FEDERAL COURT OF AUSTRALIA

Williams v Toyota Motor Corporation Australia Limited (Initial Trial)

[2022] FCA 344

File number:	NSD 1210 of 2019
Judgment of:	**LEE J**
Date of judgment:	7 April 2022
Catchwords:	**CONSUMER LAW** – representative proceeding pursuant to Pt IVA of *Federal Court of Australia Act 1976* (Cth) (**Act**) – consumer class action – guarantee of acceptable quality pursuant to s 54 *Australian Consumer Law* (**ACL**) – where 264,170 vehicles supplied in Australia with defective diesel particulate filter (**DPF**) system – where defect causes range of consequences including emission of foul-smelling white smoke, the display of excessive DPF notifications, and the need to have the vehicle inspected, serviced and repaired – defect consequences arise when vehicle subject to normal highway driving conditions – where respondent attempted a range of countermeasures – first effective countermeasure introduced in 2020 – consideration of the proper construction of s 54 of the ACL – whether guarantee in s 54 applies to first and second hand purchasers – whether guarantee applies to those who have had the effective countermeasure – consideration of s 271(6) of the ACL – consideration of matters in ss 54(2) and (3) – whether vehicles fit for all the purposes for which goods of that kind are commonly supplied, acceptable in appearance and finish, free from defects, safe and durable – whether breach of s 54 can be determined on a common basis **CONSUMER LAW** – representative proceeding – whether representations concerning vehicles misleading or deceptive – consideration of ss 18, 29 and 33 of the ACL – future representations case – failure to disclose case – whether misleading and deceptive conduct claims determinable on a common basis **CONSUMER LAW** – individual claim of the second applicant for reduction in value loss and other reasonably foreseeable loss under s 272(1)(b), including excess GST, stamp duty, financing costs, lost income and excess fuel costs – individual claim of second applicant for misleading and deceptive conduct

DAMAGES – reduction in value damages pursuant to s 272(1)(a) of the ACL – proper construction of s 272(1)(a) – conceptualising reduction in value – determining the proper meaning of reduction in value – where market data incomplete – whether appropriate to have regard to concepts such as repair cost and willingness to pay when determining reduction in value – danger in overcomplicating statutory concepts and shoehorning s 272(1)(a) into a definitional corner – point in time at which reduction in value damages is to be assessed – information following date of acquisition relevant to the extent it bares upon value at the time of acquisition – identifying, calculating and applying the reduction in value – valuation an art not an exact science – consideration of expert evidence – reduction in value of 17.5 per cent appropriate – mechanics of calculating "average retail price" – income tax consequences for group members of a damages award

DAMAGES – other reasonably foreseeable loss or damage under s 272(1)(b) of the ACL – excess GST – consideration of the relevant principles – whether reduction in value better characterised as an "overpayment" or "under delivery" – impact of characterisation on GST damages – consideration of the GST consequences for group members of an award of damages under s 272(1)(b)

DAMAGES – representative proceedings – aggregate damages – where claim advanced on alternative bases under s 33Z(1)(e) and 33Z(1)(f) of the Act – whether reduction in value can be awarded on an aggregate basis – difficulty associated with secondary market – overriding principles applicable to the award of compensatory damages – whether applicants' approach to damages under s 33Z(1)(f) cuts across the statutory purpose of s 272(1)(a) – s 33Z(1)(e) appropriate source of power

DAMAGES – individual claim of second applicant – whether second applicant suffered a reduction in value – whether second applicant entitled to damages for other reasonably foreseeable loss under s 272(1)(b) – whether second applicant entitled to damages available under s 236 for misleading and deceptive conduct – whether causal connexion between misleading and deceptive conduct and consequential loss – no double recovery

PRACTICE AND PROCEDURE – where referee appointed to inquire into and report on questions relating to the defect – where parties tendered a statement of agreed facts – where reports of referee adopted by the court without

objection – where respondent contests aspects of the referee reports and agreed facts at trial – parties bound by conclusions of referee when adopted

Legislation:

A New Tax System (Goods and Services Tax) Act 1999 (Cth) ss 9-15, 19-10, 19-70, 19-80, 29-20, 134-1, 195-1

Australian Securities and Investments Commission Act 2001 (Cth)

Competition and Consumer Act 2010 (Cth) s 82, Sch 2 ss 2, 4, 7, 18, 29, 33, 54, 55, 59, 236, 259, 267, 271, 272

Evidence Act 1995 (Cth) ss 136, 191

Federal Court of Australia Act 1976 (Cth) ss 33D, 33Z

Federal Court Rules 2011 (Cth) r 28.67

Income Tax Assessment Act 1997 (Cth) ss 20-20, 20-25, 20-30

Trade Practices Act 1974 (Cth) s 74D, 82 (repealed)

Fair Trading Act 1987 (NSW) s 42 (repealed)

Sale of Goods Act 1979 (UK) s 14

Cases cited:

Adcock Private Equity v Porges [2018] NSWSC 1363

Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd (1979) 146 CLR 249

Atlas Tiles Ltd v Briers (1978) 144 CLR 202

Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd [2014] FCA 634; (2014) 317 ALR 73

Australian Competition and Consumer Commission v Google LLC [2021] FCA 367; (2021) 391 ALR 346

Australian Competition and Consumer Commission v Jayco Corporation Pty Ltd [2020] FCA 1672

Australian Competition and Consumer Commission v TPG Internet Pty Ltd [2020] FCAFC 130; (2020) 278 FCR 450

Australian Securities and Investments Commission v GetSwift [2021] FCA 1384

Blatch v Archer (1774) 1 Cowp 63

Bodum v DKSH Australia Pty Ltd [2011] FCAFC 98; (2011) 280 ALR 639

Boral Besser Masonry Limited v Australian Competition and Consumer Commission [2003] HCA 5; (2004) 215 CLR 374

Bramhill v Edwards [2004] 2 Lloyd's Law Reports 653

British Transport Commission v Gourley [1956] AC 185

Butcher v Lachlan Elder Realty Pty Ltd [2004] HCA 60; (2004) 218 CLR 592

BVT20 v Minister for Immigration, Citizenship, Migrant

Services and Multicultural Affairs [2020] FCAFC 222

Campbell v Backoffice Investments Pty Ltd [2009] HCA 25; (2009) 238 CLR 304

Campomar Sociedad, Limitada v Nike International Ltd [2000] HCA 12; (2000) 202 CLR 45

Capic v Ford Motor Company of Australia Pty Ltd [2021] FCA 715; (2021) 154 ACSR 235

Capic v Ford Motor Company of Australia Pty Ltd (Revised Common Questions) [2021] FCA 1320

Commonwealth v Amann Aviation Pty Ltd (1991) 174 CLR 64

Commonwealth v Milledge (1953) 90 CLR 157

Construction, Forestry, Mining and Energy Union v Hall Creek Coal Pty Ltd [2016] FCA 1032

CPB Contractors Pty Ltd v Celsus Pty Ltd (No 2) [2018] FCA 2112; (2018) 268 FCR 590

Cullen v Trappell (1980) 146 CLR 1

Dait v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 25

Daniels v Anderson (1995) 37 NSWLR 438

Davinski Nominees Pty Ltd v I & A Bowler Holdings Pty Ltd & Ors [2011] VSC 220

Dwyer v Volkswagen Group Australia Pty Ltd [2021] NSWSC 715

Eastern Express Pty Limited v General Newspapers Pty Limited (1992) 35 FCR 43

Ethicon Sàrl v Gill [2021] FCAFC 29; (2021) 387 ALR 494

Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22; (2007) 230 CLR 89

Federal Commissioner of Taxation v Qantas Airways Ltd [2012] HCA 41; (2012) 247 CLR 286

Fisher-Price Rock 'N Play Sleeper Marketing, Sales Practices and Products Liability Litigation, F Supp 3d (WDNY, 19 October 2021)

Gates v City Mutual Life Assurance Society Ltd [2001] HCA 52; (1986) 160 CLR 1

Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd (1984) 2 FCR 82

Gold Coast Selection Trust Limited v Humphrey (Inspector of Taxes) [1948] AC 459

Google v Australian Competition and Consumer Commission [2013] HCA 1; (2013) 249 CLR 435

Hadley v Baxendale (1854) 9 Ex 341

Henry Kendall & Sons v William Lillico & Sons Ltd [1969]

2 AC 31

Henville v Walker [2001] HCA 52; (2001) 206 CLR 459

HTW Valuers v Astonland Pty Ltd [2002] HCA 54; (2004) 217 CLR 640

In Re: General Motors Llc Ignition Switch Litigation 407 F Supp 3d 212 (SDNY, 2019)

J.L.W. (Vic) Pty Ltd v Tsiloglou (1994) 1 VR 237

Johnson Tiles Pty Ltd v Esso Australia Ltd [2000] FCA 1572; (2000) 104 FCR 564

Lloyd v Belconnen Lakeview Pty Ltd [2019] FCA 2177; (2019) 377 ALR 234

MacDougall v American Honda Motor Co., Inc, (CD Cal, SACV 17-1079 JGB (DFMx), 11 September 2020)

Medtel Pty Ltd v Courtney [2003] FCAFC 151; (2003) 130 FCR 18

Merck Sharp & Dohme (Australia) Pty Ltd v Peterson [2011] FCAFC 128; (2011) 196 FCR 145

Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd [2010] HCA 31; (2010) 241 CLR 357

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19 [2021] FCAFC 153

Moore v Scenic Tours Pty Ltd [2020] HCA 17; (2020) 268 CLR 326

Murphy v Overton Investments Pty Ltd [2001] FCA 500; (2001) 112 FCR 182

Murphy v Overton Investments Pty Ltd [2004] HCA 3; (2004) 216 CLR 388

Owners – Strata Plan No 87231 v 3A Composites GmbH (No 5) [2020] FCA 1576; (2020) 148 ACSR 445

Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd (1982) 149 CLR 191

Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd [2003] HCA 10; (2003) 196 ALR 257

Potts v Miller (1940) 64 CLR 282

In Re: Emerson Electric Co. Wet/Dry Vac Marketing and Sales Litigation, (ED Mo ED, 4:12MD2382 HEA, 28 October 2021)

Re General Motors Llc Ignition Switch Litigation 427 F Supp 3d 374 (SDNY, 2019)

River Bank Pty Ltd v Commonwealth of Australia (1974) 4 ALR 651

Ruxley Electronics and Construction Ltd v Forsyth [1996] AC 344

Sykes v Reserve Bank of Australia (1998) 88 FCR 511

	Tomonovic v One Australia Pty Ltd [2015] NSWCA 11; (2015) 104 ACSR 596 *Tranquility Pools & Spas Pty Ltd v Huntsman Chemical Co Australia Pty Ltd* [2011] NSWSC 75 *Trilogy Funds Management Ltd v Sullivan (No 2)* [2015] FCA 1452; (2015) 331 ALR 185 *Trivago NV v Australian Competition and Consumer Commission* [2020] FCAFC 185; (2020) 384 ALR 496 *Vautin v By Winddown, Inc (formerly Bertram Yachts) (No 4)* [2018] FCA 426; (2018) 362 ALR 702 *Verge v Devere Holdings Pty Ltd (No 4)* [2010] FCA 653 *Wenco Industrial Pty Ltd v W Industries Pty Ltd* [2009] VSCA 191; (2009) 25 VR 119 *Williams v Toyota Motor Corporation Australia Limited* [2021] FCA 1425
	Australian Law Reform Commission, *Grouped Proceedings in the Federal Court* (Report No 46, 1988) Australian Taxation Office, *Goods and services tax: GST consequences of court orders and out-of-court settlements* (GSTR 2001/4, 20 June 2001) Explanatory Memorandum, *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010* Federal Court of Australia, *Survey Evidence Practice Note* (GPN-SURV), 25 October 2016
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Number of paragraphs:	544
Date of hearing:	29 – 30 November 2021 1 – 2, 6 – 8, 20 – 21, 24 December 2021
Counsel for the Applicants:	Mr S Free SC with Mr P Meagher and Mr P Strickland
Solicitor for the Applicants:	Gilbert + Tobin
Counsel for the Respondent:	Mr R Dick SC with Mr A D'Arville and Ms X Teo
Solicitor for the Respondent:	Clayton Utz

ORDERS

NSD 1210 of 2019

BETWEEN:	**KENNETH JOHN WILLIAMS** First Applicant
	DIRECT CLAIM SERVICES QLD PTY LTD ACN 167 519 968 Second Applicant
AND:	**TOYOTA MOTOR CORPORATION AUSTRALIA LIMITED (ACN 009 686 097)** Respondent

ORDER MADE BY: **LEE J**

DATE OF ORDER: **7 APRIL 2022**

THE COURT ORDERS THAT:

1. By 5pm on 19 April 2022 the parties provide to the Associate to Justice Lee an agreed minute or competing minutes of order to reflect these reasons.
2. The proceeding be adjourned part heard for the purpose of the making and entry of final orders at 10.15am on 22 April 2022.

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

REASONS FOR JUDGMENT

CONTENTS:

LEE J:

A INTRODUCTION

1 If there was ever a case demonstrating unnecessary and bewildering complication in the law, it is this one. On one level, it is difficult to imagine a simpler dispute. Picture the familiar scene: a man goes into a car showroom and buys a car. He haggles and settles upon one he likes. He is happy with the look of it, and he is told it is a very good car. He hands over his money and contentedly drives out of the dealership. In his excitement, he is more interested in breathing in the ambrosial new car smell than reflecting on the reality that, as soon as he drove out of the dealership, the market value of the car had diminished.

2 But he was not told something. Unbeknownst to him, and indeed to the dealer, his car had a problem. Although apparently safe to drive, it was not designed to function properly during all driving conditions and, even if driven normally, there was a substantial likelihood that white smoke would come out of the car's exhaust, along with a malodour. This problem also meant it was likely the car would use more petrol than expected and he would receive excessive notifications requiring him to service the car. Although he bought the car in ignorance of the problem, he did appreciate that if there were any such issues, the cost of fixing them would not be his responsibility.

3 If he had of known the true position, there is no question in my mind that he would likely have paid less for the car. After all, it was not the problem-free car he thought he had purchased.

4 One would intuitively think that such a case should not be in the least complex. This has not proven to be the case. This is partly because a class action has been brought, and partly because of the lamentable drafting of some statutory provisions. Further, the parties (the respondent, Toyota Motor Corporation Australia Limited (**TMCA**), in particular) have maintained issues, which should have either been conceded or agreed. The result was a hearing taking weeks and hundreds of pages of submissions.

5 Before turning to consider the minutiae of the claims advanced, by way of introduction, it is worth sketching the broad outline of the case.

6 It is not in dispute that between 1 October 2015 and 23 April 2020 (**Relevant Period**), 264,170 Toyota cars in the Prado, Fortuner and HiLux ranges and fitted with so-called "1GD-FTV" or "2GD-FTV" diesel combustion engines were supplied to consumers in Australia (**Relevant Vehicles**). Each Relevant Vehicle was supplied with a diesel exhaust after-treatment system

(**DPF System**), which was defective because it was not designed to function effectively during all reasonably expected conditions of normal operation and use of the vehicle.

7 The first applicant in this class action is Mr Kenneth John Williams. The second applicant is a company of which Mr Williams is the sole director, Direct Claim Services Qld Pty Ltd (**DCS**), and through which he conducts his business as a motor vehicle accidents assessor. It is common ground that DCS acquired a Prado (**Relevant Prado**) during the Relevant Period and paid the associated tax, financing and fuel costs. The evidence establishes that the Relevant Prado has been plagued with problems associated with the defective DPF System.

8 As it turned out, and despite some initial confusion, any cause of action that exists belongs to DCS. The claim of Mr Williams was dismissed at the conclusion of oral argument (although both Mr Williams and DCS remain representative applicants, pursuant to s 33D(2) of the *Federal Court of Australia Act 1976* (Cth) (**Act**)).

9 TMCA is the "manufacturer" of the Relevant Vehicles for the purpose of s 7 of the *Australian Consumer Law* (**ACL**), being Sch 2 to the *Competition and Consumer Act 2010* (Cth). TMCA also marketed the Relevant Vehicles in Australia, and in doing so made representations about the quality and characteristics of those vehicles and the DPF System to prospective consumers.

10 The group members whom the applicants represent are persons who acquired a Relevant Vehicle during the Relevant Period (and otherwise meet the description of group members in the second further amended statement of claim (**2FASOC**)).

11 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 statutory guarantee in s 54 of the ACL; and

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

12 A number of subsidiary issues arise when considering these causes of action and the relief that should be obtained from those actions, but at a general level, this is the case advanced.

13 Finally, by way of introduction, given the size of the record, I have adopted the expedient of incorporating some references to agreed facts and other documents in these reasons (although

I should caveat this by noting that a reference is often illustrative, rather than identifying an exclusive source).

B THE RELEVANT FACTS AND EVIDENCE

14 Following the adoption of two reports of a referee (the first dated 15 October 2020 (**First Referee's Report**) and the second dated 31 August 2021 (**Second Referee's Report**) (together, **referee's reports**)), and the preparation of a statement of agreed facts (**Agreed Facts** or **AF**) and supplementary statement of agreed facts (**SAF**) for the purposes of s 191 of the *Evidence Act 1995* (Cth) (**Evidence Act**), one would have thought there would only be a simulacrum of a dispute remaining as to the facts. As it transpired, this assumption was somewhat optimistic, and it is necessary to deal with a number of contested factual issues. Before doing so, however, it is convenient to canvass briefly the facts upon which the parties agreed and provide an overview of the evidence adduced at the trial.

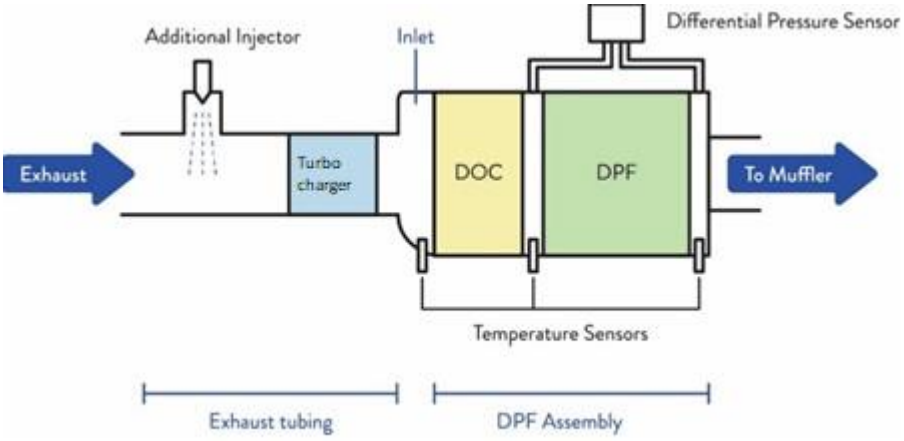
B.1 Agreed Facts

15 Drawing upon the detailed Agreed Facts (which delve into issues with technicality and granularity), it is useful to summarise the DPF System, the **Core Defect** and the effective remedy:

(1) Each of the Relevant Vehicles contained either a 1GD-FTV or a 2GD-FTV diesel combustion engine. Such diesel combustion engines generate pollutant emissions: AF 34]. The DPF System is designed to capture and convert the pollutant emissions into carbon dioxide and water vapour through a combination of filtration, combustion (that is, 'oxidation') and chemical reactions: AF [42].

(2) All Relevant Vehicles were fitted with a DPF System: AF [33], [39]. This was necessary at least because the Relevant Vehicles, throughout the Relevant Period, were required to comply with national emissions standards prescribed by the applicable Australian Design Rules, which standards regulated the emission of Pollutant Emissions: AF [35]–[39].

(3) The nature of the DPF System in the Relevant Vehicles is described in detail in the Agreed Facts: AF [33]–[66]. Two core components of the DPF System are the diesel particulate filter (**DPF**) and the diesel oxidation catalyst (**DOC**), which sit together in the **DPF Assembly**: AF [46]–[47]. The basic design of the DPF Assembly in the Relevant Vehicles is illustrated by the following image (showing a cross section):



(4) The DPF is designed to capture what is called diesel particulate matter in the exhaust gas prior to its release, and to store it: AF [42], [47]. The DPFs in the Relevant Vehicles have a finite capacity to capture and store particulate matter: AF [51]. As such, in order for the DPF to function effectively, the particulate matter captured by and stored in the DPF must be burned off periodically in a process called regeneration: AF [53]. Regeneration requires the exhaust temperature to increase to the level required for the particulate matter to oxidise: AF [57], [73(g)].

(5) The DOC comprises a honeycomb ceramic flow-through monolith substrate with a catalyst coating containing precious metals: AF [46(a)]. One of the functions of the DOC is to increase the temperature in the DPF during regeneration: AF [46(b)(ii)]. When the DOC becomes clogged or blocked, the DPF is impeded from regenerating effectively: First Referee's Report (at [8], [39], [47], [55]).

(6) When regeneration does not occur, or is ineffective, the DPF becomes blocked with particulate matter, and the vehicles experience a range of problems. Indeed, the Core Defect was described by the referee in his initial report in the following terms (at [8]):

> The DPF System was defective for the whole of the Relevant Period. The **core defect** was 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 the DPF System was ineffective in preventing the formation of deposits on the DOC surface or coking within the DOC. The deposits and/or coking of the DOC prevented the DPF filter from effective automatic or manual regeneration, and led to excessive white smoke and foul-smelling exhaust during regeneration and/or indications from the engine's onboard diagnostic (OBD) system that the DPF was "full".
>
> This defect was inherent in the design of the DPF System. The design defect was comprised of both mechanical defects and defective control logic and associated software calibrations.

(Emphasis in original).

(7) A key occurrence which caused the Core Defect to manifest was the exposure of a Relevant Vehicle to regular continuous driving at approximately 100km per hour (**High Speed Driving Pattern**): AF [67].

(8) During the Relevant Period, in Relevant Vehicles in which the Core Defect was present, if the Relevant Vehicles were exposed to the High Speed Driving Pattern and/or subject to the countermeasures other than those referred to below (at [15(10)]):

(a) the DOC became blocked by deposits forming on the face of the DOC;

(b) regeneration events failed to remove sufficient particulate matter from the DPF to prevent the DPF from becoming or remaining full or blocked;

(c) the DPF System failed to prevent the DPF from becoming full or blocked;

(d) the DOC and DPF did not function effectively;

(e) the catalytic efficiency of the DOC was diminished; and

(f) the exhaust in the DPF did not reach a sufficiently high temperature to effect thermal oxidation (the chemical reaction of particulate matter with oxygen at a sufficiently high temperature, resulting in carbon dioxide and water vapour) (see AF [73]).

(9) In the Relevant Vehicles that experienced the effects of the Core Defect, symptoms included excessive white smoke and foul-smelling exhaust 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. It will be necessary to address with precision the consequences of the Core Defect in further depth below.

(10) TMCA attempted a series of countermeasures to fix the problem. Two countermeasures are presently relevant: *first,* the countermeasure introduced and applied to all new Relevant Vehicles at the time of production (**2018 Production Change**); and *secondly,* the countermeasure introduced from May 2020 (**2020 Field Fix)**. It is common ground that the 2020 Field Fix was effective and will continue to be effective in remedying the Core Defect and its consequences in all Relevant Vehicles: see AF [180].

(11) Similarly, from June 2020, all Relevant Vehicles were produced with the countermeasure preventing the Core Defect from manifesting (**2020 Production Change**): AF [175].

16 TMCA's knowledge concerning these matters, and the development of the issues in relation to the Relevant Vehicles generally, are detailed comprehensively in the Agreed Facts: see AF [125]–[179]. There is no need to set them out here. It sufficies to note that, essentially, from February 2016, TMCA was aware that some Relevant Vehicles were being presented to dealers by customers (called by TMCA, somewhat oddly, as "guests") who reported concerns with, among other things, the emission of excessive white smoke during regeneration and the illumination of DPF notifications. Over the next four years before the introduction of the 2020 Field Fix; the number of complaints increased dramatically; the issues were escalated to the top levels of TMCA and its parent company in Japan, Toyota Motor Corporation (**TMC**); and a number of countermeasures were introduced, tested and failed. I will expand upon the relevance of TMCA's knowledge of the Core Defect and its consequences where necessary below.

17 Despite the parties' constructive approach to the production of the Agreed Facts, as I foreshadowed, some residual issues relevant to the question of liability remain in dispute.

B.2 The evidence generally

18 It is also convenient here to survey briefly the evidence that was given at trial. It may be observed from the outset that most of the evidence led concerned issues of loss and damage, and in particular, the quantification of the "reduction in value" resulting from the Core Defect.

B.2.1 *Mr Williams*

19 Mr Williams swore two affidavits and gave evidence for approximately half a day. His first affidavit was sworn on 11 December 2020 (**First Williams Affidavit**). He was a witness whose credit was not impeached and his affidavit evidence was essentially unchallenged. Mr Williams' evidence is primarily relevant to three broad issues remaining in dispute, namely:

(1) the Core Defect and its consequences, when those consequences manifested, and the impact of those consequences upon the use and enjoyment of the Relevant Vehicles;

(2) the extent to which he relied upon the representations made by TMCA; and

(3) any consequential loss and damage he suffered by reason of the Core Defect and its consequences, particularly with respect to increased fuel consumption experienced by the Relevant Prado.

B.2.2 *Messrs Nelson, Jones, Gray and Berndt*

20 Mr Martin John Nelson is the Divisional Manager of TMCA's Guest First Division, a position he has held since late 2017. He affirmed one affidavit on 5 October 2021 (**Nelson Affidavit)** concerning communications between TMCA and dealers, and TMCA and customers, and the roll out of the countermeasures, as well as amounts paid and replacement vehicles provided to customers under TMCA's consumer redress programme. He gave evidence for approximately half a day.

21 Mr Nelson's evidence indicated that TMCA, at least internally, recognised that the Core Defect and its consequences interfere with the use and enjoyment of the Relevant Vehicles. The findings of fact that emerge from Mr Nelson's evidence in this respect will be explored in greater detail below, but it is convenient to note here that his evidence establishes that:

(1) TMCA recognised, from an early stage in the Relevant Period, that the issues affecting the DPF System in the Relevant Vehicles posed a serious threat to TMCA's market reputation: Nelson Affidavit (at [82]);

(2) TMCA has approached the DPF issues as a serious matter deserving of the urgent attention of TMC, and has dedicated substantial resources to attempting to remedy the issues (T84.22–25); and

(3) since the commencement of this proceeding, TMCA has offered refunds and replacement vehicles to "hundreds" of consumers, in recognition of the failure of the vehicles to comply with statutory guarantees under the ACL (T98.25–99.13; 103.39–40).

22 TMCA also relies on the affidavits of three further witnesses:

(1) Mr Brent Andrew Jones, the Manager, Digital Marketplace of TMCA, who gave evidence in relation to webpages published on TMCA's website about DPF issues and the number of times they were accessed (**Jones Affidavit**);

(2) Mr Nathanael David Gray, the Manager, National Business Fleet Sales of TMCA, who gave evidence in relation to the categories of purchasers of Relevant Vehicles (**Gray Affidavit**); and

(3) Mr David Berndt, an employee of TMCA's solicitors, who gave evidence of what was set out in a spreadsheet which contained details of the Relevant Vehicles (**Berndt Affidavit**).

23 The evidence of these witnesses was relatively uncontroversial and will be elaborated upon where necessary below.

B.2.4 *The expert evidence*

24 The primary contest relates to the expert evidence adduced in respect of the quantification of a reduction in value of the Relevant Vehicles for the purposes of the applicants' case concerning acceptable quality under s 54 of the ACL. It is convenient to introduce the general nature of that evidence here and the ambit of the dispute, which I will expand upon in Part E.2.3 below.

Mr Cuthbert and Mr O'Mara

25 Both sides adduced valuation evidence. Mr Graeme Cuthbert, engaged by the applicants, is a licensed motor vehicle trader and car valuer with 50 years' experience. He provided two reports before the trial: one dated 23 July 2021 (**First Cuthbert Report**) and one dated 22 October 2021 (**Second Cuthbert Report**). Mr Tim O'Mara, whom TMCA engaged, is a valuer and the Managing Director of O'Maras, a valuation and auction house. Mr O'Mara specialises in valuing company assets for the purposes of merger and acquisition transactions and bank financing. He provided a first report dated 30 September 2021 (**First O'Mara Report**) and a second dated 26 November 2021 (**Second O'Mara Report**). Both experts participated in a joint conference and provided a further report dated 10 November 2021 in response to a series of questions put to them by the Court during their concurrent oral evidence. Both valuers gave evidence principally about the true value of the Relevant Prado as at the date of acquisition (8 April 2016), having regard to the presence of the Core Defect and a propensity for the consequences associated with it in the Relevant Prado.

Mr Stockton and Dr Pleatsikas

26 Both sides also adduced expert evidence in the field of economics. Mr Edward Stockton, a Vice President and Director of Economic Services at the Fontana Group, is an economist and econometrician with expertise in automobile markets and studies of the impact of defects on motor vehicle prices. Mr Stockton was engaged by the applicants and provided two reports: one dated 23 July 2021 (**First Stockton Report**) and another dated 22 October 2021 (**Second Stockton Report**). Dr Christopher Jon Pleatsikas, an economist and a Vice President at Charles River Associates, was called by TMCA, and provided a report dated 30 September 2021 (**Pleatsikas Report**). Both experts participated in a joint expert conference, out of which they produced a joint report dated 5 November 2021 (**Stockton and Pleatsikas Joint Report**).

27 Generally speaking, the economic evidence was directed to Mr Stockton's repair cost model analysis, which essentially used the warranty repair cost that TMCA reimbursed to dealers for performing the 2020 Field Fix as a proxy for the amount of money that would have been required, at the time of purchase, to restore group members to the position they would have been in had there been compliance with the statutory guarantee.

Mr Boedeker and Dr Rossi

28 The applicants also adduced evidence from Mr Stefan Boedeker, an economist with specialist expertise in conjoint analysis and Managing Director of the Berkeley Research Group. Conjoint analysis, in simple terms, is a survey-based statistical technique deployed in market research to determine how people value different attributes in a product or service. Mr Boedeker prepared three reports: a first dated 23 July 2021 (**First Boedeker Report**); a second dated 28 October 2021 (**Second Boedeker Report**); and a third dated 4 December 2021 (**Third Boedeker Report**). Dr Rossi, an econometrician and Professor of Marketing, Statistics and Economics at the University of California, Los Angeles, was instructed by TMCA and prepared a report dated 4 October 2021 (**Rossi Report**). Mr Boedeker and Dr Rossi participated in a joint expert conference and produced a joint report dated 19 November 2021, including separate statements summarising the issues between them (**Boedeker and Rossi Report**).

29 The evidence of Mr Boedeker and Dr Rossi concerned a "choice-based conjoint" survey created by Mr Boedeker for the purposes of assessing any reduction in value resulting from the Core Defect and its consequences. Mr Boedeker engaged a third party vendor (**Amplitude**) to programme, host and implement the survey and relied on another third party provider (**Dynata**) to select participants for the survey. Over 4,000 participants were surveyed, and Mr Boedeker's final analysis considered 3,565 responses (**Analysed Responses**). Dr Rossi's evidence was responsive to Mr Boedeker's evidence.

B.3 Additional findings

30 The factual issues in dispute on the question of liability are largely concerned with the scope and frequency of the Core Defect and its consequences. With some degree of simplification, the following four issues remain for determination:

(1) Was the Core Defect present in vehicles which had the 2018 Production Change?

(2) Did all Relevant Vehicles have a propensity to suffer from the consequences of the Core Defect?

(3) What was the significance of the Core Defect and its consequences?

(4) Was the market aware of the Core Defect and its consequences during the Relevant Period?

