovery by Toyota, to conclude that the defect consequences impact significantly on the owners' use and enjoyment of the vehicles. If Toyota's contention had been that the complaints did not arise from the defect in the DPF system, as it apparently contends on appeal, then it was open to it to analyse the records of the complaints and identify complaints that it says were unrelated to the core defect or inconsistent with the defect consequences. It failed to do that.

65 There is no error in the primary judge's findings and reasoning to the conclusion that the defect in the DPF system amounted to a defect in the vehicles which rendered the vehicles of unacceptable quality and their supply to thus be in contravention of the acceptable quality guarantee in s 54. Grounds 2 and 3 in the appeal accordingly fail.

ISSUES CONCERNING CONSTRUCTION AND CONCEPTUAL APPROACH

Overview

66 In this section of these reasons, we deal with grounds 4, 8 and 9 of the notice of appeal, which challenge the primary judge's construction of ss 271 and 272 and his conceptual approach to reduction in value damages.

67 Broadly, by these grounds, Toyota raises the following contentions:

- (1) that the primary judge erred in applying the test under ss 271(1) and 272(1)(a) by finding that damages for any reduction in value must be assessed by reference to the

time of supply, rather than by reference to the date on which any loss *crystallises* (including by reference to any later events) (ground 4);

- (2) because the primary judge did not assess damages by reference to the date on which any loss crystallises, his Honour erred in not taking into account certain evidence demonstrating that affected persons had not suffered any damage (the matters relied on by Toyota include the referee's finding that the 2020 field fix was effective) (ground 8); and
- (3) in light of these errors, the primary judge erred by failing to take into account matters relevant to the assessment of damages for any reduction in value in the relevant vehicles, including the secondary market data analysed by Mr Stockton, the existence of the 2020 field fix, whether and to what extent and when the defect consequences manifested in a relevant vehicle, the resale value of the relevant vehicles compared to comparable vehicles and whether group members had sold their vehicles and the prices achieved for any such sales (ground 9).

68 Evidentiary issues raised by these grounds, such as issues relating to the secondary market data analysed by Mr Stockton, are considered later in these reasons under the third group of appeal grounds.

The nature of the damages claim at the initial trial

69 As we have noted, Mr Williams and DCS as representative applicants sought aggregate damages for reduction in value resulting from the failure by Toyota to comply with the consumer guarantee. However, no such award was sought in respect of those group members who had taken advantage of the 2020 field fix. Further, the proper approach to those group members who bought and/or sold a relevant vehicle on the secondary market (i.e., partial period group members), including whether an award of damages for reduction in value could be made in their favour on an aggregate basis, was reserved for later consideration.

70 Accordingly, when it came to aggregate damages, the focus of the primary judge was on the claim for reduction in value made in respect of those group members who had bought their vehicle from a Toyota dealer and who still owned the vehicle when the 2020 field fix was made available at no cost (the **relevant cohort**).

71 The claim by the representative applicants that an assessment could be made that covered all group members in the relevant cohort was founded on the premise that, for all of them, the

reduction in value was the same. For reasons that have been given, to the extent that the premise was based upon the proposition that the relevant value was to be determined objectively and not by reference to the particular sensibilities of individual owners when it came to the defect and its consequences, the premise was correct. However, there remain issues in the appeal as to whether, on the correct conceptual approach, the objective assessment of damages for reduction in value is the same for all members of the relevant cohort and, if so, whether the primary judge was correct in concluding that a loss of 17.5% of the relevant retail price had been proven.

The primary judge’s construction and conceptual approach

72 The primary judge reasoned by the following steps in determining what his Honour described as “reduction in value damages”.

73 First, the primary judge conceptualised “reduction in value” as the price that would need to have been offered in order to sell all of the relevant vehicles assuming that the buyers were aware of the defect: J[273]-[276].

74 Secondly, the primary judge considered whether (a) the willingness to pay of the marginal consumer; or (b) the repair cost to remedy the defect may be used as a measure of the “reduction in value”. His Honour reached the following conclusion at J[297]:

To my mind, it is erroneous to shoehorn any conception of “reduction in value” as only being able to be derived by comparison to market value. Concepts such as repair cost and [willingness to pay] are useful indicators in ascertaining any reduction in value.

The reference to the “marginal consumer” is to the last buyer who had to be persuaded to enter the market to buy a vehicle in order to clear the available supply. The price had to be low enough for that buyer to be willing to pay for the vehicle. Inherent in the concept is the notion that many buyers may have been willing to pay a higher price but the market price needs to be set at a level that is low enough for a buyer to be found for each of the defective vehicles.

75 In the course of reasoning to that conclusion, his Honour dealt with criticisms as to the use of the notion of the consumer’s willingness to pay to ascertain the “reduction in value”. He did so in the following way at J[295]:

The criticism that a consumer still recovers damages notwithstanding that the level of their reduced individual [willingness to pay] may exceed the level at which a supplier wishes to supply is somewhat of a false issue. The reduction in value loss arises because the vehicle’s true value at the time of purchase (which is objectively assessed) was less than the purchase price, not because the individual consumer’s true

[willingness to pay] was less than the purchase price. In this regard, Mr Boedeker calculated the reduced [willingness to pay] for the *marginal* consumer, which approximates the price decrease that would have been required in order for [Toyota] to sell the same number of Relevant Vehicles with the defect disclosed. This represents the true value, because it is the price that would need to have prevailed in the marketplace in order for the same volume of vehicles to have been sold in the light of market knowledge of the [defect].

76 It can be seen that the evidence as to willingness to pay was viewed by the primary judge as a means by which to ascertain the price at which the defective vehicles would need to have been offered in order to clear the market.

77 Thirdly, the primary judge accepted the contention advanced by the representative applicants to the effect that the reduction in value was to be assessed by reference to the time at which the vehicle was supplied without reference to events which occurred subsequently (but that *information* which bears upon the assessment of the value of the goods at the time of supply can be taken into account): J[299]-[301].

78 Significantly, this aspect of the reasoning was part of the foundation for his Honour’s conclusion that reduction in value damages could be assessed for all members of the relevant cohort on a common basis. In that regard, his Honour observed at J[325]:

The reduction in value damages sought by group members are referable to that common propensity inherent in the Relevant Vehicles on the *date of supply*. This fortifies the view that this loss also can be assessed on a common basis, because it is based on a propensity common to all the Relevant Vehicles at the time of acquisition.

79 Fourthly, as to the relevance of evidence concerning matters which occurred after the date of purchase, his Honour concluded that such evidence could be adduced to demonstrate “what in fact the nature of the defect was” and to demonstrate the extent of any fall in the market price for the vehicles at a time when the market became fully informed of the defect because that evidence “may provide information relevant to assessing the true value at the time of acquisition”: J[328].

80 However, the focus upon the need to demonstrate evidentiary significance for establishing the factual position as at the date of purchase led his Honour to disregard the availability of the 2020 field fix in assessing damages. As to the lack of relevance of that fact to assessing the reduction in value damages, his Honour reasoned as follows at J[328]:

... if a repair became available four years after the date of acquisition and was implemented more than a reasonable time after being requested, this would not be relevant to the true value at the time of acquisition. The repair was not expected at the

time of acquisition, so it is an extraneous event, irrelevant to the true value at that time.

81 It may be noted that the references to the repair becoming available four years after acquisition and the repair not being implemented within a reasonable time after being requested, reflect the terms of evidence given by Mr Williams as to his own experience. It does not reflect the position for all members of the relevant cohort some of whom bought their vehicle just before the 2020 field fix was available and may have been able to secure a prompt repair. Of significance for present purposes is the fact that the reasoning by the primary judge treated the possibility of repair as an extraneous event throughout the whole of the period when members of the relevant cohort purchased their vehicles. The primary judge approached all members of the relevant cohort on the same basis without any allowance for the different circumstances that may have pertained to them as time went on. Nor did his Honour make any allowance for the prospective restoration of value that was made possible by the availability of the 2020 field fix at no cost to the owner of the vehicle.

82 His Honour's approach meant that a consumer may recover reduction in value damages on the basis that the vehicle as purchased was defective as well as ultimately receive the benefit of the 2020 field fix (at no further cost) thereby restoring the value at that point in time. The submissions for Toyota concerning the grounds relating to the assessment of damages emphasised this apparently anomalous outcome.

83 Although the primary judge's approach to *assessment* of the reduction in value of the relevant vehicles is the subject of the third group of appeal grounds (considered later in these reasons), it is convenient to outline his Honour's approach to, and conclusions about, assessment at this stage. The primary judge began the quantification task by emphasising statements in the authorities to the effect that undertaking a valuation process does not admit of a single precise answer especially where it is being undertaken on the basis of a hypothetical: J[340]. His Honour referred to authority to the effect that it is a "commonsense endeavour" to be undertaken as a matter of judgment based upon the available evidence rather than as an arithmetical exercise: J[342]-[343], see also J[391]-[392]. No issue arises in the appeal as to this approach in terms of legal principle. Rather, the contentions advanced by Toyota (by the third group of appeal grounds) concern the extent to which there was sufficient (or any) material upon which to base such an assessment.

84 Ultimately, after a critical consideration of the expert evidence exposing the deficiencies in the various approaches adopted by the experts, his Honour reached his conclusion as to quantification in the following way: J[393]:

The applicants advocate for a reduction in value of 25 per cent. There is always a difficulty in settling upon a pin-point figure in cases of this type. Doing so, although necessary, tends to lend a patina of precision to what in truth is an evaluative and imprecise exercise upon which, at least at the margins, reasonable minds may differ. I am inclined, however, to consider the figure fastened upon by the applicants as being simply too high. My reasons for this conclusion have been addressed in relation to my findings as to the expert evidence, which has led me to conclude that although the evidence of Mr Boedeker and Mr Cuthbert has some force, a number of the criticisms directed to its accuracy and reliability also have merit. But the conclusion that a reduction in value must still be a figure of significance not only aligns with common sense, but more specifically, my perception of the evidence of Mr Williams and the effect of the Defect Consequences more generally, as borne out by the customer complaints (as to which see [183]). Doing the best I can, a reduction in value in the range of 15 per cent to 20 per cent is appropriate having regard to all the evidence. Given the need to land on an exact figure, I should settle in the middle of this range, that is, a reduction of 17.5 per cent.

85 The above conclusion was said by the primary judge to be reached by giving weight “to the entirety of the expert evidence and the submissions advanced by the parties in respect of that evidence”: J[392]. It was expressed as a form of evaluative synthesis of the evidence recognising its problems and shortcomings to derive a single value. It was reached in circumstances where the expert evidence adduced by Toyota was in the form of criticisms of the evidence led in support of the claim rather than in the form of providing any real analysis as to a different methodology: J[394]. In short, Toyota’s case before the primary judge was that it maintained that no loss had been demonstrated. It did not present expert evidence as to an appropriate value that might be determined if the Court was of the view that there was a relevant reduction in value.

86 As has been noted, for all group members in the relevant cohort, his Honour made orders to give effect to his assessment that the reduction in value was 17.5%.

The parties’ submissions on appeal

87 Toyota challenges the primary judge’s construction of ss 271(1) and 272(1)(a) and his conceptual approach to reduction in value damages. Toyota submits that the correct conclusion is that the time of assessment is when such damage *crystallises*, for example, upon a sale of the vehicle. Toyota submits that, in the absence of a sale, damages are to be assessed at the *time of the trial*, based on all the available information at that point.

88 Toyota emphasises that, in May 2020, it developed a field fix (namely, the 2020 field fix), which was wholly effective in remedying the defect and was available, free of charge, to everyone who had purchased the vehicles in the relevant period. Toyota submits that, despite this, the primary judge found that purchasers of the vehicles who continued to hold the vehicles at the end of the relevant period remain entitled to damages equal to a 17.5% reduction in the applicable price of the vehicles.

89 Toyota submits that, in order to calculate the “damages” for reduction in value, s 272(1)(a) requires the reduction in value to be calculated at the time that any damage to the affected person crystallises. Toyota makes the following submissions:

- (1) First, the overarching enquiry required by s 272(1) is whether the consumer has suffered loss or damage for which they should be awarded “damages”. If s 272(1)(a) was intended to operate by reference to the value of the vehicle at the time of purchase only, the section could easily have said so. It does not. Rather, it directs attention, in the chapeau, to whether damages should be awarded (implicitly, for loss or damage).
- (2) Secondly, s 272(1)(a) provides for calculation of “any reduction” in value. Unlike the latter parts of the subsection, the reduction in value is not linked to any particular time period.
- (3) Thirdly, as identified by the reference to “damages” in both ss 271 and 272, the purpose of the section is an award of damages. Accordingly, the compensatory principle applies: see *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* [2004] HCA 54; 217 CLR 640 at [63]-[65]. Damages should be assessed so as to compensate the injured party for the wrong done. The primary judge recognised this fundamental principle but did not apply it. Requiring reduction in value to be assessed, in every case, at the time of purchase does not reflect that principle. It pays no attention to whether the consumer has suffered any damage in any real sense.
- (4) Fourthly, the affected person must suffer a reduction in the value of the goods “resulting from the failure to comply with the guarantee”. This also indicates a notion of actual loss or damage by reference to the failure to comply, rather than a hypothetical calculation at the time of purchase, regardless of circumstances.
- (5) Fifthly, s 271(6) expressly contemplates that events subsequent to the supply of the goods must be taken into account and does not require those events to be within any particular time after the purchase of the goods: it contemplates the manufacturer

repairing the goods within a “reasonable time” of being requested to do so. There is nothing in either s 271 or 272 to suggest that consideration of later events is limited to s 271(6).

- (6) Sixthly, s 272(3) provides that s 272(1)(b) does not apply to loss or damage suffered through a reduction in the value of the goods. The emphasis is on loss or damage “suffered through” a reduction in value, which is a further indication that the purpose of the section is to compensate for actual loss or damage.

90 The respondents support the approach adopted by the primary judge. The respondents submit that Toyota’s construction is wrong, and the primary judge was right to reject it. The respondents submit that it is contrary to the statutory text, context and purpose.

91 The respondents submit that: much of Toyota’s argument implicitly treats motor vehicles as if they are financial assets like shares or income producing assets like a shopping centre, the value of which may be ascertained by the trading value of the asset from time to time; the value of durable consumer goods like motor vehicles is substantially different, and the impaired expected functional utility of a new vehicle has an impact on value that does not depend upon some subsequent event, such as resale, to “crystallise” the loss; nor is the resale value of a vehicle on the second-hand market a direct proxy for the diminished value at the time of the original supply; it is at most a potential source of useful data; this has implications for the proper construction of s 272(1)(a), appreciating that the provision should be construed in a way that serves the remedial purposes of the ACL (see *Henville v Walker* [2001] HCA 52; 206 CLR 459 at [135]); if that subsection were construed as focusing on the time when the goods are resold, or on what the goods could be sold for in a relevant market at the time of trial, it would treat all “goods” to which the section applies as mere financial assets whose value derives solely from the fact they can be resold for a price; however, such a construction is impossible to reconcile with the context of a consumer law provision concerned with the supply of goods to consumers.

92 The respondents make submissions about the consumer-protection purpose of the ACL. The respondents submit that: the particular goods to which an action under ss 271(1) and 272 applies are goods acquired as a “consumer” (see ACL s 54(1)(a)); these are defined relevantly by ACL s 3 as goods that are of a kind “ordinarily acquired for personal, domestic or household use or consumption” and not those acquired for re-supply; the relevant Part of the ACL expressly does not apply to financial services or financial products (see s 131A(1) of the CCA);

the “goods” to which s 272(1)(a) applies are therefore consumer goods the value of which principally derives not from their resale value, but from their expected use or enjoyment by the consumer; it cannot even be said that consumer goods are routinely resold; it is improbable in this context that the legislature intended the reference to the “value” of goods in s 272 to be tied to an actual or notional resale value of goods in the second-hand market.

93 The respondents submit that: informed by this purpose and context, it is plain that the ability to recover reduction in value damages under s 272(1)(a) for non-compliance with the guarantee of acceptable quality is directed to the problem of consumers bargaining for non-defective goods but receiving instead defective goods which, by reason of their true nature and condition, have lower expected use and enjoyment; such a consumer has overpaid at the point of supply, because they received a good worth less than they bargained for; this constitutes an immediate loss (see *HTW Valuers* at [33]); the ACL confers statutory redress for that loss.