31 I will deal with each of these contested issues in turn.

B.3.1 *Was the Core Defect present in vehicles which had the 2018 Production Change?*

32 While it may have been thought that the findings made by the Court upon adoption of the reports of the referee and recorded in the Agreed Facts were clear, TMCA seeks to draw a distinction between the Relevant Vehicles:

(1) produced prior to June 2018 (**Pre-MY2018 Production Vehicles**); and

(2) produced between 1 June 2018 and 23 April 2020 (**MY2018 Relevant Vehicles**).

33 The relevance of the date 1 June 2018 is that, as foreshadowed above (at [15(10)–(11)]), the 2018 Production Change countermeasure was introduced by TMCA and applied to all new Relevant Vehicles on this date.

34 Initially, TMCA sought to contend, in its defence, that vehicles that were subject to the 2018 Production Change did not suffer from the Core Defect at the time they were supplied: Defence to Second Further Amended Statement of Claim (**D2FASOC**) (at [52(a)], [100(c)]; see also [39(c)–(d)], [41(b)]). In TMCA's opening submissions, however, it was accepted that any submission to the effect that the 2018 Production Change remedied the Core Defect "is unlikely to be accepted". Accordingly, TMCA initially stated that, "for the purposes of the initial trial, TMCA does not dispute that the Core Defect was present in the DPF Systems of all Relevant Vehicles until such time as they received/receive the 2020 Field Fix".

35 TMCA now contends that the Core Defect was not present in vehicles which had the 2018 Production Change (that is, the MY2018 Relevant Vehicles), or alternatively that the 2018 Production Change was effective to prevent Relevant Vehicles from suffering from the Core Defect. The issue affects 37 per cent (98,861) of the Relevant Vehicles. In support of this contention, it is said that the referee's conclusions with respect to the vehicles to which the 2018 Production Change was applied were ambiguous and, in these circumstances, the Court can and should find that the Core Defect was not present in the MY2018 Relevant Vehicles: see T4.12–44.

36 Whether the 2020 Countermeasures included the 2018 Production Change and whether the 2018 Production Change had been effective are matters that were debated by the parties in the submissions provided to the referee as part of the Second Referee's Report: see Annexure A [50]; Annexure E [13]–[15]; Annexure F [24]–[25]. TMCA submits that notwithstanding those submissions, and while the referee specifically asked for information about the 2018 Production Change, he did not express any indication in his Second Report about the effectiveness of that change, nor did he state whether or not the 2020 Countermeasures (which he defined as the "countermeasures implemented after the Relevant Period") included the 2018 Production Change. The so-called ambiguity in the First Referee's Report is said to arise from the following statements (at [12] and [50]):

> 12. The countermeasures **put in place** after the Relevant Period appear to remedy the defects in the DPF System, in those Relevant Vehicles which have received the most recent countermeasures.
>
> …
>
> 50. Countermeasures **released after** the Relevant Period appear to have been designed to eliminate the root causes of the core defect in the DPF System identified in the above paragraph.
>
> (Emphasis added).

37 On the assumption this construction will be favoured, TMCA submits the following evidence demonstrates the 2018 Production Change was effective in remedying the Core Defect:

(1) As at 31 July 2021, only 636 MY2018 Relevant Vehicles had DPF-related reimbursement claims made by dealers, comprising 0.64 per cent of MY2018 Relevant Vehicles and 0.24 per cent of the total number of Relevant Vehicles. This is of importance, it is said, given the referee noted in his Second Report (at [33]) that the "primary indicator" that the "2020 Countermeasures" were effective is that only 1.13 per cent of vehicles which had the 2020 Field Fix had any DPF-related claim in the year after it was applied, and the percentage of MY2018 Relevant Vehicles that had DPF-related reimbursement claims made by dealers was lower (0.64 per cent), evidencing the effectiveness of design changes made.

(2) The referee concluded in the First Reference Report (at [18]) that only Pre-MY2018 Production Vehicles required unusual or abnormal maintenance, stating:

> All Relevant Vehicles produced from the start of production through the end of MY 2017 [i.e. model year 2017] required unusual or abnormal maintenance according to the criteria set out in paragraph 16.(b) because they were included in at least one CSE to address the DPF System.

(3) Given this conclusion did not apply to MY2018 Production Vehicles, it is said that this indicates the referee accepted that the 2018 Production Change was effective.

(4) Mr Nelson gave unchallenged evidence that "all indications we had was [*sic*] the 2018 production fix was very effective": T98.23. Given the effectiveness of the 2018 Production Change, it made sense, it is said, for the action taken after 1 June 2018 to be focussed on Pre-MY2018 Production Vehicles (e.g., the "Special Policy Adjustment + letter" sent only to owners of Pre-MY2018 Production Vehicles extended the warranty for Pre-MY2018 Production Vehicles to 10 years from the first delivery date for DPF issues): AF [178].

38 Finally, it is said that even if the Court finds the Core Defect existed in MY2018 Relevant Vehicles, it is clear that the MY2018 Relevant Vehicles are no more prone to suffer from any of the consequences of the Core Defect than the vehicles that had the 2020 Field Fix.

39 These submissions are devoid of merit and must be rejected. They misconstrue the referee's reports and the Agreed Facts. Further, any contention that the 2018 Production Change was effective in remedying the Core Defect is unsupported by the evidence. I will deal with each of these topics in turn.

The Referee Reports and the Agreed Facts

40 The contentions advanced by TMCA are inconsistent with the referee's conclusions and the proper understanding of the Agreed Facts.

41 No complaint was made by TMCA, in the course of adoption of the referee's reports, that the referee's findings were ambiguous, materially incomplete, or otherwise failed to have regard to important evidence that TMCA put before the referee. Indeed, TMCA advocated for the adoption of the reports. Having been adopted, the referee's conclusions constitute findings of the Court, and the parties are bound by them: *CPB Contractors Pty Ltd v Celsus Pty Ltd (No 2)* [2018] FCA 2112; (2018) 268 FCR 590 (at 604–6 [55]–[62] per Lee J). As such, it is not open to TMCA to seek to contradict those findings at trial, nor advocate a finding which, as a critical step in its reasoning, depends upon a proposition of fact or law which contradicts those findings: *Tranquility Pools & Spas Pty Ltd v Huntsman Chemical Co Australia Pty Ltd* [2011] NSWSC 75 (at [36], [38(8)] per Einstein J); *Wenco Industrial Pty Ltd v W Industries Pty Ltd* [2009] VSCA 191; (2009) 25 VR 119 (at 124 [11] per Redlich and Bongiorno JJA and Beach AJA).

42 Additionally, TMCA is not permitted to adduce evidence to contradict or qualify a fact upon which the parties have agreed unless the Court grants it leave to do so: s 191(2)(b) Evidence Act.

43 The inconsistencies between TMCA's new contentions, on the one hand, and the referee's findings and the Agreed Facts on the other, are borne out by an analysis of the specifics.

44 The difficulty with TMCA's contentions is that the referee concluded in his First Report (at [8], [10], [38]–[39], [43]) that the Core Defect was present in *all* Relevant Vehicles, including those produced from 2018 onwards, and that the DPF System in the Relevant Vehicles was defective for the *whole* of the Relevant Period. Indeed, it is an agreed fact that the DPF System "was defective for the *whole* of the Relevant Period" (AF [67] emphasis added), and that this constituted a Core Defect inherent in the design of the DPF System: AF [67]–[69]. The referee also noted in his First Report (at [11]–[12]) that:

> 11. The countermeasures attempted by the Respondent during the Relevant Period were **ineffective** to remedy the problem, and in some cases caused the DPF System to malfunction in Relevant Vehicles which had not previously suffered from any defect consequences.
>
> 12. The countermeasures **put in place** after the Relevant Period appear to remedy the defects in the DPF System, in those Relevant Vehicles which have received the most recent countermeasures. The documents provided for my review do not indicate if the [Relevant Prado] has received the most recent countermeasures. If this is not the case, the defects remain present in that vehicle.
>
> (Emphasis added).

45 Similarly, the referee considered that the "[c]ountermeasures released *after* the Relevant Period appear to have been designed to eliminate the root causes of the core defect in the DPF System": First Referee's Report (at [50], emphasis in original).

46 There is nothing ambiguous about the referee's conclusion. TMCA is wrong to submit that "whether or not the 2018 Production Change was effective was not the subject of any express findings by the Referee". The conclusion in the First Referee's Report (at [11]) that the countermeasures attempted by TMCA during the Relevant Period were ineffective and in some cases caused the DPF System to malfunction in Relevant Vehicles which had not previously suffered from any of the consequences of the Core Defect, applies to the 2018 Production Change. Mr Nelson's evidence confirms what is otherwise obvious; namely, that the 2018 Production Change meets the description of a "countermeasure *attempted* by [TMCA] during the Relevant Period": Nelson Affidavit (at [104]–[105], emphasis added).

47 This conclusion is supported by the fact that:

(1) in the First Referee's Report (at [50]), the countermeasures that the referee concluded to be effective are described as countermeasures "released *after*" the Relevant Period;

(2) in the Second Referee's Report (at [32]), the referee enumerates the specific elements of the "2020 Countermeasures" which he considered to be effective, namely "ECM reflash, DPF assembly replacement, Additional Injector Housing Assembly replacement", which mirror the 2020 Field Fix elements, and do not align with the elements of the 2018 Production Change; and

(3) the referee's finding the Second Referee's Report (at [34]) that the 2020 Countermeasures were equally effective for Relevant Vehicles with or without the 2018 Production Change is difficult to reconcile with any submission that 2020 Countermeasures were intended to *include* the 2018 Production Change itself.

48 Properly read, there is no ambiguity in the referee's reports or the Agreed Facts.

Effectiveness of 2018 Production Change

49 Even if it were open to TMCA to seek to relitigate the effectiveness of the 2018 Production Change, TMCA has not adduced evidence capable of supporting a finding that the 2018 Production Change was effective in remedying the Core Defect, or rendering the vehicles subject to it less prone to the consequences of the Core Defect.

50 *First*, the only evidence that TMCA has sought to adduce on this issue is hearsay in the form of a submission made to the referee. Even if this evidence were admissible for a hearsay purpose (and notwithstanding r 28.67(2) of the *Federal Court Rules 2011* (Cth)), the document simply establishes that vehicles which had the 2018 Production Change have experienced a relatively low incidence of DPF issues in their first three years of service. The fact remains that: (a) the Core Defect is present in these vehicles; and (b) the referee concluded in his First Report (at [43]) that by reason of the presence of the Core Defect, these vehicles *will* experience one or more consequences of the Core Defect when exposed to the High Speed Driving Pattern. In order to prove that the incidence of consequences associated with the Core Defect in the MY2018 Relevant Vehicles will *remain* low (because the 2018 Production Change was substantially effective in remedying the Core Defect and/or the associated consequences) TMCA would have needed to lead evidence to this effect, which it did not.

51 *Secondly*, TMCA submits that a significant indicator that the referee accepted that the 2018 Production change was effective is the fact that the referee did not make any finding to the effect that vehicles which had received the 2018 Production Change required unusual or abnormal maintenance. This submission proceeds upon a false premise. The referee noted that the consequences of the Core Defect included that: (a) "Affected Vehicles must be inspected, serviced and/or repaired by a service engineer for the purpose of cleaning, repairing or replacing the DPF, the DPF System, (or components thereof)"; and (b) "Affected Vehicles must be inspected, serviced and/or repaired more regularly than would be required absent the Vehicle Defects": see First Referee's Report (at Annexure F [41(o)–(p)]). Those conclusions applied to *all* Relevant Vehicles and are not limited to those that did not receive the 2018 Production Change.

52 *Thirdly*, TMCA seeks to draw support from Mr Nelson's evidence that "all indications we had was [*sic*] the 2018 production fix was very effective": T98.23. At best, that is evidence of TMCA's understanding of the effectiveness of the 2018 Production Change at the particular point in time that Mr Nelson was addressing (that is, August 2019), and falls short of evidence capable of supporting a finding that the 2018 Production Change was in fact effective. In any event, the evidence is inconsistent with the referee's conclusions for the reasons I have explained.

53 *Fourthly*, while I do not place a great deal of reliance on this factor, the contention that the 2018 Production Change was itself effective to remedy the Core Defect is inconsistent with TMCA's own conduct, internal records and analysis. Even after developing the 2018 Production Change, TMCA recognised that the technical changes at the heart of those countermeasures were ineffective to remedy the Core Defect: AF [152]–[155]. As such, TMCA continued to pursue an effective fix and, upon developing the 2020 Field Fix, issued instructions to dealers to apply the 2020 Field Fix to vehicles that had had the 2018 Production Change. Surely this would have been unnecessary if the 2018 Production Change had itself been effective to remedy the Core Defect.

54 *Fifthly*, TMCA submits that its attempt to extend the warranty of certain Relevant Vehicles in August 2020 (in order to offer the 2020 Field Fix free of charge) was directed only to vehicles produced prior to June 2018 because the 2018 Production Change was effective. In TMCA's submission, this obviated the need to offer the same extension to vehicles that had had the 2018 Production Change. But Mr Nelson did not proffer this as an explanation for the issuance of

the warranty extension letter for vehicles produced prior to June 2018 only. A more plausible explanation is, that having regard to the three year per 100,000km warranty that TMCA provided in respect of new vehicles (until 1 January 2019), the warranty coverage in respect of most vehicles produced prior to June 2018 would have expired (or would soon expire) by August 2020; whereas the warranty coverage in respect of most vehicles produced after June 2018 would not have expired (noting in particular that since 1 January 2019, TMCA has provided a five year warranty for new vehicles): see SAF [10].

55 Hence, even if, contrary to my view, it was open to TMCA to seek to reagitate the effectiveness of the 2018 Production Change, I would not be satisfied that it was effective in remedying the Core Defect.

56 Finally, I should note for completeness that TMCA's submission that even if the Court finds, consistent with the referee's reports, that the Core Defect was present in the Relevant Vehicles that had 2018 Production Change, the Court should nevertheless find that those vehicles experience the Core Defect differently from other Relevant Vehicles, should too be rejected. Once it is appreciated that the Core Defect was *present* in all Relevant Vehicles, including vehicles produced with the 2018 Production Change, it must also be accepted that those vehicles, just like the Pre-MY2018 Production Vehicles, malfunctioned when exposed to the High Speed Driving Pattern and had an inherent propensity to experience the associated consequences: AF [73], [75]. The referee's conclusions concerning the nature of the Core Defect and its consequences, and the Agreed Facts concerning the effect of the Core Defect on Relevant Vehicles in which it is present, apply *equally* in respect of *all* Relevant Vehicles.

57 It is highly regrettable that, despite the sensible approach to engaging in the reference process and agreeing to the adoption of the referee's reports, TMCA persisted with this rather arid dispute. Such a course was devoid of merit and contrary to facilitating the dictates of the overarching purpose in Pt VB of the Act. Nevertheless, this is a convenient segue into the next factual issue in dispute: the nature of the consequences occasioned by the Core Defect.

B.3.2 *Did all Relevant Vehicles have a propensity to suffer the consequences of the Core Defect?*

58 The parties are in dispute as to whether all the Relevant Vehicles had a propensity to suffer from the Core Defect and the consequences occasioned by the Core Defect. There is also a debate as to the issue of fuel consumption. It is convenient to first deal with the overarching

contention as to the consequences occasioned by the Core Defect, before turning to the issue of increased fuel consumption.

The Defect Consequences

59 In the light of the referee's conclusions and the Agreed Facts, it can be said that if a Relevant Vehicle was exposed to the High Speed Driving Pattern, the Relevant Vehicle would experience one or more of the following consequences, by reason of the Core Defect (AF [75]):

(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 Relevant Vehicle inspected, serviced and/or repaired by a service engineer for the purpose of cleaning, repairing or replacing the DPF, DPF System (or components thereof);

(7) the need to have the Relevant Vehicle inspected, serviced and/or repaired more regularly than would be required absent the Core Defect;

(8) the need to programme 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 (**Additional Injector**) due to carbon deposits on its tip;

(11) the Additional Injector causes deposits forming on the face of the DOC, causing white smoke; and

(12) an increase in fuel consumption and decrease in fuel economy (Second Referee's Report (at [21], [28]–[29]); see below (at [66]–[74])).

(collectively, the **Defect Consequences**).

60 It seems that in written closing submissions, the applicants contend for a slight variation of these consequences. No explanation was provided as to why the findings in the Agreed Facts should be departed from, and in any event, there does not appear to be any meaningful difference between the consequences as outlined in the applicants' closing submissions and those defined above.

61 TMCA submits that the referee did not find that all of the Defect Consequences would occur during the High Speed Driving Pattern, but rather, only one or more of them in many instances. In TMCA's submission, this is evidenced by the referee's conclusion in his First Report (at [55]) that "*many* of the Relevant Vehicles … would have experienced one or more of those consequences" if subjected to the High Speed Driving Pattern (emphasis added). It is said that the referee did not seek to quantify the extent to which each of the Defect Consequences might be or was likely to eventuate whenever the High Speed Driving Pattern was engaged in, given he concluded (at [43]) that "[w]ith the exception of the [Relevant Prado], *I am unable* to identify which of the Relevant Vehicles experienced symptoms of the core defect during the Relevant Period" (emphasis added). Further, it is said that some group members may not have driven in line with the High Speed Driving Pattern and therefore may have never been affected.

62 It may be accepted that each of the Relevant Vehicles did not *actually* suffer from the Defect Consequences. However, I reject the contention that only some, not "all", of the Relevant Vehicles had the *propensity* to suffer one of the Defect Consequences if exposed to the High Speed Driving Pattern. This proposition is clearly established by the referee's conclusions in his First Report:

(1) as to the class of consequences associated with the Core Defect (see [75]);

(2) that (at [43]):

> [the Core Defect] was a feature of all of the Relevant Vehicles during the Relevant Period (at least in latent form) and **would result** in one or more of the following consequences in vehicles exposed to the high-speed pattern and/or which were the subject of the ineffective countermeasures introduced by the Respondent during the Relevant Period:
>
> (a) excessive white smoke in exhaust during regeneration;
>
> (b) foul odor [*sic*] during regeneration; and/or
>
> (c) DPF Notifications and MILs being displayed when the DPF became full as a result of ineffective regeneration.
>
> (Emphasis added).

(3) that (at [47]):

> [n]umerous Toyota documents recording its investigations into what the [r]espondent has called the 'DPF issues' describe the following mechanism(s) and physical manifestations of the core defect which, when a vehicle was exposed to the high-speed pattern and/or ineffective countermeasures, led to defect consequences";

(4) that (at [28]–[29]) "the Vehicle Defects likely have some negative impact on fuel economy" such that "the fuel consumption of the Relevant Vehicles [is] increased and/or their fuel economy decreased".

63 By reason of the fact that the Core Defect was present in each Relevant Vehicle at the time it was supplied, each Relevant Vehicle had a propensity to experience one or more of the Defect Consequences. This is because if the Relevant Vehicles were exposed to the High Speed Driving Pattern (a normal form of usage of the vehicles) the DPF System would malfunction in the manner described above (at [15(8)]), which in turn caused the vehicles to experience one or more of the Defect Consequences described above (at [59]).

64 Indeed, the likelihood or probability that any given Relevant Vehicle would suffer from one or more Defect Consequences was relatively high. In April 2017, TMCA prepared a "Field Action Proposal" form, in which TMCA sought permission from TMC to implement a "Customer Service Campaign" to address the DPF issues experienced by Relevant Vehicles: Nelson Affidavit (at [91]); T89.38–90.5. The purpose of the Field Action Proposal form was "to demonstrate to TMC the level of importance, severity and potential impact upon guests" of the DPF issues being experienced by the Relevant Vehicles: Nelson Affidavit (at [91]). The Field Action Proposal form included a statistical assessment of the proportion of Relevant Vehicles that would "fail" within five and 10 years of service respectively (that is, would be the subject of a DPF-related complaint concerning excessive white smoke or DPF malfunction, indicated by the illumination of the Malfunction Indicator Lamp (**MIL**) on the dashboard): Nelson Affidavit (at [92]–[95]); T89.30–91.13. The analysis indicated that 50 per cent of Relevant Vehicles would fail after five years in service, and 94 per cent would fail after 10 years in service: T90.35–91.13.

65 As the evidence before the Court indicates, TMCA's forecasts in April 2017 were well founded. A large proportion of Relevant Vehicles have in fact already experienced one or more of the Defect Consequences within five years of service. This is borne out by TMCA's records of warranty claims made in respect of some of the Relevant Vehicles: AF [18]. As at 31 July 2021, at least 154,916 Relevant Vehicles have received servicing related to issues with the DPF System: AF [186].

Increased fuel consumption

66 As a subset of this factual dispute, the parties are in contest as to whether the referee's findings establish that fuel consumption increased and fuel economy decreased in all Relevant Vehicles.

67 TMCA submits that the referee's conclusions do not establish that fuel consumption increased and fuel economy decreased in *all* Relevant Vehicles. Relevantly, the referee noted in his Second Report that (at [27]–[28]):

> 27. While the simple average of the mean fuel consumption increase estimates of the vehicles in the Toyota Fuel Consumption Study is 3%, more than half of the vehicles are estimated to have no more than a marginal impact on fuel consumption, as I expected in my earlier report. I note, however, that the driving patterns associated with the ECM downloads and the corresponding regeneration/non-regeneration distances reported in the TFCS are unknown and may not be directly comparable to the driving pattern of the NEDC used for the Fuel Consumption values from Type Approval, adding uncertainty to the estimates. Further, the ECM downloads reported in the TFCS do not represent a statistically significant sample of any vehicle type or model.
>
> 28. Nonetheless, the estimates do suggest that the Vehicle Defects likely have some negative impact of fuel economy in Affected Relevant Vehicles and this conclusion is further supported by the following additional considerations:
>
> (a) the core defect and the impact of the core defect on regeneration frequency and duration (as discussed in my first report);
>
> (b) the Applicant's affidavit evidence concerning the increased fuel use of his vehicle during periods in which it was emitting excessive white smoke; and
>
> (c) records of customer complaints concerning increased fuel consumption in Relevant Vehicles.
>
> (Citations omitted).

68 Further, TMCA accepts that by reference to the 11 vehicle Toyota Fuel Consumption Study (**TFCS**), the referee concluded that the vehicles in which the Core Defect was present suffered from increased fuel consumption or decreased fuel economy by reason of the Core Defect and Defect Consequences. However, it is said that it was made plain in the Second Referee's Report that whether or not each vehicle *actually* experienced an increase in fuel consumption depended on, *inter alia*, the driving style and pattern of the individual driver (at [30]):

> 30. As my observations at 27 above suggest, I am unable to answer the second part of question 3(a) based on the materials available to me. In particular, **I cannot provide a reliable single estimate for increased fuel consumption to be applied globally for all Relevant Vehicles** for the reasons identified in that paragraph and the following further reasons:
>
> (a) as discussed in my first report, the level of increased regeneration affecting each of the Relevant Vehicles will be **dependent on a range**

of variables, including the driving style and pattern of the individual driver; and

(b) it appears likely that the driving style of the owners of the vehicles in the TFCS may explain much or all of the significant variation of fuel consumption results among the individual vehicles in my analysis of the TFCS as:

(i) the two vehicles with the highest increase in fuel consumption in the sample were the two manual transmission models; and

(ii) of the 10 remaining vehicles in the sample (all of which have automatic transmissions), 7 had **only de minimis** fuel consumption variations within +/-2% of the Type Approval result for that vehicle (with the remaining 3 showing increased fuel consumption of 5-6% from the Type Approval result).

(Emphasis added).

69 TMCA submits that given the applicants did not pursue a case based on excess fuel consumption at the initial trial, and because the referee could not report on how much fuel consumption increased on an aggregate basis, there is no evidence before the Court about the extent to which fuel consumption was increased in the Relevant Vehicles, or indeed the extent to which *all* of the Relevant Vehicles experienced such an increase.

70 I reject this submission for the following two reasons.

71 *First*, TMCA's submission that the referee did not conclude that all of the Relevant Vehicles experienced an increase in fuel consumption is incorrect. In the Second Referee's Report, the referee was presented the following question:

3. Is the fuel consumption of the Relevant Vehicles increased and/or their fuel economy decreased, by reason of:

a. the Vehicle Defects and/or Vehicle Defect Consequences to which a "D" or "C" was allocated in Annexure F of the Referee's Report and, if so, by how much; and/or

b. if Supplementary Question 1 is answered "yes", the Relevant Vehicles' reliance on Automatic Regeneration and Manual Regeneration, rather than Passive Regeneration, to regenerate the DPF and, if so, by how much?

72 The referee's answer to question 3(a) was 'yes'": see [29]. While it is true that the referee was unable to determine the answer to the second part of the question ("by how much") on the materials at his disposal, that does not alter his conclusion in relation to the first part of the question, or his finding in the First Referee's Report that the Core Defect did "have some negative impact on fuel economy" in the Relevant Vehicles: see [28].

73 *Secondly*, to the extent it is said the "[a]pplicants [did] not pursue a case based on excess fuel consumption at the initial trial", that submission should too should be rejected. The applicants do contend that a consequence of the Core Defect was that fuel consumption increased, and that this is relevant in a number of respects, including to assessing: (a) whether the Relevant Vehicles were of acceptable quality at the time of supply, having regard to the class of consequences associated with the Core Defect (which was present in all Relevant Vehicles); and (b) the amount of the reduction in value of the Relevant Vehicles resulting from the Core Defect.

74 *Thirdly*, insofar as TMCA is to be understood as accepting that the class of consequences associated with the Core Defect included that "the fuel consumption of the Relevant Vehicles increased and/or their fuel economy decreased", but not accepting that every single vehicle in fact experienced increased fuel consumption, then TMCA's submission, for present purposes, is not really to the point. At the initial trial, the applicants seek damages on behalf of group members for the reduction in value resulting from the defect under s 272(1)(a) of the ACL (in which case it is not necessary to prove which individual vehicles experienced which specific consequences and to what extent), not under s 272(1)(b) for the cost of the additional fuel actually consumed by each Relevant Vehicle as a result of the Core Defect. This is because the applicants accept that damages for the costs of the additional fuel actually consumed would need to be determined on an individualised basis. The only caveat to this comment is that Mr Williams and DCS *do* seek damages of this type. I address this aspect of the claim separately below: see [522]–[530].

B.3.3 *What was the significance of the Core Defect and the Defect Consequences?*

75 The parties dispute the significance of the Core Defect and the Defect Consequences.

76 A subset of this contention is that the Core Defect was a defect of the *DPF System*, not a defect of the entire vehicle. In making this submission, TMCA places reliance on two passages of the First Referee's Report which state (at [8] and [38], emphasis added):

(1) "[t]he *DPF System* was defective for the whole of the Relevant Period. The core defect was that the *DPF System* was not designed to function effectively during all reasonably expected conditions of normal operation and use in the Australian market"; and

(2) "[a]s explained below, the *DPF System* was defective for the whole of the Relevant Period".

77 The distinction is important, it is said, because the Court is required to assess whether the *good* that was purchased was defective, and the group members did not purchase a *DPF System* – rather, they purchased a HiLux, Prado or Fortuner vehicle.

78 Further, TMCA advances the following submissions which it says militate against the significance of the Core Defect and the Defect Consequences:

(1) none of the Defect Consequences affect the operation of the Relevant Vehicles (the ability to get from A to B safely) and they remained able to be driven in all environments;

(2) the DPF System is not essential to the operation of the Relevant Vehicles;

(3) it is not suggested that the problems with the DPF System caused any safety issue; and

(4) notwithstanding the Core Defect, the Relevant Vehicles operated in a non-defective manner and the condition of each vehicle as a whole was "indisputably sound".

79 TMCA's attempt to downplay the significance of the Core Defect and the Defect Consequences does not withstand scrutiny.

80 *First*, the DPF System performs a vital function in the Relevant Vehicles and any attempt to divorce issues with the DPF system from the Relevant Vehicles is entirely superficial. As TMCA itself submitted, the DPF System is in place to ensure compliance with emissions rules: AF [39]. If a vehicle does not comply with the applicable rules, it is in breach of a range of statutory requirements, including that it cannot be registered by a state or territory registering authority for use, or driven, on Australian roads. It does not matter that the applicants have not sought to prove that by reason of the Core Defect, the Relevant Vehicles in fact failed to comply with emissions standards. The point is that, contrary to the thrust of TMCA's submissions, the DPF System is a critically important component of the Relevant vehicles, the proper functioning of which is likely to be of concern to a reasonable consumer.

81 *Secondly*, even adopting the starting point that the acceptable quality of a brand new motor vehicle costing around $50,000 is to be measured only by reference to whether it is still capable of being used to drive from A to B, the consequences of the Core Defect are such as to substantially interfere with the normal use and operation of the Relevant Vehicles. Take, for example, the following implication of the Core Defect:

(1) by reason of the Core Defect, if the Relevant Vehicles were exposed to the High Speed Driving Pattern, regeneration events failed to remove sufficient particulate matter from the DPF to prevent the DPF from becoming or remaining full or blocked (AF [73(b)]);

(2) when the DPF becomes full or blocked, the vehicle "warns" the driver of this fact by displaying DPF notifications and/or illuminating the MIL on the vehicle's dash and consistently with instructions in the Owner's Manual, owners are directed to take the Relevant Vehicle to an authorised dealership for unscheduled maintenance to have the DPF System inspected, repaired, or replaced (First Referee's Report (at [43(c)], [47(b)(iv)(A)], [55(b)], [56], [63]–[64]));

(3) if the driver continues to operate the Relevant Vehicle despite those warnings, the ECM causes the vehicle to go into Limp Mode, whereby the ECM will prevent the vehicle from going into fifth gear and will limit acceleration (Nelson Affidavit (at [76]); D2FASOC (at [17(b)(xvi)])); and

(4) if Limp Mode occurs, the vehicle must be taken to a dealer and various TMCA instruction materials state that damage may be caused to a Relevant Vehicle, or an accident may occur, if a Relevant Vehicle continues to be driven when the DPF warning light is flashing or the DPF system warning message appears.

82 TMCA submits that Limp Mode is not a consequence of the Core Defect, but rather a consequence of improper usage. This is superficial. One of the Defect Consequences is triggering DPF notifications to the driver: AF [75(i)]. Once those notifications appear, the driver must take their vehicle in for servicing to address the problem, or the vehicle will go into Limp Mode. What TMCA's submission appears to imply is that if a driver gets to the point of experiencing Limp Mode triggered by the Core Defect, it is the fault of the driver. That submission should be rejected.

83 This also casts further light on TMCA's submission that the Relevant Vehicles are not defective because they are still capable of getting people from A to B. Is one to limp from A to B unless they respond promptly to the warnings that are triggered by the Core Defect? I reject any contention that the Core Defect does not impact upon or interfere with the operation of the Relevant Vehicles, or that the Relevant Vehicles continued to be suitable for use in all driving conditions, including the High Speed Driving Pattern, even with the Core Defect present.

84 *Thirdly*, while I accept that no case was advanced on the basis that the Core Defect gave rise to any issue of safety, plumes of dense white smoke are hardly conducive to a safe driving

environment. TMCA's contemporaneous records of complaints made by Mr Williams about the Relevant Prado record Mr Williams' view that the white smoke entering the cabin of the car was "dangerous": First Williams Affidavit (at [173]). Mr Williams was not challenged on this evidence. Needless to say, I place minimal weight on this factor in reaching my conclusion.

85 *Fourthly*, tens of thousands of customer complaints illustrate the obvious point that the Defect Consequences are not trivial. They have a significant impact upon consumers' use and enjoyment of the Relevant Vehicles: see, for example, those referred to at [183] below. Indeed, TMCA ignores Mr Williams' unchallenged evidence of the lived experience of the excessive white smoke issue: First Williams Affidavit (at [117]–[119]).