94 The respondents submit that the primary judge gave six cogent reasons for construing s 272(1)(a) as requiring reduction in value to be assessed at the time of supply (J[301]-[325]). The respondents submit that all of them were correct. The respondents’ submissions include the following:

- (1) Paragraph (a) of s 272(1) is a composite provision that calls for a comparison between the lower of the prices mentioned in s 272(1)(a)(i) and (ii), which are prices necessarily pertaining to the time of supply, and the value of the goods. It plainly indicates an “apples with apples” comparison that necessarily requires the reduced value arising from non-compliance with the guarantee to be assessed at the same time as the comparator prices. This is also logical because it means reduction in value is assessed at the same time as non-compliance with s 54.
- (2) By directing attention to the reduction in value below the purchase price or average retail price, s 272(1)(a) reflects a legislative intention to compensate the consumer for having purchased goods for more than they were worth and to compensate the overpayment. “Reduction” in this context is not used to describe a process of reduction in value occurring over time. It is a reference to the true value of the defective goods being less than, and thus a reduction from, the wrongly assumed value reflected in the purchase price (whether actual or averaged). This is reinforced by the contrast with s 272(1)(b), which provides for recovery of reasonably foreseeable loss or damage after supply. Toyota wrongly submits in response that the loss in value at the time of supply

due to the defect is “entirely theoretical”. This is to ignore the fundamental consumer protection object of the CCA, and the fact that s 272(1)(a) applies to consumer goods whose value lies principally in their expected use and enjoyment. Once it is appreciated that the loss is having acquired goods at an artificially inflated price, there is no basis to describe the loss at the time of supply as being merely “theoretical”. It is also erroneous to say that no loss has “crystallised”. It is the overpayment at the time of supply that causes immediate loss: *HTW Valuers* at [33].

- (3) By reading the reduction in value as a matter to be assessed at the time of supply, s 271(1)(a) can be read harmoniously with s 271(6). Toyota submits there is no lack of harmony on its construction, because s 271(6) expressly contemplates that events subsequent to the supply of the goods must be taken into account. However, no such contextual indication arises from s 271(6). That subsection does not “take into account” subsequent events (like a repair) in assessing whether there was a reduction in value. Section 271(6) simply denies relief altogether when a repair is provided within a reasonable time of a request under an express warranty. If Toyota’s construction were adopted, s 271(6) would be otiose, because on its view of s 272, a repair (or even the mere availability of a repair) reduces any reduction in value to nil, regardless of whether or not it was provided within a reasonable time.
- (4) The primary judge’s approach was consistent with the decisions in *Capic* and *Vautin v By Winddown, Inc (formerly Bertram Yachts) (No 4)* [2018] FCA 426; 362 ALR 702. Although the Full Court is not bound by those decisions, they illuminate why the time of supply is the correct reference point. Both decisions make clear that s 272(1)(a) connects reduction in value with failure to comply with the guarantee, which arises from the inherent propensity for adverse consequences that existed at the time of supply: *Capic* at [884]; *Vautin* at [292].

95 While the appeal was reserved, the Court wrote to the parties seeking submissions on a possible alternative approach to reduction in value damages that had not been the subject of submissions at the hearing. The Court’s letter stated in part:

Grounds 4, 8 and 9 of the notice of appeal raise an issue as to whether the primary judge erred in his construction or approach to the assessment of damages for reduction in value under s 272(1)(a) of the ACL. ... For present purposes, it is assumed that grounds 1 to 3 of the notice of appeal are not made out. It is also assumed that upon a proper construction of s 272 of the ACL, in any action for damages under the provision, the Court may assess the reduction in value at the time of supply or at some other appropriate time but, in any case, for the purpose of ensuring that any award of

damages fairly compensates the claimant, the Court may assess the quantum of damages to be awarded having regard to the known circumstances at the time when the assessment is being undertaken.

If the Court were to form the view that, in the circumstances of the case, in order to fairly compensate the relevant group members (that is, the group members covered by the primary judge's aggregate damages award) for any reduction in value resulting from the failure to comply with the acceptable quality guarantee, it is appropriate to have regard not only to any reduction in value at the time of supply, but also to subsequent events, a possible approach to the assessment of damages is as follows. As this possible approach was not the subject of submissions at the hearing, the Court wishes to raise it with the parties and give them the opportunity to make submissions about it.

The approach involves taking into account not only any reduction in the value of the vehicle at the time of supply, but also the availability of the 2020 field fix, the period of time that the consumer owned the vehicle before the fix became available, and the effective life of the vehicle. The approach is as follows:

- (a) First, calculate any reduction in the value of the vehicle as at the time of supply (in dollars) on the basis of a percentage reduction in value applicable to all relevant vehicles. The percentage assumes that the defect will remain in place for the whole of the effective life of the vehicle.
- (b) Second, calculate the period of time (in months) that the group member held the vehicle before the 2020 field fix became available (i.e. the period of months from the date of supply to May 2020).
- (c) Third, determine the effective life of the defective vehicle (in months). This may be able to be determined on a general basis for all relevant vehicles, or all relevant vehicles of a particular type.

On this approach, any damages to be awarded for reduction in value under s 272(1)(a) would be:

$$a \times \frac{b}{c}$$

The approach can be illustrated by the following example. Assume that the price paid or payable by the consumer for the vehicle (and the average retail price of the vehicle) is \$50,000. Assume that the percentage reduction in value for all relevant vehicles (assuming the defect remains in place for the whole of the effective life of the vehicle) is 10% and that, accordingly, the reduction in the value of the vehicle as at the time of supply is \$5,000. Assume that the consumer purchased the vehicle in May 2018, and thus held the vehicle for 24 months before the 2020 field fix became available. Assume that the effective life of the defective vehicle is 15 years (i.e. 180 months). The damages under s 272(1)(a) would be:

$$\$5,000 \times \frac{24}{180} = \$667$$

While the above formula would need to be applied on a case-by-case basis to each relevant vehicle, additional individual circumstances (such as whether and the extent to which the defect consequences were experienced) would not be taken into account for the purposes of assessing damages for reduction in value.

96 The parties filed submissions, and responding submissions, in relation to the possible approach set out in the letter from the Court. Ultimately, as set out later in these reasons, we do not adopt the possible approach set out in the letter. We have concluded that matters of that kind should be considered on remitter (see below).

Sections 271 and 272 and general principles concerning damages

97 Sections 271 and 272 create a right of action for damages against the manufacturer where there has been a failure to comply with (relevantly) the acceptable quality guarantee. It is uncontroversial that the word “damages” in ss 271 and 272 is used in the sense of *statutory compensation*. It is implicit in the notion of compensation that the claimant needs to establish that they have suffered *loss or damage*. Section 272(1)(a) provides for compensation for a particular kind of loss or damage, namely a reduction in the value of the goods. That s 272(1)(a) is dealing with a particular kind of *loss or damage* is apparent from s 272(3), which provides that s 272(1)(b) “does not apply to loss or damage suffered through a reduction in the value of the goods”; that is, loss or damage of the kind covered by s 272(1)(a).

98 The text and structure of s 272(1)(a) indicate that, at least generally, the point in time for assessing damages for any reduction in the value of the goods is the *time of supply*. The provision refers to a reduction in the value of the goods (resulting from the failure to comply with the consumer guarantee) below the lower of “the price paid or payable by the consumer for the goods” and “the average retail price of the goods *at the time of supply*”. Each of those integers is a price referable to the time of supply.

99 However, as already noted, the use of the word “damages” makes clear that the provision is concerned with compensation for loss or damage. It is necessary, therefore, for the Court to assess whether or not the applicant has suffered loss or damage (resulting from the failure to comply with the consumer guarantee). This may require, depending on the circumstances of the case, a departure from the time of supply or an adjustment to avoid over-compensation. We do not consider that the explicit and implicit references to the time of supply in s 272(1)(a)(i) and (ii) require the assessment of damages to be based on the time of supply in all cases. The overarching consideration is that the amount of compensation for any reduction in value be appropriate.

100 In that regard, we observe that the separate provision concerning reduction in value damages and the references to “price paid or payable” and “average retail price” were included to protect manufacturers. The evident purpose is to ensure that manufacturers do not have to compensate

consumers for amounts paid by way of a higher retail margin to the supplier when compared to the average retail margin. Otherwise, s 272(1)(a) and (b) broadly reflect, as may be expected, the statutory rights of action to recover compensation or damages against the supplier of goods (if the failure to comply with a consumer guarantee cannot be remedied or is a major failure): see s 259(3)(b) and (4). In both instances, the statutory rights of action are to recover compensation or damages, that is, compensation for actual damage suffered. Therefore, the statutory language should not be seen as requiring an assessment as at the time of purchase irrespective of the particular circumstances (though in most cases that will be the appropriate approach). In the case of a claim against a manufacturer, assessment of reduction in value damages may still be undertaken by reference to the price paid (or the average retail price) at the time of supply, but taking into account subsequent events if considered appropriate. The references to the price paid or payable and the average retail price do not preclude such an approach. An assessment at a later time may be a more appropriate way to reflect the actual damage resulting from the value differential between the price paid (or average retail price) and the value of the goods.

101 Further, the authorities on statutory remedy provisions establish that it is wrong to approach such provisions by beginning with general law analogies (such as damages for breach of contract). For example, in *Murphy v Overton Investments Pty Ltd* [2004] HCA 3; 216 CLR 388, in the context of remedies under Pt VI of the *Trade Practices Act 1974* (Cth), Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ stated at [44]:

This Court has now said more than once that it is wrong to approach the operation of those provisions of Pt VI of the Act which deal with remedies for contravention of the Act by beginning the inquiry with an attempt to draw some analogy with any particular form of claim under the general law. No doubt analogies may be helpful, but it would be wrong to argue from the content of the general law that has developed in connection, for example, with the tort of deceit, to a conclusion about the construction or application of provisions of Pt VI of the Act. To do so distracts attention from the primary task of construing the relevant provisions of the Act. In the present case, analogies with the tort of deceit appear to have led to an assumption, at least at trial, that a person can suffer only one form of loss or damage as a result of a contravention of Pt V of the Act.

(Footnote omitted.)

102 In any event, general principles regarding the assessment of damages (including for breach of contract) emphasise that it may be necessary to depart from general rules in the circumstances of a particular case, if this is necessary to ensure the appropriate amount of compensation is awarded.

103 In *Johnson v Perez* [1988] HCA 64; 166 CLR 351, which concerned the assessment of damages in a claim for negligence brought by a client against a solicitor, Mason CJ stated at 355-357:

The guiding principle in the assessment of damages is compensatory. The object is to award the plaintiff an amount of money that will, as nearly as money can, put him in the same position as if he had not been injured by the defendant: *Todorovic v Waller* [(1981) 150 CLR 402 at 412] per Gibbs CJ and Wilson J. However, the time as at which damages are assessed can significantly affect the amount actually awarded. This aspect of the assessment of compensation is particularly noticeable in the present era of inflation, with its fluctuating economic values. This is because in times of inflation the amount awarded is likely to be larger if it is assessed at a later rather than an earlier date.

...

There is a general rule that damages for torts or breach of contract are assessed as at the date of breach or when the cause of action arises. **But this rule is not universal; it must give way in particular cases to solutions best adapted to giving an injured plaintiff that amount in damages which will most fairly compensate him for the wrong he has suffered:** see *Johnson v Agnew* [[1980] AC 367 at 400-401]; *Miliangos v Frank (Textiles) Ltd* [[1976] AC 443 at 468]; *Dodd Properties Ltd v Canterbury City Council* [[1980] 1 WLR 433 at 450-451, 454-455, 457]; *County Personnel Ltd v Alan R. Pulver & Co* [[1987] 1 WLR 916 at 925-926].

...

The general rule that damages are assessed as at the date of breach or when the cause of action arose has been applied more uniformly in contract than in tort and for good reason. **But even in contract cases courts depart from the general rule whenever it is necessary to do so in the interests of justice.** ...

(Emphasis added.)

104 In the same case, Wilson, Toohey and Gaudron JJ stated at 367:

As a general rule, “damages for tort or for breach of contract are assessed as at the date of the breach” (Lord Wilberforce in *Miliangos v Frank (Textiles) Ltd* [[1976] AC 443 at 468]). **The rule will yield if, in the particular circumstances, some other date is necessary to provide adequate compensation:** see, for example, *Wenham v Ella* [(1972) 127 CLR 454]; *Dodd Properties Ltd v Canterbury County Council* [[1980] 1 WLR 433]; *County Personnel Ltd v Alan R. Pulver & Co* [[1987] 1 WLR 916].

(Emphasis added.)

105 Similarly, at 386, Dawson J stated:

Clearly enough there are some cases, particularly in contract, where the appropriate time at which to assess damages is the date of breach. For example, where goods are sold and in breach of the contract there is a failure to deliver them, the damages are prima facie the difference between the contract price and the market price at the date of breach. This principle is embodied in the various Sale of Goods Acts. But as Lord Wilberforce observed in *Johnson v Agnew* [[1980] AC 367 at 400-401], **even here the rule is not absolute and fairness may require departure from the date of breach:** see *Ogle v Earl Vane* [(1867) LR 2 QB 275].

(Emphasis added.)

106 See also at 370-371 per Brennan J and 380 per Deane J. Although dissenting in the result of the case, their Honours' statements of principle were substantially similar to those quoted above.

107 It is also relevant to note that, as the primary judge recognised, in many fields of law, assessments of compensation made as at one date are commonly made taking into account all matters known at a later date when the court's assessment is being carried out: see *HTW Valuers* at [39] (Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ), citing *Kizbeau Pty Ltd v WG & B Pty Ltd* [1995] HCA 4; 184 CLR 281 at 291-296 (Brennan, Deane, Dawson, Gaudron and McHugh JJ).

The notion of reduction in value in relation to consumer goods

108 As noted above, s 272 applies if there has been a failure to comply with the consumer guarantee (as described in s 54). Therefore, the nature and extent of that guarantee indicates the circumstances in which s 272 will apply. This is an important contextual consideration when it comes to understanding the nature of the reduction in value that may be the subject of the statutory right of action to recover damages that is conferred by s 271.

109 The guarantee applies only to the supply of goods to a consumer. Goods are defined to include, amongst other things, "ships, aircraft and other vehicles" and "animals, including fish": s 2. The term otherwise has its ordinary meaning.

110 For the purposes of the ACL, a person is taken to have acquired particular goods as a consumer if, and only if (a) the amount paid did not exceed \$40,000 (or a greater prescribed amount); (b) they were "of a kind ordinarily acquired for personal, domestic or household use or consumption"; or (c) they consisted of a vehicle or trailer for use on public roads: s 3(1). Instances where the goods are acquired "for the purpose of re-supply" and for the purpose of "using them up or transforming them ... in the course of a process of production or manufacture [or] in the course of repairing or treating other goods or fixtures on land" are excluded: s 3(2). These provisions confine the application of the consumer guarantee to what may be described as consumer goods. In most instances, they will be goods that are acquired to be utilised or consumed. This is expressly the case for those that meet the requirement in s 3(1)(b). In other instances, the monetary limit together with the terms of the exclusions will confine the application of the guarantee to consumer goods. Motor vehicles are also of that character.

111 Therefore, 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 may be on-sold. In this respect, consumer goods may be contrasted with commodities or securities where it is the commercial profit or return on disposal that is a significant (often sole) purpose of the transaction. It is the market value of commodities or securities when they are on-sold that assumes significance for their buyers. This is a consequence of the fact that buyers do not purchase commodities or securities for personal use or consumption. They purchase them so that they may be traded for profit. It means that there are ready markets in which prices for commodities and securities may be observed. Further, the prices in those markets provide a measure of the true value of commodities or securities in the hands of the buyer.

112 Of course, many consumer goods may be on-sold by retail buyers in second-hand markets. In that sense, and to that extent, they have value as tradable commodities. However, most consumer goods are not purchased to be traded. They are purchased to be used for a time (and then sold in second-hand markets) or kept until the end of their useful life. Accordingly, the value to a buyer of a consumer good may not be captured by its second-hand market value at the time of purchase or soon thereafter.

113 There are a number of reasons why the price of second-hand consumer goods does not reflect their value in the hands of the original consumer who purchased the goods. Second-hand buyers are a different group of buyers to those who buy new consumer goods. They are willing to undertake the search costs involved in examining goods with different histories of use or wear and tear. They are not willing to pay the retail price at which the consumer goods may be purchased new. They are willing to trade off the assurance of purchasing new goods from a retailer who, amongst other things, will be required to conform to the consumer guarantee. Therefore, the profile of buyers in second-hand markets together with factors such as transactional costs and the risk to the buyer in purchasing used consumer goods without knowing the circumstances of their past use, may be expected to affect the prices that are observed in such markets.

114 In the case of motor vehicles, these and other factors manifest in the notorious fact that a new vehicle will suffer a significant immediate loss in tradable value as soon as it is driven from the showroom. However, the utility to consumers who continue to hold their vehicles remains unaffected by this phenomenon and the value, in the sense of the utility of the new vehicle in the possession of the original buyer, remains the same.

- 115 For those reasons, the value of consumer goods at the time of purchase is indicated by the price that a consumer would pay to acquire those goods and not by the price that may be paid by a buyer to the consumer if those goods were immediately on-sold. Significantly, s 272(1) refers to “the value of the goods”, not the market value of the goods. Of course, the retail price at which the consumer purchases the goods is a market price. It is an objective measure of the value of the goods to consumers in general. However, the point is that it is not to be equated with the price that may be obtained upon resale of consumer goods. That price is likely to be considerably lower than the value to the consumer that is indicated by the purchase price.
- 116 Like consumer goods in general, motor vehicles are purchased to be utilised, at least for a material period of time. They have a limited life over which they can be utilised and the purchase price that is paid for such goods can be understood as a payment for their utilisation value. Put another way, the market price for new consumer goods represents the value of their usefulness to buyers. It is a value that may be enhanced by brand reputation in respect of matters such as reliability and availability of repairs. In some cases, it may be enhanced by the cachet associated with a brand. Indeed, for some consumer goods, much of the utilisation value lies in the perception, respectability or assurance that comes with having a particular brand of consumer good.
- 117 Therefore, the value of many consumer goods to a buyer is more accurately understood to lie in their utilisation value (or life-of-use value) as reflected in the purchase price. If, at some point, the goods are on-sold willingly by a consumer then the value of the goods may be said to be represented by the worth of their utilisation up until their sale plus their second-hand market value. However, if instead the goods are kept by the retail buyer until the end of their normal useful life then the whole of the value will have been the utilisation value. In such a case, the use of the goods will have exhausted their value over time. For such a buyer, the availability of a second-hand market price will not equate with the utilisation value. The buyer prefers to utilise the consumer goods entirely, rather than on-sell into a second-market where, for reasons that have been given, the price will be discounted for various factors including transactional costs and risks arising from prior use.
- 118 Therefore, when it comes to assessing the extent to which a failure to comply with the consumer guarantee at the time of supply resulted in a reduction in value, the approach that the general law has developed in assessing loss in cases concerning the defective supply of valuable assets (such as land, leasehold, resource interests, intellectual property, goodwill or commercial

equipment) or in tradable commodities is not apposite. In such cases, there is available to the buyer the opportunity to re-sell into a market that measures the objective value of the defective asset or commodity in the hands of the party who has suffered the loss. For reasons that have been given, the resale value of a consumer good is unlikely to provide such a measure. The buyer of second-hand consumer goods will not attribute to them the same value as a buyer of new consumer goods. Therefore, in the case of consumer goods it will usually be necessary to focus upon the price that would have been paid if the consumer had known of the defect when purchasing the goods rather than on the price that may prevail on the resale of the defective goods. It will also be necessary to have regard to whether replacement or repair is available as a means of remedying the defect and restoring the value of the consumer goods in the hands of the buyer.

119 There are a number of different possibilities depending upon the circumstances. These are discussed later in these reasons in connection with the third group of appeal grounds.

The proper conceptual approach in the circumstances of this case

120 The present case is complex because of the position in relation to repair. This is not a case where it might be said with certainty at the time of purchase by each member of the relevant cohort that there was no possibility that the defect would be able to be repaired. It was not suggested, for example, that Toyota abandoned its warranty obligations such that there could never be any expectation that a repair for the defect might be found. There was evidence to the effect that as the defect consequences manifested and were reported by Toyota dealers, steps were taken by Toyota to find a fix for the defect and once it did, it made that fix available for free. In that regard, it should be noted that the unchallenged findings of the primary judge are to the effect that, for a considerable period, Toyota maintained publicly that there was no defect or that the defect was of a kind that Toyota was addressing under warranty and that it did so at a time that it was aware that there was a defect that it was unable to repair. Nevertheless, the evidence also showed that Toyota undertook considerable work to find a fix, it expected that it would do so and it eventually did find a fix and made it available for free.

121 In the result, finding the fix took a number of years from when the defective vehicles were first supplied. Once the fix was found, there remained the logistics of making the fix available. They meant that it would take some time until the fix could be applied to every vehicle. In consequence, some consumers had to wait a long time for a remedy to be found and even then

faced the possibility of further delay in securing the repair. The length of time depended upon how close to the availability of the 2020 field fix the particular consumer made their purchase.

122 Therefore, this was not a case where there was no possibility of repair. The most that could be said was that there was a risk that the defect would not be able to be repaired. Expressed in positive terms, there was a possibility that there would be a fix although there would be a delay of uncertain duration in finding the fix. If a fix was found it would likely be available at no cost, but it might take some time before it was made available to a particular consumer. All of this in circumstances where the defect did not mean that the vehicle could not be used and most of its attributes could be utilised despite the defect. Which is not to understate the significance of the defect, but merely to seek to be specific about the circumstances that would determine the extent of the reduction in the value of the vehicle resulting from the failure to comply with the guarantee and also to demonstrate the significance of when the vehicle was purchased for assessing whether a fix might be found and provided (and, if so, when).

123 In our view, in the particular circumstances, an assessment of the reduction in value of the relevant vehicles assessed at the time of purchase requires appropriate allowance for those future possibilities. It also requires due regard to the considerable utility afforded to the consumer by the vehicle notwithstanding the defect. In short, although there was a defect, for each consumer who purchased one of the defective Toyota vehicles there was a possibility that the defect could be remedied at no cost and the value of the vehicle prospectively restored, and there was also the ability to use the vehicle (though compromised by the defect consequences which, on the unchallenged findings of the primary judge, manifested in relatively common driving conditions). This means that it is wrong to assess the value of the vehicle without regard to those matters. Their significance is exposed by the fact that, by the time of the initial trial, it was known that the 2020 field fix was available and the experts agreed that, in consequence, there was no ongoing reduction in value. 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.

124 Both before the primary judge and on appeal, Mr Williams and DCS claimed that the loss should be assessed at the date of purchase of the vehicle. On their approach the subsequent availability of the 2020 field fix was irrelevant. It was treated as a supervening event. Therefore, it treated each Toyota vehicle as supplied as being burdened with the defect and the

defect as being of a kind that could not be remedied at any time. Further, it did not matter whether the vehicle was supplied four years before the fix was available or in the weeks beforehand. The loss was the same in each case. On their case the loss should be measured by reference to the price that would be paid on resale for a vehicle that was known to have the defect. Alternatively, it should be determined by the willingness to pay of the marginal buyer in a market for the defective goods.

125 The position of Toyota before the primary judge and on appeal was that there had been no loss demonstrated. The availability of the 2020 field fix was said to restore all value to those who had continued to hold their vehicles. Any loss in value would only be crystallised at the time of resale. Therefore, on its case, those purchasers who had not sold their Toyota vehicle by the time the fix was available had never crystallised any loss in value. It was said that up until that point those who had purchased the defective vehicles had not suffered reduction in value damage “in any real sense”.

126 To a considerable degree this position was based upon Toyota’s claim that, upon a proper construction of s 272(1), the appropriate point in time at which to assess the reduction in value was the time when damages were said to crystallise (noting that at times its position was put in terms of a requirement that the damages compensate for actual loss or damage – a proposition that appeared to focus upon a notion of realised loss of the kind that might be measured by reference to an actual resale). It also placed considerable reliance upon the agreed position as between the experts that there was no reduction in the value of the vehicles if assessed at trial because of the availability of the 2020 field fix at no cost to the owner of the vehicle.

127 In our view, the competing approaches fail to have due regard to the fact that the value of consumer goods lies in their utility over their useful life rather than in any resale price. The purchase price is an objective measure of that value. For reasons that have been given, it is a price that depends upon expectations as to the useful life of the goods rather than upon their resale value. Therefore, the correct approach is to ascertain the component of the price actually paid that could be said to be attributable to the loss in utility arising from the defect. This requires regard to reasonable expectations as to the availability and timing of a repair that would restore the utility; that is an assessment as at the time of purchase as to the period of time for which the defect was expected to affect the vehicle (before a repair could be found and carried out on the vehicle). It also requires regard to any use to which the goods may be put despite the defect.

128 In our view, had a fix not been available at the time of trial, the proper conceptual approach would have been to factor in the possibility of the availability of a fix when determining the reduction in the value of the relevant vehicles at the time of purchase. This is because it would overstate the reduction in value if it was assessed on the basis that the defect would definitely exist for the whole of the life of the vehicle. In factoring in the possibility of the availability of a fix, it would have been necessary to take into account two types of uncertainty that existed at the time of purchase: first, uncertainty as to whether there would be a fix; and, secondly, even if a fix became available, uncertainty as to how long it might take for the fix to be designed, tested and made available.

129 However, in circumstances where those uncertainties had resolved by the time of trial, in our view the proper conceptual approach in the circumstances of this case is to factor in the availability of the 2020 field fix when determining the reduction in value of the relevant vehicles at the time of purchase. On this approach, the period of time that the particular consumer held the vehicle before the fix became available is taken into account. This approach is appropriate for the following two reasons.

130 The first reason is that it is 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 (noting that, on the facts of the present case, at the time of purchase, the possibility of a fix being found and applied to the vehicle within a reasonable period of time was not so remote as to be irrelevant to a reasonable consumer). Rather than try to assess the reduction in value based upon expectations at the time of purchase as to what might occur in the future, it is appropriate to use the known information at the time of trial. The information available at trial concerning repair of the defect established that a fix did become available at no cost and (subject to an argument raised by the respondents – see [134] below) established when that fix was available. It enabled an assessment to be made as to how long the defect applied to the vehicle of the particular consumer and to use that information to assess the reduction in value damages as at the time of purchase by that consumer.

131 The second reason for the above approach is that, consistently with the authorities discussed above, it is necessary to ensure that there is no over-compensation given the circumstances known at the time of trial. For completeness, we note that we do not see any inconsistency between the approach outlined above and s 271(6), which deals with a particular scenario in a particular way.

132 The assessment involved in the approach that we have outlined need not be undertaken on a strict arithmetical basis. On the basis of the authorities relied upon by the primary judge, informed by the proper conceptual approach (as outlined above), reduction in value damages can still be determined doing the best that can be done with the available evidence (assuming there is enough evidence available to do so).

133 In our opinion, the conceptual approach adopted by the primary judge was in error because it did not factor in the fact that a fix had become available (or even the possibility that a fix might become available). It treated the defect as one that would remain for the whole life of the vehicle despite the possibility that a fix might be developed and in the face of evidence at trial that the 2020 field fix was available and could be availed of by buyers to completely fix the defect. This produced an amount that was more than was necessary to fairly compensate the relevant consumers for the failure to comply with the consumer guarantee. We therefore uphold appeal grounds 4, 8 and 9.

134 In the Court's letter to the parties (set out above), the Court raised a possible approach to the assessment of reduction in value damages involving a formula that took into account the effective life of the vehicle and the proportion of time that the defect applied to the vehicle before the fix became available. In the parties' submissions in response to the letter, submissions were made by the respondents to the effect that it was not established that the 2020 field fix was in fact available to consumers in May 2020. This is not a matter that we propose to resolve in these reasons. This is a matter that can be the subject of further submissions before the primary judge upon remittal (see below). On the conceptual approach that we consider should be taken, as outlined above, the relevant date will be the date when the 2020 field fix in fact became practically available.

135 Further, in the respondents' submissions in response to the Court's letter, they contended that if (contrary to their primary position) an apportionment approach (over the effective life of the vehicle) were to be adopted, the apportionment should not be conducted on a linear basis; rather, it should take into account that value in vehicles declines more quickly at the beginning of their effective life. Again, this is not something that we need to resolve in these reasons. This is a matter than can be the subject of submissions and, if considered appropriate, evidence before the primary judge on remittal.

136 It follows from the above that the aggregate damages award made by the primary judge pursuant to ss 271(1) and 272(1)(a) needs to be set aside. It also follows that the aggregate

damages award for excess GST needs to be set aside, as it incorporates the formula adopted by the primary judge for reduction in value damages. It also follows that the damages award in favour of DCS must be set aside, as it relies on the primary judge's approach to reduction in value damages. Further, the award of interest on damages needs to be set aside. Therefore, paragraphs 1 to 5 of the orders made by the primary judge on 16 May 2022 are to be set aside. In the concluding section of these reasons, we discuss the question whether the matter should be remitted for reassessment of damages. It is convenient to discuss this after considering the third group of appeal grounds.

ISSUES CONCERNING ASSESSMENT OF REDUCTION IN VALUE

Overview

137 We now turn to consider the remaining grounds of appeal (and grounds 4, 8 and 9 to the extent not already covered), which concern the primary judge's *assessment* of the reduction in value of the relevant vehicles; that is, his assessment of 17.5% as the reduction in value of the vehicles. His Honour's conclusion in this regard has been set out earlier in these reasons (see [84] above).

138 Before summarising Toyota's contentions on appeal, we note that there were three main sources of expert evidence before his Honour. These were summarised at J[344] in the following terms (there being no issue as to the accuracy of the summary):

- (1) Mr Cuthbert's valuation evidence indicates that the reduction in value resulting from the [defect], measured by reference to Mr Cuthbert's expert opinion as to the value of the Relevant Prado at the time of supply, is in the range of 23 per cent to 27.5 per cent;
- (2) Mr Boedeker's survey evidence indicates that, on average, the reduction in value resulting from the [defect], as measured by the change in consumers' [willingness to pay] for a defective vehicle compared to an identical, non-defective vehicle, is above 10 per cent but below 40 per cent, and most likely in the range of approximately 20 per cent to 30 per cent; and
- (3) Mr Stockton's evidence indicates that the "minimum" reduction in value resulting from the [defect], as measured by reference to the cost of repairing it, is in the range of approximately 2.9 per cent to 7.3 per cent. This is an inherently conservative measure.

139 His Honour undertook a detailed analysis of the main criticisms and limitations of the expert evidence (J[346]-[390]). It is evident from that analysis that his Honour was of the view that there was too much emphasis upon expert evidence when the task that was required to be

undertaken involved a much more practical and common sense approach informed by an understanding of the nature of the defect and its consequences.

140 In its written submissions, Toyota grouped its grounds of appeal concerning the approach adopted by the primary judge to the assessment of the reduction in value into three propositions. They were to the following effect:

- (1) In reaching an overall conclusion as to the extent of any reduction in the value of the vehicles resulting from the failure to comply with the consumer guarantee, the primary judge erred in using expert evidence as to the extent of the reduction in the price which a reasonable consumer would be willing to pay for Toyota vehicles with the defect (ground 5);
- (2) The primary judge erred in failing to have regard to evidence given by Mr Stockton concerning prices in the resale market which (so it was submitted) indicated that there was no real effect upon those prices as more information came into the market about the defect (ground 7);
- (3) The primary judge erred in failing to find that the valuation evidence was so flawed that each of the three sources relied upon (the evidence of Mr Cuthbert, Mr Boedeker and Mr Stockton) provided an insufficient foundation upon which to undertake a common sense assessment of the reduction in value of the goods and therefore no such loss had been proven (grounds 6 and 10-15).

141 Having regard to the way in which the submissions were presented orally, Toyota advanced the following further proposition namely:

- (4) In the alternative to (3), the primary judge ought to have undertaken a common sense assessment of the reduction in value of the goods by reference to evidence of the repair costs and by taking account of the evidence of Mr Stockton of observed prices in the resale market to reach a much lower value for any reduction in the value of the goods, and erred in not doing so.

142 We will first make some general observations concerning the assessment of reduction in value damages in relation to consumer goods. We will then consider the evidence of the experts, addressing Toyota's submissions about that evidence. Then we will consider the extent to which the market become informed and Toyota's submissions in that regard. We will then consider Toyota's four propositions.

General observations concerning the assessment of reduction in value damages in relation to consumer goods

143 In considering the quantification of a reduction in value in relation to consumer goods, there are a number of possibilities depending on the circumstances. Some of these possibilities are as follows.

Replacement

144 First and foremost there is the possibility of replacement, an outcome which the statutory provisions expressly contemplate and appear to encourage. In such cases, replacement will ensure there is no reduction in the value of the goods.

Write-off

145 Next, there is the possibility that the damaged or defective goods are completely useless and incapable of repair but are not replaced. In such cases, the reduction in value will be complete. Subject to the terms of s 272(1)(a)(ii), the reduction in value will be the whole of the purchase price (with an allowance for any scrap value – that is, a value for the goods’ materials rather than any value that might be said to be the goods’ value qua their character as consumer goods).

Repair is possible

146 Then there is the possibility that the goods are not replaced but there is, at the time of supply, an available means of repairing the goods. Repair may reinstate the utility of the goods wholly or partially. Where the repair would wholly reinstate the utility of the goods, the cost of repair may be a measure of the reduction in the value of the goods that resulted from the defect. This is because it is a measure of what is required in order to restore the utility of the goods.