86 *Fifthly*, TMCA's attempt to downplay the significance of the Core Defect is inconsistent with its contemporaneous conduct and internal communications. TMCA had significant concerns about how the problems experienced by the Relevant Vehicles would impact upon TMCA's brand and reputation; it apprehended that the issues experienced by the Relevant Vehicles were of a serious nature and materially affected consumers' use and enjoyment of the Relevant Vehicles. For example, the Global Registration Notice issued on 31 August 2016, in explaining that a countermeasure was "urgently necessary", referred to "several customers getting stopped by the police, and also other road users".

B.3.4 *Market Awareness of the Core Defect and Defect Consequences*

87 A key issue in dispute between the parties is whether (and to what extent) consumers were aware of the Core Defect and Defect Consequences during the Relevant Period.

88 The relevance of this fact to TMCA's case arises as follows. Mr Stockton gave evidence that he analysed the secondary market data from the vehicle valuation and information website RedBook, and vehicle auctions both for Relevant Vehicles and the vehicles he identified as comparator vehicles: First Stockton Report (at [254]–[260]). He compared resale prices as a percentage of manufacturers' suggested retail price (**MSRP**) for Relevant Vehicles and comparator vehicles over time, including through regression analysis: First Stockton Report (at tab DVI 2). Mr Stockton found that the retained value of Relevant Vehicles in the resale market exceeded that of comparator vehicles: First Stockton Report (at [262(a)]). He also found that the *relative* value retention of Relevant Vehicles was higher in 2020 and 2021 than in earlier periods: First Stockton Report (at [262(b)]). Mr Stockton determined these results to be inconsistent with a mature market response to information about the Core Defect and in part

counterintuitive, and so did not finalise his analysis and instead investigated whether the market was maturely informed of the Core Defect: First Stockton Report (at [250], [265]).

89 TMCA seizes upon the preliminary conclusions reached by Mr Stockton as proof that:

(1) a reasonable consumer fully acquainted with the Core Defect and Defect Consequences would nevertheless regard the Relevant Vehicles as being of acceptable quality; and

(2) the presence of the Core Defect in the Relevant Vehicles did not result in a reduction in the value of the Relevant Vehicles at the time they were supplied.

90 A critical premise in TMCA's reasoning is that at some point during the Relevant Period, the market became fully informed of the Core Defect and Defect Consequences, such that the secondary market data analysed by Mr Stockton should be taken as reflecting an informed market response to the Core Defect and Defect Consequences.

91 TMCA submits that there are numerous means by which information was available to market participants in respect of the Core Defect in the Relevant Vehicles, namely:

(1) From February 2016, owners of the Relevant Vehicles took their vehicles to dealers in respect of the problems and dealers sought to have the problems fixed. Between February 2016 and September 2018, TMCA received at least 4,000 Dealer Product Reports and more than 100,000 warranty claims: AF [149], [155]. It is said the total number of those owners amounts to a substantial volume of people in the market.

(2) The various dealers received formal communications from TMCA in relation to the DPF issues and the fixes that were attempted at different points in time: SAF [8]. TMCA also delivered presentations to regional offices and dealers: AF [124]. TMCA submits that there is no evidence to the effect that dealers kept this information from anyone.

(3) In March 2018, TMCA received enquiries from dealers about a social media post which suggested that TMCA had announced a recall campaign "to fix failing DPFs". That post was not correct, but the fact that it referred to a recall, it is said, suggested a more serious problem than was actually present.

(4) Problems with Toyota DPFs were the subject of discussion in "multiple" web forums by around late 2016 or early 2017 and from July 2018 (prior to any mention of a class action), there were various media reports about issues with Relevant Vehicles: AF [123].

(5) From around December 2018, there were media reports of the possibility of a class action in respect of DPF issues and since these proceedings were commenced on 26 July 2019 a number of articles have reported on the proceedings: AF [123].

(6) On 5 September 2019, TMCA launched a webpage dedicated to the DPF System and this litigation which, between September 2019 and April 2020, was viewed between 2,713 to 4,544 times per month: AF [114]; Jones Affidavit (at [11]).

(7) There is evidence that some purchasers purchased a vast number of vehicles over the period (it is common ground that 16,961 unique purchasers purchased more than one Relevant Vehicle). For example, Mr Berndt refers to companies with the acronym "BHP" contained in their name being responsible for the purchase of around 1,700 vehicles: Berndt Affidavit (at [9]). The first of those purchases was in November 2015 and the last was in April 2020. Although the Court is not in a position to understand the way that the BHP companies share information among themselves, it is said one can readily infer that if the DPF defect consequences manifested in respect of vehicles purchased by BHP early in the period, that would affect the purchase decisions of BHP later in the period.

92 While I accept that there were articles concerning potential issues with Toyota vehicles over the Relevant Period, it cannot seriously be said that I can be satisfied that the secondary market was aware of the Core Defect and Defect Consequences. 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: T285.1–9, T293.23–294.16, T296.22–36. TMCA 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.

93 Further, I reject TMCA's contention that the Court "would accept the market data as reflecting an informed market, unless shown otherwise". The very existence of the Core Defect as an objective fact is something that TMCA was still disputing up to and during the reference process in 2021. Even after the reference process, TMCA continues to dispute whether the Core Defect was present in the 2018 Production Change Vehicles as a matter of objective fact. It would be artificial, and a subversion of the evidentiary onus, to start with an *a priori* assumption

that the market must nevertheless have known the truth about the Core Defect from 2015, and then ask whether the applicants have disproved that assumption.

94 Beyond these general comments, it is necessary to say something about each of the categories of information relied upon to evidence market awareness.

Print and online media

95 There are several issues with the print and online media relied upon by TMCA.

96 *First*, 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.

97 *Secondly*, 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.

98 *Thirdly*, although certain of the articles refer to problems experienced by certain of the Relevant Vehicles, they also contain statements from TMCA to the effect that the problems referred to have been remedied, or that an effective remedy is at least available. For example, two of the articles contain statements such as:

(1) "[TMCA] apologised for the inconvenience to affected customers and confirmed the above technical issues are being addressed"; and

(2) "[i]n a statement, [TMCA] said it 'launched the latest in a series of initiatives, a customer service campaign, to resolve the potential DPF issue' in October. 'All customers with potentially affected vehicles have been, or are in the process of being, contacted by letter and are requested to make contact with their closest/preferred Toyota dealer,' the company said".

99 It is arguable that a reasonable consumer reading these articles would understand that the problems or issues with the vehicles referred to in the articles have been or are able to be fixed. But this was not the case.

100 *Fourthly*, insofar as certain of the articles refer to details of allegations made in this legal proceeding, it should be recalled that TMCA has, since the commencement of the proceedings, *denied* the core allegation that the Relevant Vehicles are defective in design and have an inherent propensity to experience adverse consequences. It is curious to submit that a reasonable consumer reading articles describing allegations made in this proceeding would understand from such articles that the Relevant Vehicles are defective in the manner alleged, in circumstances where the allegation has been consistently denied by TMCA.

101 *Sixthly*, and while I place minimal, if any, weight on this factor, it is true to say that in carrying out TMCA's "DPF Consumer Redress Program", TMCA has not denied a consumer redress on the basis that the consumer ought to have known about the Core Defect and Defect Consequences when they purchased the vehicle, having regard to statements made in print and online media about problems with the vehicles: see the evidence of Mr Nelson at T103.42–46.

Knowledge derived from prior ownership

102 TMCA also appears to contend that consumers may have become fully informed about the Core Defect and Defect Consequences by reason of their prior ownership or experience of a Relevant Vehicle. This contention is also problematic.

103 *First*, knowledge that one's vehicle has experienced problematic behaviours (for example, the emission of excessive white smoke or foul-smelling exhaust) does not equate to knowledge that the root cause of those problems or issues is that the DPF System in the vehicle is defective in design. Nor does knowledge that one particular vehicle acquired in the past experienced certain problems associated with the DPF System translate into an awareness that a new vehicle acquired at a later date will have the same underlying defect.

104 *Thirdly*, even assuming that some consumers acquired knowledge of the Core Defect through their own experience of owning a Relevant Vehicle, there is nothing to attribute this knowledge to the market *generally*. During Mr Williams' cross-examination, there was some faint suggestion that such knowledge might be disseminated throughout the market by way of "pub chats" or ad hoc carpark conversations: T65.20–21; T61.1–13. While TMCA accepts that, in isolation, Mr Williams' evidence in this respect would not take matters very far, Mr Williams'

evidence that he discussed these matters with other Prado drivers is said to be a useful real world example of the dissemination of the issues. While I accept schooners were no doubt downed over frustrated conversations about car issues, it cannot seriously be said that the exchange of information in this context resulted in a fully informed resale market.

105 *Finally*, the number of group members who acquired two or more Relevant Vehicles during the Relevant Period is relatively miniscule. On the basis of TMCA's evidence on this issue, there were 185,816 unique purchasers of the 264,170 "new" Relevant Vehicles, of which 16,961 unique purchasers purchased two or more vehicles: Berndt Affidavit (at [6], [9]). Of those unique purchasers, 582 purchased more than 20 vehicles, and five purchased more than 500 vehicles: Berndt Affidavit (at [9], [12]–[13]).

Disclosure by dealers

106 TMCA also postulates that the market may have become informed about the Core Defect and Defect Consequences through information disseminated by dealers. The hypothesis advanced by TMCA is that dealers may have been informing individual consumers about the Core Defect and Defect Consequences at the point of sale. There are a number of issues with this submission.

107 *First*, as TMCA accepts, there is no evidence to support this assertion. TMCA itself sold 7,316 Relevant Vehicles directly to consumers but did not lead evidence of instances in which it disclosed the Core Defect to consumers at the point of purchase.

108 *Secondly*, this assertion is inconsistent with TMCA's admission that it failed to disclose the Core Defect or Defect Consequences during the Relevant Period: see [244]–[250]. It is also inconsistent with the admitted fact that, throughout the Relevant Period, TMCA represented that the Relevant Vehicles were, in their design and manufacturing, not defective, of good quality, reliable, durable and suitable for use in any driving environment: see [215]–[217].

109 *Thirdly*, TMCA's hypothesis is contrary to the evidence given by Mr Nelson, who described the way in which TMCA controlled the information conveyed by dealers to consumers about the Relevant Vehicles, namely that:

(1) dealers in the TMCA network are encouraged to raise with TMCA any technical issues they encounter at an early stage. Those dealers then rely on TMCA to give them guidance about how to manage those issues (T74.44–75.6; T76.17–27);

(2) this arrangement is adopted to try and manage technical issues in a uniform way across the network of dealerships (T75.8–9) and ensure that dealers respond to technical issues in a way that is consistent with TMCA's advice (T75.43–45); and

(3) TMCA has a contractual relationship with its dealers which requires them to comply with TMCA's communications concerning technical issues, including "bulletins", "all dealer service letters" (**ADSL**) and "technical newsflashes". On occasion, the ADSLs would be structured in a "Q&A" format, intended to anticipate the kind of questions that guests might ask dealers about the technical issue the subject of the ADSL in order to "encourage [dealers] to manage the guests in a consistent way by answering these kinds of questions in a consistent way" (T77.10–78.7; T79.25–46; T80.9–81.8).

110 Mr Nelson's evidence is supported by contemporaneous documentary evidence, which shows that dealers sought and relied on the "Q&As" provided by TMCA to determine what information they could provide to guests in respect of the DPF issues. Generally speaking, throughout the Relevant Period, dealers were informed by TMCA that, insofar as TMCA had identified issues with certain of the Relevant Vehicles: (a) TMCA had developed a fix for those issues; (b) dealers were to apply the fix to any affected vehicles in stock (that is, unsold vehicles); and (c) the application of the fix to such vehicles would solve the issues otherwise affecting the vehicles: see e.g. T92.24–93.21; T94.25–95.5; T95.27–46; T96.2–41; T.97.4–98.23. Hence, on the basis of the information provided to the dealers by TMCA, they were never selling defective vehicles to consumers.

111 Indeed, if a consumer purchasing a new vehicle asked whether the vehicle to be purchased was affected by the DPF issues the subject of this legal proceeding, dealers were instructed to tell them that they were not. That was contrary to the true position (even if TMCA and its dealers may have been labouring under a mistaken belief that the problem had been solved). As the referee concluded, the Core Defect was present in all Relevant Vehicles supplied during the Relevant Period (that is, up to 23 April 2020). Further, nothing in the materials provided to dealers by TMCA disclosed to dealers the nature of the Core Defect as concluded by the referee.

112 In the light of the above evidence, the suggestion that dealers were nevertheless disclosing the Core Defect to consumers at the point of purchase is fanciful. Such dealers would have been acting in breach of their contractual obligations to TMCA and against their own commercial interests in selling Relevant Vehicles. Further, such dealers would have had to have acquired

an understanding of the Core Defect that was not explained in any of the bulletins provided by TMCA to dealers for the purpose of educating dealers about the DPF issues experienced by Relevant Vehicles.

TMCA's 'DPF Webpage'

113 Finally, TMCA contends that one of "the means by which information [about the Core Defect] was available to market participants" was a webpage launched by TMCA in September 2019 concerning this litigation. But there was no disclosure on the webpage of any defect in the Relevant Vehicles, let alone disclosure of the consequences of any defect. While there is a reference to a "DPF issue", the nature of the "DPF issue" is neither described nor explained. Further, the webpage explained that only vehicles produced prior to June 2018 were affected by the DPF issue, which was false. I am not satisfied that the webpage was a means by which the market came to be aware of the Core Defect or Defect Consequences.

Conclusions on market awareness of Defect Consequences

114 Overall, I am satisfied that the market was not apprised of the Core Defect and the Defect Consequences. It will be necessary to say something further about the secondary market data below.

115 For completeness, before moving on, I should say something about *Bramhill v Edwards* [2004] 2 Lloyd's Law Reports 653, upon which TMCA places some emphasis. That case concerned a buyer who had purchased a motor home which was 102 inches wide in circumstances where the road rules provided for a maximum width of 100 inches. The buyer brought proceedings for breach of s 14 the *Sale of Goods Act 1979* (UK), which contained broadly similar consumer guarantees as s 54 of the ACL. Relevantly, the primary judge concluded that, notwithstanding there was some evidence which indicated that the authorities turned a blind eye to that road rule, including articles in the American RV Magazine of December 1998, the American Motor-home Club magazine of 1999 and various magazine advertisements in the period prior to June 1999, a reasonable person would still not have regarded the vehicle to be of acceptable quality. As to this finding, Auld LJ (with whom Thomas and Jacob LJJ agreed) concluded (at 660 [38]):

> In my view, there was ample evidence, albeit of a secondary and circumstantial nature, to which the Judge referred in pars. 38, 39 and 40 of his judgment, on which he was entitled to conclude that the authorities had turned a blind eye to wide-spread breaches of the Regulations and that that was well-known to enthusiasts for such vehicles in this specialist trade.

116 The Court of Appeal held that the reasonable buyer would be attributed with knowledge of those matters and would therefore regard the motor home as satisfactory: see 660–661 [38]–[42].

117 TMCA submits that *Bramhill* stands for proposition that the evidence required to support a finding that the market is informed need not be extensive or precise. But no overarching principle can be discerned from the Court of Appeal's reasoning. *Bramhill* concerned a factual finding made in entirely different and bespoke circumstances, with a suggestion that the primary judge had misapplied the statutory test: see 660 [39]. Ultimately, the reasoning in *Bramhill* does not bear upon my view that on the evidence adduced, ignorance of the Core Defect and Defect Consequences was profound and widespread, and I am satisfied the market was not informed.

B.3.5 *Mr Williams and the Relevant Prado*

118 It is also convenient here to make a number of findings in relation to the Relevant Prado, which are largely undisputed. These findings will inform a number of aspects of the individual claim of DCS.

119 Mr Williams lives in Redland Bay, a semi-rural area south-east of Brisbane in Queensland, with his wife and four children: First Williams Affidavit (at [4]–[5]). He is employed as a motor vehicle accident assessor by DCS, a company of which he is the sole director and secretary and the only permanent employee: First Williams Affidavit (at [6]–[7]). DCS provides loss assessment services to Australian Accident Management Commercial Pty Ltd (**AAMC**): First Williams Affidavit (at [17]). Mr Williams' work involves travelling to job sites to inspect and assess damaged vehicles: First Williams Affidavit (at [18]).

120 The Relevant Prado is a 2016 Toyota Prado GXL 2.8L Diesel Automatic. It is a five door wagon, its colour is glacier white, and it was purchased with professional window tint. It was purchased on 8 April 2016 from Southside Toyota in Woolloongabba, Queensland: AF [77]; First Williams Affidavit (at [8], [78]).

Purchase decision

121 In early 2016, Mr Williams determined to trade in his vehicle at the time (a Toyota Kluger MY12 KX-R Petrol Wagon) and purchase a new vehicle, consistent with his usual practice of replacing his primary vehicle approximately every three to four years: First Williams Affidavit (at [31]–[32]). Mr Williams considered purchasing, and researched, at least four vehicles: the

Toyota Prado (both diesel and petrol models), the Ford Ranger (dual cab model) and the Nissan Patrol: First Williams Affidavit (at [47], [59]–[64]).

122 In deciding which new vehicle to purchase, Mr Williams placed importance upon, among other things, the vehicle being comfortable, able to drive in all conditions, and reliable in the sense that it performs consistently without fault and does not require servicing outside of its normal recommend manufacturer's servicing milestones; he also placed importance on fuel economy, safety, re-sale value and the vehicle's looks: First Williams Affidavit (at [34]–[35]). These factors were important to Mr Williams:

> … because [he] intended to use the new vehicle primarily for work and my work involves frequent driving, often over long distances and in a variety of driving conditions including city and suburban roads, highways, and country roads. As such, [he] wanted to ensure that I was driving a vehicle that was reliable, comfortable, safe, fuel efficient, and performed well in all conditions.

123 The Toyota Prado was included among the vehicles Mr Williams was considering purchasing because he was of the view that Toyota vehicles are high quality, reliable, and safe, and that, in addition, Prados are tough, powerful, comfortable, and luxurious vehicles: First Williams Affidavit (at [49(c)]). His view in this regard was based upon TMCA's advertising: First Williams Affidavit (at [49(c)]).

124 In giving consideration to purchasing the Toyota Prado in particular, in early 2016, Mr Williams visited TMCA's website and reviewed materials including:

(1) A brochure published on the website which contained information about, and described features of, and displayed photographs of, the models in the Toyota Prado range. Mr Williams did not download or otherwise keep a copy of the brochure but gave evidence that the "Prado e-Brochure" looks consistent with the brochure he reviewed in early 2016 (First Williams Affidavit (at [51]–[52]).

(2) Pages on the website promoting the Toyota Prado range, which included information about the vehicles and their features, and displayed photographs of the vehicles. Mr Williams did not download or otherwise keep a copy of the webpages, but gave evidence that a compilation of webpages from a digital archive of the TMCA website looks consistent with the webpages he reviewed in early 2016: First Williams Affidavit (at [51]–[52]).

(3) The technical specifications for the models in the Toyota Prado range published on the website, including in respect of the vehicle's engine, torque, power, transmission, and

fuel economy. Mr Williams did not download or otherwise keep a copy of the technical specifications, but gave evidence that a digital archive copy looks consistent with the technical specifications he reviewed in early 2016: First Williams Affidavit (at [51]–[52]).

125 In the course of his research, Mr Williams decided that the Toyota Prado GXL with a 2.8L engine and automatic transmission was the model which best suited his needs and budget: First Williams Affidavit (at [55]). He discounted the GXL Petrol Automatic model primarily because he formed the view that it was likely to achieve significantly worse fuel economy than the GXL Diesel Automatic model, and he would therefore incur higher fuel costs over time: First Williams Affidavit (at [56]).

126 In around March 2016, Mr Williams determined to purchase the Relevant Prado. This decision was made in reliance upon the materials Mr Williams reviewed, and the views he formed on the basis of those materials, particularly that: (1) the vehicle was a "high quality" vehicle; and (2) the vehicle had the characteristics that he was looking for, being those set out above (at [122]), including that the vehicle was suitable for highway driving, was reliable and durable, was comfortable, would perform consistently without fault and would not require servicing outside of its regular, scheduled servicing: First Williams Affidavit (at [65]–[66]).

127 Mr Williams was not aware, prior to the purchase of the Relevant Prado, of problems with the DPF System in the Relevant Vehicles. Mr Williams' evidence is that he "would not have purchased the Prado if [he] had known the issues [he] would experience with the vehicle. Instead, [he] would have purchased a different vehicle": First Williams Affidavit (at [224]).

Purchase, trade-in and financing

128 In late March and early April 2016, Mr Williams made arrangements for the purchase of a Toyota Prado GXL Diesel with a 2.8L engine and automatic transmission from Southside Toyota. The Relevant Prado was purchased on 8 April 2016: AF [77]; First Williams Affidavit (at [68]–[77]).

129 The purchase costs for the Relevant Prado were as follows (AF [80]):

Vehicle	$56,354.55
Professional Window Tint 2 Windows	$278.18
Discount	-$5,862.96
GST	$5,249.25
Registration Fee	$367.65

Compulsory Third Party	$336.60
Dealer Delivery	$1,722.73
Stamp Duty (calculated on $62,300.00)	$1,869.00
Total	$60,315.00

130 It is common ground that the vehicle was purchased by DCS.

131 Upon purchase of the Relevant Prado, Mr Williams traded-in his Toyota Kluger for a trade-in price of $17,000: First Williams Affidavit (at [83]). As at 8 April 2016, there was $26,205.62 remaining on a loan for the Kluger, the purchase of which had been financed through Esanda Finance Corporation Limited: First Williams Affidavit (at [83]). The trade-in price for the Kluger was deducted from the outstanding balance of the loan amount, leaving a shortfall of $9,205.62 remaining on the loan for the Kluger: First Williams Affidavit (at [83]).

132 On 8 April 2016, DCS entered into a Business Vehicle Loan agreement with Toyota Finance for a period of 60 months, with 59 monthly payments of approximately $1,067.43 and a final residual payment at the end of the lease of $20,774.23: AF [79], [82]. The balance of the loan was paid on or about 23 October 2020: AF [86]; First Williams Affidavit (at [100]).

Use of the Relevant Prado

133 Mr Williams describes his use of the Relevant Prado in detail in his evidence: First Williams Affidavit (at [23], [105]–[113]). From April 2016 to September 2019, Mr Williams mainly drove the Relevant Prado to and from job sites. This involved driving on a mix of highways, and regional, suburban and residential roads. The Relevant Prado was also used for short trips to the shops, and on weekends for family trips, such as to the Gold Coast and to the beach.

Problems with the Relevant Prado

134 The Relevant Prado developed problems relating to the DPF System soon after it was purchased: AF [88]. Mr Williams' evidence makes plain that these problems are not trivial. They have had a substantial impact upon his use and enjoyment of the vehicle.

Excessive white smoke and foul-smelling exhaust

135 Mr Williams describes his first experience with his vehicle emitting foul-smelling, white smoke, which occurred in around late 2016, in the following terms (at [117]–[118]):

> On this occasion, I had stopped [the Relevant Prado] at a set of traffic lights and was idling, when the engine revs began to lift to about approximately 1,100 to 1,200 rpm and a massive cloud of white smoke began to plume out of the exhaust.
>
> I observed this white smoke through the rear-view and side mirrors of [the Relevant

> Prado]. The white smoke was dense, so that while I could see through the edges of the smoke cloud, I could not see through the middle of the smoke cloud. The cloud of smoke was about as high as [the Relevant Prado] and while I was sitting at the lights spread across approximately two lanes of traffic.
>
> At the time, I had the windows down and could smell the white smoke. The smoke did not smell like smoke from fire, but rather had a strong, acidic, chemical smell.

136 Just weeks later, the issue occurred again, in similar circumstances, causing a similar density and spread of the smoke, and a strong acidic, chemical smell which would enter the vehicle, even when the windows were closed (at [123]):

> I recall that when this second instance of [the Relevant Prado] emitting white smoke occurred, I again felt surprised, but more so angry at what had occurred and worried that there was something mechanically wrong with [the Relevant Prado]. I had spent a lot of money buying [the Relevant Prado] and was concerned that I had brought [*sic*] a "lemon".

137 The "white smoke" issue became more frequent, occurring a couple of times a week: First Williams Affidavit (at [126]). By around February 2017, it was occurring almost daily: First Williams Affidavit (at [135(a)]).

138 In July 2017, at an unscheduled service on account of DPF issues, the DPF in the Relevant Prado was replaced: First Williams Affidavit (at [142], [144]). This, however, did not resolve the issue.

139 On or shortly before 19 April 2018, after two further services, the Relevant Prado suffered a "particularly bad instance" of the emission of white smoke: First Williams Affidavit (at [152]). Mr Williams had his family in the vehicle with the windows down when a substantial amount of white smoke started to blow from the exhaust: Williams (at [153]). The smoke and its chemical smell surrounded the family. Mr Williams felt sick from the amount of smoke and the chemical smell, and recalls, "we were all coughing from the smoke and … from their facial expressions, it looked as though the smoke was also making my wife and children feel sick": First Williams Affidavit (at [153]).

140 Following this incident, on 19 April 2018, Mr Williams sent an email complaint to Oldmac Toyota in the following terms (at [157]–[158], [160]):

> [The Relevant Prado] is blowing so much white smoke, it is starting to make my wife and kids sick, the fumes are coming into the car. The car does a burn off at the lights or when you pull up and the smell is getting on her cloths [*sic*], hair and the trim stinks as well. If you think you can't help, please give me contact details for head office. This car has been back to you and the DPF replaced. This car is using lots of fuel as well. I will soon park [the Relevant Prado] and call Toyota Finance to come and take the Car, I have had it.

141 On 19 April 2018, Mr Williams also lodged the following complaint with TMCA (at [159]):

> Hi, could you please tell me who I send a complaint to in relation to my 2016 Prado with a DPF problem, the smoke is killing my family. It has been replaced and it is still doing it. I keep getting told by the dealer that it will blow smoke. Come on, I do not see other cars fitted with DPF blowing smoke like the 2.8 Toyota range.

142 On 23 April 2018, Mr Williams received a telephone call from someone at TMCA in response to the 19 April 2018 complaint. TMCA's record of this conversation includes (at [162]):

> HiLux [*sic*] started blowing smoke quite badly - started happening at 30,000/ 40,000kms when smoke started to appear- went to Oldmac Toyota and alerted them of the issue- already checked the system had it checked 5x for the problems with DPF - Oldmac Toyota replaced DPF – it's been fine up till now and its [*sic*] starting to smoke again and it's crazy smoke now, is aware of the burn off - revs will jump [*sic*] and massive amounts of smoke would just emit and it does [*sic*] goes into the vehicle, which harms his family and it's very annoying and uncomfortable.

143 On 15 November 2018, Mr Williams again lodged a complaint with TMCA as follows (at [173]:

> Please call me, I have ongoing problems with my 2016 Prado, blowing smoke, this will [*sic*] 9 times, three DPF have been changed. This Vehicle is affected [*sic*] my family health, it smells of Diesel, smoke comes in the cabin when it does a burn while sitting in traffic, it is dangerous.

144 On 17 November 2018, Mr Williams lodged a complaint with Toyota Finance, which stated (at [174]):

> I am writing in relation to my 2016 Prado which has ongoing problems with blowing smoke.
>
> It has been back to Old Mac [*sic*] Toyota Cleveland QLD 9 times.
>
> It has had 3 DPF replaced, forced burns have been carried out.
>
> The problems is [*sic*] the smell and fumes entering the Vehicle.
>
> Twice now while sitting at the traffic lights it has done a large burn and the smoke has entered the cabin area with my whole family in the car, young kids.
>
> I have tried to be patient with working in with trying to fix the problem but after so many attempts it is not working.
>
> The vehicle is under finance with Toyota and I would be happy to walk away from it, I owe around $45,00.00 [*sic*], I have fitted [*sic*] bull bar, snorkel, electric brake system for towing, tow bar, c/b radio, I am happy just to walk away.
>
> I am certain that this ongoing problem falls under lemon laws.
>
> This vehicle cost me $380.00 a week to run. To date I have spent $24,000 in loan repayments and $5,000 on extras fitted to the Vehicle.
>
> I will wait [*sic*] the return email or phone call to discuss.

> If I don't get a response I will stop payments to Toyota finance and happy to get a poor credit rating for it, you can come and take the car, my family are not going back in the car, the smoke is bad, no more I have am over it [*sic*].
>
> Every time I take it back to Toyota it is good for 3 months, then it starts again. I have to take time off work, drop the car off, pick it up, drop my wife home, we have no other car to get around to take the kids to school.

145 On 20 November 2018, Mr Williams received a call from someone at TMCA in response to the 15 November 2018 complaint. TMCA's record of this conversation includes (at [173]):

> Guest advised that the concern is that the smoke is getting in the vehicle when the burn off is done and kids are in the car and he thinks this is dangerous.

146 Notwithstanding these complaints, and the numerous vehicle services described below, Mr Williams continued to experience frequent instances of his vehicle emitting foul-smelling white smoke throughout the period he continued to drive for work: First Williams Affidavit (at [135], [139], [144], [149], [172], [204], [214]).

147 The referee concluded that the Relevant Prado experienced symptoms and consequences consistent with the Core Defect, including emitting excessive white smoke and a foul odour: First Referee's Report (at [14], [42], [57]–[58]).

Increased fuel consumption

148 Once the Relevant Prado began to experience incidents of emitting foul-smelling white smoke, Mr Williams also observed that its fuel consumption increased: First Williams Affidavit (at [128]). It will be necessary to turn to the issue of Mr Williams' increased fuel consumption in more depth below: see [522]–[530].

Servicing and repairs

149 Mr Williams has taken the Relevant Prado for servicing at least 17 times, including 10 scheduled services and seven unscheduled services: Williams (at [114]–[115]). The DPF System was replaced at least twice, the ECU was reprogrammed at least twice, forced burns were conducted at least four times, and the fifth injector was cleaned at least twice: Williams (at [142]–[143], [160], [163]–[166], [169]–[171]). None of the attempts to fix the problems with the Relevant Prado were successful.

150 Relevantly, the referee concluded in his First Report (at [42]) that:

> Service records for [the Relevant Prado] confirm that it exhibited symptoms consistent with the core defect. In particular, during the Relevant Period from at least 19 June 2017 to 11 June 2018, [the Relevant Prado] required repeated unscheduled

> maintenance due to it emitting excessive white smoke and an offensive odor [*sic*]. These adverse effects persisted even after several unscheduled visits to a dealership to address the complaints through diagnostic and service procedures, including those detailed in Technical Newsflash bulletins (TNFs) and All Dealer Service Letters (ADSLs) provided to Australian dealers by the Respondent during the Relevant Period.

151 At the service conducted in October 2020, being the last occasion on which the Relevant Prado was serviced, Mr Williams was told by the dealership conducting the service that the DPF needed to be replaced yet again. He was told he would "have to book it in for another service once we have the replacement parts": First Williams Affidavit (at [213]). As at the hearing, the dealership was yet to contact Mr Williams to let him know whether the necessary replacement parts had arrived: T67.35–46, T69.14–19. If the dealership had contacted him to let him know the replacement parts were ready, Mr Williams' evidence is that he would have taken his vehicle in to have the necessary repairs carried out: T69.18–19.

Income forgone

152 There were also instances where the Relevant Prado required servicing for issues associated with its DPF System on a day when Mr Williams was due to be inspecting vehicles for work (on behalf of DCS). As a result, he was unable to undertake any inspections that day: Williams (at [229]–[239]). Mr Williams has therefore missed work on several occasions as a consequence of the Core Defect and Defect Consequences (with the result that DCS lost the benefit of the payments that it would have received for the performance of that work). This happened on 27 April 2018, 12 April 2019, and 20 March 2020: Williams (at [231]). On each occasion, DCS lost between $1,350 and $1,800 (excluding GST) in revenue: First Williams Affidavit (at [237]).

C ACCEPTABLE QUALITY CASE

153 The applicants contend that each of the Relevant Vehicles was not of "acceptable quality" within the meaning of s 54(2) of the ACL, and therefore failed to comply with the statutory guarantee as to acceptable quality in s 54(1).

C.1 The relevant provisions

154 Section 54 of the ACL is, relevantly, in the following terms:

> **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.

(Emphasis in original).

C.2 Does the guarantee in s 54 apply?

155 Subject to one clarification to which I will come, it is common ground that each of the Relevant Vehicles was supplied with the statutory guarantee as to acceptable quality: AF [200]. The claims advanced arise out of the supply of Relevant Vehicles to group members by dealers or "other retailers". Each Relevant Vehicle supplied in those circumstances was relevantly "supplied", "in trade or commerce", "to a consumer", "other than by way of sale by auction": AF [201]–[203].

156 The definition of "Group Members" in this proceeding is not, however, limited to persons who acquired Relevant Vehicles in the circumstances described above. It also includes people who acquired the Relevant Vehicles second hand from a person who acquired the vehicle in the circumstances described above, because the class of persons who may bring an action for damages against the manufacturer of goods for a failure of the goods to comply with the statutory guarantee is broader than simply the consumer who first acquired the goods.

157 Indeed, where, in respect of "a supply of goods to a consumer", the guarantee under s 54 is not complied with, "an *affected person* in relation to the goods may … recover damages from the manufacturer" pursuant to s 271 (emphasis added). The term "affected person" is defined in s 2 of the ACL as follows:

> ***affected person***, in relation to goods, means:
>
> (a) a consumer who acquires the goods; or
>
> (b) a person who acquires the goods from the consumer (other than for the purpose of re-supply); or
>
> (c) a person who derives title to the goods through or under the consumer.
>
> (Emphasis in original).

158 The term "manufacturer", as it appears in s 271, is defined in s 7 of the ACL. TMCA is the "manufacturer" of the Relevant Vehicles pursuant to s 7(e) of the ACL: see also AF [6].

159 Accordingly, the group members, in relation to each relevant instance of supply of a Relevant Vehicle, are: (1) the consumers who acquired a Relevant Vehicle from a dealer or other retailer; and (2) any person who acquired a Relevant Vehicle from that consumer other than for the purpose of re-supply. This means that in relation to any particular Relevant Vehicle, there may be more than one group member who qualifies as an "affected person" and is therefore entitled to bring a claim under s 271 of the ACL in respect of a failure to comply with the guarantee in s 54.

160 The one clarifying matter I foreshadowed above is effect of s 271(6) of the ACL.

161 Section 271 and the provision which immediately follows, s 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.

162 TMCA accepts that the guarantee of acceptable quality applies to Relevant Vehicles purchased by group members, but submits that those with respect to whom 271(6) applies cannot commence an action for reduction in value damages under s 272(1)(a). So much is true. This does not, however, have the effect of excluding the application of the guarantee in s 54 to the supply of goods in respect of which such persons would otherwise have a cause of action. Persons to whom s 271(6) applies may still bring an action for damages under s 272(1)(b) in respect of the relevant failure to comply with the guarantee under s 54. Hence, the guarantee in s 54 applies to *all* instances of supply of a Relevant Vehicle that are the subject of this proceeding. That is so regardless of whether s 271(6) applies to some group members.

163 This qualifying matter is important given, as will be seen below, the applicants do not currently seek relief under s 272(1)(a) on behalf of those group members who received the 2020 Field Fix (**2020 Field Fix Group Members**). This is because, in respect of these group members, there is a live dispute (to be resolved at a later date) as to the application of s 271(6).

C.3 Was the guarantee in s 54 was complied with?

C.3.1 *Construing s 54 of the ACL*

164 Despite the obscure drafting of other sections of the ACL, s 54 is relatively straightforward. The continued use of the conjunction "and" in s 54(2) makes clear that goods must possess *all* of the qualities listed in s 54(2), to the requisite standard, in order to comply with the guarantee of acceptable quality. Failure to possess any one of those qualities will result in a failure to comply with the guarantee: see *Vautin v By Winddown, Inc (formerly Bertram Yachts) (No 4)* [2018] FCA 426; (2018) 362 ALR 702 (at 732 [142(d)–(f)] per Derrington J); *Australian Competition and Consumer Commission v Jayco Corporation Pty Ltd* [2020] FCA 1672 (at [25] per Wheelahan J).

165 The question of whether the goods are of acceptable quality is to be answered by reference to the quality of the goods at the time of supply: *Capic v Ford Motor Company of Australia Pty Ltd* [2021] FCA 715; (2021) 154 ACSR 235 (at 377 [606] per Perram J); *Jayco* (at [27]); *Vautin* (at 738 [170]–[171], 760 [263]). The applicable standard of "acceptable quality" is to be determined by reference to what the "reasonable consumer" would regard as acceptable, having regard to the matters in s 54(3). The relevant enquiry is necessarily objective: *Medtel Pty Ltd v Courtney* [2003] FCAFC 151; (2003) 130 FCR 182 (at 199 [43] per Moore J, 205 [64] and 207 [72] per Branson J, with whom Jacobson J agreed at 209 [81]); *Capic* (at 265 [105]). As Wheelahan J explained in *Jayco* (at [26]):

> The reasonable consumer sits with an array of other hypothetical persons who have been recruited by the law and by reference to whom objective standards are evaluated: see, *Healthcare at Home Ltd v The Common Services Agency* [2014] UKSC 49; 4 All ER 210 at [1]–[4] (Lord Reed JSC). Such a person has been described as an anthropomorphic conception of justice that is and must be the court itself: see *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at 728 (Lord Radcliffe).

166 In determining whether the "reasonable consumer" would regard the goods as acceptable at the time of supply, one must assume that the construct is "fully acquainted with the state and condition of the goods (including any hidden defects of the goods)": s 54(2) of the ACL; see also *Medtel* (at 205–206 [65]–[70]). Thus, in the present case, the "reasonable consumer" is taken be fully acquainted with the nature of the Core Defect, including the ways in which it causes the Relevant Vehicles to malfunction when exposed to the High Speed Driving Pattern, and the class of consequences or symptoms associated with the Core Defect.

167 Although TMCA accepts that the question of whether the goods are of acceptable quality is to be assessed by reference to the quality of the goods at the time of supply, it submits that the determination of what was objectively reasonable for the consumer to expect is made taking into account all relevant information available at the time of trial. Relying on the reasoning in *Medtel* (at 200 [45], 203 [57], 206 [70], 209 [81]), TMCA submits that "the individual experience of each vehicle owner, affects the assessment".

168 The flaw in this proposition is that the state and condition of the vehicles at the time of supply is not determined by anything occurring after the time of supply. The fact that a defective product has continued to perform following the time of supply through to the time of trial does not defeat a finding that the product was defective at the time it was supplied. In *Medtel*, as Branson J (at 202 [54], with whom Jacobson J agreed at 209 [81]) explained, "the principal issue to be determined … is whether a product which, at the time of trial, can be demonstrated to have performed, and to be continuing to perform, satisfactorily can nonetheless be found to be "not of merchantable quality" within the meaning of s 74D(1) of the *Trade Practices Act 1974* (Cth)". Her Honour found (at 199 [41]) that the goods in issue – pacemakers – were not of merchantable quality at the time of supply, despite the fact that the applicant's pacemaker had not failed by the time of trial: see generally at 197–202 [36]–[52].

169 Two further points should be noted.

170 *First*, it is inappropriate to imbue the "reasonable consumer" with knowledge that an effective fix will ultimately become available, as TMCA contends. This is not a matter that goes to "the state and condition of the goods" at the time of supply (cf s 54(2) of the ACL); nor is it a fact that could have been known at the time of supply (by contrast, the Core Defect was present in the Relevant Vehicles, and therefore knowable, in the sense relevant to the operation of s 54(2), at the time of supply): see *Medtel* (at 206 [69]–[70], citing *Henry Kendall & Sons v William Lillico & Sons Ltd* [1969] 2 AC 31 at 118–119 per Lord Pearce). Whether a reasonable consumer would, at the time of purchase "expect a fix for the DPF defect … to become available" differs from the question of whether the reasonable consumer would, at the time of purchase, consider it acceptable (in spite of such expectation) that no fix is presently available, and it is not known when a fix will become available: see also *Capic* (at 384 [641]).

171 *Secondly*, TMCA submits that "the best guide to the hypothetical reasonable consumer is the evidence of what actual market participants have done in respect of the vehicles". In doing so, TMCA proceeds upon the assumption, based on what it says is evidence of secondary market

data, that the "actual market participants" (that is, persons buying Relevant Vehicles second-hand) were "fully acquainted with the state and condition of the goods (including any hidden defects of the goods)" at the time of supply. There are a number of issues with this approach. *First*, it is unfounded as a proposition of law. Section 54 calls for the determination of a hypothetical question by reference to a *hypothetical consumer* imputed with knowledge of the true facts (including about hidden defects); the hypothetical consumer is an anthropomorphic conception of justice that is and must be the Court itself: see *Jayco* (at [26] per Wheelahan J). At a minimum, any suggested connexion between the statutory test involving the hypothetical reasonable consumer and empirical data about the buying behaviour of actual consumers calls for very careful consideration of that data. This leads to the *second* difficulty, that is, TMCA relies on data about sales in the second-hand market. Even if (contrary to what I have found above at [87]–[117]), some inference could be drawn about buyers in the second-hand market having some awareness of DPF-related problems, that would not lead to the conclusion that buyers of new vehicles were aware that they were buying vehicles that suffered from the Core Defect.

172 It is then convenient to turn to an analysis of the factors outlined in ss 54(2) and (3). I propose to deal first with the matters in s 54(2), before turning to the mandatory considerations in (3).

C.3.2 *Section 54(2) factors*

173 One might have thought that given what has already been canvassed above, the liability case is glaringly obvious: the product was not of acceptable quality. Alas, reams of submissions were made contesting this conclusion and it is necessary to deal with them.

Fit for all the purposes for which goods of that kind are commonly supplied (ACL 54(2)(a))

174 Curiously, TMCA disputes that the Relevant Vehicles were "fit for all the purposes" as a reasonable consumer would regard as acceptable. TMCA's primary position is to downplay the significance of the Core Defect and its consequences. Indeed, the following submissions are advanced:

(1) it is an overstatement to claim that the DPF System "malfunctioned" during instances of the High Speed Driving Pattern, given Toyota's Owners' Manuals and other material provided to guests explained that the emission of white smoke during regeneration was a characteristic of the DPF System;

(2) the DPF System is designed to ensure compliance with emissions rules, and is not essential for the operation of essential parts of the Relevant Vehicles and there is no suggestion that the Core Defect resulted in a failure to comply with any emissions rules; and

(3) the Relevant Vehicles were operational in any driving environment, including the High Speed Driving Pattern, even with the Core Defect present.

175 It is submitted that the severity of the DPF defect should be distinguished from, for example, *Medtel*, where the defect created a superadded risk of failure of the pacemaker such that the pacemaker was not fit for the purpose for which goods of that kind are commonly bought. There, it was said that the consumer's life depended on the pacemaker (see 200 [46]), whereas here the operation of each Relevant Vehicle did not depend on the DPF System: AF [34]–[39], [42].

176 I reject these submissions.

177 As the referee found, the Relevant Vehicles were "not designed to function effectively during all reasonably expected conditions of normal operation and use in the Australian market": First Referee's Report (at [8]; see also [21]); AF [67]. The Relevant Vehicles could not be exposed to the High Speed Driving Pattern without the DPF System malfunctioning: AF [73]. When the DPF System malfunctioned, one or more adverse consequences outlined above (at [59]) ensued. No reasonable consumer acquiring a new vehicle would regard as acceptable the fact that the vehicle cannot be exposed to a mode of operation and use that is considered normal in the Australian market without malfunctioning.

178 Insofar as TMCA submits that so long as the Relevant Vehicles did not "cease to function", they could still transport the driver "from A to B", and were fit for all the purposes for which goods of that kind are commonly supplied, this is untethered to any analysis of the applicable statutory standard. A reasonable consumer would not regard as acceptably *fit* for all purposes a vehicle that transports the passenger "from A to B", but in doing so, has a propensity to exhibit the Defect Consequences.

179 It is no answer to say, as TMCA does, that the proposition that "the emission of white smoke during regeneration was a characteristic of the DPF System" was explained in "Toyota's Owners' Manuals and other materials". The referee found that although the Owner's Manuals identified the emission of some white smoke as "a normal characteristic of DPF System

regeneration", the level of white smoke emitted by the Relevant Vehicles as a consequence of the Core Defect was "unusual and excessive": First Referee's Report (at [48]); see also AF [75(c)].

180 In the light of the above, TMCA's contention that, notwithstanding the Core Defect, the Relevant Vehicles operated in a non-defective manner is unsubstantiated and made in the teeth of the evidence.

Acceptable in appearance and finish (ACL 54(2)(b))

181 "Finish", as the term is used in s 52(2)(b) of the ACL, has a meaning which extends beyond merely visual qualities of the goods: *Capic* (at 389 [671]). As the referee found, a consequence of the Core Defect was the emission of "excessive" white smoke and "foul-smelling" exhaust from the vehicle's exhaust pipe during and after regeneration: see [59(3), (5)]. I am satisfied that the reasonable consumer would not regard this as acceptable. TMCA attempts to distinguish *Capic* on the basis that *Capic* involved, relevantly, "gear rattle". But no analysis is offered as to why a tendency to exhibit gear rattle means that the vehicles in that case were not acceptable in terms of their 'finish'" (*Capic* (at 389 [671]), and yet a tendency to emit "excessive" white smoke and "foul-smelling" exhaust does not. It is a distinction without a difference.

Free from defects (ACL 54(2)(c))

182 Apart from seeking to draw a distinction between goods that are defective, and goods that contain a defective component (a notion I reject), TMCA contends that the emission of excessive and foul-smelling white smoke is not something that a reasonable consumer would regard as unacceptable because it does not, for example, impact upon the "safety" of the vehicle. TMCA submits that "it would be perfectly rational for the applicants' hypothetical consumer to conclude that excess white smoke (which might be emitted if the car was driven in a particular way) mattered very little … such that the defect in the DPF System made no material difference to the way in which they valued the vehicle".

183 This submission should be rejected. The adverse consequences and symptoms associated with the Core Defect are not trivial. When they manifest, they impact significantly upon consumers' use and enjoyment of the Relevant Vehicles. TMCA's business records are replete with thousands of complaints from group members attesting to this. For example, group members complained to TMCA about the following issues:

(1) discomfort and/or distress experienced by drivers of and passengers in the Relevant Vehicles due to the emission of the foul-smelling white smoke;

(2) in relation to the emission of foul-smelling white smoke, inability to use standard features of the Relevant Vehicles while driving such as putting the windows down, poor visibility, abuse from other motorists and/or pedestrians, being pulled over by the police, and a general feeling of embarrassment when driving;

(3) frustration at the inconvenience of frequent servicing and/or repairs in addition to the regular servicing of the vehicles, and loss of work opportunities and/or income due to the Relevant Vehicles being off the road for the additional servicing and repairs;

(4) frustration that the fuel economy of the Relevant Vehicles was significantly worse than the fuel economy advertised by TMCA or as compared to the fuel economy when the Relevant Vehicle was first purchased; and

(5) feeling angry, deceived, misled, frustrated, disappointed, stressed and inconvenienced by their experience in driving the Relevant Vehicles and/or expressing a wish that they had never purchased, or that they no longer wanted to use, the vehicles.

184 These are not idiosyncratic or unpredictable responses of the kind that might only be said to emerge on an *ex post* analysis. Rather, these are the kind of adverse experiences and reactions that would be anticipated and would cause a reasonable consumer, acquainted with the defective character of the Relevant Vehicles, to regard those goods as not of acceptable quality.

185 In response, TMCA submits that it is "not known" whether the white smoke complained of by these customers was *in fact* caused by the Core Defect (as opposed to, for example, improper usage of the Relevant Vehicles). That submission is fallacious in the light of the sheer number of complaints. Indeed, TMCA itself recognised the serious nature of the Defect Consequences in connexion with its DPF "Consumer Redress Program", through which it provided refunds or replacement vehicles to hundreds of consumers in recognition of a "major failure" of the subject vehicles to comply with statutory guarantees: Nelson Affidavit (at [152]–[167]); T103.39–40.

186 Finally, for completeness, I should note that TMCA submits that "[i]n [the] light of the fact that there are Group Members that have chosen *not* to take advantage of the 2020 Field Fix, it can readily be concluded that those Group Members do not perceive their vehicles to be affected in any significant way". No such conclusion can readily be drawn. There are numerous reasons why group members may not have received the 2020 Field Fix, including that: (a) the

group member may have subjected their Relevant Vehicle to one of the ineffective earlier countermeasures which exacerbated rather than remedied the Core Defect and consequently decided against returning to TMCA for any further repairs; (b) the group member may not be aware of the availability of the 2020 Field Fix; and (c) the group member may be intending to take up the fix, but has not yet organised to do so.

187 Hence, notwithstanding the lengthy submissions on the point, it is obvious the reasonable consumer would not have viewed the Relevant Vehicles as defect-free.

Durable (ACL 54(2)(e))

188 Turning to the final factor, durability, TMCA accepts that the DPF System was not as durable as a reasonable consumer would expect, but again, emphasises that it was only the DPF System, not the vehicle as a whole, that suffered from the Core Defect. This submission should be rejected for the reasons already explained (at [80]). A vehicle that requires frequent, unscheduled repair or replacement of a component part would not be regarded as acceptably "durable" by a reasonable consumer. When the DPF System fails, it is *the vehicle*, not the DPF System, that must be brought in to the dealership for servicing and repair.

Conclusion on s 54(2) factors

189 Having regard to the conclusions of the referee, as found by the Court, the conclusion that the Relevant Vehicles did not comply with the guarantee as to acceptable quality is clear, even before one considers the additional factors in support of that conclusion contained in s 54(3). It is, however, necessary to detail these matters given they are mandatory considerations.

C.3.3 *Section 54(3) factors*

190 Section 54(3) of the ACL sets out "mandatory matters" that must be considered in determining whether the guarantee of acceptable quality has been breached: see *Capic* (at 384 [637]).

191 Pursuant to s 54(3)(d), regard must be had to "any representation made about the goods by the supplier or manufacturer of the goods". As explained above, TMCA 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: see AF [187]–[190]. TMCA further marketed the Relevant Vehicles as having a DPF System that was non-defective, of good quality, reliable, durable, did not have a propensity to fail and was sufficient to prevent the DPF from becoming partially or completely blocked. These representations are admitted (see [215]–[217]), and there was nothing in

TMCA's marketing of the Relevant Vehicles that would "temper" the reasonable consumer's expectation as to the quality of the Relevant Vehicles: *Jayco* (at [27]). As such, having regard to the way in which the Relevant Vehicles were marketed, the conclusions set out above as to the reasonable consumers' expectations are only fortified: see also *Capic* (at 389 [669]–[670]).

192 TMCA submits that, despite its failure to correct or qualify the misleading representations, it is nevertheless possible that dealers made representations to consumers acquiring Relevant Vehicles that disclosed the problems with the Relevant Vehicles, prior to acquisition. For the reasons I have outlined above (at [106]–[112]), this contention should be rejected.

193 I should, however, address an additional submission. TMCA submits that it was not "privy" to any of the sales of 97 per cent of Relevant Vehicles and asserts that it remains incumbent on those who allege a breach of s 54 to put forward all relevant evidence to satisfy the court of the mandatory matters in s 54(3). I disagree. Although the factors in s 54(3) are mandatory considerations, the applicants are under no duty to adduce all evidence of communications between dealers and customers. All evidence is to be weighed according to the proof which it was in the power of one side to have produced, and the other to have contradicted: *Blatch v Archer* (1774) 1 Cowp 63 (at 65 per Lord Mansfield). While it was not incumbent on TMCA to lead evidence of the circumstances of each and every supply, if TMCA wished to rely upon any representation as relevant to the analysis under s 54(3)(d) of the ACL, it was open to it to lead evidence in this respect (for example, by calling any of the dealers in TMCA's camp who sold Relevant Vehicles, to give evidence about the kinds of representations they made to consumers at the point of sale).

194 Insofar as TMCA submits that representations arising from "news articles", "word of mouth", or "comments made by dealerships selling competing vehicles" are relevant to the analysis under ACL s 54(3)(d), that submission is incorrect. Section 54(3)(d) is concerned with representations made about the goods *by the supplier or manufacturer* of the goods.

195 As regards to the other relevant considerations in s 54(3), the following two points can be made.

196 *First*, in respect of the "the nature of the goods" (s 54(3)(a)), the Relevant Vehicles are light-duty diesel vehicles. The "reasonably expected conditions of normal operation and use" of the Relevant Vehicles in the Australian market included the High Speed Driving Pattern (that is, regular highway driving): AF [67]; First Referee's Report (at [8]). There is nothing about the nature of the vehicles that would suggest that the reasonable consumer would regard as

acceptable the fact that the Relevant Vehicles cannot be exposed to such a mode of driving without malfunctioning.

197 *Secondly*, in respect of the "the price of the goods" (s 54(3)(b)), although the prices of the Relevant Vehicles, when sold as new vehicles, differ according to model line and model year, as a general observation all of the Relevant Vehicles were sold for substantial amounts. This reflects the fact that these were not cheap items attracting commensurately low expectations of quality, reliability and durability: AF [21]. The MSRP prices were within the following ranges:

(1) for the HiLux 4x2, $24,990 to $51,340;

(2) for the HiLux 4x4, $36,990 to $65,090;

(3) for the Fortuner, $42,590 to $62,540; and

(4) for the Prado, $52,990 to $89,590.

198 In reaching this conclusion, it may be accepted, as Stevenson J observed in *Dwyer v Volkswagen Group Australia Pty Ltd* [2021] NSWSC 715 (at [158]), that the reasonable consumer would "be acquainted with the fact that motor vehicles are complicated pieces of machinery that may develop problems … that may require rectification by the manufacturer during the vehicle's lifetime". But this is a radically different thing to accepting that a vehicle, because of a defect already present at the time of supply, cannot be used in a reasonable and normal way without malfunctioning and consequently exposing the vehicle to one or more non-trivial, adverse consequences: see *Capic* (at 384 [636]).

C.4 Determining the question of acceptable quality on a common basis

199 A point of contest which divides the parties is whether the Court can and should determine the question of whether the Relevant Vehicles were of acceptable quality on a common basis. The applicants contend I can and should determine the issue of acceptable quality on a common basis, but TMCA submit, I cannot, and should not.

200 As the authorities reveal, there are cases in which liability under s 54 can be determined on a common basis and others where it cannot. Whether the question of liability under s 54 can be determined as a common question will depend on the facts and how the parties conduct their positions, all of which will differ between cases. In saying this, the cases are useful in locating the current facts. In cases such as *Capic* (relating to a gear box defect), *Ethicon Sàrl v Gill* [2021] FCAFC 29; (2021) 387 ALR 494 (relating to defective pelvic mesh implants) and

Medtel (relating to faulty pacemakers), the question of acceptable quality was been determined on a common basis.

201 By contrast, in *Owners – Strata Plan No 87231 v 3A Composites GmbH (No 5)* [2020] FCA 1576; (2020) 148 ACSR 445 (at 452–453 [26]–[32]), Wigney J declined to address the question of liability under s 54 on a common question. That case related to allegations that certain aluminium composite panels distributed in Australia were not of merchantable quality for the purposes of s 74D of the *Trade Practices Act 1974* (Cth) (**TPA**) and were not of acceptable quality for the purposes of s 54 of the ACL. In declining to find that the questions which purported to pose the statutory tests or questions in s 74D of the TPA and s 54 of the ACL were common questions, his Honour reasoned (at 452–453 [26]–[32]) that:

> 29. The list of "matters" in s 54(3) are not generic, as was submitted by Owners, but relate to the goods the subject of the specific supply in question. For example, the price of the goods (s 54(3)(b)) is the price of the goods actually supplied and the statements made on the packaging and labels (s 54(3)(c)) are the statements made on the packaging and labelling in the case of the specific supply. In this case, it could not necessarily be concluded that all of the group members purchased the relevant goods for the same price, or in the same packaging. It is equally clear that the "circumstances relating to the supply of the goods" referred to in s 54(3)(e) of the ACL must be a reference to the specific supply in question.
>
> 30. This construction of the provisions is also supported by such consideration as has been given to the issue in the authorities. In *Graham Barclay Oysters*, Lindgren J (with whom Lee J relevantly agreed) said as follows concerning the objective test in s 74D of the TPA (at [533]–[534]):
>
> > The words "as it is reasonable to expect" suggests a question as to the identity of the person or persons, the reasonableness of whose expectation is in question and is to be determined by the court. Possible contenders are:
> >
> > (1) the consumer or other person who suffers loss or damage;
> >
> > (2) a reasonable consumer placed as that actual consumer or other person was;
> >
> > (3) a reasonable bystander (in effect, the court).
> >
> > In my opinion consistently with both the objective nature of the standard aimed for and the consumer protection purpose of the provision, it is the second or third category of person whose reasonable expectation is called into service by the statute, and in my opinion a reasonable bystander would seek to put himself or herself in the position of a reasonable consumer placed as the actual consumer or other person was. Accordingly, it is right to inquire into the reasonable expectations of a category (2) person.
>
> 31. In other words, the reasonable consumer effectively stands in the shoes of the actual consumer. There is no reason to think that s 54 of the ACL should be

> construed differently. Indeed, as already noted, the language of s 54 points even more strongly to this being the correct construction. I am not persuaded that there is any basis for concluding that Lindgren J's conclusion was wrong. In any event, Lee J agreed with Lindgren J and accordingly I am effectively bound to follow that conclusion. It should also be noted that Moore J in *Medtel* (at [42]–[43]) effectively approved Lindgren J's formulation of the test and nothing said by Branson J (with whom Jacobson J agreed) suggested any disagreement with that formulation.
>
> 32. It follows that, to the extent that questions 44, 45 and 46 purport to address the statutory tests in s 74D of the TPA and s 54 of the ACL, they cannot be common questions. That is because to answer those questions, it is necessary to have regard to the relevant circumstances of the particular supply in question, including matters such as the price, any statements made on the packaging or labels and any other "relevant circumstances relating to the supply". Those circumstances may not be determinative or even particularly significant having regard to other findings that may be made. But that cannot be determined unless and until those circumstances are considered. More significantly, the circumstances will not necessarily be the same in respect of every supply to every group member.

202 A further example of a case in which a judge declined to determine issues of liability on a common basis was *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* [2011] FCAFC 128; (2011) 196 FCR 145. There, the primary judge held that the question of whether "Vioxx tablets [were] not of merchantable quality within the meaning of section 74D [of the TPA] by reason of the fact that consumption of Vioxx materially increased the risk of suffering the [relevant] condition" was not a common question given the question could not be determined uniformly. The Full Court did not disturb that finding (see 195–196 [180]–[182]), and referred to the fact that the statute itself (there, s 74D of the TPA) recognised that the description of the goods, the price of the goods and "all other relevant circumstances" are relevant in determining what was reasonable to expect about fitness for purpose at the time of supply: see 196 [182].

203 TMCA seeks to distinguish the current case from *Capic* and locate it in the realm of the reasoning in *Owners* and *Merck*. It is said that the number of relevant vehicles in *Capic*, while substantial, was significantly lower than in the present case (73,451, or less than a third compared to the present case), the purchasers were relatively uniform (purchasers of Focus, Fiesta and EcoSport vehicles, described as "economical entry level vehicles"), and the case involved a different mechanical problem (defects in the transmission): see *Capic* (at 244–247 [17]–[35], 379 [615]).

204 TMCA submits that the applicants' attempt to treat the Relevant Vehicles as an undifferentiated whole and their purchasers as homogenous is erroneous for the following reasons:

(1) While the Relevant Vehicles are broadly described as HiLux, Prado and Fortuner, there were 49 different sub-types of those vehicles with different overall specifications: see AF [7]. Even among those 49 different types of vehicles, there was variation, as purchasers were offered a range of options and accessories: T55.21–41.

(2) The various group members had various different characteristics. There are 264,170 Relevant Vehicles. 22,578 of the initial purchasers of those vehicles purchased more than one Relevant Vehicle and 972 of those initial purchasers purchased more than 20 Relevant Vehicles, with five purchasers purchasing more than 500 vehicles: Berndt Affidavit (at [9]). It is said that one would expect the research carried out by those who purchase large volumes of Relevant Vehicles to be different to those carried out by a purchaser of only one vehicle.

(3) It is said that the discussions that each purchaser had with the seller of their vehicle(s) would also necessarily have differed. For example, TMCA contends that purchaser who raised with their seller the question of white smoke that had been reported in the media, or as a consequence of their own research or discussions with others in the industry (e.g. other competing car dealers), may have been assured that all necessary repairs would be covered by warranty (just like most other problems with Toyota vehicles).

(4) That a class action has been brought on behalf of group members as opposed to just one purchaser, it is submitted, does not change the statutory test prescribed by s 54, particularly in circumstances where, as the appellants accept, "[t]he significance of each of the matters in s 54(3) will vary with each case."

205 Put simply, it is said that the interactions between each seller and purchaser are relevant to the assessment under s 54.

206 In considering this issue, it is first necessary to reiterate that the applicants' case is not that the Relevant Vehicles were not of acceptable quality because the Core Defect *in fact* manifested in one or more adverse consequences at some point during the life of each vehicle. Rather, it is that the Relevant Vehicles were not of acceptable quality because, at the time they were supplied, they were defective because of the *common* flaw in the design of the DPF System and carried an inherent *propensity* to manifest one or more adverse consequences.

207 Accordingly, it does not matter, for the purposes of the applicants establishing a failure to comply with the statutory guarantee, whether or not a given vehicle ultimately developed the problems it was prone to develop. Indeed, there is nothing unusual in concluding that goods

are not of acceptable quality by reason of an inherent risk of failure present at the time of supply, even in circumstances where not all of the goods have, in fact, failed: see *Capic* (at 250 [52]–[53], 377–378 [608]–[612], 409–410 [774], 433–434 [883]–[886]); *Medtel* (at 197–198 [36], 199 [41]; 202 [54], 207–208 [74]–[75], 208 [77]); *Vautin* (at 734 [149]).

208 There is a superficial attraction to TMCA's submissions that the Court cannot determine the question of acceptable quality on a common basis because the Court is required by s 54 of the ACL to enquire into the individual circumstances of each instance of supply. However, two reasons point against this conclusion.

209 *First*, it must be remembered that in assessing whether goods are of acceptable quality for the purposes of s 54(2), the relevant enquiry is *objective*, to be assessed by reference to the reasonable consumer. The reasonable consumer is taken to be "fully acquainted with the state and condition of the goods (including any hidden defects of the goods)": s 54(2). Putting to one side s 54(4) (which operates separately from the process for determining whether goods are of acceptable quality as a form of defence (see *Capic v Ford Motor Company of Australia Pty Ltd (Revised Common Questions)* [2021] FCA 1320 at [10] per Perram J), the statutory test does not operate by reference to what a particular individual consumer knew or *subjectively* believed about the condition of the goods.