147 However, if the repair will only partially reinstate utility then it may be necessary to allow an amount for repair costs and, in addition, assess the residual reduction in value associated with the ongoing diminished utility (see consideration below of instances where repair is not possible).

Repair is not possible

148 In other cases, repair may not be possible, but the defect will be of a kind where the goods retain diminished utility (such that they should not be written-off). In such instances, the goods will retain the defect over the whole of their life during which they will have diminished utility compared to equivalent goods without the defect (assuming they are not replaced by goods without the defect). Understanding the extent to which that utility is diminished will require a

comparison between the lifetime of use of goods with and without the defect. In most cases that comparison will be appropriately undertaken by making an objective assessment of the order of magnitude or significance of the defect. How much of the utility of the goods does it affect? Is it a substantial defect that compromises the use of the goods? Will the defect reduce the useful life of the goods? Does it compromise the cachet of the goods? In all likelihood, judgments will be required to be made informed by an understanding of the nature and extent of the defect together with its consequences for the utilisation of the goods. The answer will be likely to be most aptly expressed in percentage terms. The percentage can then be applied to the purchase price to determine an amount of damages for the reduction in the value of the goods. In such cases, it may also be relevant to consider some form of survey evidence to assist in understanding the significance of the defect for the kind of consumers who purchase the goods.

149 Significantly for present purposes, the assessment requires a focus upon the nature of the defect and the magnitude or significance of its effect upon the utility of the goods in the hands of the consumer.

150 It should be observed that there will be instances where the defect results in diminished utility and a repair is physically possible but the cost of carrying out the repair exceeds any reduction in value of the goods determined in the manner just described. In such cases, the methodology just described will be an appropriate way to assess the reduction in value for the purposes of s 272(1)(a). In effect, the prohibitive cost of the repair means that there is, as a matter of commercial reality, no repair available.

Resale price as a measure of loss of value

151 Finally, there is the prospect of resale. In rare instances, there may be a market in which goods with the defect are sold second-hand. In such instances, an observable market price may be used to assess the reduction in value of the goods. However, any such market price will still need to allow for the considerations that have been discussed, including the transactional costs and discount for risk that are factored into the prices that may be observed in second-hand markets for consumer goods. If no such allowance is made then use of the resale price as a measure of the reduction in the value of the goods in the hands of the consumer will be likely to over-compensate. It will include in the damages those discounts which arise in any case where consumer goods are sold second-hand.

Market expertise as a basis for assessing reduction in value

152 Much more likely, is the availability of more general market information as to the effect of defects on second-hand prices that is of a kind that provides a sufficient basis for an expert to express an opinion as to the reduction in value of the goods in the hands of the original consumer that may be properly attributed to the type of defect in a particular case. Without intending to be exhaustive as to the types of expertise that may be relevant, expertise may arise from observing market behaviour or analysing data in markets where parties are pricing discounts for various types of defects in goods of a similar kind to that in issue. Alternatively, expertise as to the way in which retail prices are established for goods like those in issue may provide a sufficient basis for an expert to express an opinion as to the value of the component of the price that relates to the attribute of the good that is defective.

153 However, any assessment by reference to such market prices will require the demonstration of a meaningful basis upon which to reason from market observation or understanding to a particular value. Expertise in observing or understanding markets for the goods in question or second-hand markets for those goods may not provide a sufficient foundation with which to form an opinion concerning the way in which the market would price the defect in question. This is simply a function of the fact that most markets are for goods that conform to the requirements of the consumer guarantee. A rare or peculiar defect may be sufficiently unusual that it is not possible to draw meaningful conclusions based upon observation or understanding of markets where, by definition, no analogous defect has occurred.

154 The concept of a clearing price has possible relevance in the context of using other market information as a basis for assessing the quantum of any reduction in the value of goods resulting from a failure to comply with the guarantee. It may be accepted that the price at which any goods (including goods with a particular defect) will be bought and sold depends upon the willingness of sellers to supply at different prices and the willingness of buyers to acquire at different prices. The higher the price, the greater the volume of supply. The lower the price, the greater the volume of demand. Markets establish an equilibrium or market price at which the volume traded means that supply meets demand. This is the clearing price, the price at which all available supply is purchased.

155 Essential to the notion of a clearing price, is the understanding that buyers and sellers are willing participants who can come and go in the market. Conceivably, the market price that might prevail in a market for goods with a particular defect might be the subject of expert

analysis and opinion based upon an informed understanding of the willingness to supply and the willingness to acquire. Buyers who would otherwise buy certain goods without the defect might be surveyed as to the discount that would need to be offered if they were to be persuaded to purchase the same goods with an identified defect. Much would depend upon the reliability of the survey which in turn would depend upon many matters including the quality of the survey design, securing appropriate respondents to the survey (those who might be in the market), how seriously participants took the survey and whether participants really understood the nature of the defect. Assuming that such a survey could be conducted with accuracy, it would then be necessary to identify the willingness to pay of the marginal buyer. It is possible that some participants in the survey may have a willingness to pay that is so low that they would simply not buy the defective goods. Instead, all the available goods with the defect would be purchased by buyers with a higher willingness to pay. In short, in order to determine the willingness to pay of the marginal buyer (and hence the clearing price) it is necessary to form a view about the willingness to supply.

156 As to willingness to supply, one approach is to simply assume that the market price is the price that must be established in a market in which the same number of defective goods must be sold as were actually sold. However, to make that assumption is to deprive the market of an important characteristic, namely the ability of a supplier to choose not to sell – to stand out of the market if the price gets to a point where it is too low for the supplier to be willing to supply. In effect, an assumption of that kind treats the supplier as being willing to sell no matter how low the price has to go in order to clear the market.

157 It may be argued that it is appropriate to make an assumption of that kind in circumstances where the analysis is being undertaken to determine the reduction in value that results from a failure to conform to the requirements of the consumer guarantee. However, the problem remains of identifying from the results of a survey the willingness to pay of the marginal consumer.

158 The use of any form of average or median value for willingness to pay based upon the survey results will significantly overstate any reduction in value. In any market, individual buyers may be willing to pay more (in some cases much more) than the purchase price. However, none of this value has been lost. It is only the difference in value between the clearing price in a market for non-defective goods compared to defective goods that has been lost.

159 All of these aspects make the use of the concept of willingness to pay in order to derive a clearing price both highly speculative and conceptually questionable as a means of establishing a form of market price for the defective goods. Nevertheless, provided the problems are acknowledged, in cases where assessment of the reduction in value is difficult, a willingness to pay analysis may offer some assistance. Although it may be criticised as not providing an accurate indication of the price that would prevail in a hypothetical market for the defective goods (because it requires supply at any price), it may provide information as to the price significance (large or small) that most buyers attach to the defect. For the purposes of assessing the reduction in the value of consumer goods that have been purchased (the buyer being burdened with the defect by reason of the failure to conform to the consumer guarantee), a willingness to pay analysis may provide evidence which may be used, with due allowance for its limitations, in undertaking an assessment of the percentage of the purchase price paid that may be attributed to the utility that would have been available if the defect had not existed.

160 For similar reasons, survey evidence designed to elicit the order of magnitude of the price effect of a particular defect on the price that a buyer who is in the market for an equivalent non-defective good may have some relevance to the making of an evaluative judgment as to the percentage reduction in value to consumers that may be attributed to the defect. However, it is unlikely to afford a meaningful basis for reaching a conclusion as to the actual market price that would prevail in a hypothetical market for goods with the defect.

161 An issue arises as to whether willingness to pay may be a relevant measure in determining value for the purposes of assessing damages. In *Dwyer v Volkswagen Group Australia Pty Ltd* [2021] NSWSC 715 at [240]-[244], Stevenson J declined to accept the proposition that willingness to pay can be a proxy for market value. So much may be accepted. Markets set prices at the margin. Consequently, the market price will be well below the willingness to pay of most buyers. However, for reasons that have been given, that does not mean that evidence of willingness to pay is irrelevant. It can still provide evidence of the relative significance of the difference between goods with and without the defect. It may be possible to extrapolate from that evidence that the defect was of minor importance or of great importance.

Some possible further complexities

162 The above analysis assumes that the defect is one which will compromise the utility of all the goods in all cases. Further complexities arise where the defect is known to be present in some but not all of the goods and it is difficult to discern which are the defective goods by simple

examination. The risk of the defect being present and the risk, if present, of the defect producing serious consequences are matters that may affect the significance of the defect.

163 In such instances, the risk of the existence of the defect is itself a form of defect in all of the goods. It may be appropriate to approach the question of whether there is any reduction in the value of the goods and the assessment of that reduction on the basis that the presence of the risk itself is what results from the failure to comply with the guarantee. If there is a means of testing to see whether the defect is present then the cost of that test may be an appropriate measure of the reduction in value of the goods in those cases, subject to an assessment of a greater reduction in those cases where the test uncovers the defect.

164 As to these matters, it may be observed that the consumer guarantee is expressed in terms that apply to defects even though they may not be known to the consumer. It does so by defining the state of “acceptable quality” in respect of the goods by reference to “a reasonable consumer fully acquainted with the state and condition of the goods”: s 54(2). In effect, the legislation assumes that the defect is known at the time of supply to the consumer.

165 In other instances, the defect may be of a kind that manifests only in certain conditions of use. In consequence, some consumers may not be burdened by the consequences of the defect because of the particular circumstances of their use. For reasons that have been expressed, the legislative provisions concerning the guarantee require an objective approach that does not take into account the particular circumstances of the consumer when determining whether there has been a failure to comply with the guarantee. So, even a consumer who does not use the goods in a way that will manifest the defect will have purchased goods that fail to comply with the guarantee. The statutory language in s 272(1)(a) does not refer to the reduction in value of the goods to the particular consumer. Consistently with the terms of the guarantee, it provides for a statutory action for damages “for ... any reduction in the value of the goods, resulting from the failure to comply with the guarantee”. There will be a reduction in the value of the goods for all consumers because the goods supplied lack utility, albeit in a respect that may not have any significance for the consumer. The consumer still has a good with less value as a consumer good than goods without the defect.

The evidence of Mr Cuthbert

166 We now turn to consider the expert evidence that was before the primary judge, including some of Toyota’s contentions on appeal.

167 Mr Cuthbert has worked in the automotive industry for over 50 years. He is a qualified motor mechanic, has been a licensed second hand dealer in motor vehicles and for a number of years was a licensed vehicle tester. He estimates that he has conducted over 10,000 valuations of motor vehicles. He has provided valuations for a number of different purposes, including court proceedings, vehicle insurance and vehicle financing.

168 In his report dated 23 July 2021, Mr Cuthbert explained how he would undertake vehicle valuations. He explained that in his experience and opinion, “valuing vehicles is an impressionistic exercise in which a number of factors are considered, with these factors taking on different levels of importance depending on the kind of vehicle being valued and the context in which it is being valued” (para 53). The report goes on to say:

My typical practice is to consider a range of factors as I describe in this report, assess them together to form a view about the value of the vehicle, and then use them to “sense-check” my valuation.

169 The process he then described involves considering attributes of the particular vehicle, undertaking his assessment of the general popularity and desirability of the vehicle and bringing to account the available market data for comparable vehicles. As to his approach to problems with a vehicle, he provided the following evidence in his report (paras 69 to 71):

In my experience, it is not unusual to identify issues or problems of some description with a vehicle I am valuing. In particular, there are often minor cosmetic issues in used vehicles.

When I identify an issue or problem with a vehicle I am valuing, I consider the nature of the issue or problem and **whether I should reduce the value** of the vehicle to reflect the impact of the issue or problem. As I explained ... above, when I value a vehicle, I also consider the nature of the vehicle and the way in which that type of vehicle is generally used, as this is relevant to the significance of any issue or problem that I identify.

It is not my usual practice to reduce the value of a vehicle for a minor or trivial issue such as minor wear and tear on a used vehicle, or a small deviation from regular recommended servicing requirements if the vehicle otherwise has no issues.

(Emphasis added.)

170 He referred to the types of mechanical issues or problems that would generally cause him to reduce the value of a vehicle. He said that they included (para 73):

- (a) problems with the vehicle’s engine, including engine noises indicating wear, sensor issues, oil leaks, temperature issues and pressure issues; and
- (b) problems with other important mechanical parts of the vehicle, including problems with the transmission, the exhaust system, power steering operation

and suspension, to name a few.

171 Mr Cuthbert then identified factors that he typically considered in deciding how to reduce the value of a vehicle due to a mechanical issue or problem with the vehicle.

172 The circumstances in which Mr Cuthbert said he would apply a discount, based upon the factors he identified, may be summarised as follows:

- (1) whether a repair is available and the cost of repair (noting that typically he would not apply a reduction for repair costs if such a repair is available at the time and will be carried out under the vehicle's factory warranty, but may reduce the value due to the inconvenience associated with obtaining the repair);
- (2) whether the vehicle is likely to require additional servicing, maintenance or repairs outside of regular servicing;
- (3) whether there was a risk that the resale value would be reduced because of the issue or problem;
- (4) whether there are likely to be safety implications that cannot be addressed by repair (in which case Mr Cuthbert's evidence was "I may consider that the vehicle is not fit for use and therefore will reduce the value of the vehicle to its "salvage value", which is the price that I would expect a salvage auction house to pay for a vehicle");
- (5) whether the issue or problem may result in discomfort or embarrassment to the owner; and
- (6) whether the defect was of a kind such that there should be a "desirability reduction".

173 Mr Cuthbert then reported upon his assessment of the attributes of Mr Williams's Prado. He referred to his instructions to the effect that the vehicle suffered from the defect at the time of purchase by DCS. He described his instructions as to the consequences of the defect. He expressed the opinion that he considered the defect to be "a serious mechanical problem ... which materially reduces [its] value" (para 99). He also expressed the opinion that he considered the defect consequences "to be serious and the risk of experiencing them a factor which materially reduces the value" of the vehicle (para 103).

174 Mr Cuthbert's evidence was as to the *value* of Mr Williams's Prado with the defect; his view as to the *seriousness* of the defect was properly treated at the initial trial as an assumption on which his evidence was based (being a matter to be established by other evidence). Ultimately, the findings by the primary judge as to the defect consequences were unchallenged. Those

findings were based upon a referee report. Also unchallenged were the findings by the primary judge rejecting submissions by Toyota that sought to downplay the significance of the defect and the defect consequences: J[79]-[86]. His Honour found that the consequences were “not trivial” and “they impact significantly upon consumers’ use and enjoyment” of the vehicles: J[183]. Notably, there was no finding to the effect that the defect was so serious that without repair the vehicles were only able to be used for salvage. Nor did the primary judge find in terms that the defect was a “serious mechanical problem” (terminology which suggests that the vehicle was prone to breaking down, which was not the state of the findings).

175 Mr Cuthbert was asked to assume that there was no effective fix for the defect at the time of purchase of the vehicle in April 2016. As to that aspect, he said in his report (para 104):

... if no repair is available which will fix the issue or problem at the time I am valuing the vehicle, depending on the severity of the issue or problem, I will typically reduce the value of the vehicle more than if such a repair exists.

176 He expressed the opinion that on account of the defect and its consequences “which did not have an effective fix at the time of purchase” he considered it appropriate to reduce the value of the vehicle at the time of purchase “significantly” on account of the defect and its consequences (para 104).

177 It may be observed that the whole of the methodology described by Mr Cuthbert up until this point explained how he would undertake the task of assessing the appropriate reduction in value to account for the defect (para 110).

178 Mr Cuthbert then turned to the quantification of the reduction in value. He began as follows (para 109):

In my opinion, the value of the [vehicle] as at April 2016 was significantly reduced as a result of the [defect] and the risk of the vehicle experiencing the [defect consequences].

179 He then stated that he assessed the value of the vehicle at the time of purchase to be an amount which was 23.5% to 27% below his assessment of its retail market price.

180 Both these statements are consistent with Mr Cuthbert undertaking an assessment of the appropriate reduction in value to account for the defect. They reflect his earlier indication that the process is impressionistic and requires regard to the various factors that he identified.

181 Mr Cuthbert then expressed the basis for his view as to the extent of the reduction in the following terms in his report (para 111):

I have formed this view drawing on my experience as a motor vehicle dealer, broker and valuer over the last 50 years and having regard to:

- (a) the seriousness of the [defect and defect consequences];
- (b) there not being any effective fix to the [defect] available as at April 2016;
- (c) the salvage value of the [vehicle] as at April 2016, with a reduction to this level being the maximum reduction I would expect to apply to a vehicle with a defect which does not have an effective fix at the time of purchase; and
- (d) the price at which I consider [Mr Williams and DCS] may have been able to sell the [vehicle] to a purchaser, other than a salvage auction house, in April 2016 (assuming it had not been driven).

182 Mr Cuthbert went on to explain that he had considered the salvage value and the price at which the vehicle might have been sold to a buyer other than a salvage auction house. He estimated the salvage value of the vehicle to have been “approximately 60% to 63%” of his assessed retail market price (para 116). He gave the basis for that estimate.

183 Mr Cuthbert then explained that he considered the salvage value “to be the floor value” (para 121). He then expressed the following view (para 123):

In assessing the price within this range at which [Mr Williams and DCS] would likely have been able to sell the [vehicle] in April 2016, I consider that purchasers would have existed in the market who would have been willing to pay a further amount on top of the salvage value of the [vehicle], in the hope that they would be able to find someone to fix the [defect] at a reasonable price, despite the absence of a known effective fix at the time. In my experience, including in interacting with them at vehicle auctions, purchasers of this kind take into account the types of considerations that I address above when determining a vehicle’s value.

184 At the initial trial and on appeal, Toyota was critical of this reasoning. Toyota contended that it had the consequence that the analysis undertaken by Mr Cuthbert was anchored in the salvage value and, in the result, did not bring to account the factors that he said were involved in undertaking his assessment.

185 A number of points should be made concerning this submission insofar as it concerned the report itself. First, Mr Cuthbert described his approach as impressionistic and involved bringing the factors that he had described into a single assessment based upon experience. Secondly, having regard to the terms of the whole of the report and the detail provided concerning the factors that Mr Cuthbert considered as a matter of usual practice, it is unlikely

that at the point of assessing the relevant amount Mr Cuthbert simply put all those matters to one side. Thirdly, in the final sentence of the paragraph quoted above, Mr Cuthbert made express reference to purchasers of the kind he had described taking into account “the types of considerations that I address above when determining a vehicle’s value”. In effect, he is attributing to those buyers a consideration of the same factors as those that he would take into account.

186 Nevertheless, it appears from the terms of the report that at the point of undertaking the assessment, Mr Cuthbert may not have evaluated for himself the required reduction in value having regard to the factors he described, but rather posited a buyer considering the amount on top of salvage value that the buyer would pay on the basis that “purchasers would have existed in the market who would have been willing to pay a further amount on top of the salvage value of the [vehicle], in the hope that they would be able to find someone to fix the [defect] at a reasonable price, despite the absence of a known effective fix at the time”.

187 It was the possibility of such a buyer approaching the question of price in that way (as well as his own view as to the seriousness of the defect) that caused him to reach the opinion that an approximate 23.5% to 27% reduction was appropriate (para 124).

188 Therefore, the precise manner in which the assessment reflected Mr Cuthbert’s application of the factors in the manner he described in his report is, at least, somewhat obscure when regard is had to the terms of his report. It appears to focus upon a buyer who was assessing, by reference to the factors Mr Cuthbert had identified, an amount that the buyer was willing to pay on top of salvage value in the hope that the defect could be fixed. At least on its face, this appears to be different to forming his own opinion as to the amount by which he should reduce the value from the retail market price by reference to the factors he has described in order to take account of the defect. It appears to focus upon the price that a buyer who was purchasing a vehicle that would have no utility unless the vehicle was repaired might be willing to pay.

189 Mr Cuthbert was also asked whether his opinion would differ if at the time of purchase “there was a real possibility that an effective fix ... would become available from around January 2020”. As to that question, his evidence in his report was as follows (paras 127 and 128):

I consider that a delay in the development of an effective fix of almost four years is too long to have an impact on my assessment of the reduction in value to the [vehicle] resulting from the [defect] and risk of the [defect consequences] at the time of purchase.

The possibility of an available fix for the [defect] four years after the [vehicle] was

purchased does not change the fact that the purchaser would have been exposed to four years of owning the vehicle without the fix. This is not a case of the vehicle being restored to a defect-free state immediately after purchase; four years is sufficiently long for the impact of the [defect] and the [defect consequences] to be likely to be experienced by the owner.

190 The reasoning in the report as to the significance of a real possibility of a fix some four years later rests upon the view that there would have been a period when the defect consequences would be likely to be experienced.

191 It may be noted that in response to criticisms raised concerning the valuation approach set out in his report, Mr Cuthbert provided a supplementary report, dated 22 October 2021. In that report he explained his opinion concerning fair market value in the following terms (para 12 (c)):

... in my view and based on my experience, it is unrealistic and incorrect to conclude that a prospective purchaser of the [vehicle] in April 2016 who is aware that the vehicle suffers from the [defect] and the risk of experiencing one or more of the Defect Consequences and that no fix for the [defect] exists at that time, would be willing to pay the same purchase price as they would if the [vehicle] did not suffer from the [defect] and the risk of experiencing one or more of the Defect Consequences. In these circumstances, based on my experience, the seller would need to reduce the purchase price of the [vehicle] in order to achieve a sale to a prospective purchaser who had this knowledge.

192 However, he then went on to explain again that in his experience and opinion the valuation of motor vehicles was an impressionistic exercise. He explained his approach in the following terms (para 18):

... valuing motor vehicles is an impressionistic exercise in which a number of factors should be considered, including the cosmetic condition of the vehicle, the mechanical condition of the vehicle and the general popularity and desirability of the vehicle in the relevant market. These factors, and the individual characteristics of particular vehicles, will take on different levels of importance depending on the kind of the vehicle being valued and the context in which it is being valued.

193 He then explained that his view on the reduction in value of the vehicle the subject of the claim by Mr Williams and DCS was formed having regard to the following (we paraphrase, save where quoted):

- (1) the factors described in the passage quoted above (as explained in his report), namely the various factors that he had identified;
- (2) his assessment of the seriousness of the defect and the defect consequences;

- (3) there being no effective fix to the defect as at April 2016 (the time the vehicle was purchased);
- (4) the salvage value, “with a reduction to this level being the maximum reduction I would expect to apply to a vehicle with a defect which does not have an effective fix at the time of purchase”; and
- (5) the price at which Mr Williams and DCS may have been able to sell the vehicle to a purchaser other than a salvage auction house assuming that it had not been driven (being the buyer he had described in his evidence as one willing to pay a further amount on top of salvage value in the hope that someone could be found to fix the defect at a reasonable price).

194 Therefore, regard to the supplementary report describes the salvage value as an outer limit on the extent of the appropriate reduction. Importantly for present purposes, it reiterates Mr Cuthbert’s description of the task that he had undertaken as being an impressionistic assessment taking account of the factors he had applied based upon his extensive experience in valuing motor vehicles taking account of their defects. It places his analysis of the price that a purchaser might pay above the salvage value in that context.

195 Nevertheless, it appears to treat the defect as one which is so serious that it is appropriate to approach the valuation on the basis that it requires the ascertainment of an amount on top of salvage based upon the uncertain prospect (or hope) of being able to find someone who can fix the defect. Such an approach suggests, at least, that he has in mind a buyer who considers that if the defect cannot be fixed then the only use of the vehicle is for salvage.

196 Toyota’s submissions in the appeal criticised the reasoning of Mr Cuthbert on the basis that it involved working up “in some unspecified way” to reach an amount on top of the salvage value. It was said to be an approach that fixated on the salvage value which was inappropriate for a vehicle that was functional and not in a state where it needed to be scrapped by reason of the defect. His reasoning process was characterised as “wholly opaque” and involved working from an inappropriate starting point.

197 Particular reliance was placed upon what emerged at the trial in the course of cross-examination of Mr Cuthbert which was said to demonstrate that no objective means had been used to reach the conclusion as to the appropriate reduction. Exchanges to the following effect were said to be significant:

- (1) Mr Cuthbert agreed that what he did was to take the salvage value and then say that “there might be a hypothetical consumer who assesses the probability of a fix arising and you add a bit to the value that you’ve already arrived at when you do your salvage method” (T127) (later in his evidence he agreed that he was referring to “people having the hope that they would be able to find someone to fix the defect at a reasonable price” (T128)).
- (2) It was put to Mr Cuthbert a number of times that he did not undertake the exercise of going through the factors that he said that he typically considered in undertaking a value (set out above) but he was unable to explain how he did so. In that regard Mr Cuthbert referred to “the whole process moving forward” (T127) and his methodology being one that “follows through the valuation process” (T129) as being the way he established value but did not otherwise elaborate on the manner in which the factors identified by him had been applied.
- (3) Mr Cuthbert maintained that it was appropriate to start the approach to valuing the vehicle by starting with the salvage value even though the vehicle could do most of the things that a car should do, namely, get the passenger from point A to point B (T128-129).
- (4) Mr Cuthbert seemed to agree that the approach that used the salvage value as the baseline value was different to the approach of using the factors to assess a reduction from the retail price as explained in his report (T133).

198 It was also put to Mr Cuthbert that a defect in his approach was that the use of the salvage value as a starting point was to assume that the vehicle could not be driven and it was so unfit for use that the best that you could do is sell it off for parts (T126). Mr Cuthbert disagreed with that characterisation. However, it may be noted that earlier he had agreed that in most cases the affected vehicles would remain capable of taking driver and passenger from point A to point B (T113). Therefore, taking account of that concession, it would not be logical for Mr Cuthbert to undertake his valuation analysis on the basis that the vehicle was only good for parts unless the defect was fixed. This point may be viewed as support for a conclusion that he did not undertake his valuation on that basis or as a reason why, if he did, he was in error as to his approach.

199 By starting with a salvage value and positing the additional amount that a purchaser might pay on top of the salvage value on the basis that he might, to use the language of Mr Cuthbert “put

the vehicle back on the road at a reasonable cost” (T126), Mr Cuthbert appeared to have treated the vehicle as if it was a write-off unless repaired in some way – or, at the very least, that the defect was so substantial that such an approach was appropriate. Further, the required repair was considered on the basis that it was only a possibility or a matter about which a purchaser may be hopeful. This is supported by the fact that during cross-examination, Mr Cuthbert described his approach as “a variation in the salvage auction house as to which type of salvage auction it may be sold at” (T126). He referred to two variants of salvage value. First, “the straight out salvage value” (the floor price) and second “the possibility of a potential buyer considering that he can put the vehicle back on the road at a reasonable cost to fix and have it back on the road for a figure that he has calculated away from [the manufacturer’s standard retail price]” (T126).

200 The state of the evidence supported a submission to the effect that Mr Cuthbert’s opinion appeared to have been formed on the basis of a view that overstated the seriousness of the defect. Hence, its focus upon salvage value and its ultimate emphasis upon what a buyer might pay over and above the salvage value on the basis that a repair might be found.

201 As to the evidence of Mr Cuthbert, the primary judge made the following finding (J[354]):

The seriousness of the mechanical problem, the lack of a fix at the time of supply, the risk of additional servicing and associated inconvenience, the embarrassment and discomfort associated with excessive foul-smelling white smoke and the impact on resale value and desirability were all factors considered by Mr Cuthbert ... I similarly accept his evidence that he did not start from salvage value and work up in a way that skews the value to the bottom end of the range.

202 Ultimately, his Honour found that there was no reason not to accept Mr Cuthbert’s evidence “as a useful guide to valuation” and that it should be accepted because he was a professional car valuer with 50 years’ experience and it accords with what his Honour considered to be “robust common sense”: J[356].

203 In our view, this 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. It also failed to have regard to the emphasis that Mr Cuthbert’s ultimate assessment placed upon a notional buyer who was the kind of buyer who would be purchasing a vehicle that was being sold for salvage that might be able to be repaired rather

than upon the value that a retail purchaser would place on the vehicle given the effect of the defect on the use of the vehicle.

204 In our view, the issues raised concerning the use of the salvage value and proper regard to the diminished use of the vehicle with the defect should have led his Honour to treat Mr Cuthbert's percentage reduction in value with considerable circumspection. It should not have been treated as a useful guide to valuation without making due allowance for the matters to which we have referred. To this extent, we uphold grounds 10 and 12 of the notice of appeal.

205 Further, in our view, there were two additional conceptual reasons for concluding that Mr Cuthbert's approach overstated the reduction in value, especially to the extent that his value was sought to be deployed to support an aggregate assessment of loss for all group members who had bought and kept their defective Toyota vehicles. They arise from the views we have expressed as to the proper valuation task required by the terms of s 272(1).

206 First, in the case of consumer goods, 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. This is because it is the value of the goods to a consumer purchaser that must be assessed. The resale price of a consumer good will determine a different value, namely the second-hand value. It will include transaction costs and discounts for risk. For those reasons, an assessment of reduction in value without regard to such considerations is likely to overstate the reduction in value compared to an approach which considers the extent of the reduction in value for a reasonable purchaser resulting from the failure to comply with the guarantee.

207 Secondly, it 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 that regard, Mr Cuthbert's value was expressed on the basis that no fix was available. He was then asked to say whether he would have a different view if, at the time of purchase, there was a real possibility that an effective fix would become available almost four years later. In his view, that possibility was too far away to have any impact on his assessment. However, the purchase of Mr Williams's Prado was one of the earlier purchases of the defective vehicles. Other vehicles were purchased much closer to the time when the free fix ultimately became available.

208 Mr Cuthbert's evidence was dealing specifically with the purchase of Mr Williams's Prado by DCS. However, reliance was placed on the report to reach a conclusion as to reduction in value damages on an aggregate basis for the whole of the relevant cohort. For reasons we have given,

what was required in order to use market information to support an aggregate assessment of value was for account to be taken of the possibility of a repair and the extent of the utility of the vehicle in the meantime. Any such assessment would depend upon matters such as prevailing views as to Toyota's approach to performing its warranty obligations, views as to the likelihood of the defect consequences arising and views as to the seriousness of those defect consequences if they arose. Therefore, there were issues in simply extrapolating the opinion expressed by Mr Cuthbert by reference to the circumstances of Mr Williams and DCS to the aggregate assessment of reduction in value damages for all members of the relevant cohort.

209 Neither party addressed these aspects before the primary judge. We will return to them when considering the appropriate orders to be made on the appeal.

210 For completeness we note that it was submitted that Mr Cuthbert's analysis did not take account of the potential resale value of the vehicle. It was put to him that he had not taken account of the market evidence as to what a Prado may sell for in the market place. He responded to the effect that there was no secondary market information at that time (bearing in mind that the valuation task was in respect of the reduction in value of a new vehicle as at the date of purchase). He accepted that the vehicles were popular and renowned for having a high resale value. He said that he should have included a sentence in his report to the effect that Prados are generally known for reliability and were "not known for having an upcoming listed fault". He did not agree that he should have brought to account the resale information at that time because the full extent of the defect was not known. We can see no difficulty with this reasoning by Mr Cuthbert, so far as it goes.

211 Finally, it was submitted that Mr Cuthbert had accepted in cross-examination that the inconvenience and embarrassment suffered by Mr Williams was central to his analysis. The relevant passages relied upon concern Mr Cuthbert's response to certain questions that were posed by the primary judge for consideration by the experts.

212 The questions posed by the primary judge were based upon six assumptions the last of which was expressed in the following terms:

... although unknown and unknowable at the time of purchase four years earlier, the secondary market resale data shows no discernible deterioration in the resale value of vehicles like the [vehicle] purchased compared to similar types of motor vehicles.

213 As will emerge, the assumption appears to have been prompted by data collected by Mr Stockton (considered in more detail below). The other assumptions were to the effect that

the defect and its consequences existed at the time of purchase, that it was also known at the time of purchase that there was no ready fix for the defect, that any additional servicing required to be undertaken by reason of the defect would be undertaken under warranty at no cost, that it was likely that there would be some negative but undetermined impact on fuel economy and that countermeasures are now available at no cost which will remedy the defect if implemented.

214 Based upon the six assumptions, Mr Cuthbert was asked to express his opinion in answer to three questions, namely:

- 1 Assessed as at the time of purchase, using only information which was available at the time of purchase?
- 2 Assessed as at the time of purchase, using the information available today?
- 3 Assessed as at [the date of the initial trial]?

215 As to 1, Mr Cuthbert maintained the value expressed in his report. As to 2, he expressed the opinion that the value would be the same because Mr Williams would be faced with the defect consequences for a considerable period during which time there would be requirements for extra servicing and possible repairs, he would have lost trust in his vehicle and he would have the constant thought as to whether or not the vehicle would leave him in an embarrassing situation with the issuing of white smoke and/or the foul odour. As to 3, Mr Cuthbert identified many factors that affected a resale valuation of Mr Williams's Prado at the time of the initial trial (some of which had increased used car values) and expressed the opinion that a vehicle with the fix applied would have the same value as those being advertised for sale at the time.

216 At one point in the course of his cross-examination about these answers, Mr Cuthbert did accept that he was loading a lot of his assessment of loss of value into embarrassment and inconvenience (T196). He also agreed that in referring to embarrassment and inconvenience he was relying upon the information from Mr Williams because "that's the one we have the details for" (T195). However, shortly after that evidence, Mr Cuthbert said: "I didn't concentrate on the embarrassment and inconvenience. I took the overall ownership problems and consequences into my initial calculations, and that's what I based it on" (T196).