210 *Secondly*, I accept that s 54(2) dictates that regard must be had to the matters in s 54(3) in assessing whether goods are of an acceptable quality, and that the significance of each of the matters in s 54(3) will vary on a case by case basis. That is, I accept that through the objective statutory prism, there is some room for subjective contextualisation. But in the 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. To the extent it is said it should be inferred there were material differences between these characteristics (for example, between those who purchased a Relevant Vehicle and those who purchased many), that submission should be rejected. TMCA has not led any 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.

211 To my mind, this case is relatively indistinguishable from *Capic* (at 376–389 [603]–[673], 390–392 [675]–[690]). The supplies at issue in *Capic* were not materially less diverse than the supplies at issue in this case. Each of the 73,451 vehicle in *Capic* potentially involved the kind of unique interaction between supplier and consumer that TMCA hypothesises in the present case and that was no obstacle to a common finding of a failure to comply with the statutory guarantee. More to the point, this case is distinguishable from *Owners*. As outlined above, Wigney J held (at 452–453 [29]) that in that case "it could not necessarily be concluded that all of the group members purchased the relevant goods for the same price, or in the same packaging", and there appeared to be a live issue as to the significance of any such differences: (at 453 [32]). Here, TMCA has 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 Relevant Vehicle as acceptable. Nor do the circumstances suggest there is any realistic possibility of such individual factors being material, having regard in particular to the nature of the defects and the admitted representations.

212 There is no impediment to determining the issue of acceptable quality on a common basis.

C.5 Was the guarantee in s 54 complied with in respect of the Relevant Prado?

213 It follows that the Relevant Prado, which is a Relevant Vehicle, was not of acceptable quality at the time it was supplied to DCS. TMCA accepts this.

D MISLEADING AND DECEPTIVE CONDUCT CASE

214 The applicants allege that, continuously throughout the Relevant Period, TMCA made several representations in relation to the Relevant Vehicles that were misleading in contravention of ss 18, 29 and 33 of the ACL.

D.1 The representations

215 While the applicants' case initially included number of disputed representations, only those admitted by TMCA are now pressed. TMCA admits to making the following representations:

(1) the Relevant Vehicles:

(a) were, or were part of model lines that were, in their design and manufacturing:

(i) not defective;

(ii) of good quality;

(iii) reliable;

(iv) durable; and

(v) suitable for use in any driving environment;

(b) provided, or were part of model lines that provided, a driving and/or passenger experience that was comfortable;

(c) would be, or were part of model lines that would be, in their design and manufacturing:

(i) not defective;

(ii) of good quality;

(iii) reliable;

(iv) durable; and

(v) suitable for use in any driving environment;

(d) would provide, or were part of model lines that would provide, a driving and/or passenger experience that was comfortable;

(2) the Relevant Vehicles contained, or were part of model lines that contained, a DPF System that, in its design and manufacturing:

(a) was not defective;

(b) was of good quality;

(c) was reliable;

(d) was durable;

(e) did not have a propensity to fail;

(f) completed a regeneration cycle with sufficient regularity to prevent the DPF from becoming partially or completely blocked;

(g) would not be defective;

(h) would be of good quality;

(i) would be reliable;

(j) would be durable;

(k) would not have a propensity to fail; and

(l) would complete a regeneration cycle with sufficient regularity to prevent the DPF from becoming partially or completely blocked.

(collectively, (1)(a)–(b) constitute the **Vehicle Representations**; (1)(c)–(d) constitute the **Future Vehicle Representations**; (2)(a)–(f) constitute the **DPF System Representations;** and (2)(f)–(l) the **Future DPF System Representations**).

216 For simplicity, I will refer to the four sets of representations collectively as the **Representations**.

217 TMCA admits that the Representations were made "continuously, and continued, throughout the Relevant Period", were directed to "the public at large", and made "in trade or commerce": AF [188], [190], [192], [194], [196]. The applicants also allege, and TMCA admits, that TMCA failed to correct or qualify those continuing representations: AF [195]. As such, the scope of the dispute in relation to the Representations is confined to whether they were misleading or not and, in relation to a subset of the representations, whether TMCA had reasonable grounds for making the Representations.

D.2 Were the representations misleading or deceptive?

218 The applicants contend that the Representations made by TMCA were:

(1) misleading and deceptive, or likely to mislead or deceive, in contravention of s 18 of the ACL;

(2) false or misleading in contravention of ss 29(1)(a) and (g) of the ACL; and

(3) liable to mislead the public in contravention of s 33 of the ACL.

219 It is convenient first to set out the relevant legal principles, before turning to consider each category of Representations.

D.2.1 *The relevant principles*

220 As is evident, the applicants advance their misleading and deceptive conduct case on a number of statutory bases. Section 18 of the ACL is in the following terms:

> **18 Misleading or deceptive conduct**
>
> (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

221 Section 29(a) and (g) are in the following terms:

> **29 False or misleading representations about goods or services**
>
> (1) A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by

any means of the supply or use of goods or services:

(a) make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; or

…

(g) make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits.

222 Section 33 is in the following terms:

33 Misleading conduct as to the nature etc. of goods

A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.

223 Generally speaking, there is "no meaningful difference" between the words and phrases "misleading and deceptive" and "mislead or deceive" (s 18), "false or misleading" (s 29) or liable to "mislead" (s 33): *Australian Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd* [2014] FCA 634; (2014) 317 ALR 73 (at 81 [40] per Allsop CJ); see also, *Australian Competition and Consumer Commission v Google LLC* [2021] FCA 367; (2021) 391 ALR 346 (at 369–372 [113]–[127] per Thawley J and the authorities surveyed by his Honour).

224 However, one caveat should be made to this comment. That is, the authorities do indicate that the meaning of the phrase "liable to mislead the public" in s 33 of the ACL is a higher standard that "likely to mislead". Indeed, in *Coles Supermarkets*, Allsop CJ observed (at 82 [44]):

> While the words and phrases "misleading or deceptive", "mislead or deceive", "false or misleading" and "mislead" are synonymous, the authorities reveal that a distinction is to be made between "likely to mislead or deceive" (in s 18) and "liable to mislead" (in s 33). The latter has been said to apply to a narrower range of conduct: *Westpac Banking Corporation v Northern Metals Pty Ltd* (1989) 14 IPR 499 at 502; *Trade Practices Commission v J & R Enterprises Pty Ltd* (1991) 99 ALR 325 at 338–9 *(J & R Enterprises); and Australian Competition and Consumer Commission v Turi Foods Pty Ltd (No 4)* [2013] FCA 665 at [79]. Under s 33, what is required is that there be an actual probability that the public would be misled: *J & R Enterprises* at 339. (This citation of *J & R Enterprises* at 338–9 should not be taken to endorse the comments of O'Loughlin J as to a burden beyond reasonable doubt at 339.)

225 Notwithstanding this, the enquiry relevant to determining whether particular conduct had the requisite contravening character is generally the same in respect of ss 18, 29 and 33 of the ACL. Here, at least, any distinction in statutory wording makes no material difference to the outcome.

226 It is trite to observe that the question of whether conduct is misleading or deceptive, or is likely to be so, is an objective question of fact that the Court must determine for itself: *Campbell v Backoffice Investments Pty Ltd* [2009] HCA 25; (2009) 238 CLR 304 (at 341–342 [102] per Gummow, Hayne, Heydon and Kiefel JJ), citing *Butcher v Lachlan Elder Realty Pty Ltd* [2004] HCA 60; (2004) 218 CLR 592 (at 625 [109] per McHugh J). It is not necessary to prove that the conduct in question *in fact* misled or deceived anyone, nor is it necessary to prove an intention to mislead: see *Google v Australian Competition and Consumer Commission* [2013] HCA 1; (2013) 249 CLR 435 (at 443 [6], 443–444 [9] per French CJ, Crennan and Kiefel JJ).

227 The central question is whether the impugned conduct, viewed as a whole, has a sufficient tendency to lead a person exposed to the conduct into error, that is, to form an erroneous assumption or conclusion about some fact or matter: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2020] FCAFC 130; (2020) 278 FCR 450 (at 458–459 [22] per Wigney, O'Bryan and Jackson JJ). Conduct is likely to mislead or deceive if there is a real and not remote possibility of it doing so: *Global Sportsman Pty Ltd v Mirror Newspapers Pty Ltd* (1984) 2 FCR 82 (at 87 per Bowen CJ, Lockhart and Fitzgerald JJ); *TPG* (at 459 [22(a)]).

228 Section 18 of the ACL does not expressly identify what persons or class of persons should be considered as the possible victims for the purpose of deciding whether conduct is misleading or deceptive or likely to mislead or deceive. As such, as Gibbs CJ explained in *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 (at 198–199), consideration must be given to the nature of the particular conduct in issue, and the persons or class of persons likely to be affected by the conduct.

229 Where, as here, the impugned conduct is directed to the public generally, or a section of the public, the question of whether the conduct is "likely to mislead or deceive" must be approached at a level of abstraction. The Court must consider the likely characteristics of the persons who comprise the relevant class to whom the conduct is directed, and the likely effect of the conduct on ordinary or reasonable members of the class, disregarding reactions that might be regarded as extreme or fanciful: *Campomar Sociedad, Limitada v Nike International Ltd* [2000] HCA 12; (2000) 202 CLR 45 (at 85 [102]–[103] per Gleeson CJ, Gaudron, McHugh, Gummow, Kirby Hayne and Callinan JJ); *TPG* (at 458–459 [22]).

230 Once the effect of the impugned conduct on the hypothetical reasonable or ordinary member of the class of prospective purchasers has been determined, the issue of whether the conduct had the character of being misleading will have been "determined for the class, that is, the

whole class": *Bodum v DKSH Australia Pty Ltd* [2011] FCAFC 98; (2011) 280 ALR 639 (at 680–681 [206] per Greenwood J, with whom Tracey J agreed at 693 [272]). It is not necessary also to demonstrate that "a not insignificant number" of reasonable persons within the relevant class would be misled: *TPG* (at 459 [23]); *Trivago NV v Australian Competition and Consumer Commission* [2020] FCAFC 185; (2020) 384 ALR 496 (at 547–549 [192]–[193] per Middleton, McKerracher and Jackson JJ).

231 Importantly, I should stress that while a finding that a representation made to a class of consumers was likely to mislead ordinary or reasonable members of that class will generally be sufficient to establish a contravention of ss 18, 29 and 33 of the ACL, it does not necessarily follow that all members of the class to whom the representation was directed are entitled to relief. In order to establish, relevantly, an entitlement to damages under s 236 of the ACL, each member would need to establish that the group member suffered loss "because of" the contravening conduct, typically by proof of detrimental reliance on the relevant misrepresentations. The applicants accept that the determination of an entitlement to relief in respect of misleading and deceptive conduct can be made in respect of the applicants' claims. However, in relation to group members, relief is a matter for separate determination at a later date.

D.2.2 *Examining the representations*

The Vehicle Representations and the DPF System Representations

232 By reason of the referee's conclusions, TMCA accepts that the DPF System Representations breached the statutory norms in ss 18, 29(1)(a) and (g), and s 33 of the ACL. TMCA therefore accepts that the DPF System in the Relevant Vehicles was: defective, not of good quality, not reliable, not durable; had a propensity to fail and was unable to complete a regeneration cycle with sufficient regularity to prevent the DPF from becoming partially or completely blocked.

233 TMCA resists the same conclusion in respect of the Vehicle Representations on a single basis, namely the false distinction drawn between defective *goods* on the one hand, and goods that contain a defective *component* on the other hand. Indeed, TMCA submits that "the failings of the DPF System in any particular vehicle did not make the representations about that vehicle *as a whole* misleading". This argument should be rejected for the reasons explained above: see [80]. In any event, TMCA's interpretation of the Vehicle Representations cannot survive the application of the principles set out above (at [220]–[231]), which call for consideration of what *a reasonable and ordinary prospective consumer* of a Relevant Vehicle would have

understood the Vehicle Representations to mean. I am satisfied that the reasonable and ordinary consumer would understand the representation that "the [Relevant] Vehicles were … in their design and manufacturing, not defective" to mean that *the components that comprise* the Relevant Vehicles were, in their design and manufacturing, not defective.

The Future Vehicle Representations and the Future DPF System Representations

234 It is convenient to address the Future Vehicle Representations and the Future DPF System Representations together. These representations were misleading having regard to the findings regarding the Core Defect and the Defect Consequences.

235 TMCA's remaining contention is that the Future Vehicle Representations and the Future DPF System Representations were made on reasonable grounds. TMCA concedes that the Future DPF System Representations were made without reasonable grounds "from December 2016", but submits that for some period of time during the investigation of the DPF issues, it had reasonable grounds for making the Future DPF System Representations so that they were not false, misleading, deceptive or liable to mislead the public.

236 These representations are properly characterised as representations with respect to future matters. In respect of representations that pertain to future matters, s 4 of the ACL is enlivened which, by virtue of s 4(1), dictates that such a representation is misleading unless the person has reasonable grounds upon which to make it and, by virtue of s 4(2) deems that the maker of the representation does not have reasonable grounds for making the representation, unless evidence is adduced to the contrary. The effect of the deeming provision in s 4(2) is to place an evidential burden on TMCA to point to evidence of reasonable grounds for the making of the impugned future representations: see *Australian Securities and Investments Commission v GetSwift* [2021] FCA 1384 (at [2144]–[2163] per Lee J), which concerned the analogous provision in the *Australian Securities and Investments Commission Act 2001* (Cth)).

237 In response to the allegation that TMCA lacked reasonable grounds for making the Future Vehicle Representations and Future DPF System Representations, TMCA pleads (see D2FASOC at [87]):

> … the fact that some owners of DPF Vehicles experienced some DPF Issues does not mean that TMCA did not have reasonable grounds for making the Admitted Future Vehicle Representations [and Future DPF System Representations] in circumstances where:
>
> (i) the DPF Issues were not safety related;

(ii) TMCA has reimbursed Dealers so that the repair of the DPF Issues are provided free of charge to Group Members;

(iii) TMCA has continued to investigate the DPF Issues and validate and implement enhancements to DPF Vehicles; and

(iv) TMCA has implemented the Customer Redress Scheme referred to in paragraph 82(b)(ii) above.

238 Further, in closing submissions, the following was advanced.

239 In respect of the Future DPF System Representations, reliance is placed on the fact that production of each type of Relevant Vehicle commenced in June and July 2015 and at that stage, TMCA received and started to sell vehicles which had been manufactured by TMC and Toyota Thailand: AF [2]. There was no reason, it is said, for TMCA to be aware of any difficulty with the DPF System, given it did not design or manufacture the DPF System or the Relevant Vehicles and, as Mr Nelson's evidence is said to demonstrate, very few vehicles initially presented to dealers with DPF issues. TMCA points to the fact that it immediately commenced an investigation into the issues, escalating the matter to TMC, as designer and manufacturer of the Relevant Vehicles, in circumstances where it was responsible for the costs of the various repairs, field fixes and countermeasures which were rolled out. In respect of the Future Vehicle Representations, TMCA once again deploys the reoccurring argument that defectiveness of the DPF System does not translate to a conclusion that the Relevant Vehicles were defective. TMCA accepts that from December 2016, when the first countermeasure was released, it no longer had reasonable grounds for making the Future DPF System Representations.

240 These submissions must be rejected when one considers the applicable legislative framework.

241 *First*, when analysed, nothing in TMCA's defence purports to identify any *reasonable grounds* that existed and were relied upon by TMCA at the time it made the future representations. Rather, what is put forward is a series of mitigating circumstances, which appear to suggest that even if the future representations were misleading, TMCA has sought to make right its wrongs. Those contentions have no legal relevance in relation to the question of whether TMCA had reasonable grounds for the representations it made with respect to future matters: cf *Sykes v Reserve Bank of Australia* (1998) 88 FCR 511 (at 513–514 per Heerey J, with whom Sundberg J agreed at 521); *GetSwift* (at [2158]–[2160] per Lee J).

242 *Secondly*, the matters relied upon by TMCA are insufficient to discharge its evidentiary burden. The findings of the referee indicate that inadequate investigations were carried out during the

"design, development and validation stages of the [Relevant] [V]ehicles' development": First Referee's Report (at [45]). TMCA has not brought forward any evidence explaining the steps (if any) that were taken, prior to the supply of the Relevant Vehicles to consumers, to ensure that there was a reasonable basis to represent to consumers, for example, that those vehicles would not be defective, and would be of good quality, reliable, durable and suitable for use in any driving environment. TMCA simply emphasises the steps taken in pursuit of a remedy for the Core Defect. Mr Nelson, being TMCA's only fact witness, frankly admitted that he had no relevant involvement in the marketing of the Relevant Vehicles: T78.13–14.

243 TMCA has failed to discharge its evidential burden under s 4(2) of the ACL. The future representations made by TMCA were made without reasonable grounds. For completeness, I note that this conclusion is put beyond doubt by the matters summarised in the applicants' closing submissions (at [203]–[224]).

D.3 The omissions case

244 In addition to the misrepresentations case, the applicants allege that TMCA engaged in misleading conduct because of its failure to disclose, or adequately disclose, the following matters to prospective purchasers or persons acquiring a Relevant Vehicle:

(1) the existence, nature and extent of the Core Defect in the Relevant Vehicles;

(2) the Defect Consequences;

(3) that the Core Defect had not been remedied; and

(4) from February 2016, TMCA knew of the Core Defect and its consequences.

245 This conduct is said to be misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the ACL and liable to mislead the public in contravention of s 33 of the ACL.

246 TMCA accepts that it did not disclose the Core Defect, the Defect Consequences, TMCA's knowledge of such, or that Relevant Vehicles had not been remedied, to the public at large. At the same time, TMCA appears to contend that so long as it was working to fix the problems plaguing the DPF System, and so long as it intended to fix such problems under warranty, it had no obligation to disclose those problems to prospective consumers.

247 The failure to disclose information may constitute misleading conduct, including where, viewed objectively, there is a reasonable expectation that certain facts would, if they exist, be

disclosed. As French CJ and Kiefel J explained in *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* [2010] HCA 31; (2010) 241 CLR 357 (at 369–370 [20]), "[t]he judgment which looks to a reasonable expectation of disclosure as an aid to characterising non-disclosure as misleading or deceptive is objective." Further, proof of the defendant's knowledge of the fact that ought to have been disclosed is not necessary to establish misleading or deceptive conduct by omission, but is nevertheless a relevant circumstance, including where disclosure would reasonably be expected of a fact if that fact were known to the relevant party: *Johnson Tiles Pty Ltd v Esso Australia Ltd* [2000] FCA 1572; (2000) 104 FCR 564 (at 591 [66] per French J, with whom Beaumont J agreed at 568 [1], and Finkelstein J agreed at 603 [99]). Thus, a failure to disclose may be misleading even where the failure to disclose was not deliberate.

248 In circumstances where TMCA had made continuing representations that the Relevant Vehicles contained a DPF System that was not (and would not be) defective, there existed a reasonable expectation that if the DPF System in the Relevant Vehicles was in fact defective, that matter would be disclosed. That expectation is even stronger in circumstances where TMCA *knew* the DPF System was defective. Similarly, in circumstances where TMCA had made a continuing representation that the Relevant Vehicles were suitable for use in any driving environment, there existed a reasonable expectation that if the Relevant Vehicles were not, in fact, suitable for all reasonably expected conditions of normal operation and use in the Australian market, that matter would be disclosed.

249 For completeness, I note that TMCA's efforts to fix the problems cannot affect my assessment of whether it was misleading not to disclose those problems to prospective purchasers before they acquired a Relevant Vehicle.

250 The omissions case succeeds.

D.4 Determining the misleading and deceptive conduct case on a common basis

251 TMCA submits that, much like its contention in respect of the acceptable quality case, it is not open to the Court to determine the misleading and deceptive conduct case on a common basis.

252 TMCA's core submission is that there is a need to distinguish between representations which are directed to the *public at large*, and representations which are directed to a *section of the public*. In the former case, it is said that the question is entirely objective, and it is not necessary to prove the conduct in question *in fact* misled or deceived anyone. In the latter case, however,

it is said that the only basis upon which any group member can recover damages is if they can demonstrate the misleading or deceptive conduct was *directed* to them and they relied on such conduct.

253 It is common ground that the question of reliance demands a subjective inquiry dependent on the individual group member. TMCA submits, however, that the subjective element in the second stage of the inquiry influences the first stage, meaning that in this case, the question of liability cannot be determined on a common basis.

254 In support of this contention, reliance is placed on the discussion of French CJ in *Campbell v Backoffice*. There, his Honour stated, in respect of s 42 of the *Fair Trading Act 1987* (NSW) (at 318–319 [24]–[26]) that:

> 24. The question whether conduct is misleading or deceptive or likely to mislead or deceive within the meaning of s 42 of the *Fair Trading Act* is logically anterior to the question whether a person has suffered loss or damage thereby for the purposes of s 68. The distinction between characterisation of the conduct and determination of the causation of the claimed loss said to result from it must be maintained. In so saying, it is necessary to acknowledge that there may be practical overlaps in the resolution of these logically distinct questions. The characterisation of conduct may involve assessment of its notional effects, judged by reference to its context. The same contextual factors may play a role in determining causation.
>
> …
>
> 26. This Court has drawn a practical distinction between the approach to characterisation of conduct as misleading or deceptive when the public is involved, on the one hand, and where the conduct occurs in dealings between individuals on the other. In the former case, the sufficiency of the connection between the conduct and the misleading or deception of prospective purchasers "is to be approached at a level of abstraction not present where the case is one involving an express untrue representation allegedly made only to identified individuals". Where the conduct is directed to members of a class in a general sense, then the characterisation enquiry is to be made with respect to a hypothetical individual "isolate[d] by some criterion" as a "representative member of that class". **In the case of an individual it is not necessary that he or she be reconstructed into a hypothetical, "ordinary" person. Characterisation may proceed by reference to the circumstances and context of the questioned conduct.** The state of knowledge of the person to whom the conduct is directed may be relevant, at least in so far as it relates to the content and circumstances of the conduct.
>
> (Footnotes omitted, emphasis added).

255 TMCA contends that in the current circumstances, the Court is concerned with conduct directed to identified individuals, meaning it is necessary to have regard to the surrounding facts and circumstances of the conduct in determining whether it was misleading or deceptive. For

example, it is said that if a particular group member received information from a dealer about the DPF System, that may affect whether TMCA's conduct towards that group member was misleading as a whole, not just whether the group member relied on the conduct.

256 It is said that this distinction is further evident in my reasoning in *Lloyd v Belconnen Lakeview Pty Ltd* [2019] FCA 2177; (2019) 377 ALR 234, where I stated (at 330–331 [378]–[380]):

> 378. It became apparent that at the commencement of the hearing there was a recognition by both parties that there were certain deficiencies in the Merck orders that had initially been proposed by consent. This is not an unexpected development in class actions as the intense preparation prior to the commencement of the initial trial and the hearing itself can lend clarity to identifying what, in truth, are the common, or largely common, contested issues. The parties recognised that this was such a case for at least two reasons.
>
> 379. **The *first* issue that arose has some importance. Despite advancing written submissions which tended to meet the misleading and deceptive conduct case at a level of generality as if it was being determined on behalf of all group members, the respondents in both cases accepted (indeed, at times, stressed) the prospect that the determination of a misleading and deceptive conduct case, or an unconscionability case, in relation to a representative applicant, will not be determinative of the case that may be made by an individual group member. They were correct to do so.**
>
> 380. **Individual group members in both proceedings may have a range of individual circumstances, which may be relevant to the circumstances of determining whether there has been contravention of a relevant statutory norm and, if so, whether casually related loss was suffered …**
>
> (Footnotes omitted, Emphasis added).

257 Relying on these authorities, TMCA submits that there would be no purpose served by the Court resolving whether the various Representations (or the omissions conduct) were misleading or deceptive on a generalised basis, in circumstances where it will later need to characterise the conduct and determine reliance upon it in respect of a particular group member.

258 I disagree.

259 The reason why such conduct can be characterised as misleading without reference to individual circumstances is because the pleaded conduct with which I am presently concerned was directed at a *class of persons*, rather than conduct directed to any identified individual: the representations were made in the course of TMCA's marketing of the Relevant Vehicles, not in dealings between TMCA and any particular group member. This is the critical point of difference to what the Chief Justice was saying in *Campbell v Backoffice* and what I was saying in *Belconnen*. The question of whether the impugned conduct was misleading is to be assessed by reference to its effect upon a hypothetical reasonable or ordinary member of the class of

persons to whom it was directed. It is not necessary to consider whether any *particular* group member was in fact misled. No further factual or legal enquiry is necessary in order to determine, on a common basis, the question of whether TMCA's conduct in making the DPF System Representations contravened ss 18, 29(1)(a) and (g), or 33 of the ACL.

260 It should be noted that TMCA has conceded that in making the DPF System Representations, it engaged in conduct that was in contravention of ss 18, 29(1)(a) and (g), and s 33 of the ACL, without the need to enquire into the individual circumstances of any particular group members: see [232]. It is passing strange that TMCA now submits, in respect of the pleaded Vehicle Representations, that it is necessary to enquire into the factual circumstances of each individual purchaser before the Court can characterise TMCA's pleaded conduct as contravening the statutory norm.

261 But what I have said about determining the pleaded contravening conduct on a common basis ought not to be misunderstood. To repeat, I am dealing with the appropriate characterisation and legal consequence of specified conduct directed to a class, not individuals. The finding I make as to this common issue will bind TMCA as a party (in accordance with ordinary principles of issue estoppel) and will also bind group members (but only because of an order I will make under s 33ZB of the Act creating a "statutory estoppel" in relation to those non-parties). The group members have the benefit of this finding, to the extent it is relevant in resolving their individual controversy with TMCA. Although on the facts it appears unlikely, as a matter of theory, the common conduct found to be misleading may be qualified by some circumstance bespoke to a group member which could conceivably bear upon whether, having regard to all the circumstances, what occurred could successfully result in a claim for statutory compensation for misleading and deceptive conduct. In theory, individual circumstances may not only bear upon questions of causation, but also upon whether specific conduct directed to an individual group member by TMCA pleaded in an individual case was, having regard to all the circumstances, appropriately characterised as being misleading.

262 But there is obvious utility in determining, on a common basis, the issue of whether TMCA engaged in misleading conduct, even if the questions of causation, reliance and damage in relation to this aspect of the case are required to be dealt with on an individual basis. Needless to say, the answers to common questions generally will likely obviate the need for group members to prove that TMCA engaged in misleading conduct for two reasons: *first*, group members will also have the benefit of the common findings in relation to the acceptable quality

case; and *secondly*, the general ignorance of the Core Defect and the Defect Consequences suggests all group members were in a relevantly identical position (unless for some reason, not thus far revealed, TMCA can point to something about their individual case which suggests an individual group member was not mislead and causation of loss is not established).

E LOSS AND DAMAGE

263 With the residuum of the liability case determined, it is necessary to turn to the question of loss and damage. In this section, I will deal with the claims of group members generally, before considering the individual claim of DCS in Section F.

E.1 Overview of the damages claim of group members in issue at the initial trial

264 The applicants allege that group members have suffered loss and damage resulting from the Relevant Vehicles failing to comply with the statutory guarantee under s 54 of the ACL. The pleading seeks damages from TMCA for two kinds of loss under s 272 of the ACL, namely:

(1) under s 272(1)(a), damages for the reduction in value of each Relevant Vehicle resulting from the failure to comply with s 54 of the ACL; and

(2) under s 272(1)(b), other reasonably foreseeable loss or damage suffered because of the failure to comply with s 54 of the ACL, including excess taxes, excess financing costs, excess fuel costs and costs incurred in having the Relevant Vehicle serviced or repaired on account of the Core Defect.

265 Not all of these claims for relief fall to be wholly determined at the initial trial. Nor does the question of whether group members are entitled to damages caused by TMCA's misleading and deceptive conduct under s 236 of the ACL arise for determination. Instead, at the initial trial, the applicants seek the following relief on behalf of group members:

(1) 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 of the Relevant Vehicles resulting from the failure of the Relevant Vehicles to comply with the statutory guarantee (save for in respect of the 2020 Field Fix Group Members) (**reduction in value damages**); and

(2) an award of aggregate damages (whether in the form of a total aggregate amount or a specified formula applicable to each group member) for the excess GST that all group members paid in connexion with acquiring the Relevant Vehicles (**GST damages**).

266 The damages claim on behalf of group members raises a number of contested legal issues that affect both the question of whether the alleged categories of loss and damage have been suffered, and if so, the amount of such loss and damage. I will deal with the entitlement to reduction in value damages first, before turning to consider the claim for GST damages.

E.2 Reduction in value damages

267 The claim for damages against TMCA for the failure of the Relevant Vehicles to comply with the statutory guarantee under s 54 of the ACL is brought on behalf of group members under s 271(1). The kinds of damages that may be recovered in an action under s 271(1) are described by s 272. In particular, s 272(1)(a) provides for the recovery of reduction in value damages:

> **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 …

268 An "affected person" who may claim damages under s 272(1)(a) is defined by s 2(1) as including: (a) a consumer who acquires the goods; (b) a person who acquires the goods from the consumer (other than for the purpose of re-supply); or (c) a person who derives title to the goods through or under the consumer. All group members satisfy this definition in one way or another see [157]–[159]. Those who acquired their Relevant Vehicle from TMCA or a dealer fall within (a). Those who acquired their Relevant Vehicle second-hand in a private sale fall within (b).

269 The damages formula in s 272(1)(a) comprises three key steps:

(1) ascertaining *whether or not* the pleaded failure to comply with the statutory guarantee caused the value of the goods in question (here the Relevant Vehicles) to be reduced below the lower of the two prices mentioned in ss 272(1)(a)(i) and (ii) (**identifying any reduction in value**);

(2) if so, determining the *amount* by which the failure to comply with the statutory guarantee caused the value to be reduced below the lower of those prices (**quantifying the reduction in value**); and

(3) the practical step of calculating the reduction in value in respect of the goods found not to be of acceptable quality (**applying the reduction in value**).

270 Before turning to consider these issues, it is necessary to resolve some issues of construction.

E.2.1 *The proper construction of s 272(1)(a) of the ACL*

271 Four key questions of principle remain in dispute in relation to the construction of s 272(1)(a):

(1) how does one conceptualise "reduction in value";

(2) the meaning of "reduction in the value";

(3) the point in time by reference to which the reduction in value must be assessed; and

(4) whether information obtained after the time of supply can be taken into account.

272 I will consider each of these issues in turn.

Conceptualising "reduction in value"

273 It is convenient to commence by noting one point of clarification at a conceptual level.

274 The phrase "reduction in the value of the goods" entails an objective concept of value. It is not a subjective concept, such as the reduction in value to the individual consumer. The relevant question is what a hypothetical reasonable purchaser – or the cognate concept of what a willing (but not anxious) purchaser – would pay, assuming the purchaser was fully acquainted with the goods including the Core Defect and the Defect Consequences. This way of approaching "value" finds support in *Vautin*, where Derrington J (at 769–770 [301]) postulated the notion of "putative purchaser" or "notional purchaser", and asked what that person would have been prepared to pay assuming knowledge of the defect. Put another way, the question is what price would need to *have been offered* to sell the goods to the hypothetical reasonable consumer.

275 The question is not what the manufacturer or supplier would have been *prepared to sell* the goods for assuming awareness of the Core Defect by hypothetical reasonable purchasers. Nor is it assessed by analysing what price willing but not anxious buyers and sellers would agree upon, which was the test in *HTW Valuers v Astonland Pty Ltd* [2002] HCA 54; (2004) 217 CLR 640 (at 661 [46] per Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ) in relation to valuing a shopping centre. Unlike a shopping centre, which is a single asset that exists in both the actual world and the hypothetical "but for" world, mass produced vehicles could theoretically be subject to different dynamics where there is a change in demand. For example, as Dr Rossi's analysis indicates, the volume of Relevant Vehicles sold in the "but for" world

would be significantly lower if the counterfactual exercise is approached on the basis of an assumption that TMCA can engage in profit maximising behaviour, such as by reducing its volume to maximise profit (that is, not manufacturing some of the vehicles). This was common ground between Dr Rossi and Mr Boedeker: see T320.26–35; 328.7–28; 336.1–10; 337.32–41; 339.30–340.24.