217 These exchanges do indicate that the evidence of Mr Cuthbert concerned the circumstances of use of the Prado as experienced by Mr Williams. Whilst they are an insufficient foundation to support the submission that the analysis of Mr Cuthbert rested, in effect, upon Mr Williams's evidence as to his embarrassment, they do expose the limitations of an opinion as to the reduction in value of a particular vehicle as a foundation for drawing conclusions to support an

aggregate assessment of reduction in value damages for all members of the relevant cohort. Reliance upon the actual experience of Mr Williams and the conclusions that might be drawn based upon that experience (such as his embarrassment) tend to disconnect the analysis from an objective assessment as to how a reasonable consumer might view the significance of the defect at the time of purchase taking into account the possibility that a fix may be found and provided under warranty.

218 Finally, we note that Mr Cuthbert accepted that the availability of the fix restored the value of the vehicle. This was made abundantly clear in other evidence and was not in issue on the appeal.

The evidence of Mr Boedeker

219 Mr Boedeker presented expert evidence based upon results obtained from a “choice-based conjoint survey”. Both before the primary judge and on appeal Toyota contended that there were many flaws in the analysis. The primary judge accepted the merits of many of the criticisms but concluded that the evidence still had “some force” when it came to quantification of the aggregate reduction in value for members of the relevant cohort. Toyota pressed the significance of the flaws on the basis that they should have led the primary judge to conclude that Mr Boedeker’s evidence could provide no basis for making such an assessment.

220 For reasons that we develop below, we are not persuaded that the primary judge used the figures produced by Mr Boedeker as part of the foundation for concluding that the appropriate measure of the reduction in value was 17.5% from a relevant measure of the retail price. Rather, his Honour confined his use of the willingness to pay survey evidence. He treated it as some confirmation of his own assessment, based on the evidence of the nature of the defect and its consequences, that the defect would have a significant effect upon the value of the vehicles to a reasonable consumer. Unlike the conclusion reached in the case of Mr Cuthbert, his Honour did not find that the figures produced by the willingness to pay analysis provided a useful guide or any indication as to the appropriate figure. His Honour placed only limited reliance on the willingness to pay analysis of Mr Boedeker (see J[379]).

221 In those circumstances, we consider the attack upon the evidence of Mr Boedeker to proceed from a false premise and it is not necessary to consider the validity of the analysis undertaken to support the particular figures advanced by Mr Boedeker. Those figures were not relied upon by the primary judge.

The evidence of Mr Stockton

222 Mr Stockton is an economist and econometrician. He has considerable experience applying econometric analysis within what he describes as the retail automotive industry and has studied many different markets for automotive and agricultural equipment. He says that his experience has been undertaken with an emphasis on pricing mechanisms and pricing behaviour.

223 Mr Stockton prepared a very detailed report based upon the analysis of available market information. He also drew upon information concerning the affected vehicles. He produced much detail concerning his sources of information, the economic models he had used and the calculations he had undertaken. He also summarised his key findings in narrative terms and by reference to a series of tables. For present purposes, it is the information presented in the tables that assumes significance.

224 In his report dated 23 July 2021, Mr Stockton expressed the opinion that buyers of the defective Toyota vehicles had made an overpayment which was reliably attributable to the defect. He expressed the opinion that in a scenario where the 2020 field fix was effective then it was appropriate to use what he termed a “Repair Cost Model” as the basis for assessing the reduction in value of the defective vehicles. He identified the reduction in value generated by the defect as being “the amount of additional money that would have been necessary at the time of purchase for Group Members to acquire the Defective Vehicles for which they bargained”. It described the cost to repair the defect as an observable and measurable increment being “the amount of money or equivalent market value that would be needed to add to the transaction to make the Affected Vehicles as delivered equivalent to the Affected Vehicles as represented” (paras 34 to 41).

225 In addition, Mr Stockton investigated whether the conditions had been satisfied to enable an excess depreciation model (also described as a diminished value model) to be used to determine the reduction in value attributable to the defect. It is a model that seeks to identify a correlation between awareness of a defect that was previously not identified and some change in observable market prices. As to whether such a model could be used, Mr Stockton concluded as follows (para 46):

In this matter, those conditions are not satisfied. Rather, my inquiry strongly supports the finding that the resale market does not have well-developed knowledge of the [defect], and therefore, is not exhibiting an informed response to the [defect] in terms of resale prices of [defective vehicles].

226 Nevertheless, Toyota sought to deploy the market data that had been used by Mr Stockton to reach that conclusion to support submissions to the effect that the data showed that, throughout the relevant period, the defective vehicles held their value better than comparator vehicles. Those comparator vehicles included the same Toyota models supplied with a petrol engine in which the defect was not present.

227 Particular reliance was placed upon the following passage from the report of Mr Stockton (para 250):

Although my analysis of the resale market pricing behaviour of Affected Vehicles described below is not the product of finalized analysis of the type that I would have conducted had I found that a Diminished Value model would reliably bear upon the Questions asked of me, in my opinion, I had sufficient data and undertook sufficient analyses and testing to identify pricing trends and to test for effects that might affect resale market prices for reasons separate from the [defect]. I have no reason to expect that increasing sample size or refining the model through additional regression specifications would have reversed or negated trends observed in the data. Consequently, I consider that I applied appropriate diligence and professional care and made all relevant inquiries to reach the findings presented in this section, and those findings are, in my opinion, reliable and indicative of the relevant pricing trends in the resale market, as those trends relate to the [defect].

228 The above passage is to be found in the introduction to the section of Mr Stockton's report that is concerned with whether an excess depreciation model could be used. Ultimately, as has been observed, it was found that the model could not be used.

229 However, Mr Stockton was cross-examined as to the purpose to which some of his data might be put. He was taken to some of his tables and asked whether the data in them could be used for comparing the retained values of affected vehicles with the retained values of unaffected vehicles of the same make and model (but with petrol engines). In particular he was taken to a data point in the table which showed that the retained value for the defective vehicle was higher than the retained value for the equivalent Toyota vehicle with a petrol engine.

230 Mr Stockton agreed that on average there was a higher average value retention for the vehicles affected by the defect compared to those that were not so affected (T222). That concession is borne out by a consideration of the relevant tables produced in his report.

231 In his report, Mr Stockton tested this and other aspects of the data which he described as counter-intuitive (para 265). Accordingly, he went on to investigate whether "other portions of the resale market indicate a response to the [defect] at all". He described the inquiry that he undertook in the following terms (para 266):

Inherently, this investigation consisted of two inquiries. First, irrespective of whether the resale market responds to the [defect], are there indicia of the resale market's distinct awareness of the [defect]? Second, if evidence exists of market actors' awareness of the [defect], is there an observable response to that information? As described below, I conclude that in some portions of the market, particularly Toyota dealerships, clear evidence of knowledge of the [defect] is present. Furthermore, clear evidence of a response to knowledge of the [defect] is also present. By contrast, an asymmetry exists between patterns observed in Dealer Sales Data and patterns observed in Auction Data. Based on the suite of findings described below, it is my opinion that the more sensitive response by Toyota dealerships to the [defect], relative to auction participants, indicates that either Toyota dealerships' response to the [defect] is based on more mature information relative to the [defect] or auction buyers' response to the [defect] is not based on mature market knowledge relative to the [defect].

232 The above conclusion is based on the following findings by Mr Stockton (para 267):

First, Affected Vehicles traded-in to Toyota dealerships had much higher frequency of DPF repairs than Affected Vehicles as a whole.

Second, trade-in prices paid by Toyota dealerships to Group Members correlated negatively with the degree to which those vehicles were in need of DPF repairs prior to retail sale.

Third, auction sales prices were independent of the DPF repair history of Affected Vehicles.

Fourth, Toyota dealership trade-in prices and retail prices of Affected Vehicles correlated closely with DPF repair history of Affected Vehicles.

Fifth, the combination of the third and fourth findings described above highlight an important gap in the behaviour of the auction market and the more informed trade-in market, as Toyota dealerships were acutely responsive to Affected Vehicles' DPF repair history, whereas auction buyers' behaviour was independent of that history.

(Separate sub-paragraph numbering excluded.)

233 The submission advanced by Toyota was to the effect that Mr Stockton set out to determine the negative reaction which the defect brought about in the used car market and, having seen that the market data showed no such negative reaction, Mr Stockton concluded that something was faulty about the market data. A submission in those terms is unfair to Mr Stockton. There is no foundation for suggesting that Mr Stockton simply concluded that the data was wrong. Rather, prompted by an understandable observation that the data appeared to be counterintuitive, Mr Stockton undertook a detailed analysis of what was driving the result. He concluded from that analysis (and the data which he presented to support the five findings that he made) that there was an informational problem with the data. In short, the defect was not a matter that was known to all market participants. In cases where there were reasons to conclude that the defect consequences had manifested and that was known to the buyer then prices were lower. In auction markets there was different behaviour.

234 Therefore, the overall data were not suitable for an excess depreciation model as a means of measuring the reduction in value for all defective vehicles. However, equally the same data could not be used to support the affirmative position advanced by Toyota in the appeal, namely that buyers of the defective vehicles in resale markets were willing to pay more for them than comparable vehicles despite being aware of the defect. Rather, the proper conclusion was that the data could not be used to reach any conclusion because the foundation for concluding that there was a positive correlation between the defect and higher value had not been established. Rather, the more detailed analysis showed that only some buyers were informed as to the defect and those buyers paid lower prices compared to other buyers.

235 Significantly, Toyota did not point on the appeal to any part of the evidence where Mr Stockton accepted the premise for the submission made on appeal by reference to the data in the table, nor to any basis upon which the Court should reject the analysis (and conclusions) based upon the five factual findings made by reference to a detailed consideration of the data.

236 The above submission was advanced before the primary judge and rejected. His Honour described it as being based upon a critical premise that the market became “fully informed of the [defect]”: J[90]. His Honour went on to reject the validity of the use of the market data analysed by Mr Stockton as indicating that the defect did not affect the value of the relevant vehicles.

237 Toyota criticised his Honour’s approach on the basis that the submission advanced at the initial trial was to the effect that the evidence showed that the market became more informed over time, not that the market participants were fully informed. Accepting (for the purposes of the argument) that to be so, his Honour was correct to describe the market being fully informed as a critical premise for the use to which Toyota sought to put the market data. If some segments of the market knew or the extent of awareness was imperfect such that the full significance of the effect was not apprehended or the extent of market knowledge was gradual then the data could not be used in the manner submitted by Toyota. Unless there was a foundation for a conclusion that the market in general was aware of the defect and its significance, then overall market data could not be deployed to reach a conclusion that the price in some way indicated the general market response to the significance of the defect. All the more so in the context of the detailed analysis by Mr Stockton.

238 Ultimately, as to the use of the market data in the tables prepared by Mr Stockton, the primary judge found as follows (J[92]):

As Mr Stockton put it, and as I accept, there would need to be an awareness generally on the part of consumers in the resale market of a systematic forward-looking propensity in Relevant Vehicles before it could be said the market was informed... [Toyota] contends that this does not accord with common sense, because unknown future problems would have a greater adverse impact on consumers. I disagree. The fact that a consumer is aware of a past problem in one vehicle does not mean they would associate this with a systemic problem in all vehicles going forward.

239 The logic of this finding was not impeached. Further, Toyota's submission fails to adequately grapple with the significance of the unchallenged findings that Toyota engaged in misleading and deceptive conduct which included adverse findings about its conduct when it knew of the defect. Therefore, any information that the market acquired was through individual experience of particular owners and information channels that operated in a market where Toyota was not accepting that there was a problem.

240 Finally, as to this aspect of the evidence, Toyota sought to rely upon the evidence of its own expert Dr Pleatsikas. It must first be observed that Dr Pleatsikas did not express his own opinion as to conclusions that may be reached concerning value. Rather, his evidence was in the form of a critique. In that context, Dr Pleatsikas offered up the following critique in the course of giving oral evidence concerning the reasoning of Mr Stockton as to why it was not appropriate to use an excess depreciation model (T310):

[Mr Stockton] asserts that because he could find no real breakpoint in the data indicating some type of major event that informed the market about the defect, that the diminished value analysis should be ignored. But the real world is messy. We don't always have a single breakpoint. Data filtration into a market is often gradual. What's incontrovertible is that more and more data about the defect filtered into the market over time. What's also true is that the value premium for the affected vehicles also increased over time. If you put these facts together, the logical conclusion is that the market did not impute a significant negative market price effect on the defect. As the market learned more about the defect the value premium increased for these vehicles. The bottom line is that none of Mr Stockton's four factors justify ignoring the diminished value analysis.

241 It may be observed that the above passage from the oral testimony of Dr Pleatsikas (upon which Toyota placed considerable reliance) advances the opinion that as the market learned more about the defect the value premium increased. In our view, there are a number of problems with this testimony.

242 First, as Dr Pleatsikas observed, the data actually showed that over time there was an increase in the value premium for the defective vehicles compared to other vehicles. Yet, he used the data to reach an opinion that as the market became informed it "did not impute a significant negative market price effect on the defect". Understandably, he stopped short of attributing

the increase in the value premium over time to the defect. However, necessarily implicit in this approach to the data is the attribution of the increase in value premium to some other variable or variables. Dr Pleatsikas offered no explanation in that regard as part of the testimony relied upon.

243 Conceivably, increases in value attributable to variables other than the defect might swamp any negative effects of information about the defect. This may be especially so if the information about the defect was imperfect and not communicated across all buyers.

244 Secondly, the proposition that it might be concluded that there was no observable negative effect on prices must also be evaluated in the context of the findings made as to the seriousness of the defect and its consequences. It was the seriousness of the defect together with the increase in the value premium over time that caused Mr Stockton to consider the result to be counter-intuitive. We have already addressed the respects in which Dr Pleatsikas disagreed with the explanation offered by Mr Stockton after considering the data more closely.

245 Thirdly, the views of Dr Pleatsikas were not supported by any economic analysis of the data that justified a conclusion that the data concerning the value premium might be said to be correlated with information about the defect becoming available in the market.

246 Finally, the criticism by Dr Pleatsikas of the approach by Mr Stockton depended upon whether it might be found, on all the evidence, that information filtered into the used vehicle market to a sufficient degree (both as to who knew and what was known) that its potentially negative effect upon value would be able to be observed in the market data. The proposition that despite such knowledge there was no observable negative effect on prices must also be evaluated in the context of the findings made as to the seriousness of the defect and its consequences.

247 It may be noted that the contentions advanced for Toyota did not seek to support the conclusion expressed by Dr Pleatsikas that there was no justification for ignoring the excess depreciation model (described as the diminished value analysis). Rather, the view expressed by Dr Pleatsikas concerning “data filtration” was advanced to support a contention that the Court, on appeal, should have regard to the data presented in the tables to conclude that there was no reduction in value by reason of the defect. At its core, that submission was properly described by the primary judge as being based upon a critical premise that the market as a whole knew about the defect and its consequences. Although his Honour used the term “fully informed”, we do not understand him to have done so by adopting any technical economic meaning to the

effect that every participant had perfect knowledge. Rather, his Honour was quite properly drawing attention to the fact that conclusions could not be drawn from the evidence of the overall average price being paid in the second-hand market unless there was some basis for concluding that the market as a whole was informed of the problem (and not just some pockets who had some general awareness that there was an issue with some vehicles in the context of Toyota declining to acknowledge publicly that there was a problem).

248 Therefore, the real nature of the complaint raised by Toyota when it comes to the use that it says should have been made of the market data in the tables prepared by Mr Stockton is to the effect that there should have been a finding by the primary judge that over time the point was reached where the market as a whole knew enough that you would expect any concern amongst buyers in general to be reflected in a comparison between the prices being paid for vehicles with the defect and their petrol engine counterparts. We address that aspect of the evidence below.

249 Finally, it must be noted that Mr Stockton also undertook a separate repair cost model analysis. It was relied upon in support of the claim for aggregate reduction in value damages as a measure of the ‘floor’ for the assessment, being a percentage between 2.9% and 7.3% of the relevant retail price: J[380]. The analysis was based upon the warranty repair costs that Toyota reimbursed to dealers for performing the 2020 field fix: J[383]. It treated that amount as a proxy for what would have been required at the time of purchase to ameliorate the defect. As the primary judge observed, “although it measures the economic value of restoring the consumer to the position they ought to have been in at the time of supply, it does not account for the fact that the [2020 field fix] was not delivered for many years” (J[383]).

The extent to which the market became informed

250 For Toyota, the following propositions were advanced as to why the market was sufficiently informed about the defect such that the information in the tables produced by Mr Stockton should have been brought to account by the primary judge:

- (1) It was not necessary to demonstrate that the market was fully informed of the defect before the information in the tables was relevant.
- (2) There was evidence that supported conclusions that the market was informed by print and online media.