276 What the Court must do is assume that in the "but for" world, the Relevant Vehicles were manufactured and had to be supplied in Australia. Section 272(1)(a) calls for an assessment of "any reduction in the value of the goods". The term "the goods" refers to the goods that were supplied. Here, "the goods" that were supplied are 264,170 Relevant Vehicles. Accordingly, the question in this case is what price would need to have been offered by TMCA in order to sell all 264,170 Relevant Vehicles, assuming market participants were aware of the Core Defect. At a conceptual level, this is the price point described by Mr Boedeker, namely the point at which the demand curve for Relevant Vehicles (assuming awareness of the Core Defect) intersects with the quantity actually sold, namely 264,170: T320.25–30; 332.25–27, 36–38; 334.13–15.

The meaning of "reduction in the value"

277 Then comes the more concrete question: how does one define the "reduction in value"? TMCA submits that the concept of reduction in value can only be looked at through the prism of market data. By contrast, the applicants rely on the expert reports of Mr Stockton and Mr Boedeker who, respectively, quantify a reduction in value by means of "repair cost" (that is, equating the reduction in value arising from the Core Defect with the cost of repairing that defect) and by the change in consumers' "willingness to pay" (**WTP**). TMCA raises a number of criticisms in respect of the applicants' approach.

278 It is convenient to set out those criticisms first.

279 *First*, TMCA submits that Mr Stockton's analysis is circular and involves reading "reduction in value" as, at all times, equivalent to the cost of repair. As a matter of statutory interpretation, it is said, such a reading is not available given various parts of the ACL, including s 271(6), expressly refer to the concept of repairing goods and had the legislature intended to equate "reduction in value" with "repair costs", s 272 could easily have provided as much.

280 Moreover, it is said that Mr Stockton's method of using the average cost of DPF repairs as a "proxy" for the reduction in value of the Relevant Vehicles at the time of purchase must be rejected in the light of Dr Pleatsikas' evidence, namely that:

(1) Mr Stockton's approach of using repair costs as a proxy is erroneous where there is a much firmer base for an economic analysis of loss: that is, readily available market sales data: Stockton and Pleatsikas Joint Report (at [33]);

(2) the amount spent to repair a defect may be higher than the loss in value from the defect or lower and there is no foundation in logic or economics to determine the comparison simply by reference to the defect and the consequence, as opposed to market value: Stockton and Pleatsikas Joint Report (at [22]–[23]). Dr Pleatsikas said during the concurrent evidence (at T216.11–17) that:

> [a]s noted in my discussion of warranty repair cost, there is no necessary economic link between the cost of the [2020 Field Fix] and effects on vehicle value, and Mr Stockton has not provided any such link. Instead, Mr Stockton's repair cost model which uses both a hypothetical vehicle and a hypothetical and non-realistic transaction, appears to rest on noneconomic assumptions that are not founded on economic theory, and have no discernible link to reduction in market price, if any, for the affected vehicles.

(3) it is untenable to treat the amount that a manufacturer is prepared to pay under warranty as a proxy for reduction in value, given that the amount that manufacturers may be willing to pay does not necessarily relate to the specific effect that such repairs may have on the marketplace values of the particular vehicles: Stockton and Pleatsikas Joint Report (at [23]); and

(4) reliance on Mr Stockton's analysis also suffers from the logical problem that TMCA paid the cost of repairs, and if recovery on the basis of repair costs were awarded by the Court, group members who have had repairs undertaken will have received the full benefit of the value of those repairs and will be paid the cost of those repairs, with the issue compounded if a group member sold the vehicle, as the new owner would also be a group member: Stockton and Pleatsikas Joint Report (at [24]).

281 In support of this position, TMCA draws an analogy with contractual damages. It is said that in cases of contractual damages, courts may be asked to consider whether to award compensation on two alternative bases: that the damage caused be rectified, or that the change in market value by reason of the damage be paid. TMCA points to the House of Lords decision in *Ruxley Electronics and Construction Ltd v Forsyth* [1996] AC 344, where the contract specified that the pool should have a diving area seven feet and six inches deep. Upon

completion, the pool was suitable for diving, but the diving area was only six feet deep. There was evidence at the trial that the shortfall in depth had not decreased the value of the pool, and that the pool was safe and suitable for diving. The only method of achieving a pool of the required depth would have been to demolish the existing pool and reconstruct a new one at a cost of £21,560. The House of Lords found that such a cost would have been wholly disproportionate to the disadvantage of having a pool of a depth of only six foot and held that the cost of reconstruction was not recoverable.

282 It is said that while none of the authorities concerning contractual damages apply directly to the present case, there is a relevant analogy between these proceedings and *Ruxley*. Here, there was a defect in the DPF System in the Relevant Vehicles, but there is no suggestion that the Relevant Vehicles were other than perfectly safe to drive. It is said that the secondary market evidence establishes that there was no reduction in the value of the Relevant Vehicles as at the date of purchase and the cost of repair or rectification of the Relevant Vehicles is borne by TMCA and not the consumer (meaning group members will not bear any cost in connexion with the rectification of the defect). That is, the case is analogous to the facts at trial in *Ruxley*, where the Court was not satisfied that the plaintiff would use any damages award to rectify the pool. It is said that there is no basis upon which the Court can assess how the costs incurred by TMCA in order to repair the defects compare to the objective amount that is necessary to fix any individual defect.

283 *Secondly*, in respect of Mr Boedeker's analysis, it is said that using WTP as a proxy for reduction in value is erroneous as it accounts only for the demand side, not the supply side.

284 TMCA relies on Mr Rossi's criticism that, as a matter of economics, the only meaningful and logically defensible measure of value is by a market price, defined through the computation of both supply and demand, that is, WTP is only half of the equation: Rossi Report (at [12], [49]–[55]); T343.15–21, 41–46; T380.5. As Dr Rossi remarked in Dube JP and Rossi P, *Handbook of the Economics of Marketing* (North Holland, 2019):

> It should be emphasized that conjoint analysis can only estimate demand. Conjoint survey data, alone, cannot be used to compute market equilibrium outcomes such as market prices or equilibrium product positioning in characteristics space. Clearly, supply assumptions and cost information must be added to conjoint data in order to compute equilibrium quantities. Conjoint practitioners have chosen the unfortunate term "market simulation" to describe demand predictions based on conjoint analyses. These practices are not simulations of any market outcome and must be understood for their limitations as we discuss below.

285 It is said that while Mr Boedeker accepts this principle in parts of his evidence, he has refused to adjust the supply side in his "but for" world; instead proceeding on the basis that TMCA and Toyota dealers would have been forced to sell the same number of Relevant Vehicles, albeit at prices reduced in the range of 20 to 40 per cent: T344.30–345.10. That is erroneous, it is said, as all economic forces are still functioning unhindered save that the defect is disclosed. As Dr Rossi said during his characteristically forthright style cross-examination (at T329.18–23):

> It's not a dispute between Mr Boedeker and myself. It's a dispute between Mr Boedeker and the profession of economics. So what does Mr Boedeker want to do? Mr Boedeker wants to ignore supply altogether, any of the factors that influence the supply of products, and simply compute the vertical difference between the blue demand curve and the yellow, which is the reduced demand when the defect has become open and known in the marketplace …

286 Further, TMCA relies upon the reasoning in *Dwyer*, where Stevenson J concluded (at [240]–[244]) that a survey that only measures WTP is not a proxy for market value under s 272(1)(a) of the ACL:

> *Only measured willingness to pay*
>
> 240. The first is that, as Professor Baddeley accepted, the Discrete Choice Experiments were not directed to ascertaining the market value of the vehicles in question. Rather they were directed to ascertaining a purchaser's willingness to pay for the vehicle; or the "value to the consumer" of the vehicle. Thus, the Discrete Choice Experiments were directed only to the demand side of a transaction that, in the real world, would have a supply side as well.
>
> 241. It is no doubt true that in the real world there would not be a market for vehicles known to have a defective airbag, not least because no rational and responsible vehicle manufacturer would offer such vehicles for sale.
>
> 242. But it does not follow that, assuming it can be ascertained, a purchaser's willingness to pay for a vehicle can be a proxy for the vehicle's market value.
>
> 243. The test posited by s 272 of the ACL is expressed in terms of "price payable" or "average retail price" and thus in terms of value in a market of buyers and sellers.
>
> 244. The Discrete Choice Experiments were not directed towards this question and say nothing about market value.

287 TMCA point to the fact that many American courts have also taken the same view and their pronouncements about the lack of utility of WTP in assessing damages are instructive. For example, in a recent US proceeding (*MacDougall v American Honda Motor Co., Inc*, (CD Cal, SACV 17-1079 JGB (DFMx), 11 September 2020)), the US District Court of California explained the vice of WTP "in the simplest terms" when "striking out" the expert report of Mr Boedeker in that proceeding (at 4):

> Put in the simplest terms, measuring damages solely through the lens of a consumer's WTP overestimates a consumer's damages because even if a consumer has a reduced WTP for a defect or undesirable product, the consumer does not suffer any loss if their reduced WTP remains greater than the actual cost of the product. The integration of accurate and realistic supply-side considerations – such as the actual price of a product – therefore plays a critical role in producing an accurate measure of damages in a choice-based conjoint analysis.

288 Other US courts have rejected the evidence of Mr Boedeker on this basis: see *In Re: General Motors Llc Ignition Switch Litigation*, 407 F Supp 3d 212 (SDNY, 2019); *Re General Motors Llc Ignition Switch Litigation*, 427 F Supp 3d 374 (SDNY, 2019); *In Re: Emerson Electric Co. Wet/Dry Vac Marketing and Sales Litigation*, (ED Mo ED, 4:12MD2382 HEA, 28 October 2021).

289 In short, it is said that WTP addresses the demand side but does not address the supply side; that is, the willingness of the supplier to sell at a particular price. It is self-evident, in TMCA's submission, that a consumer will always be willing to pay less, but whether a supplier will supply at that price is another matter. Hence, a market price cannot be derived from WTP alone.

290 There is always a danger in overcomplicating statutory concepts, particularly when expert evidence is involved. After all, it must be remembered that the concept of "reduction in value" is a statutory one; expert evidence, while helpful, cannot bear upon the proper construction of s 272(1)(a). Similarly, there is a danger in shoehorning s 272(1)(a) into a definitional corner with only one precise means of calculation. I accept that in some cases (perhaps the majority), the concept of reduction in value may best be viewed through the prism of market value, but here, where there are issues with ascertaining market value, it cannot be said that one should push on, as it were, and apply a calculation known to be incomplete. TMCA contends that s 272(1)(a) does not provide for the use of estimates or proxies. But nothing in the text of s 272(1)(a) excludes proxies or estimates. Nor was the High Court averse to inexact calculations or estimates of damages based on true value in *HTW Valuers* (at 663 [50], 664–665 [56]–[57] per Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ).

291 Indeed, the *first* of TMA's contentions that "repair cost" is not an appropriate methodology for assessing reduction in value damages under s 272(1)(a), is difficult to reconcile with the reasoning of Derrington J in *Vautin*. In that case, accepting imperfections in calculation (and no expert evidence having been adduced), his Honour treated the repair cost of the good (a vessel) as the *prima facie* amount of the reduction in value. His Honour stated (at 769–770 [300]–[302]):

> 300. As at the date the vessel was delivered it was newly constructed and it can be accepted that it was worth its purchase price of $4,233,801.03. The contrary was not suggested by any party and the contract to acquire it appears to have been an arm's length transaction. As will be discussed below, the value of these types of vessels depreciates rapidly over time and a determination of its value as at the date of trial needs to take into account that decline in value. However, such questions of depreciation are not relevant to its value when it was brand new. That being so a relatively rough calculation can be made as to the value of the vessel as at the date of supply on the assumption that the putative purchaser would have been aware of the existence of the defects in the vessel as well as the cost of remedying them. On the basis that the total cost of putting Revive into the condition of a Category A vessel would be $2,995,505.70 (as is discussed below), *prima facie*, its value as at the date of supply was no more than the purchase price less that amount or approximately $1,238,295.33.
>
> …
>
> 302. Overall, and accepting that a broad-brush approach is necessary in the assessment of damages, it is not appropriate for the Court to hazard a guess as to the valuation figure of Revive at the date of sale. That is a matter on which the Court requires expert evidence and none was adduced at trial. The best that can be done on the evidence which was adduced is to conclude that, at the date of the supply, Revive's value was, at the most, the purchase price less the cost of undertaking the necessary repairs to render it fit as a Category A vessel or $1,238,295.33. The amount of the diminution in value of the vessel is equal to the cost of repairs at $2,995,505.70.

292 Further, TMCA's reliance on *Ruxley* is misplaced. *Ruxley* was a case where the House of Lords found it would be unreasonable to award the plaintiff its rectification costs in circumstances where the diminution in value resulting from the failure to build the pool to the correct depth was nil. The case does not stand for the proposition that repair cost cannot be used to calculate reduction in value resulting from a defect when the amount the hypothetical reasonable purchaser would pay is otherwise unknown. Whether or not it is appropriate to do so is a question of fact.

293 As to the *second* criticism relating to the use of WTP to measure reduction in value, it is again necessary to emphasise that Dr Rossi's views as an economist cannot bear upon the proper construction of s 272(1)(a). Nor should I be swayed by the approach taken by US Courts to approaching the legal analysis relevant to the application of an Australian statutory provision: cf *Eastern Express Pty Limited v General Newspapers Pty Limited* (1992) 35 FCR 43 (at 71–72 per Lockhart and Gummow JJ); *Boral Besser Masonry Limited v Australian Competition and Consumer Commission* [2003] HCA 5; (2004) 215 CLR 374 (at 464 [278] per McHugh J). In any event, the US courts do not speak with one voice on whether WTP is an appropriate measure of damages. There are two competing lines of authority, with one supporting the use of WTP, and the other rejecting it: see *Fisher-Price Rock 'N Play Sleeper Marketing, Sales*

Practices and Products Liability Litigation, F Supp 3d (WDNY, 2021) (at 6–7). The conclusion reached in that case at a preliminary stage was as follows (at 7):

> What these two lines of cases indicate is that there is a legitimate difference of opinion, both among judges and experts, about the significance of supply side information in calculating loss of value. Mr. Weir's methodology is not wrong or "fake"—it is simply different in a principled way from Dr. Rossi's analysis …

294 The question for the Court in this proceeding is whether, as a matter of legal principle, it is appropriate to focus on the WTP of the hypothetical reasonable consumer when assessing reduction in value loss for the purposes of s 272(1)(a) of the ACL.

295 The criticism that a consumer still recovers damages notwithstanding that the level of their reduced individual WTP 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 WTP was less than the purchase price. In this regard, Mr Boedeker calculated the reduced WTP for the *marginal* consumer, which approximates the price decrease that would have been required in order for TMCA 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 Core Defect.

296 In making these comments, I accept what was said by Stephenson J in *Dwyer* (at [242]). But it is important not to conflate reduction in value under s 272(1)(a) with a "market value" that assumes a market equilibrium (that is, one that takes into account both supply and demand forces). As noted above, the correct approach is to ask at what price TMCA would need to have sold the vehicles in order to sell the same volume with the defect disclosed. This would be the relevant "market value". That is not to say there are not real issues with Mr Boedeker's survey, to which I will come, but I do not think his method of examination is meaningless when looking to the statutory concept of reduction in value – it is a helpful indicator.

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 WTP are useful indicators in ascertaining any reduction in value.

The point in time by reference to which reduction in value damages must be assessed

298 It is common ground that the damages formula in s 272(1)(a) does not expressly identify the point in time by reference to which the reduction in value of the goods is to be assessed. It is a matter of construction as to what is implied by the provision.

299 The relevant positions of the parties are as follows:

(1) the *applicants* contend that the reduction in value must be assessed by reference to the time at which the Relevant Vehicle was supplied without reference to *events* which occurred subsequently, but that subsequent *information* which bears on the assessment of the value of the goods at the time of supply can be taken into account; and

(2) *TMCA* contends that the reduction in value must be assessed by reference to the date on which the loss crystallises, including by reference to the condition of the goods at the time of trial, or events that have occurred since the acquisition of the Relevant Vehicle. The kinds of events that TMCA asserts should be taken into account include the existence of the 2020 Field Fix, whether and when the Defect Consequences manifested in a Relevant Vehicle after purchase and whether group members sold their vehicles (and the prices achieved for such sales).

300 I have reached the conclusion that the applicants' construction is to be preferred. In demonstrating why this is the case, it is convenient first to set out the position of TMCA.

301 TMCA submits that there is no hard and fast rule about the date at which the reduction in value is to be assessed. Rather, the questions for the Court, in any s 272 case, are:

(1) whether there has been any reduction in the value of the goods;

(2) whether any part of that reduction in value resulted from the failure to comply with the statutory guarantee; and

(3) whether that reduction in value takes the value of the goods below the particular price benchmarks referred to in s 272(1)(a).

302 It is common ground that the price benchmarks can only be assessed at the time of supply. However, TMCA contends that the first two enquiries are not so limited, and the Court is to determine the market value of the Relevant Vehicles either at the date of supply and purchase, or, possibly, at a later date, depending upon the time that the loss of value said to arise crystallises. This arises, it is said, from the following aspects of the statutory text of s 272(1)(a):

(1) the opening words of subs 272(1)(a) – "any reduction" – unlike the later parts of the subsection, the reduction in value is not linked to any particular time period;

(2) in order to recover under s 272, the affected person must suffer a reduction in the value of the goods "resulting from the failure to comply with the guarantee" – this 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 the circumstances of the affected person;

(3) while the price concepts in ss 272(1)(a)(i) and (ii) are anchored to the time of sale, the concept of "value of the goods, resulting from the failure to comply" is not; and

(4) section 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 – this emphasises the fact that *loss or damage* from reduction in value of the goods is the key focus of s 272(1)(a).

303 In this respect, TMCA relies on the reasoning of Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ in *HTW Valuers*, where their Honours said (at 666–668 [63]–[65]):

> In *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd*, a majority of the House of Lords held that ''there can be circumstances in which it is proper to require a defendant only to bring into account the actual proceeds of the asset provided that he has acted reasonably in retaining it''. And Lord Steyn, who reached the same result, pointed out **that the fundamental rule was that the plaintiff should be compensated**; that **the rule which turns on an assessment of value is only a means of giving effect to the overriding compensatory rule**; and that the valuation of assets as at the date of the transaction is ''simply a second order rule applicable only where the valuation method is employed''. He went on:
>
> > **''If that method is inapposite, the court is entitled simply to assess the loss flowing directly from the transaction without any reference to the date of transaction or indeed any particular date. Such a course will be appropriate whenever the overriding compensatory rule requires it.''**
>
> …
>
> There is certainly no reason why an approach of that kind is not open under s 82 of the Act. **The deduction of true value at the acquisition date from the price paid is no more than a guide to the assessment of damages under s 82**. Section 82 does not in terms refer to that method, and the width of s 82 permits other approaches to the assessment of damages so long as they work no injustice. The alternative approach advocated by the plaintiff has particular appropriateness in the present circumstances. That is because a primary reason for the common adoption, in assessing damages in deceit, of the test of comparing the price paid for an asset with its true value when acquired is the desirability of separating out losses resulting from extraneous factors in the later history of the asset.
>
> (Citation omitted, emphasis added).

304 TMCA proffers the following example. Consumer A and Consumer B purchase mobile phones on the same day for $10. The torch built into the mobile phone is defective and does not work. The next day, the market becomes aware the torch light does not work and the market for those phones changes such that the market price is now $8. The two purchasers take different courses:

(1) the torch light is important to Consumer A, who immediately sells the phone for $8; and

(2) Consumer B does not care about the torch in his phone and is indifferent to the torch being defective. Consumer B holds onto the phone for one year and then wishes to sell it, but during that year, the price of the phone has surged to $11, by reason of its rarity.

305 According to TMCA, on the date of purchase analysis, under s 272, Consumer A is entitled to recover the $2 loss in value from the supplier, and Consumer B is entitled to sell the phone for $1 profit and then claim $2 compensation from the supplier by reason of the apparent loss in value at the date of purchase. TMCA submits that it cannot be said that Consumer B has suffered any loss from the reduction in value of the phone at that date because no loss had crystallised.

306 In this respect, reliance is again placed on the *dictum* of Stevenson J in *Dwyer*. There, his Honour was addressing a case where cars had been sold with defective Takata airbags, but the airbags had later been replaced with non-Takata airbags. In the light of the replacement, his Honour rejected the suggestion that the purchasers had suffered any loss in value if there was a failure to comply with the s 54 of the ACL. His Honour said (at [192]–[194]):

> 192. The plaintiff's case concerning "reduction in the value" directs attention only to events at the time that the plaintiff purchased the vehicle.
>
> 193. But the question for the purpose of s 272 of the ACL is what damage the plaintiff has now suffered "for", that is, as a result of or by reason of, any reduction in the value of the vehicle below the purchase price "resulting from" any failure by VW to comply with the s 54 guarantee.
>
> 194. The question is, what effect has any such failure had on the plaintiff's financial position?

307 His Honour went on to say (at [205]):

> It is not to the point only to enquire what the "true value" of the plaintiff's vehicle was at the date of purchase and thus whether that "true value" was less than the purchase price. What matters is the plaintiff's position now that the airbag has been replaced. The effect of such replacement is that such defect, as may hitherto have affected the vehicle's value, has been removed.

308 For these reasons, TMCA submits the appropriate time to assess reduction in value damages under s 272 is the time at which any losses crystallised for any particular group member. It notes that the date of resale or trade-in might be one such event; the date when a purchaser who immediately suffered one of the Defect Consequences returned the vehicle to the dealer may be another. For individuals who continue to hold a Relevant Vehicle, it is said that the date of trial may be the only practical date at which to assess any such loss. Indeed, ascertaining the appropriate date of valuation is a matter which must ultimately depend on what is necessary in order to assess the damage suffered by a particular purchaser arising from a reduction in value.

309 This point of contest is ultimately one to be resolved by principles of statutory construction. To my mind, there are at least six reasons which support the proposition that reduction in value is to be assessed by reference to the time of acquisition.

310 *First*, the text of s 272(1)(a) indicates a legislative intention that the assessment is to be made by reference to the time of acquisition. The requirement for a reduction in value below the lower of the prices mentioned in 272(1)(a)(i) and (ii) calls for a comparison between one of those prices – which are necessarily "at the time of supply" – and the value of the goods taking into account the relevant non-compliance with the statutory guarantee. It is logical to expect that Parliament intended this comparison to be an "apples with apples" comparison such that both the prices and the "real value" of the goods are to be assessed by reference to the same point in time, namely the time of acquisition. To the extent that TMCA asserts that the chapeau in s 272(1)(a) is not linked to any particular time period, this should be rejected. Subclause (a) is a composite provision that combines the chapeau with its two comparator prices. There is no indication in the text that the clause should not be read as a whole, or that the chapeau should be decoupled from the point of supply inherent in the two comparator prices: see, similarly *Dait v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 25 (at [31] per Jagot, Bromwich and Lee JJ).

311 *Secondly*, by directing attention to the reduction in value resulting from the failure to comply with the guarantee below the purchase price or average retail price at the time of supply, s 272(1)(a) reflects a legislative intention to compensate the consumer for having purchased the goods for more than they were worth. Put another way, s 272(1)(a) compensates the overpayment made by the consumer at the time of acquisition. This too is consistent with an intention to assess value by reference to the time of acquisition, because otherwise, the value assessment could be infected by a range of post-acquisition circumstances that may have

caused the value to increase or decrease, which could distort the assessment of loss. The context provided by s 272(1)(b) also supports this construction: it provides for recovery of "reasonably foreseeable" loss or damage, suggesting the focus is on the time of supply.

312 TMCA's suggestion that the words "resulting from the failure to comply with the guarantee" indicate that *actual* loss is required, and that assessing loss at the time of acquisition would be merely hypothetical, goes nowhere. There is no dispute that s 272(1)(a) requires *actual* loss, but loss assessed at the time of acquisition is not merely hypothetical. By paying more than a Relevant Vehicle is worth, in circumstances where a Relevant Vehicle was not of acceptable quality, the consumer suffers immediate loss.

313 *Thirdly*, this construction means that s 272(1)(a) can be read harmoniously with s 271(6), which provides that if the manufacturer remedies the non-compliance by repairing or replacing the good within a reasonable time after having been required by an affected person to do so in accordance with an express warranty, the affected person cannot commence an action for reduction in value damages under s 272(1)(a). The logical scheme is as follows: affected persons can bring a claim for damages under s 271(1) and seek damages of the kind described in s 272 if the goods fail to comply with the guarantee in s 54; any reduction in value damages resulting from the non-compliance under s 272(1)(a) is calculated by reference to the time of acquisition without regard to any subsequent repair that remedied the non-compliance; however, if the manufacturer provided a repair that remedied the non-compliance *within a reasonable time* after being required to do so under an express warranty, no reduction in value damages can be recovered due to s 271(6).

314 To the extent that TMCA asserts that its construction is supported by s 272(3), which provides that s 272(1)(b) does not apply to loss or damage suffered through a reduction in value of the goods, this submission should be rejected. The text of s 272(3) says nothing about timing, and in any event, it is a "for the avoidance of doubt" provision: Explanatory Memorandum, *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010* (at [7.124]). It ensures that a consumer cannot avoid the effect of s 271(6) by seeking to recover reduction in value loss as a consequential loss.

315 *Fourthly*, two decisions of this Court support the construction contended for by the applicants, namely *Capic* and *Vautin*.

316 In *Capic*, Perram J (at 433 [880]–[882]) rejected valuation evidence that assessed the current market value of Ms Capic's vehicle. His Honour said that such evidence answered the wrong question for the purposes of s 272(1)(a), whereas the correct question was what the vehicle was worth on the date it was acquired: see 433–434 [880]–[884], 435 [890]. Events that occurred after the date of acquisition – such as the risks inherent in the defect coming to pass, or the fact that the manufacturer had repaired the problem – were irrelevant, because "neither bears upon the risk of failure which existed at the date of the acquisition": see 434 [884].

317 In *Vautin*, damages were claimed against the supplier and the manufacturer of a recreational fishing vessel in circumstances where there had been a failure to comply with the guarantees under ss 54, 55 and 59 of the ACL. Derrington J held that the applicant was entitled to reject the vessel under s 259(3)(a) and receive a refund of the purchase price from the supplier: see 769 [297]. In *obiter* (at 769 [299]), his Honour considered whether the applicant would have been entitled to reduction in value damages from the supplier under s 259(3)(b) of the ACL had his right to reject the vessel been lost. Section 259(3)(b) is similar to s 272(1)(a). It provides that:

> **259 Action against suppliers of goods**
>
> …
>
> (3) If the failure to comply with the guarantee cannot be remedied or is a major failure, the consumer may:
>
> …
>
> (b) by action against the supplier, recover compensation for any reduction in the value of the goods below the price paid or payable by the consumer for the goods …

318 When construing s 259(3)(b), Derrington J observed (at 767 [292]) that the relevant reduction in value – although not made clear in the section – is that "which is attributed to the failure of the goods to comply with the guarantee". In that context, his Honour found (at 767 [292]) that "the difference is measured *as at the date of supply* which is the relevant date to consider when ascertaining whether there was a failure to comply with the guarantee" (emphasis added). Accordingly, his Honour assessed the reduction in value as at the date of acquisition: see 769–770 [300]–[302]. Derrington J also took the same approach when assessing what the reduction in value damages payable by the manufacturer would have been under s 272(1)(a): see 779 [340].

319 TMCA submits that these decisions are either distinguishable or should not be followed. At a high level of generality, it is simply said that their Honours' reasons were *obiter* and/or did not contain any detailed analysis of the question of timing to assess damages under s 272. I disagree. Not only does the reasoning in *Capic* and *Vautin* align with a proper construction of s 272 (and for which, as is explained above, reasons are provided), these cases should be followed as a matter of comity. This is particularly so with questions of statutory construction: see *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v FAK19* [2021] FCAFC 153 (at [14] per Allsop CJ); *BVT20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 222 (at [62] per Allsop CJ, Moshinsky and O'Callaghan JJ).

320 *Fifthly*, to the extent TMCA relies on *HTW Valuers* and *Dwyer* for the proposition that the Court must determine the "market value" of the Relevant Vehicles as at the time any loss crystallised, this reliance is misplaced. Quite apart from the fact that focusing on the "market value" fails to answer the right question, *HTW Valuers* concerned s 82 of the TPA, which differs substantially from s 272(1)(a). Specifically, s 82 entitled recovery for loss or damage "suffered by" contravening conduct of another person without referring to a method of damages assessment. By contrast, s 272(1)(a) contains an express damages formula, namely the difference between the true value of the goods and the relevant price at the time of supply.

321 Further, in any event, TMCA's argument is inconsistent with *HTW Valuers*. The High Court in that case still sought to assess loss as the difference between the price paid and the *true* value at the time of acquisition, notwithstanding that it rejected assessing loss as the difference between the price paid and the *market* value at that time: see 660–661 [44]–[46]. It rejected reliance on *market* value at the time of acquisition, because the market value was infected by the imperfect knowledge of the market and hence was not a true value: see 661 [45]. There was also no difficulty in that case in assessing damages by reference to the decline in value closer to trial when that decline in value was inherent in the asset and not due to extraneous factors: see 667–668 [65]. It was therefore indicative of the true value at the time of acquisition.

322 This also highlights the problem with the hypothetical example about the mobile phone posed by TMCA, which conflates *market* value with *true* value, and impermissibly allows extraneous subsequent events to affect the analysis. While the subsequent $2 fall in market price may provide evidence of the reduction in value – if it accurately reflects the true value of the mobile phone at the time of purchase – it is not the reason why Consumer A can recover damages.

Consumer A is entitled to reduction in value damages because he overpaid for the mobile phone to begin with, not because the market value later fell on account of the defect. Likewise, the fact that the market price appreciated by $1 after Consumer B's purchase on account of the rarity of the mobile phone does not gainsay the loss suffered by having overpaid for the mobile phone in the first place. Had that loss not been suffered – for example, had Consumer B paid $8 instead of $10 – Consumer B's profit would have been greater. This simply reflects the fact that, when assessed objectively from the perspective of the hypothetical reasonable consumer, there was an overpayment at the point of purchase, and therefore a reduction in value. The reduction in value results regardless of whether an individual like Consumer B is indifferent to the issue, because it depends on the hypothetical reasonable consumer, not the idiosyncratic individual.

323 As to the *obiter* analysis of Stevenson J in *Dwyer* (at [174]–[175]), his Honour's comments regarding the potential application of s 272(1)(a) were framed by particular reference to two matters: (1) his Honour's identification of the relevant question as being "what effect has any such failure had on the plaintiff's financial position?" (at [194]); and (2) his Honour's finding that this question must be answered having regard to events that have happened since the purchase of the vehicle, such as the provision of a repair and the fact that no risks of the defect had come to pass: see [190]–[191], [197], [200], [203]–[204]. This should not be taken as suggesting that these are generally applicable principles to be applied in all cases involving s 272(1)(a). Such framing of the issues in *Dwyer* reflected the particular factual circumstances of that case and the way in which the plaintiff sought to put the claim for reduction in value damages.

324 Indeed, as appears from [177]–[187] of his Honour's reasons, the plaintiff advanced a case on loss and damage that was not confined to the statutory measure in s 272(1)(a), but sought to invoke broader notions of "loss" and "damage", including specifically by reference to events after the supply: see [186], [208]. As to the facts of the case, the claim for damages arose in circumstances where the relevant suggested risk with the airbags was one that would (on the plaintiff's case) arise at a distant point in the future, but before that point had been reached the airbags in the affected vehicles had been replaced at no cost. Stevenson J's comments regarding the need to consider how "risks evolved into certainties" (at [191], quoting *HTW Valuers* (at 661 [45] per Gleeson CJ, McHugh J, Gummow, Kirby and Heydon JJ)), must be read and understood in this context.

325 *Sixthly*, as was the case in *Capic*, the Core Defect in this proceeding had a propensity to cause certain adverse consequences that would manifest when the Relevant Vehicles were driven in line with the High Speed Driving Pattern. 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.

326 This construction of s 272(1)(a) has implications for the claim on behalf of group members. It means that reduction in value damages are to be assessed by reference to the date of acquisition having regard to the propensity for the Defect Consequences that was inherent in the Relevant Vehicles. It also means these damages do not vary from group member to group member based upon the extent to which the Defect Consequences actually manifested.

Whether information obtained after the time of supply can be taken into account

327 Related to the former point, the parties are in dispute as to whether evidence of matters which occur after the date of purchase can be used in order to assess value at the date of purchase. The applicants contend that while the Court may take into account later acquired information that bears upon the true value of Relevant Vehicles at the time of acquisition, it cannot take into account later events that do not bear upon that value at the time of acquisition. TMCA submits that the inquiry is not so limited and that the Court is entitled to consider whether the risk as at the date of purchase has evolved into certainties at subsequent dates.

328 When properly appreciated, there is a limited difference (if any) between these two positions. Of course, speaking at a level of generality, information as to how the defect played out and the risk evolved into certainties is relevant – it demonstrates what in fact the nature of the defect was. That approach is consistent with the reasoning in *Potts v Miller* (1940) 64 CLR 282 (at 299 per Dixon J) and *HTW Valuers* (at 658–659 [39]–[40], 661 [45]). Such an approach is also consistent with the fact that both Mr Boedeker and Mr Stockton take into account post-purchase events in their analysis (such as using repairs carried out after the purchase date). Further, if the market price of Relevant Vehicles was initially erroneous due to unawareness of the defect, but subsequently the market became fully informed and market prices fell, the subsequent market prices may provide information relevant to assessing the true value at the time of acquisition. This is similar to what occurred in *HTW Valuers*. By contrast, 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.

329 With these issues of construction resolved, it is necessary to move to the three stage analysis I identified above, namely: (1) identifying any reduction in value; (2) quantifying the reduction in value; and (3) applying the reduction in value.

E.2.2 *Identifying any reduction in value*

330 As would already be obvious, the applicants contend that the presence of the Core Defect in the Relevant Vehicles reduced the value of the vehicles at the time they were supplied and each consumer therefore received a vehicle that was less valuable than the one they bargained for, resulting in an overpayment.

331 As reflected in the introduction to these reasons, as a matter of common sense and intuition, that is a sound – indeed, irresistible – conclusion. The Core Defect makes the Relevant Vehicles inherently less reliable. It causes the vehicles to experience non-trivial adverse behaviours when exposed to a pattern of driving that is accepted to be part of the normal operation and use of the vehicle (namely, the High Speed Driving Pattern). Logically, such vehicles were worth less, at the time of supply, than they otherwise would have been worth if they were not defective. Put differently, given a choice between two otherwise identical vehicles, one having the defect and the other not having the defect, the only rational conclusion is that a consumer would be willing to pay less for the vehicle that has the defect than the vehicle that does not have the defect. Every expert witness that gave evidence at trial ultimately accepted this blindingly obvious proposition, one way or another.

332 For completeness, I should address TMCA's contentions with respect to secondary market data. It will be recalled that TMCA's response to the reduction in value case centres on the proposition that the best source of evidence for reduction in value is market transactions, which it asserts show that Relevant Vehicles held their value in the resale market better than comparator vehicles. It is said that this is inconsistent with any reduction in value resulting from the Core Defect and also means that had group members selected an alternative comparator vehicle instead, they would have been worse off.

333 I have dealt with the incompleteness of the market data relied upon by TMCA to indicate that the market was fully informed about the Core Defect and Defect Consequences above: see

[87]–[117]. While this is a determinative reason to place no weight on the market data, three further points should be made.

334 *First*, even if the market was informed of the Core Defect at some point during the Relevant Period, the fact that Relevant Vehicles had a better relative resale value than comparator vehicles is insufficient to indicate that there was no reduction in value. That is, while the data may indicate that Relevant Vehicles held their resale value better than comparator vehicles, it does not necessarily mean that the defect had no impact on value. Mr Stockton gave evidence, which I accept, that in assessing market data it is preferable to identify a "break point" between periods in which the market had differing levels of information about the defect before any conclusions can be drawn concerning reduction in value, so that resale performance due to differing levels of information can be compared: T213.29–31; First Stockton Report (at [264]). But in this case, there was no such break point in the data: T212.32–213.3; First Stockton Report (at [260(a)]). While Dr Pleatsikas asserted that "the real world is messy" and there is not always a single breakpoint (T310.29–32) he did not deny the importance to the analysis of identifying a break point and comparing periods with differing levels of information: T312.37–313.29.

335 Identifying a break point is preferable because there are many confounding factors in secondary market data that would need to be removed before the impact of a defect on market prices could be safely detected: T267.17–25. As Mr Stockton stated, there are "other factors that are going on in the market, and other trends that are clearly unrelated to the defect", which means little conclusion can be drawn from the mere fact that Relevant Vehicles had better relative resale performance: T270.33–36. In saying this, I should say that I accept, as Dr Pleatsikas opines, that "the market is messy", but where there is no indication of when the market became informed of the defect, and there are otherwise a multitude of variables at play, it simply cannot be said that the market data is probative evidence of there being no reduction in value.

336 *Secondly*, 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 Core Defect and its consequences had no impact on value.

337 *Thirdly*, when it comes to determining whether there was a reduction in value in Relevant Vehicles resulting from the Core Defect, the fact that Relevant 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.

E.2.3 *Quantifying the reduction in value*

338 The real issue in dispute concerns the *quantification* of the reduction in value. The applicants contend that the presence of the Core Defect reduced the value of each Relevant Vehicle at the time it was supplied (as new) by an amount equal to 25 per cent of the average retail price of the Relevant Vehicle. That is, the real value of each of the Relevant Vehicles was 75 per cent of the average retail price for that model at the time of purchase.

339 In embarking on the valuation task, it is important to keep in mind the remarks of Viscount Simon LC in *Gold Coast Selection Trust Limited v Humphrey (Inspector of Taxes)* [1948] AC 459 (at 473) that:

> Valuation is an art, not an exact science. Mathematical certainty is not demanded, nor indeed is it possible.

340 Nor would one expect there to be a single precise answer, in circumstances where the question is one of valuation about a hypothetical scenario at a point in the past: *River Bank Pty Ltd v Commonwealth of Australia* (1974) 4 ALR 651 (at 653 per Stephen J); *Verge v Devere Holdings Pty Ltd (No 4)* [2010] FCA 653 (at [221] per McKerracher J). See also *Tomonovic v One Australia Pty Ltd* [2015] NSWCA 11; (2015) 104 ACSR 596 (at 626 [188] per Bathurst CJ, with whom Barrett JA agreed at 630 [220], and Emmett JJA agreed at 632 [228]).

341 Ultimately, valuation is an exercise in estimation, informed by the Court's findings about the nature of the Core Defect and the Defect Consequences, and the Court's characterisation of the severity of those matters, judged through the eyes of the hypothetical reasonable purchaser.

342 Indeed, in *Commonwealth v Milledge* (1953) 90 CLR 157, Dixon CJ and Kitto J described valuation of property in these terms (at 162):

> It was indeed a jury question in the sense that it was to be decided, not by a strict

> adherence to precise arithmetical calculations, but by a commonsense endeavour, after consideration of all the material before the court, to fix a sum satisfactory to the mind of the court as representing the value contained in the land …

343 In *Milledge,* six valuers gave evidence, and the trial judge formed the view that, in Dixon CJ and Kitto J's words, all were "men of experience and integrity, and he drew no distinction amongst them in regard to soundness of judgment or otherwise". Faced with such evidence, the task of the trial judge was to make a "critical selection of the most helpful facts from the mass of information provided by the evidence, and applying correct principles in the light of the selected material". It was not to simply calculate the average of the six valuation opinions. Dixon CJ and Kitto J held that the trial judge was required to "form an estimate which really satisfied his Honour's mind as being the value of the property": see *Milledge* (at 160–162).

344 In much the same way, the expert evidence in this case provides the Court with evidentiary guidance as to the appropriate quantum of the reduction in value resulting from the Core Defect. At a broad level, expressing the reduction in value as a percentage of the average retail price of the Relevant Vehicles (with an eye to the relevant statutory exercise of ascertaining what the real value of the goods was at the time of purchase), the applicants' experts proffer the following views:

(1) Mr Cuthbert's valuation evidence indicates that the reduction in value resulting from the Core 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 Core Defect, as measured by the change in consumers' WTP 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 Core 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.

345 Given the extraordinary amount of time dedicated to the expert evidence both at the hearing and in the parties' submissions, in particular the criticisms levelled by TMCA towards the applicants' experts, it is necessary to address their evidence in some depth. I will do so by reference to the experts' fields of expertise.

The valuation evidence

346 The applicants' valuer, Mr Cuthbert, was asked to value the Relevant Prado at the time of supply on the following assumptions (at [78]):

(1) that the DPF System was not designed to function properly;

(2) that the DPF System was unable to regenerate effectively to prevent the DPF from becoming full in all reasonably expected conditions; and

(3) that if the Relevant Vehicle was exposed to the High Speed Driving Pattern, it would experience one or more of the emission of excessive white smoke with foul odour, excessive warning notices, unscheduled servicing and malfunctioning components.

347 In his first report, Mr Cuthbert opined that the defective DPF System in the Relevant Prado was a "serious mechanical problem" and that the Defect Consequences were "serious": First Cuthbert Report (at [101], [103]). In his opinion, these features materially reduced the value of the Relevant Prado at the date of supply, and significantly so in circumstances where there was no effective fix available at that time: First Cuthbert Report (at [103]–[104]). Other factors that reinforced this view were the fact that the vehicle was at risk of requiring additional servicing which would cause inconvenience, and the owner was at risk of embarrassment due to excessive white smoke: First Cuthbert Report (at [105]–[107]). Although it was put to Mr Cuthbert that the Core Defect did not prevent the vehicle from being driven from "point A to B" – an observation which he agreed was accurate in "[m]ost cases" – his view that the defect was "serious" was not challenged: T113.6–26. Indeed, Mr Cuthbert considered that a vehicle is not necessarily fit for purpose merely because it can "get people from A to B": T128.45–129.1.

348 In Mr Cuthbert's view, at the time of supply (in April 2016) the Relevant Prado was subject to a reduction in value of approximately 23.5 per cent to 27 per cent: First Cuthbert Report (at [124]). There were three key steps to Mr Cuthbert's reasoning:

(1) Mr Cuthbert considered the seriousness of the Core Defect having regard to his usual methodology for doing so, including looking to factors such as: (a) the impact of the Core Defect on the vehicle's performance and operation; (b) the need for the vehicle to have additional service or repairs; (c) the increased costs of owning the vehicle; (d) the reduced resale value of the vehicle; (e) the negative impact of the owner's experience

and enjoyment of the vehicle; and (f) the reduced desirability of the vehicle: First Cuthbert Report (at [75]–[85], [99]–[108]).

(2) Mr Cuthbert had regard to the salvage value of the vehicle (which would have been approximately 37–40 per cent less than the new vehicle price) as a floor price (that is, a price discount that was the absolute maximum): First Cuthbert Report (at [114]–[116]); T126.8–10.

(3) Mr Cuthbert had regard to the possibility that there may have existed purchasers who would have purchased the Relevant Prado in the hope that they could find someone to fix the Core Defect: First Cuthbert Report (at [123]). That involved a recognition that such a person would be prepared to pay more than the salvage price, but less than the market price for a non-defective vehicle. As to working out the right point between those two bookends, based on his experience, Mr Cuthbert considered that such a purchaser would have paid approximately 23.5 to 27 per cent less than the new vehicle price: First Cuthbert Report (at [124]).

349 Mr Cuthbert's view also did not change when the Court asked him to value the Relevant Prado at the time of supply using information available today. The fact that an effective repair would become available in July 2020 was insufficient to gainsay the reduction in value at the time of supply, when in the meantime there would be inconvenience caused by additional servicing and embarrassment caused by excessive white smoke.

350 The initial position of TMCA's valuer, Mr O'Mara, was antithetical to that of Mr Cuthbert. In his report, Mr O'Mara concluded there was no quantifiable reduction in value of the Relevant Prado resulting from the Core Defect at the time of supply: O'Mara Report (at [89]). This was predicated on an analysis of the resale history of five "comparable" Prados and supported by his view that the Core Defect and Defect Consequences were not that serious when regard was had to the American Society for Quality's definition of a "defect" and the GraysOnline Risk Calculator: O'Mara Report (at [68]–[69], [78]–[82]).

351 However, Mr O'Mara somewhat retreated from this position during his oral evidence: T180.8–12, 24–25; T181.10–18; T182.7–9; T182.42–183.4. As to the resale data, Mr O'Mara accepted that he could not draw any conclusions from the data concerning the five Prados without making allowances for other attributes that might have changed and affected prices, and acknowledged that he had not engaged in this analysis: T178.43–179.1. Indeed, Mr O'Mara ultimately appeared to accept that he could not draw anything from the resale data at all, or that

any inference was neutral: T179.3–11. Further, Mr O'Mara relied on the GraysOnline Risk Calculator to downplay the significance of the Core Defect, but accepted that this was a tool used to measure the risk to personal safety: T180.8–25. Mr O'Mara accepted that negative attributes of a car that did not affect personal safety, but would adversely affect value, would not register on the GraysOnline Risk Calculator: T181.10–18. The cross-examination revealed that Mr O'Mara had used the GraysOnline Risk Calculator and the American Society for Quality's definition of a "defect" because he could not find any other appropriate benchmark: T180.23–25; T182.7–9. His ultimate position was that he assumed the Core Defect does result in a reduction in value, albeit one which he did not consider himself suitably equipped to quantify without a benchmark: T182.42–183.4.

352 It is now necessary to address the criticisms mounted by TMCA against Mr Cuthbert.

353 *First*, it is said that Mr Cuthbert did not apply his own methodology. TMCA points to the fact that Mr Cuthbert described a reasoning process whereby in order to value a defect, he would take into account the factors outlined above (at [345(1)]) but the only thing that Mr Cuthbert did was to calculate the "salvage value" of the vehicle and then work up from that value in some unspecified way to identify an amount that a purchaser would have been willing to pay: First Cuthbert Report (at [123]). It is said this approach is flawed because it relies upon an assumption that the hypothetical purchaser would require the vehicle to be fixed prior to purchase (from its salvage contents), skewing the exercise towards the bottom end of his range of values (that is, a greater reduction).

354 Mr Cuthbert denied any suggestion he did not apply his own methodology, observing that "[e]ach process, as it moves through the report, is heading towards establishing the value": T127.19–20. I accept this evidence, in part, because it accords with Mr Cuthbert's first report. 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: First Cuthbert Report (at [99]–[108]). 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: T126.3–T127.20. Instead, as he explained, he merely used salvage value as a floor price to bookend the analysis: T126.8–10; First Cuthbert Report (at [114], [121]). In circumstances where no other objective benchmark existed, and the valuation task was hypothetical, it seems logical to have identified a yardstick

below which the value could not fall. In any event, it was simply a price point to which Mr Cuthbert considered it "appropriate to have regard": First Cuthbert Report (at [114]).

355 *Secondly*, it is said there are inadequacies in the First Cuthbert Report because Mr Cuthbert did not take into account information from later periods in his valuation (including secondary market data), and accounted for inconvenience and embarrassment suffered by Mr Williams: T114.8–17. But these contentions go nowhere. They address issues of principle which I have considered and determined above: see [277]–[297].

356 Ultimately, there is no reason not to accept Mr Cuthbert's opinion as a useful guide to valuation. Mr Cuthbert is a professional car valuer with 50 years' experience, and more importantly, his opinion accords with what I consider to be robust common sense.

Valuation evidence cannot support reduction in value for group members

357 The more important question is whether Mr Cuthbert's evidence can be used as a means to quantify the reduction in value in respect of the Relevant Vehicles collectively.

358 The applicants' position is that Mr Cuthbert's evidence is relevant generally to the question of quantification. On the other hand, TMCA submits that Mr Cuthbert was asked to value the Relevant Prado only, and therefore cannot be said to be expressing any wider view. There are two facets to this submission: *first*, central to Mr Cuthbert's valuation of the Relevant Prado is the proposition that Mr Williams suffered inconvenience and embarrassment (T196.34–36) which is an inherently subjective factor (T195.35–196.4); and *secondly*, applying Mr Cuthbert's conclusions generally would be misguided given there are differences between different models of Relevant Vehicles.

359 I accept that Mr Cuthbert's evidence is directed to the valuation of the Relevant Prado and that there are differences between different models among the Relevant Vehicles. But I do not think this means Mr Cuthbert's evidence is irrelevant to the more general question of quantifying the reduction in value of the Relevant Vehicles. Mr Cuthbert valued the Relevant Prado based on the Core Defect and the propensity for the Relevant Prado to exhibit Defect Consequences which were *common* to all Relevant Vehicles, and expressed his views at a level of generality applicable to all Relevant Vehicles: T108.17–22; T132.39–45. For example, in respect of the topic of inconvenience and embarrassment, Mr Cuthbert was not focussed on the subjective state of mind of Mr Williams, but on the objective inconvenience and embarrassment, which he opined would affect owners of Relevant Vehicles generally: see, for example, First Cuthbert

Report (at [75(c)]). Of course, his opinion on reduction in value should not be taken as a figure to be applied *carte blanche*, but that is not how it is sought to be used. I agree with the applicants' submission that Mr Cuthbert's evidence can serve as a helpful indication of the likely reduction in value to be applied generally.

The conjoint analysis

360 As I foreshadowed above (at [28]–[29]), Mr Boedeker's calculation of the reduction in value is premised on a "choice-based conjoint survey" which Mr Boedeker designed. Dr Rossi's evidence was responsive to Mr Boedeker's evidence.

361 A choice-based conjoint analysis, according to Mr Boedeker, is a form of conjoint analysis in which survey participants are asked to make choices between various sets of product profiles, referred to as "choice sets": First Boedeker Report (at [24]–[25]). It involves two stages. The *first* stage involves data collection through the conduct of a survey of an appropriate sample of the relevant target population, where participants are presented with the choice sets (which are screens containing different products with different attributes) and are asked to select their preferred product: First Boedeker Report (at [26]–[27], [126]–[127]). The *second* stage involves data analysis. The data collected through the survey is subjected to various econometric and statistical techniques, in order to draw statistically valid inferences about how much more or less consumers would be willing to pay for a specific product if some particular attributes of the product were to be varied: First Boedeker Report (at [28], [128]). The integers of that survey, the selection of survey participants and the survey methodology are considered to translate survey participants' answers into a sum that is said to reflect a "reduction in value" of the product: First Boedeker Report (at [29]).

362 While there was one survey, the choice screens shown to some participants included the six attributes, while others only included five: T354.10. The common five attributes were: (a) model; (b) presence of the Core Defect; (c) probability of manifestation of Defect Consequences; (d) time taken until fix for the defect is available; and (e) price: First Boedeker Report (at [233]). The added attribute was "defect effect on fuel consumption". In the six attribute survey, participants were shown a screen containing five vehicles with different attributes and asked to choose their preferred vehicle from the five. Survey participants completed this task 15 times and each time the attributes of the vehicles were varied: First Boedeker Report (at [238]).

363 An example of a screen of a five attribute choice set is set out below (the top part of the choice set provides general information about the vehicles; the left-most column presents the features or "attributes" of the vehicles; and the following five columns then present the participants with different "product profiles", being vehicles with varying "levels" of certain "attributes", at different prices): First Boedeker Report (at [207]).

Figure 4: Illustrative Example of a Choice Set Taken from a Screen Shot of the Primary Survey

Model					
Brand/Vehicle	Toyota Hilux	Ford Ranger	Nissan Navara	Holden Colorado	Isuzu D-Max
Diesel Engine	2.4L Turbo Diesel	2.2L Turbo Diesel	2.3L Turbo Diesel	2.8L Turbo Diesel	3.0L Turbo Diesel
Drivetrain	4x2	4x2	4x2	4x2	4x2
Engine Specs	Power: 110 kW / 400 Nm	Power: 110 kW / 400 Nm	Power: 120 kW / 403 Nm	Power: 147 kW / 440 Nm	Power: 140 kW / 450 Nm
	Towing: 2800 kg	Towing: 2500 kg	Towing: 3500 kg	Towing: 3500 kg	Towing: 3500 kg
Defect is present	Yes	No	No	Yes	No
Probability that any one or more of the Defect Effects will Manifest	25% (2.5 in 10)	-	-	60% (6 in 10)	-
Elaspsed time to fix defect	The defect is fixed three or more years after purchase.	-	-	The defect is fixed within one year after purchase.	-
Defect effect on fuel consumption	3% increased fuel consumption	-	-	0% increased fuel consumption	-
Features: Same for all vehicles incl. safety, comfort, technology, appearence	ABS + Stability control	ABS + Stability control	ABS + Stability control	ABS + Stability control	ABS + Stability control
	Power Windows	Power Windows	Power Windows	Power Windows	Power Windows
	Air Conditioning	Air Conditioning	Air Conditioning	Air Conditioning	Air Conditioning
	Reversing Camera	Reversing Camera	Reversing Camera	Reversing Camera	Reversing Camera
Drive away price for Vehicle	$27,000	$28,000	$31,000	$28,000	$34,000
Which would you prefer?	○	○	○	○	○

364 As is discernible from the example above, the choice-based conjoint survey posited scenarios where consumers had different levels of awareness about the probability that any one or more of the Defect Consequences would manifest (namely 10 per cent, 25 per cent, 50 per cent or 60 per cent) and where consumers also had different levels of awareness as to the availability of a fix for the Core Defect. The survey also posited different levels of excess fuel consumption resulting from the Core Defect, namely not increased (that is, '0 per cent'), or increased by 3 per cent, 7 per cent or 10 per cent. Mr Boedeker used the conjoint survey results to calculate the impact of the Core Defect on the marginal consumer's WTP, and to ultimately arrive at aggregate reduction in value amounts for each model line (that is, Fortuner, Prado, HiLux 4x2, and HiLux 4x4), and reduction in value percentages for each model line.

365 The Second Referee's Report was received after Mr Boedeker had completed his first report. In the Second Referee's Report, the referee concluded that the Core Defect and/or Defect Consequences increased the fuel consumption of Relevant Vehicles (see [66]–[74]), and that the increase in average fuel consumption for each of the vehicles in the TFCS was between 0 per cent and 9 per cent (with the simple average of the mean fuel consumption increase of these

vehicles being 3 per cent): Second Referee's Report (at [27]). The referee concluded that he could not determine a reliable single estimate of the amount by which the Core Defect caused fuel consumption to increase in all Relevant Vehicles: Second Referee's Report (at [30]).

366 Mr Boedeker considered the implications of the Second Referee's Report in his second report, and expressed the opinion that had survey participants been informed that the increase in fuel consumption was unknowable but likely in the range of 0 per cent and 9 per cent, their aggregate preferences would generally have reflected an expected value towards the midpoint of that range: Second Boedeker Report (at [38]). Indeed, he considered the reduction in value indicated by the results of the conjoint survey based on an increase in fuel consumption between 0 per cent or 3 per cent is likely to be more conservative than would have been the case if those participants were told that the increase in fuel consumption was unknowable but likely in the range of 0 per cent and 9 per cent, as the centre of the range, 4.5 per cent, is larger than either of these values: Second Boedeker Report (at [39]).

367 Nevertheless, in the light of the conclusions in the Second Referee's Report, Mr Boedeker considered that the most appropriate scenario for assessing reduction in value was the combination of his 3 per cent excess fuel and no available fix at the time of acquisition permutations: Second Boedeker Report (at [39], [43]–[44]). He summarised his findings as to reduction in value as follows (Second Boedeker Report (at [44(a)])):

Probability Defect Effects Manifest					
Time to Fix	Model Line	10% Manifestation Probability	25% Manifestation Probability	50% Manifestation Probability	60% Manifestation Probability
No fix available	Fortuner	-20.65%	-29.59%	-32.36%	-35.25%
	Prado	-26.01%	-33.24%	-34.96%	-39.59%
	Ute4x2	-11.13%	-17.86%	-26.34%	-22.20%
	Ute4x4	-19.78%	-28.36%	-34.83%	-32.44%

368 The results range between 11.13 per cent and 39.59 per cent reduction in value, according to the changing assumptions as to the probability of the Defect Consequences manifesting.

369 Mr Boedeker also detailed what he described as the "most conservative estimate" of the reduction in value of the Relevant Vehicles (that is, where there was no increase in fuel consumption and no fix available at the time of purchase). Mr Boedeker considered "these estimates to reflect the 'minimum' reduction in value resulting from the Defect and risk of Defect Consequences": Second Boedeker Report (at [46]). His findings in this respect were as follows: Second Boedeker Report (at [47(a)]).

Probability Defect Effects Manifest					
Time to Fix	Model Line	10% Manifestation Probability	25% Manifestation Probability	50% Manifestation Probability	60% Manifestation Probability
No fix available	Fortuner	-16.37%	-25.78%	-28.69%	-31.73%
	Prado	-21.53%	-29.20%	-31.02%	-35.92%
	Ute4x2	-9.90%	-16.71%	-25.32%	-21.11%
	Ute4x4	-15.77%	-24.76%	-31.54%	-29.04%

370 The general and intuitive trend indicated by these results is that as the manifestation probability increases, so too does the reduction in WTP.

371 The results of the survey indicate that the reduction in consumers' WTP for defective vehicles is, generally speaking, above 10 per cent but below 40 per cent, and, according to Mr Boedeker, most likely in the range of approximately 20–30 per cent.

372 The real issue between Mr Boedeker and Dr Rossi is whether the results of the survey are so unreliable as to be of no utility at all. TMCA advances no less than 18 separate criticisms of Mr Boedeker's report, largely relying on the evidence of Dr Rossi. Broadly speaking, these are criticisms directed at three levels: (1) at the level of principle; (2) at the level of survey design; and (3) at the level of survey execution and results interpretation.

373 I have already dealt with the criticisms advanced at the level of principle above: see [277]–[297]. It would be surplusage to repeat the entire suite of criticisms directed at the survey design, execution and interpretation. It suffices to canvass the core criticisms with a degree of amalgamation and synthesis:

(1) It is said that there were various categories of survey responses which indicated that many survey participants did not take the survey seriously or did not understand what the survey was about. This is because the results included a number of "gibberish" responses to the open-ended questions in Mr Boedeker's survey, including random and nonsensical sequences of characters such as "sùreftr" and "34t45y656ygbh": T393.31, T394.27–28, T395.1; Rossi Report (at [142]). Apart from these answers, the following are examples of answers given by participants to open ended questions said to indicate the survey was not being taken seriously (Rossi Report (at [139], [141])):

(a) "Plz give me extra. Money than usual i need to feed kids";

(b) "It's perfect, it's nutritious, it's rich, and it's done very quickly"; and

(c) "I'm pretty keen for data entry jobs if you are aware of any please email me".

(2) TMCA submits that there is evidence of "speeding" by survey participants, that is, participants did not read carefully the instructions and attribute descriptions: Rossi Report (at [122]–[130]). Mr Boedeker accepted that it was essential for participants to read the instructions and definitions carefully (T396.36–41; T399.18–23) but conceded he had not formed any views about the amount of time it should take for participants to do so: T398.21–37. Further, participants were not told about how long they should spend reading the instructions in each screen, nor was any strategy implemented to ensure a participant remained on a question for a set period: T398.46–47. Dr Rossi observed that 76.6 per cent of Analysed Responses spent less than 60 seconds on the instructions and 35 per cent spent less than six seconds per question: Rossi Report (at [123]–[127]). It is said this was an inadequate amount of time to process all of the information on each choice screen in order to consider the trade-offs between the five options presented. The only possible inference, in Dr Rossi's opinion, is these "speeders" did not take the survey seriously or the survey design was too cognitively taxing: Rossi Report (at [125], [128]).

(3) TMCA submits that 99.7 per cent of the Analysed Responses exhibited illogical preferences for more severe defects at a statically significant level (Rossi Report at [149]–[150]; T330.25–37), to an extent which Dr Rossi had not seen in his 20 years' experience: Boedeker and Rossi Report (at p 4 of Dr Rossi's statement). It is said that if the survey participants had understood the survey instructions, then the results would reflect the logic that a less severe defect should be preferred over a more severe defect: Rossi Report (at [147]–[149], [151]); Boedeker and Rossi Report (at p 4 of Dr Rossi's statement). Further, TMCA contends that there is an illogical disparity between the results of Mr Boedeker's five attribute survey (without fuel consumption as an attribute) and six attribute survey (with fuel consumption as an attribute). Given both address a situation where there is no excess fuel consumption (that is, a 0 per cent option), it is said that their results should be the same yet they are not: the five attribute estimates were larger than the corresponding 0 per cent increase in fuel consumption results from the six attribute survey: Rossi Report (at Exhibit 9; [82]). These results, it is said, imply that consumers would be willing to pay more for a vehicle with the "Defect" that increases fuel consumption than they would for a vehicle with an otherwise identical defect which does not affect fuel consumption: Rossi Report (at [82]).

374 Other criticisms of Mr Boedeker's survey include: (a) the price elasticities of demand revealed by the survey indicate it was biased and confusing; (b) there is evidence of survey fraud; (c) the survey did not reflect real-world decision-making; and (d) there was a failure to conduct a proper "pre-test": see Rossi Report (at [92]–[95]; [131]–[138]; [158]–[166]).

375 The applicants' main response to these contentions is that Dr Rossi failed to take a constructive approach to the process of designing an effective survey instrument, consistent with his obligations under the Court's *Survey Evidence Practice Note* (GPN-SURV) (**Practice Note**), and that many criticisms raised by Dr Rossi should have been raised in TMCA's responses to the survey while it was being drafted, but they were not. Nor were these issues raised, it is said, in a subsequent meeting between Mr Boedeker and Dr Rossi for the purpose of conferring upon any outstanding issues or concerns held by Dr Rossi in relation to the design of the survey. The applicants' submit that because of Dr Rossi's failure to engage constructively with Mr Boedeker in the process of designing the survey, the Court should, consistently with the Practice Note, attach little weight to his subsequent criticisms of the design of the survey.

376 The applicants' contentions may have some merit, but that does not mean the survey should be accepted uncritically. The fact is, as TMCA 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, TMCA 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.

377 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.