- (3) Contrary to the finding of the primary judge, the experts agreed that it was appropriate and conventional for economists to use information that concerned sales from the used car market in forming conclusions as to the effect on value of the defect of vehicles sold in the new vehicle market.
- (4) Contrary to the finding of the primary judge, the information prepared by Mr Stockton was not confined to comparing vehicles of different makes (by reason of the comparison that could be made to the same Toyota vehicles with petrol engines).

251 On the basis of the above propositions it was contended that the information in the tables should have led to a finding that there was no reduction in value by reason of the defects. For the following reasons, we do not accept that the primary judge was in error in approaching the damages issues on the basis that the market was not sufficiently informed as to the defect and its consequences to be able to conclude that the data as analysed by Mr Stockton was relevant to the assessment of reduction in value damages.

The extent to which the market needed to be informed

252 For reasons that have been given, unless it was established that the used car transactions were informed to a considerable degree by knowledge of the defect on the part of buyers in general then it is not possible to safely conclude that the average of such observed prices indicates the effect of the defect on value. Evidence to the effect that there was some awareness amongst some buyers was not sufficient. Further, it has not been shown that the primary judge was in error in accepting the expert evidence of Mr Stockton as to why conclusions as to the effect of knowledge of the defect could not be drawn from the average prices in the used car market.

The evidence concerning print and online media

253 His Honour considered the evidence as to the extent to which the market had been informed of the defect by the publication in the print and online media of articles about the problems that had been experienced by owners of diesel Toyota vehicles: J[95]-[101]. His Honour identified six issues with the claim by Toyota that the market had been informed in that way. Toyota seeks to challenge his Honour's reasoning in a number of ways.

254 First, Toyota placed reliance upon the evidence of Dr Pleatsikas. For reasons that have been given, we do not accept that submission.

255 Secondly, it was alleged that the primary judge erroneously found that the fact that the articles were published "says nothing" about reduction in value at the time of purchase and was

contrary to expert evidence about the appropriateness of using subsequent evidence of second hand sales (see below). However, this contention misstated the nature of the relevant finding by his Honour which was expressed in the following terms (J[96]):

... none of the articles published prior to October 2020 disclose that the Relevant Vehicles are defective in the way concluded by referee and found by the court. As regards to an article dated 23 October 2020, by the time that article was published, an effective fix had become available (as is explained in the article). Even if one assumes that the information in this article was absorbed by the resale market and reflected in market prices for used Relevant Vehicles from October 2020, it says nothing about the reduction in value of those vehicles resulting from the defect at the time they were initially supplied, when no effective fix was available.

256 As to the above finding, it may be observed that the first sentence is not challenged. It is of considerable significance because it is a finding to the effect that during the period from 2016 until October 2020 there was no media article that disclosed the nature of the defect as found by the Court. In short, media articles could not be the means by which the market became informed of the real seriousness of the defect and its consequences.

257 Toyota's submission focussed upon the final sentence. It was addressing the significance of an assumption in favour of Toyota that an article published in October 2020 disclosed the defect. The point made by the primary judge was that even if such an assumption is made, there was a material difference between the circumstance of a buyer purchasing a second-hand vehicle at a time when the 2020 field fix was available and a buyer of the new vehicle at a time when no fix was available. His Honour is not addressing the possibility of a second-hand sale at a time when there was awareness of the defect and no fix was available. Indeed, it is understandable why his Honour does not do so given the finding in the first sentence that none of the articles provided that information.

258 Thirdly, Toyota criticised the following finding by his Honour (at J[97]):

... there is no evidence or reason to infer that the resale market for Relevant Vehicles is an "efficient market" in the sense that information published on a trade website or in a newspaper should be taken to be absorbed by the resale market and reflected in the market price of the Relevant Vehicles.

The finding was said to be contrary to the evidence given by each of Mr Cuthbert and Mr Williams.

259 As to Mr Cuthbert, the evidence relied upon was given in very general terms and concerned information about the market available on CarSales.com and from RedBook and AutoEdge

that he would use to ensure that his assessments as to value had a close connection to the market price for used vehicles. The finding by the primary judge addressed a different point. It concerned the extent to which the prevailing prices might reflect information that might be published on a trade website or in a newspaper because it is information that guides the assessment of value made by most buyers.

260 As to Mr Williams, he was cross examined as to his own use of such information for his car purchases and in providing loss assessment services to insurers. Evidence that Mr Williams gave as to his own practice and awareness could hardly provide a foundation for a conclusion as to what may be the position in the market as a whole, especially as he was an atypical purchaser given his employment interest.

261 Fourthly, it was said that the primary judge fixed the bar too high in making findings to the effect that the descriptions in the articles were too general and did not expose the seriousness of the defect. In that regard, the issue for present purposes is whether the average market data could be used to draw a conclusion based upon observed average resale prices. If the information that was available did not disclose the seriousness of the defect, that was a proper basis upon which to question the use of such information as a basis for finding that the data could not be used to conclude that there was no effect upon value from the defect.

262 Fifthly, it was said that evidence about Toyota's consumer redress program did not assist. As to such evidence his Honour introduced the reference to that material by saying "while I place minimal, if any, weight on this factor": J[101]. Given that clear qualification, it could not be said that there was error in not relying on Mr Stockton's data by reason of anything that was said about the redress program.

263 Finally, the contention advanced does not challenge other reasons identified by the primary judge for concluding that the market was not fully informed of the defect. They included the following unchallenged findings:

- (1) Having regard to the content of the articles relied upon by Toyota it was "arguable that a reasonable consumer reading [them] would understand that the problems or issues with the vehicles referred to in the articles have been or are able to be fixed [when] this was not the case" (J[99]).

- (2) Toyota had, since the beginning of the proceedings (in 2019) denied the core allegation that the vehicles were defective in design and have an inherent propensity to experience adverse consequences (J[100]).
- (3) There were a number of issues with the hypothesis advanced by Toyota that dealers may have been informing individual consumers about the defect and its consequences, including the fact that there was no evidence to support the assertion even though more than 7,000 of the vehicles were sold as used vehicles by its dealers (J[106]-[107]).
- (4) The information that Toyota allowed its dealers to give to the market was tightly controlled and included information about what dealers could provide to customers and included instructions to dealers to tell customers to respond to questions about the DPF by telling customers that they were not the subject of legal proceedings (J[111]).

Use of information concerning sales in the used car market

264 Having found that the market was not apprised of the defect and its consequences, his Honour noted that it would be necessary to say something about “the secondary market data” (namely the data assembled by Mr Stockton in his tables): J[114]. Later his Honour returned to this aspect when identifying whether there had been any reduction in value by reason of the defect. His Honour began that aspect of his reasons with the observation that as a matter of common sense and intuition, the nature of the defect and its consequences led to “a sound – indeed, irresistible – conclusion” that there was reduced value at the time of supply: J[330]-[331]. With respect, we agree.

265 In that context, his Honour addressed the secondary market data. He drew upon the earlier findings as to the incompleteness of information that was available to the used car market: J[333]. He described this as a determinative reason to place no weight on the data in forming a view as to the extent of reduction in value. Having regard to our conclusions concerning his Honour’s earlier analysis, this was a full and sufficient basis for his Honour’s approach of disregarding the second-hand pricing information when assessing reduction in value.

266 His Honour proceeded to make three additional points. First, his Honour emphasised the significance of the existence of many confounding factors in secondary markets: J[334]-[335]. Next, his Honour observed (J[336]):

... even if the market had become increasingly informed of issues that related in one way or another to the defect, Mr Stockton’s initial regression analyses did not test whether sales prices later in the period differed from sales prices earlier in the period. This means it cannot be inferred from the market data that such information as there

was in the market relating to the [defect] and its consequences had no impact on value.

267 There is force in both these points, neither of which is challenged.

268 Rather, Toyota focusses upon the final one of the three further points made by the primary judge, being as follows (J[337]):

... when it comes to determining whether there was a reduction in value ... resulting from the [defect], the fact that [the vehicles] held their value better than comparator vehicles in the resale market is of little moment for at least two further reasons: (1) it is not a comparison that is directed to the new car market, so any potential relevance would be confined to the analysis of the supply of second-hand vehicles to some group members; and (2) the relevant question for analysing loss under s 272(1)(a) is not a comparison between the position the purchaser is in and the position the purchaser would be in if they had purchased a different type of car altogether: it is a comparison between the true value of the goods actually purchased and the lesser of the price paid or the average retail price of those goods.

269 It is the first of these two points that is presently relevant. Toyota challenged the reasoning on the basis that the experts agreed that it was appropriate to use data from the used car market to reach conclusions about the value of the defect. It may be accepted that the experts agreed that it was conventional for economists to reason from data in the used car market. However, given the reasoning pathway adopted by the primary judge, that point was a wholly insufficient basis upon which to seek to impugn the finding that the available used car market data did not provide a foundation for concluding that there was no reduction in value. The real issues in the case were whether it was possible to reason from the data in the present case and, if so, what conclusions might properly be drawn. It was not the case that the experts agreed that one could simply take the used car market data and treat that in an uncritical way as a basis for concluding whether there had been a reduction in value by reason of the defect.

The nature of the comparison

270 Toyota also contended that the second of the two points made in the quoted passage above (J[337]) was incorrect. In particular, it was said that it suggested that the available data (in the tables produced by Mr Stockton) involved a comparison with “a different car altogether” and this was not correct. It was said to be incorrect because there was data which enabled a comparison between the prices for the same model of vehicle but with a petrol engine (although there were also other makes and models listed as possible comparators). It is true that both types of comparators were presented in the data. However, it is still possible to describe a vehicle with a petrol engine as a different type of car altogether.

271 In any event, once again, the point being made concerns a relatively minor aspect of the reasoning process. For reasons that we have given, his Honour’s approach is supported by a consideration of his unchallenged findings and insufficiency in the passage of oral testimony of Dr Pleatsikas relied upon by Toyota.

Conclusion on the extent to which the market became informed

272 For the reasons we have given, we are not persuaded that the primary judge was in error in not bringing to account the evidence concerning the average sale prices of used vehicles in reaching a conclusion as to the quantum of reduction in value damages.

Consideration of Toyota’s propositions

273 Having regard to the reasons we have expressed, we now address each of the propositions advanced by Toyota in the appeal.

Proposition (1): Alleged error in using ‘willingness to pay’ evidence (ground 5)

274 It is important to begin the consideration of proposition (1) by noting the way in which the primary judge approached the “willingness to pay” evidence given by Mr Boedeker as commented upon by Toyota’s expert Dr Rossi.

275 His Honour undertook a detailed analysis of the criticisms of the “choice-based conjoint survey” upon which the opinions of Mr Boedeker were based. His Honour concluded that analysis in the following way by first addressing a point made by the applicants that Dr Rossi’s criticisms about the survey should not be accepted because he had not taken up the opportunity to participate in the design of the survey (J[376]-[379]):

The applicants’ contentions may have some merit, but that does not mean the survey should be accepted uncritically. The fact is, as [Toyota] submits, there were a number of difficulties with the survey, which throw doubt on the validity of a number of responses, and should influence the weight to be attributed to it. In saying this, at times, [Toyota] exaggerates these difficulties: for example, Mr Boedeker accepted that the five attribute survey produced anomalies and instead sought to focus on those results identified in the six attribute version of his survey: Second Boedeker Report (at [79]). Similarly, as will be seen, the emphasis on illogicality of responses is overstated.

Nevertheless, the applicants do not contend that the survey ought to be the source of truth for a precise reduction in value. It is the general picture that emerges from the conjoint analysis which it is said, and I accept, is still of some limited utility in coming to a landing on a figure for any reduction in value.

The results of Mr Boedeker’s survey, at a very broad level, make intuitive sense: wholly unsurprisingly, they suggest consumers are willing to pay less for defective vehicles than they are willing to pay for identical, non-defective vehicles, and the

difference in [willingness to pay] widens as the probability of manifestation of the [defect consequences] and the duration of the [defect] increases.

...

In summary, while it is no doubt true that Mr Boedeker's survey confronted difficulties, I accept his conjoint survey evidence is a very general indicator of a significant reduction in value of the Relevant Vehicles resulting from the [defect]. Given Dr Rossi's criticisms and my reservations as to the accuracy of the survey (and having regard to the principles of law that apply in relation to the valuation exercise), it is unrealistic (and unnecessary) to seek to attach any greater reliance or precision to Mr Boedeker's survey than this general impressionistic finding.

276 It can be seen that the primary judge placed only limited reliance upon the willingness to pay analysis by Mr Boedeker.

277 Ultimately, the conclusion by the primary judge was expressed at J[393] in the following terms (already quoted but reproduced again at this point for ease of reference):

The applicants advocate for a reduction in value of 25 per cent. There is always a difficulty in settling upon a pin-point figure in cases of this type. Doing so, although necessary, tends to lend a patina of precision to what in truth is an evaluative and imprecise exercise upon which, at least at the margins, reasonable minds may differ. I am inclined, however, to consider the figure fastened upon by the applicants as being simply too high. My reasons for this conclusion have been addressed in relation to my findings as to the expert evidence, which has led me to conclude that although the evidence of Mr Boedeker and Mr Cuthbert has some force, a number of the criticisms directed to its accuracy and reliability also have merit. **But the conclusion that a reduction in value must still be a figure of significance not only aligns with common sense, but more specifically, my perception of the evidence of Mr Williams and the effect of the [defect consequences] more generally, as borne out by the customer complaints** (as to which see [183]). Doing the best I can, a reduction in value in the range of 15 per cent to 20 per cent is appropriate having regard to all the evidence. Given the need to land on an exact figure, I should settle in the middle of this range, that is, a reduction of 17.5 per cent.

(Emphasis added.)

278 The above passage was followed by the following further reasoning at J[394]:

While, of course, the applicants bear the onus of establishing a reduction in value and an appropriate quantification for that reduction, I am somewhat fortified in this view by reason of the fact that none of [Toyota's] experts provided any real analysis of their own as to the reduction in value that was suffered by group members. Although Mr O'Mara conceded that the [defect] reduced the value of [Mr Williams's Prado], he did not express any view about the quantum of that reduction in value: see [351]. Likewise, Toyota's expert economists provided no positive evidence in relation to the quantification of the reduction in value.

279 Therefore, the ultimate reasoning by the primary judge to support the finding of aggregate reduction in value damages of 17.5% appears to have involved the following constituent parts:

- (1) the evidence of Mr Boedeker and Mr Cuthbert has some force but there are valid criticisms of their analysis (noting the earlier findings that (a) the evidence of Mr Boedeker was a general indicator of a significant reduction in value but it was unrealistic (and unnecessary) to place any greater reliance upon it; and (b) the evidence of Mr Cuthbert was a useful guide to valuation);
- (2) the findings to the effect that the defect was significant and had substantial consequences meant that as a matter of common sense the resulting reduction in value must have been “a figure of significance”;
- (3) the evidence of the nature of the customer complaints about the consequences experienced by them also supports a conclusion that the reduction in value must have been “a figure of significance”;
- (4) the overall thrust of the evidence of Mr Williams of his experience of the defects when using the Prado vehicle as also borne out by the customer complaints supports the figure of 17.5%; and
- (5) Toyota did not lead evidence as to the quantification of the reduction in value.

280 Within the context of that analysis, it appears that Mr Boedeker’s evidence was relied upon as providing some support. However, for reasons we have given that support was not as to the figures concerning willingness to pay but the indication the survey provided as to the significance of the defect for consumers. As discussed above, it appears that the figure arrived at by Mr Cuthbert was given some significance because of his Honour’s finding that it was a useful guide to valuation. As noted above, in this respect we consider the primary judge erred.

281 Subject to that matter, the ultimate conclusion by the primary judge was principally based upon his Honour’s assessment of the seriousness of the defect and its consequences (being findings based upon the report of a referee) and the evidence of Mr Williams and the many others who had made complaints to Toyota, buttressed by the lack of any countervailing evidence from Toyota as to how the reduction in value might be quantified.

282 Importantly, his Honour accepted the merit of a number of criticisms directed to the accuracy and reliability of the analysis of Mr Boedeker and Mr Cuthbert.

283 In that context, the particular reliance placed upon the evidence of Mr Williams and the complaints received by Toyota confirms that his Honour was considering an appropriate

percentage to reflect the evidence as to the consequences of the defect in what were relatively common driving conditions.

284 Toyota's proposition (1) is based upon an argument to the effect that it was not correct to refer to willingness to pay as a measure of market value. This was really a legal argument to the effect that s 272(1) required an assessment of the reduction in market value and the willingness to pay analysis did not determine market value. For reasons we have given, we do not accept the validity of this argument. His Honour was correct to focus upon the price that reasonable buyers would pay for the goods (in the present case the vehicles) if they had known of the defect. This was to focus upon the utility of the consumer goods in the hands of the buyer rather than the resale value. It was an approach that was appropriately directed to the reduction in that value that resulted from the failure to comply with the consumer guarantee. For that purpose, it was not necessary to posit a market in which Toyota was free to choose not to supply the defective goods if the price was too low. Rather, it was appropriate to focus upon understanding the effect upon the willingness to pay that knowledge of the defect would have on relevant buyers. As the analysis was not ultimately used by the primary judge to determine with any precision a clearing price, it is not necessary to determine whether a willingness to pay analysis might be used in that way.

285 Ultimately, it could not be said that it was inconsistent with the proper legal conception of the statutory provision to include in the assessment process a general view that the defect was viewed by reasonable buyers as being very significant when reaching a conclusion as to an appropriate percentage reduction. The primary judge went no further than using the evidence of willingness to pay in that way.

286 For those reasons proposition (1) is not a basis for demonstrating error in the reasoning by the primary judge.

Proposition (2): Alleged error in failing to have regard to the data that formed part of the evidence of Mr Stockton

287 Toyota contended that the data included in the tables prepared by Mr Stockton concerning average market prices paid for used vehicles (the "secondary market data") should have been used by the primary judge to conclude that there was no reduction in value resulting from the failure by Toyota to comply with the consumer guarantee. For reasons that have been given, we do not accept the validity of that contention. No error has been demonstrated in the reasoning by the primary judge as to why that data did not assist.

288 Properly viewed, for reasons that have been given, contrary to the submission advanced by Toyota, the data in the tables prepared by Mr Stockton were not evidence that pointed in a different direction to the evidence relied upon by the primary judge. Rather, it was evidence which had not been shown to be probative of that question.

289 In oral submissions, Toyota also sought to rely upon the evidence of the extent of complaints made to Toyota dealers by owners as evidence to support the conclusion that the market must have been aware of the defect and its consequences. The fact that there were many complaints being made at a time when Toyota was not accepting the existence of the defect does not demonstrate awareness in the marketplace more generally.

290 Toyota also sought to rely upon evidence to the effect that some buyers were repeat purchasers of a considerable number of vehicles. It did not adduce any evidence from any of these buyers, the conditions in which the vehicles were used or the process by which decisions were made to purchase more vehicles. Submissions as to the use to which the fact of subsequent purchases may be put in circumstances where the factual circumstances of the purchases was not in evidence were no more than conjecture. The evidence that the purchases occurred fell well short of demonstrating that those responsible for the purchases were aware of the defects and their consequences as well as the prospect that the same defects might manifest in other vehicles purchased from Toyota yet chose to continue to buy more vehicles.

291 Therefore, proposition (2) must be rejected.

Proposition (3): Alleged insufficiency of the foundation for the common sense assessment by the primary judge

292 It is necessary to be clear about the nature of proposition (3). It was a claim to the effect that the opinion evidence relied upon by the primary judge in making what he described as a common sense assessment was so fundamentally flawed that the primary judge was in error in relying upon that evidence. In short, it was a claim that there was an insufficient evidentiary foundation for the conclusion reached by the primary judge. Quite properly, it was not a complaint about the adoption of a common sense approach by which the relevant evidence was identified and synthesised into an overall conclusions concerning the reduction in value. Such an approach to the assessment of damages of the kind claimed was appropriate and consistent with authority.

293 Therefore, the issue raised by proposition (3) is whether there was a sufficient evidentiary foundation for the common sense assessment. It involves two steps. The first is to criticise the evidence that was relied upon. The second is to maintain that, on appeal, this Court should conclude that there was no basis upon which to make the kind of common sense assessment that the primary judge undertook. By those steps it is contended that the proper conclusion to reach is that aggregate reduction in value damages had not been established for the relevant cohort.

294 We have already explained our understanding of the nature of the common sense assessment undertaken by the primary judge. In our view it did not place any real reliance upon the actual figures advanced by Mr Boedeker. Rather, it relied upon the contents of his survey as exposing reasons supporting the impressionistic assessment (made by reference to the evidence as to the consequences of the defect in relatively common driving conditions) that the defect was of such a character that it would be significant for any reasonable buyer. Otherwise, it was the evidence of Mr Cuthbert as to value and the evidence of Mr Williams together with the record of the nature and extent of the complaints that was used by the primary judge together with his Honour's assessment of the seriousness of the problems that the defect could present that formed the foundation upon which the 17.5% figure rested.

295 For the reasons set out at [203]-[204] above, we consider that the primary judge erred in his reliance on Mr Cuthbert's evidence of value, and to this extent grounds 10 and 12 are made out.

296 For these reasons, and to that extent, proposition (3) is made out. It follows that the primary judge's assessment that the reduction in value of the relevant vehicles was 17.5% cannot stand.

297 However, it does not follow that there is an insufficient basis to undertake an assessment on a common sense basis. We address that aspect separately below.

Proposition (4): Alternatively to (3), the common sense assessment should have taken account of Mr Stockton's resale figures and repair cost analysis

298 To the extent that proposition (4) is based upon the use of the data in the tables prepared by Mr Stockton, for reasons that have already been given it should be rejected.

299 To the extent that proposition (4) seeks to deploy the evidence of Mr Stockton concerning repair costs in a manner that would cause the damages to be assessed by reference to those costs we see considerable difficulties. The costs identified by Mr Stockton are those that are

reimbursed by Toyota to its dealers for undertaking the 2020 field fix. They do not include the no doubt considerable costs incurred by Toyota in finding a fix (noting that it took a number of years to develop). Therefore the figures produced by Mr Stockton are likely to understate the ultimate economic cost of remedying the defect.

300 Further, and more fundamentally, as the primary judge observed, to focus only upon repair costs is to fail to bring to account the costs associated with the delay in the repair being available. During that time, the utility of the defective vehicle will have been significantly diminished. The repair only operates prospectively. An assessment of reduction in value damages based upon repair costs will fail to bring to account that aspect of the reduction in value which will have been experienced by consumers from the time of purchase up until the time when Toyota is able to carry out the repair (as distinct from simply find the fix).

301 For these reasons, proposition (4) is not made out.

Conclusion on appeal grounds

302 Apart from grounds 10 and 12, the grounds of appeal considered in this section of these reasons are not made out.

Re-assessment of the reduction in value

303 As indicated above, it follows from our conclusion in relation to grounds 10 and 12 and Toyota's proposition (3) that the primary judge's assessment that the reduction in value was 17.5% cannot stand. In these circumstances, the question arises whether this Court is able to and should re-assess the reduction in value of the relevant vehicles. Any such re-assessment would be of the reduction in value of the relevant vehicles *before taking into account* (as we consider is necessary and appropriate) the fact that the 2020 field fix became available. That is because the Court does not have sufficient material before it to determine what allowance should be made for the fact that the 2020 field fix became available. At the hearing of the appeal, the parties indicated that, if the Court found error in the primary judge's determination of the 17.5% figure, it would be open to this Court to re-assess that figure.

304 Giving the evidence of Mr Cuthbert (which is the subject of the successful appeal grounds) little weight and otherwise adopting the same approach as the primary judge and focussing upon the seriousness of the defect and its consequences, we are of the view that there was a sufficient basis to reach a conclusion as to the extent of the reduction in value expressed as a percentage of an appropriate measure of the retail price.

305 For reasons that have been given, the assessment of the reduction in value required a consideration of the extent of the loss of utility resulting from the failure to conform to the consumer guarantee. It required a focus upon the reduction in the price that a reasonable consumer would be willing to pay taking account of the defect when compared to the retail purchase of the same goods without the defect. Although resale prices might be relevant, especially to the extent that they revealed the extent of a discount that may be required in order to sell goods with the defect compared to goods without the defect, care must be taken in using prices paid on resale of used goods. As we have explained, there are reasons unrelated to any defect as to why there may be a considerable differential between the value of the goods in the hands of the consumer and the value of the goods on resale.

306 In the present case there was detailed evidence in the form of the report from the referee as to the nature of the defect and its consequences. Further, the consequences were likely to arise in relatively common driving conditions. Therefore, the defect was one which was likely to manifest for many buyers. These aspects of the findings by the primary judge were not in issue on the appeal. Further, the nature of a motor vehicle and its utility to a consumer are matters of ordinary everyday understanding. It is not necessary for the Court to receive evidence as to the nature of the use to which vehicles of the kind the subject of the present claims might be put by a consumer. On the basis of the findings as to the defect and its consequences, the Court can form a view as to an appropriate percentage reduction in utility as viewed by a reasonable consumer.

307 As we noted at the outset of these reasons, the primary judge made detailed findings concerning the defect and its consequences. Some of those were more technical in nature. Others concerned the practical consequences for the owner of the vehicle. In our view, it is appropriate to have regard to the way the matters the subject of those findings would be viewed by a reasonable purchaser of a motor vehicle in order to form a view as to the extent of the effect upon the utility of the vehicle over its useful life. We consider the following findings to be of particular significance:

- (1) the defect was present in all relevant vehicles and was inherent in their design: J[15(6)], J[62];
- (2) each vehicle had the propensity to experience one or more of the defect consequences: J[63];

- (3) a key occurrence which caused the defect to manifest was the exposure of a relevant vehicle to regular continuous driving at approximately 100km per hour: J[15(7)];
- (4) the likelihood or probability that any given relevant vehicle would suffer from one or more of the defect consequences was relatively high: J[64];
- (5) if the defect did manifest then the symptoms included excessive white smoke and foul-smelling exhaust and system warning notifications displaying on an excessive number of occasions for an excessive period of time: J[15(9)], J[59(5)];
- (6) if the warning notifications were ignored then the vehicle would go into limp mode which would prevent the vehicle going into fifth gear and would limit acceleration: J[81(3)];
- (7) there was a need to have the vehicle inspected, serviced and/or repaired more often: J[59(6)]; and
- (8) there was an increase in fuel consumption and decrease in fuel economy: J[59(12)], J[66]-[74];

308 There was no suggestion by these findings that the safety of those in any of the relevant vehicles when the excessive smoke was produced was threatened or that the defect might adversely affect the safe road handling capacity of those vehicles. They were not made unroadworthy by the defect consequences. In all other respects, the features of the vehicles were not compromised. Rather, the potential consequences were additional servicing and compromised fuel efficiency together with the production of occasional foul smelling smoke.

309 It is conceivable that particular consumers may have been acutely embarrassed by the production of the smoke. There was reference in the evidence to “several customers getting stopped by the police, and also other road users”: J[86]. These aspects may or may not provide the foundation for a claim to damages under s 272(1)(b) of the ACL. However, in our view, it is necessary to focus upon the effect upon value to consumers in general rather than the particular sensitivities of some consumers. It is the way a reasonable consumer would view the characteristics of the defect and its consequences for the practical use of the vehicle (which are deemed to be known to the consumer for the purposes of assessing the reduction in value damages) that assume significance.

310 By reference to the above evidence as to the nature of the defect and its consequences, this Court is able to make an assessment of the reduction in value expressed in percentage terms by reference to an appropriate measure of the retail price. Again, there is no issue in the appeal

concerning the manner in which the primary judge identified the retail price based upon the expert evidence presented as to the way in which such prices may be determined.

311 Accordingly, even in the absence of expert evidence, the Court is able to reach a view as to the extent of the reduction in value based upon a close consideration of the evidence as to the nature of the defect. In effect, this is substantially what was done by the primary judge. His Honour also found some overall support for the conclusion that the reduction in value was significant by reference to the survey evidence of Mr Boedeker to the effect that the willingness to pay for vehicles with the defect was considerably lower than the willingness to pay for vehicles without the defect. As we have explained, we do not understand his Honour to have otherwise used that evidence for the purposes of reaching a view as to an appropriate figure for the reduction in value.

312 We would assess the reduction in value of the relevant vehicles (before taking into account the availability of the 2020 field fix) at 10% for the following reasons.

313 The first is our general agreement with the approach by the primary judge which placed emphasis upon the importance of making an assessment of the extent of the effect of the defect and its consequences on the utility of the vehicle in the hands of the consumer. It is possible to undertake such an assessment in percentage terms informed by the evidence as to the seriousness of the defect and its consequences. That evidence is to be found in the contents of the referee's report, the descriptions by Mr Williams, the contents of the complaints to Toyota and the Court's own objective assessment of the significance of those consequences.

314 The second is the merit of the submission advanced by Toyota to the effect that much of the utility of the vehicle was unaffected by the defect and its consequences, even on the basis that the vehicle may be expected to exhibit the defect consequences in relatively common driving conditions.

315 The third is the merit of certain of the criticisms raised by Toyota concerning the reasoning by Mr Cuthbert which tended to give undue emphasis to a salvage value. This tended to give the false impression that the defect was so significant that vehicles with the defect should be viewed as having little utility unless a fix could be found and regard to Mr Cuthbert's figures by the primary judge tended to overstate the reduction in value.

316 For these reasons, we conclude that the reduction in value of the relevant vehicles (that is, the vehicles that were the subject of the primary judge's aggregate damages award), before taking into account the fact that the 2020 field fix became available, was 10%.

CONCLUSION AND ORDERS

317 For the reasons set out above, we have concluded that the second group of appeal grounds is made out. It follows that the primary judge's aggregate damages award (and associated orders) need to be set aside. Further, we have concluded that some of the third group of appeal grounds are made out. In light of that conclusion, we have re-assessed the figure for the reduction in value of the relevant vehicles, *before taking into account the availability of the 2020 field fix*, as 10%.

318 We are not in a position to re-assess the reduction in value of the relevant vehicles *taking into account the availability of the 2020 field fix* because further material is necessary to undertake that task, in circumstances where neither party at trial advocated for the conceptual approach that we consider to be correct.

319 In these circumstances, a question arises whether the matter should be remitted for re-assessment of reduction in value damages or whether the representative applicants have simply failed to prove their case for reduction in value damages for the relevant cohort (so that there should be no remittal). We consider the appropriate course in the interests of justice to be for the matter to be remitted for re-assessment of reduction in value damages (and damages for excess GST) in accordance with these reasons. We consider this to be the appropriate course in circumstances where neither party at trial advocated for the conceptual approach that we consider to be correct, and the approach was not raised by the primary judge with the parties during the hearing of the matter or while judgment was reserved. The re-assessment of reduction in value damages should take place on the basis that (as we have found) the reduction in value before taking into account the availability of the 2020 field fix is 10%. The aspect that remains to be determined is what allowance should be made (by way of reduction of the 10% figure) for the availability of the 2020 field fix. Consistently with our reasons, that aspect is to be approached in a way that takes into account the period of time that the particular consumer held their vehicle before the fix became available. There is no reason why the remittal should not be to the primary judge.

320 As stated in *Fernando v Commonwealth of Australia* [2014] FCAFC 181; 231 FCR 251 at [52]-[53] (Besanko and Robertson JJ, Barker J agreeing), remittal to the primary judge does

not result in a new trial. It is a continuation of the original trial. The continuation is on the basis of the findings as made save to the extent that they have been overturned on appeal. We note that a remitter that takes effect as an order for a new trial is in a different category: *R v Carroll* [2010] NSWCCA 55; 77 NSWLR 45 at [28]-[29]. We are not ordering a new trial.

321 It will be a matter for the primary judge on remitter to determine whether, and the extent to which, it would be appropriate to give leave to reopen and adduce further evidence. It will also be a matter for the primary judge on remitter to determine whether an assessment of reduction in value damages on the basis we have stated can be undertaken on an aggregate basis for all of the relevant cohort, for subgroups within the relevant cohort or not at all.

322 We will give the parties the opportunity to make submissions on what consequential orders we should make (in particular, what other orders made by the primary judge need to be set aside in light of our reasons) and costs.

323 Accordingly, we will make orders to the effect that:

- (1) The appeal be allowed.
- (2) Paragraphs 1 to 5 of the orders made by the primary judge on 16 May 2022 be set aside.
- (3) The matter be remitted for re-assessment of reduction in value damages under ss 271(1) and 272(1)(a) of the Australian Consumer Law (**ACL**), being Sch 2 to the *Competition and Consumer Act 2010* (Cth), and damages for excess GST under ss 271(1) and 272(1)(b) of the ACL, in accordance with the reasons of the Full Court.
- (4) Within 14 days, each party file a written submission on consequential orders and costs.
- (5) Within 28 days, each party file any responding written submission on consequential orders and costs.
- (6) Subject to further order, the issues of consequential orders and costs be determined on the papers.

I certify that the preceding three hundred and twenty-three (323) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Moshinsky, Colvin and Stewart.

Associate:

A handwritten signature in black ink that reads "A. Tilkeard". The signature is written in a cursive style with a large, sweeping initial "A".

Dated: 27 March 2023