378 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 WTP widens as the probability of manifestation of the Defect Consequences and the duration of the Core Defect increases. This overarching trend is reflected by the "heat maps" prepared by Mr Boedeker: Second Boedeker Report (at [89]). The "heat map" for the Prado, for example, is as follows:

	0% decrease in fuel efficiency	3% decrease in fuel efficiency	7% decrease in fuel efficiency	10% decrease in fuel efficiency
10% Manifestation Probability				
Fixed within one year after purchase	-4.96%	-10.38%	-10.53%	-12.24%
Fixed between the first and second year after purchase	-13.01%	-17.97%	-18.11%	-19.67%
Fixed between the second and third year after purchase	-6.90%	-12.21%	-12.36%	-14.03%
Fixed three or more years after purchase	-10.49%	-15.60%	-15.74%	-17.35%
No fix available	-21.53%	-26.01%	-26.13%	-27.54%
25% Manifestation Probability				
Fixed within one year after purchase	-14.25%	-19.14%	-19.27%	-20.82%
Fixed between the first and second year after purchase	-21.51%	-25.99%	-26.11%	-27.52%
Fixed between the second and third year after purchase	-16.00%	-20.79%	-20.92%	-22.43%
Fixed three or more years after purchase	-19.24%	-23.85%	-23.97%	-25.43%
No fix available	-29.20%	-33.24%	-33.35%	-34.63%
50% Manifestation Probability				
Fixed within one year after purchase	-16.45%	-21.22%	-21.35%	-22.85%
Fixed between the first and second year after purchase	-23.53%	-27.89%	-28.01%	-29.39%
Fixed between the second and third year after purchase	-18.16%	-22.83%	-22.95%	-24.43%
Fixed three or more years after purchase	-21.31%	-25.81%	-25.93%	-27.35%
No fix available	-31.02%	-34.96%	-35.07%	-36.32%
60% Manifestation Probability				
Fixed within one year after purchase	-22.37%	-26.81%	-26.93%	-28.32%
Fixed between the first and second year after purchase	-28.95%	-33.01%	-33.12%	-34.40%
Fixed between the second and third year after purchase	-23.96%	-28.30%	-28.42%	-29.79%
Fixed three or more years after purchase	-26.89%	-31.07%	-31.18%	-32.50%
No fix available	-35.92%	-39.59%	-39.69%	-40.84%

379 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 Core 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.

The economic evidence

380 Although the applicants do not advance Mr Stockton's repair cost model analysis as their primary submission, it is said that such evidence nonetheless assists to "define the floor" for the reduction in value percentage of between 2.9 and 7.3 per cent of average retail price.

381 It is unnecessary to detail Mr Stockton's "Repair Cost Model" with granularity: see First Stockton Report (at [164]–[217]). Mr Stockton defines it as follows (at [164]):

> The Repair Cost Model evaluates the Reduction in Value experienced by Group Members who received defective vehicles instead of the non-defective vehicles for which they bargained. The Repair Cost Model applies accepted economic theory and relevant market data to determine the amount of compensation that would have restored Group Members to positions equivalent to those they would have occupied had the Affected Vehicles been non-defective at the point of sale. Specifically, the Repair Cost Model calculates the amount of money that would need to be paid to consumers in order for the combination of compensation and their receipt of Affected Vehicles as delivered to place them in an equally good position as that which they would have occupied had the Affected Vehicles been non-defective.
>
> (Citation omitted).

382 Essentially, the explanation for Mr Stockton's Repair Cost Model as a method for measuring reduction in value is that the cost of a remedial repair is a market-based transaction that

conceptually reflects a proper and reasonably accurate estimate of the reduction in value associated with the Core Defect, because had it been delivered at the point of acquisition, it would have restored the consumer to the expected level of utility they bargained for at that time: First Stockton Report (at [187]).

383 Mr Stockton's model uses the warranty repair cost that TMCA reimbursed to dealers for performing the 2020 Field Fix (that is, the average amount that TMCA has spent on DPF repairs in respect of the Relevant Vehicles) as a proxy for the amount of money that would have been required, at the time of purchase, to restore group members to the position they would have been in had there not been any non-compliance with the statutory guarantee. This figure is calculated using the warranty service histories, the data source of which is from TMCA's records and is known, and referred to as the **WINPAQ Data** (WINPAQ being a custom built financial system used to monitor, track and process reimbursement claims submitted by dealers): AF [18]; First Stockton Report (at [61]). This calculation, it is said, provides a conservative proxy for the impact of the Core Defect on the expected utility of the Relevant Vehicle to consumers, and hence a measure of reduced value. The reason it is said to be conservative, or "constitutes a floor", is because 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: First Stockton Report (at [447]).

384 The quantification of the repair cost by vehicle model, and the aggregate reduction in value, is described in detail by Mr Stockton: First Stockton Report (at [206]–[217]). In effect, to derive the average cost of the repair for each vehicle model, Mr Stockton divides the total costs paid by TMCA to Toyota dealers in respect of the 2020 Field Fix warranty repairs delivered by those dealers by the number of vehicles that received the service: First Stockton Report (at [212]). Mr Stockton then converts these figures from dollars in 2020 to the relative prices in the relevant earlier build year for that vehicle model: First Stockton Report (at [213]).

385 In addition to the criticisms mounted by TMCA against the evidence of Mr Stockton at a level of principle and in respect of the market data, which I have addressed above (see [277]–[297]), it is said that a number of issues plague Mr Stockton's evidence and methodology. I will address each of them in turn.

386 *First*, TMCA submits, relying on the Report of Dr Pleatsikas, that it is untenable to treat the amount that a manufacturer is prepared to pay under warranty as a proxy for reduction in value.

The amount that a manufacturer may be willing to pay does not necessarily relate to the specific effect that such repairs may have on the marketplace values of the particular vehicles: Stockton and Pleatsikas Joint Report (at [23]). The cost of executing warranty repairs, it is said, may in some circumstances exceed the value of economic harm to group members: Pleatsikas Report (at [117]).

387 While there may be different methods for calculating reduction in value, using the amount a manufacturer paid under warranty is far from "untenable". Indeed, the amounts used from the WINPAQ data are the amounts TMCA reimbursed to dealerships for the execution of warranty repairs; they are not the total cost to the manufacturer of executing a warranty campaign. There is also no suggestion the 2020 Countermeasures were enhancing, rather than remedial: Second Stockton Report (at [53]).

388 *Secondly*, it is said that any attempt to rely on Mr Stockton's analysis also suffers from the inherent logical problem that TMCA paid the cost of repairs. If recovery on the basis of repair costs was awarded by the Court, it is said group members who have had repairs undertaken will have received the full benefit of the value of those repairs and will be paid the cost of those repairs. The problem is compounded, it is said, if a group member sold the vehicle, as the new owner would also be a group member.

389 The mere fact that TMCA pays for the repair (that is, the 2020 Field Fix) does not explain why the cost of that repair would not be a reasonable approximation for the reduction in value suffered. In substance, this assertion seems more directed to the issue of whether or not group members *actually suffered* a reduction in value loss.

390 In the end, while I accept that there are some imperfections with Mr Stockton's analysis, it is of some use.

Conclusions on quantifying the reduction in value

391 After trudging manfully through the expert evidence, it is necessary to recall the basic proposition I stated at the commencement of the quantification analysis – "valuation is an art, not an exact science". There is no doubt that the Core Defect and the Defect Consequences were not merely trivial or trifling. While the Core Defect did not directly interfere with the safety of the Relevant Vehicles, when the Defect Consequences manifested, which was a certainty occasioned by the normal use of highway driving, they were serious. On this basis,

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

392 In landing on a figure as to the appropriate reduction in value, I have given weight to the entirety of the expert evidence and the submissions advanced by the parties in respect of that evidence. This is not a case, as TMCA submits, like *J.L.W. (Vic) Pty Ltd v Tsiloglou* (1994) 1 VR 237, where the Court should decline to put a figure on the reduction in value because there is no reliable indicator to inform such a figure. It makes intuitive sense for the figure to be above that calculated by Mr Stockton and, for the reasons reflected in the evidence of Mr Boedeker and Mr Cuthbert, to be a significant figure. The very nature of the Defect Consequences demands such a conclusion.

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.

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 TMCA'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 Core Defect reduced the value of the Relevant Prado, he did not express any view about the quantum of that reduction in value: see [351]. Likewise, TMCA's expert economists provided no positive evidence in relation to the quantification of the reduction in value.

E.2.3 *Applying the reduction in value*

395 After determining that the reduction in value for the Relevant Vehicles should be in the figure of 17.5 per cent, it is then necessary to turn to the practicality of any award of damages to reflect this reduction. Two issues arise at this stage of the inquiry:

(1) determining the meaning of the concepts "price paid or payable" and "average retail price" in s 272(1)(a)(i)–(ii) and how they apply in the current case; and

(2) determining whether there should be an award of aggregate damages for the reduction in value.

396 I will deal with each of these issues, and the subsidiary issues they throw up, in turn.

The meaning of "price paid or payable" and "average retail price" in s 272(1)(a)(i)–(ii)

397 It is necessary initially to return to an aspect of statutory construction. As noted above, s 272(1)(a) of the ACL provides an entitlement to damages for any reduction in value of goods, resulting from a failure to comply with the guarantee below the lower of: (i) the price paid or payable by the consumer for the goods; or (ii) the average retail price of the goods at the time of supply.

398 The *former* of these concepts – the price paid or payable by the consumer for the goods – is straightforward. The price paid for the goods is the purchase price exclusive of taxes such as GST, luxury car tax (**LCT**) or stamp duty. This is because s 2(1) of the ACL defines the "price" of goods as an amount paid or payable "for their acquisition", whereas a tax is an amount paid to the Government by reference to the acquisition price, not in exchange *for* the goods.

399 The *latter* of these concepts – the average retail price of the goods at the time of supply – is more complex. It is not defined in the ACL and no guidance is otherwise provided as to its interpretation. Indeed, the statute does not identify the time period over which the average is to be taken (apart from implicitly requiring that it be the average at the time of supply), nor does it identify whether the sales prices included in the average must be for identical goods in every respect.

400 This lack of clarity must be resolved, because Relevant Vehicles from the same model line (that is, Prado, HiLux, Fortuner) were often sold at different prices due to their different attributes, or because they were sold in a different period.

Preliminary issues

401 Two preliminary issues arise for determination:

(1) Should the average retail price be calculated across a whole model line, or should the average retail price be disaggregated, such as by series and build year?

(2) Should the average retail price be exclusive or inclusive of accessories that were added to the vehicle at the time of supply?

402 The relevant Explanatory Memorandum provides limited assistance in resolving these issues. However, it does confirm that the legislative intention of the "lower of" formula in s 272(1)(a) is to ensure that manufacturers are "not required to provide excessive compensation to consumers if suppliers charge high prices for goods": Explanatory Memorandum, *Trade Practices Amendment (Australian Consumer Law) Bill (No 2) 2010* (at [7.122]). In the absence of contrary textual or contextual indications, the meaning of "average retail price" should be determined consistently with this legislative intention.

403 In respect of the *first* question, the legislative intention weighs in favour of averaging only across vehicles that are alike, to the extent that this is practically measurable – that is, vehicles of the same series and sold in the same time period. This is because averaging the retail price across all Relevant Vehicles over the Relevant Period in a particular model line would tend to: (a) overstate the average retail price for lower priced trim levels or earlier produced vehicles, which could mask the extent to which suppliers charged excessive prices for those vehicles; and (b) understate the average retail price on higher priced trim levels or vehicles produced at times when prices were higher. This could mean that some consumers receive no damages simply because they purchased a vehicle with a higher trim level, or at a time when prices were higher, not because the supplier charged an excessive price for the vehicle supplied. Both of these results would be contrary to the legislative intention of the "lower of" formula in s 272(1)(a).

404 In respect of the *second* question, the applicants contend that the legislative intention militates in favour of measuring the purchase price of goods and average retail price of those goods *exclusive* of accessories, whereas TMCA appears to contend that the average retail price must include accessories (albeit no reasoning is provided for this contention). I favour the applicant's position because if average retail prices were calculated with purchase prices that included accessories, this would tend to increase the average retail price and could mask the extent to which suppliers charged excessive prices. Further, assuming reduction in value is to be

calculated by applying a percentage reduction to the average retail price, the reduction in value would be magnified if this percentage were applied to average retail prices calculated using purchase prices inclusive of accessories. This would be contrary to the legislative intention, as it could result in excessive damages merely because a consumer purchased expensive accessories.

The mechanics of calculating "average retail price"

405 As to the mechanics of calculating the average retail price for each Relevant Vehicle, the applicants contend, and I accept, that it can be done as follows.

406 The starting point for each Relevant Vehicle is the applicable MSRP for that vehicle. The MSRP is TMCA's recommended retail price for the vehicle, including GST and LCT but excluding accessories. The MSRPs within each model line varied from vehicle to vehicle by, among other things, time of production, time of sale and series.

407 It is then necessary to consider the data showing actual sales. This is drawn from the records of sales for Relevant Vehicles sold as new by the top 29 dealers: AF [16]. This is the data that Mr Stockton used for the purpose of calculating average purchase prices for each model and build year of Relevant Vehicles: First Stockton Report (at [63]–[70]). Mr Stockton "cleansed" the data, including removing transactions where sales prices exceeded MSRP because such transactions likely included substantial or expensive accessories, and if those transactions were included, it could overstate any average purchase prices calculated: First Stockton Report (at [69]). Mr Stockton did not otherwise attempt to remove accessories costs from the dealer sales price data, because the relevant data does not record the extent to which the recorded sales prices included accessories in any given case. Mr Stockton did, however, remove any GST or LCT from the dealer sales prices before using them to calculate average purchase prices, so that the averages were calculated on a tax exclusive basis: First Stockton Report (at [68]).

408 Further, in order to control the level of variation in sales prices across the Relevant Period (affecting each model line due to varying series, build year and time of supply), Mr Stockton calculated the average of Relevant Vehicle sales prices as a percentage of their applicable MSRP: First Stockton Report (at [66]). This process yielded an average discount rate for each model line of Relevant Vehicles for each build year that controls for different MSRPs that apply to different series within a model line. This discount rate can then be applied to the MSRP applicable to any particular Relevant Vehicle. Calculating average retail prices in this manner is consistent with the legislative intention, as it ensures a "like for like" comparison.

409 Pausing here, it is convenient to address two apparent criticisms of TMCA concerning this approach to average retail prices.

410 *First*, TMCA appears to criticise Mr Stockton's calculation of average retail prices (calculated as a percentage of MSRP) on the basis that he used sales prices inclusive of accessories, for which it is said no evidence has been adduced by the applicants. This criticism should be rejected. Although Mr Stockton used sales prices inclusive of accessories, he excluded transactions where sales prices exceeded MSRP. He did this so his calculations would not overstate average retail prices, and to ensure a "reasonable and accurate" calculation: First Stockton Report (at [69]). This evidence was not challenged by TMCA or Dr Pleatsikas. It is unsatisfactory for TMCA to now assert that Mr Stockton's average purchase prices (expressed as a percentage of MSRP) fail to provide an appropriate approximation for actual average retail prices excluding accessories.

411 Indeed, and in any event, Mr Stockton's conclusions are consistent with other evidence. Mr Cuthbert's evidence, for example, was that the standard discount off MSRP in 2016 was in the order of 2.5 per cent to 3.5 per cent (First Cuthbert Report (at [95])) indicating that Mr Stockton's calculation of a discount for the 2016 Prado of 3.77 per cent is reasonable. Further, TMCA did not adduce evidence indicating that Mr Stockton's calculations understate the standard discount off MSRP or average retail prices for Relevant Vehicles, nor is this a case where evidence of actual sales prices excluding accessories was available. Even after subpoenaing to the top 29 dealers, the data produced only provided final sales prices inclusive of accessories. While I accept that TMCA bears the onus, I am comfortably satisfied that approximation using this data is reasonable in the circumstances: see *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty Ltd* [2003] HCA 10; (2003) 196 ALR 257 (at 266 [38] per Hayne J with whom Gleeson CJ, McHugh and Kirby JJ agreed at 259 [6]).

412 *Secondly*, TMCA appears to criticise the applicants' average retail prices because they were based only on a sample of sales prices, not the whole population of 264,170 vehicles (that is, 107,775 of the Relevant Vehicles, or 41 per cent of the total Relevant Vehicles). This criticism should also be rejected. The purpose of the exercise is to discern an average price. It was not put to Mr Stockton that the sample he used was inappropriately small, or that it did not yield statistically significant averages. Further, while TMCA asserts that the top 29 dealers may have priced the vehicles differently from dealers outside the data set, no evidence is provided for this contention. Nor does TMCA attempt to show by reference to any data that the sample used

by Mr Stockton for calculating average sales prices did not generate statistically significant results.

413 In this respect, it is important to bear in mind the need for the legislation to be given a practical operation. This is a class action conducted on behalf of a large number of group members and supported by sophisticated representatives and a litigation funder. In the ordinary course, s 272(1)(a) would need to be applied for the purposes of an individual's claim for damages by reference to the particular defective goods that they purchased. If such a claimant could only prove the "average retail price" of those goods by obtaining the sales data for every sale across the country in the relevant period, the statutory entitlement to damages could never be effectively enforced. A methodology which establishes the average price based on a reasonably indicative dataset must be sufficient for the purposes of the provision.

414 Further, to the extent necessary, comfort in this conclusion can be taken from Mr Stockton's "'Lower of' Discount" calculation, described below at [438(3)]. It appears those "Lower of" discount figures were within 97 to 99 per cent of the average purchase prices that Mr Stockton calculated, which suggests there is little variation in the data used. In other words, it can be inferred that the averages Mr Stockton calculated are likely to have been materially accurate.

415 With questions as to construction and calculation clarified, it is necessary to turn to the question of aggregate damages.

Aggregate Damages

416 The power to award damages on an aggregate basis is found in s 33Z of the Act, which, relevantly, is in the following terms:

> **33Z Judgment—powers of Court**
>
> (1) The Court may, in determining a matter in a representative proceeding, do any one or more of the following:
>
> …
>
> (e) make an award of damages for group members, sub-group members or individual group members, being damages consisting of specified amounts or amounts worked out in such manner as the Court specifies;
>
> (f) award damages in an aggregate amount without specifying amounts awarded in respect of individual group members;
>
> …
>
> (2) In making an order for an award of damages, the Court must make provision for the payment or distribution of the money to the group members entitled.

> (3) Subject to section 33V, the Court is not to make an award of damages under paragraph (1)(f) unless a reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment.

417 As is evident from the statutory text, there are two ways in which a Court can award damages on an aggregate basis: via s 33Z(1)(e) or s 33Z(1)(f).

418 The Court's power in s 33Z(1)(e) is not premised on any condition being satisfied, other than the general requirement, stated in the chapeau to s 33Z(1), that the Court must be "determining a matter in a representative proceeding", which requirement is undoubtedly satisfied here. However, it is limited to particular kinds of damages awards, namely an award that prescribes how the quantum of damages for group members, sub-group members or individual members is to be ascertained, or an award that specifies the amounts to which each of them are entitled. By contrast, the Court's power in s 33Z(1)(f), to award damages in an aggregate sum without specifying amounts to be awarded in respect of individual group members, is enlivened only when the condition set out in s 33Z(3) is met. That is, damages in an aggregate amount can only be awarded if a "reasonably accurate assessment can be made of the total amount to which group members will be entitled under the judgment".

419 I should note that I have already determined, as a separate question before the initial trial, the issue of whether the Court may, under s 33Z(1)(e) or s 33Z(1)(f), make an award for *part* of the damages claimed by some or all group members in the proceeding. The answer is yes: see *Williams v Toyota Motor Corporation Australia Limited* [2021] FCA 1425 (at [69], [73], [76] per Lee J).

420 The applicants' advance, as alternatives, both a s 33Z(1)(e) case and a s 33Z(1)(f) case. Before turning to consider these cases, it is convenient to recall some basic principles applicable to the award of compensatory damages and address a number of overarching submissions levelled by TMCA against why the claim for aggregate damages, whether based on s 33Z(1)(e) or (f), should not succeed.

General principles that govern the assessment of damages

421 Although sometimes it might seem the case procedurally, class actions are not the litigation equivalent of the Galapagos Islands – the hinterland of the broader law of damages must inform the analysis undertaken in addressing compensatory issues in the present context. Speaking at a general level, two overarching principles as to the award of compensatory damages ought to be borne in mind.

422 *First*, an award of compensatory damages must be considered in the light of the overriding compensatory principle – that damages should be assessed so as to compensate the injured party for the wrong done, with the object of such an award being to put the claimant in the position the claimant would have been in but for the contravening conduct: see *Gates v City Mutual Life Assurance Society Ltd* [2001] HCA 52; (1986) 160 CLR 1 (at 13–14 per Mason, Wilson and Dawson JJ). Indeed, as McHugh J emphasised in *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459 (at 502 [131]), any measure of damages must give way to the overriding principles of fair and not excessive compensation.

423 *Secondly*, and as an extension of the first point, it is trite that when it comes to assessing the amount of any damages award, "mere difficulty in estimating damages does not relieve a court from the responsibility of estimating them" and "[w]here precise evidence is not available the court must do the best it can": *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 (at 83 per Mason CJ and Dawson J). This principle equally applies when assessing reduction in value damages under s 272(1)(a): see *Capic* (at 433 [883]).

Overarching observations and findings

424 TMCA advances a number of submissions against the award of aggregate damages, which are relevant to both the s 33Z(1)(e) and s 33Z(1)(f) cases. It is convenient to address those criticisms here.

425 A number of TMCA's submissions can be disposed of briefly. TMCA submits that the number of group members being unknown, that the number of Relevant Vehicles that have received the 2020 Field Fix continues to increase, and the fact that any claimed reduction in value requires an assessment of the individual Relevant Vehicle and the extent to which (if at all) the vehicle suffered from any of the Defect Consequences, means an award of aggregate damages ought to be refused.

426 These contentions have no merit. To the extent it is said that this aspect of the damages inquiry requires an assessment of the *extent* to which each vehicle suffered from any of the Defect Consequences, that submission is misconceived. As I have repeated, the applicants' representative case is based on *propensity*, not experience. As to the issue of group membership and the 2020 Field Fix, the aggregate reduction in value amount will be able to be calculated upon TMCA providing updated information (current as at the date of judgment) in respect of the number of Relevant Vehicles which have received the 2020 Field Fix and/or in respect of which refunds or replacement vehicles have been provided through TMCA's consumer redress

programme. Relevant Vehicles acquired by group members who have opted out will also be able to be excluded from the calculation of aggregate reduction in value damages at this time.

427 The more substantive contention put forward by TMCA relates to the effect of different permutations of ownership of the Relevant Vehicles. Put simply, two integers are relevant to the assessment of damages – group members and Relevant Vehicles. There is no difficulty in calculating damages where a group member has held a Relevant Vehicle for the entire Relevant Period, as the two integers coincide (**Entire Period Group Members**). The situation is complicated, however, where group members have bought and/or sold a Relevant Vehicle on the secondary market, as the two integers do not coincide (**Partial Period Group Members**).

428 The applicants accept that an adjustment is necessary in the circumstances of Partial Period Group Members, and skilfully seek to skirt this issue by proposing that the Court determine a single recoverable sum for the reduction in value for each Relevant Vehicle, which is then shared proportionally between group members who held or hold an interest in that vehicle and who come forward to claim damages in the distribution scheme.

429 But this is problematic for a number of reasons. Assume Consumer A purchased a Relevant Vehicle new and traded it into a dealer. That Relevant Vehicle was then purchased by Consumer B. How do Consumer A and Consumer B share any damages award? Does the share depend on how long each party held the vehicle, or the number of kilometres they each travelled? What is the total life of the vehicle by reference to which the calculation takes place? Alternatively, does the share depend on how much Consumer B paid Consumer A, perhaps expressed as a percentage of the new car price? Are relative prices relevant at all? Does it matter that the 2020 Field Fix was some time away for Consumer A, whereas it was available for Consumer B? Each of these questions arise in this one simple example.

430 Take another: assume Consumer A purchased a Relevant Vehicle from a trader but immediately thereafter got a job with a company car and, just as quickly, on-sold it to Consumer B by a private sale. The initial cost of the sale was recovered by Consumer A from Consumer B, save for a very minor amount relating to stamp duty and the like. Although Consumer A suffered relevant loss on purchase by buying the Relevant Vehicle at greater than true value, he recovered this loss entirely by passing it on to Consumer B. Although the applicants seek to address this problem by a single recoverable sum for the reduction in value for each Relevant Vehicle, it seems to me that fixing a sum by reference to the sole measure of how long a group member held onto the car is superficial. Ultimately the best measure of loss when there has

been a secondary sale may depend upon other circumstances, and in the case of secondary sales, to approach this aspect of the damages claim as the applicants suggest could conceivably, in individual cases, produce anomalous results.

431 Further and more complex permutations are easily imaginable and the counterfactuals would cascade in complexity as the number of owners of a Relevant Vehicle increases. Apart from these examples, the question arises as to what should occur if there are two owners of a Relevant Vehicle, Consumer A and Consumer B, but Consumer B never comes forward – is the effect of the applicants' proposal that Consumer A should recover the entire reduction in value amount?

432 The bottom line is that without knowing the price at which, or the time at which, the Partial Period Group Members bought and sold Relevant Vehicles on the secondary market, one cannot determine on a principled basis how the compensation for the owners of those Relevant Vehicles ought to be assessed or distributed. One must always bear in mind the whole object of any award of damages is to put the claimant in the position the claimant would have been in but for the contravening conduct.

433 Therefore, while the simplicity of an "award damages and figure it out later" approach is appealing, it does not seem to me to be one that is satisfactory.

434 In any event, the approach of awarding damages on a *per vehicle basis* and determining the question of distribution to group members at a later stage is unsupported by the terms of s 33Z.

435 Importantly, s 33Z(1)(e) specifies that the Court can "make an award of damages for *group members*, *sub-group members* or *individual group members*" (emphasis added) and while s 33Z(1)(f) allows the Court to "award damages in an aggregate amount without specifying amounts awarded in respect of individual group members", s 33Z(3) states that such an order is not to be made "unless a reasonably accurate assessment can be made of the total amount to which *group members will be entitled* under the judgment" (emphasis added). As is evident, ss 33Z(1)(e) and (f) are concerned with assessing damages based on the amount to be distributed to *group members* (not some other measure, such as Relevant Vehicles).

436 Even if I am wrong in this respect, s 33Z(1) embodies a discretion: "[t]he Court *may*, in determining a matter in a representative proceeding, do any one or more of the following …": (emphasis added). For the reasons I have outlined, I would, in any event, decline to make an award of aggregate damages in respect of the Partial Period Group Members. The award of

such damages must be made on an individualised basis, having regard to the individual circumstances of the Partial Period Group Members.

Entire Period Group Members

437 The question that remains is whether damages should be awarded on an aggregate basis to the Entire Period Group Members, and if so, whether the appropriate mechanism to award such damages is s 33Z(1)(e) or s 33Z(1)(f). I have concluded that s 33Z(1)(e) is the appropriate head of power to award aggregate damages. Before explaining why this is so, it is necessary to touch briefly on the s 33Z(1)(f) case.

438 In summary, the applicants submit that the Court can arrive at a "reasonably accurate" aggregate damages amount as the basis of an award of damages under s 33Z(1)(f) for reduction in value by applying a methodology with the following key integers:

(1) a reduction in value percentage of 17.5 per cent, meaning each of the Relevant Vehicles should be found to have had a true value, for the purposes of s 272(1)(a), that is 82.5 per cent of the average retail price for that type of vehicle at that time;

(2) the average retail price for the particular vehicle is calculated using the steps described above (at [405]–[415]); and

(3) in order to aggregate the effect, across the full cohort of Relevant Vehicles, of applying the points of comparison required by s 272(1)(a), the Court can rely on Mr Stockton's calculations pursuant to what he describes as the "'lower of' construct" – a pricing construct that he developed: First Stockton Report (at [63]–[64]). This is an average for each model and build year, calculated based on a constituency comprising prices paid that were lower than the average price for that model and build year, and otherwise the average price where the actual price exceeded the average: First Stockton Report (at [63]–[64]). In other words, Mr Stockton's "'lower of' discount" provides some indication of how far, on average, actual purchase prices were below the average retail price for each model and build year.

439 Using these integers, the recoverable reduction in value for each Relevant Vehicle (other than the 2020 Field Fix vehicles) is said to be calculated by: (1) multiplying 17.5 per cent by the relevant average retail price applicable to each vehicle; and (2) deducting the difference between the average retail price and the "lower of" retail price for that vehicle. The aggregate

recoverable reduction in value is then calculated as the sum of each recoverable reduction in value amount for each Relevant Vehicle (other than 2020 Field Fix vehicles).

440 It is said that the aggregate reduction in value amount will be able to be calculated using this methodology for group members (other than the 2020 Field Fix group members and those who have opted out) upon TMCA providing updated information (current as at the date of judgment) in respect of the number of Relevant Vehicles which have (at that time) received the 2020 Field Fix and/or in respect of which refunds or replacement vehicles have been provided through TMCA's consumer redress programme. The effect of Mr Stockton's calculations is that this would equate to the amounts awarded in total in respect of all of the Relevant Vehicles if the formula above was applied for each of those Relevant Vehicles individually.

441 Putting to one side issues concerning the interpretation of "reasonably accurate", there is a central flaw in the applicants' proposal for the assessment of damages under s 33Z(1)(f): that is, the method of calculation proposed. It is clear that s 272 provides two alternative bases upon which the calculation for damages is to be assessed, namely, any reduction in value below the lower of: (i) the price paid or payable by the consumer for the goods; or (ii) the average retail price of the goods at the time of supply. The insuperable difficulty is that Mr Stockton's calculation cuts across these statutory concepts, and instead proposes a proxy for this statutory exercise: T506.1–2.

442 The applicants accept that "to get to the [s 33Z(1)(f)] point, you do need to cut through the statutory comparator" (T573.6–7) but submit that one must appreciate the broad terms of s 33Z before discounting this methodology. In support of this contention, reliance is placed on the Australian Law Reform Commission (**ALRC**) Report that prompted the introduction of Part IVA: see *Grouped Proceedings in the Federal Court* (Report No 46, 1988). Notably, it is said that the ALRC recognised (at [224]–[226]) that there could be a number of situations in representative proceedings where it may be appropriate to determine an aggregate quantum without specifying individual amounts, one such example being where wrongful conduct affects market price. The ALRC also observed (at [227]–[228]) that the aggregate damages assessment had the advantage of reducing costs to the parties and the administration of justice and that the risk of inaccuracy that arises from having to estimate aggregate damages was not itself a ground for objecting to aggregate assessment, because assessing damages often involves estimation.

443 But despite the imaginative attempts of counsel for the applicant to navigate this issue, it was recognised that the s 33Z(1)(f) case had its flaws. This was for good reason. While it may be readily accepted that the purpose of s 33Z is to allow a broad-brush approach to the assessment of aggregate damages, it cannot be the case that a general provision such as s 33Z of the Act can override the specific terms of s 272 of the ACL, which creates the entitlement to statutory compensation. This is simply a reflection of the maxim of construction *generalia specialibus non derogant* (general provisions do not override specific ones), which not only applies internally to statutes, but across statutes. Indeed, while the proxy contended for by the applicants may provide a convenient short cut to the question of aggregate damages, it undermines the text and statutory purpose of s 272 of the ACL. The s 33Z(1)(f) claim must be rejected.

444 Turning to the alternative way in which the claim for aggregate damages is advanced, as outlined above, s 33Z(1)(e) allows the Court to make an award of damages for group members consisting of specified amounts or amounts worked out in such manner as the Court specifies.

445 In order to make a damages award of this kind, the Court need only be satisfied, in accordance with the general damages principles described above, that the proposed methodology would sufficiently approximate the reduction in value of the Relevant Vehicles resulting from the Core Defect as at the date of acquisition. Indeed, contrary to what is said by TMCA, it is not the case that such orders "must be precise" and that s 33Z(1)(e) does not accommodate estimates or approximations. While the formula, methodology, or specific amount must be clear (that is, an actual figure) so it can be implemented, there is nothing in the text of s 33Z(1)(e) to indicate that the Court must arrive at such orders or specific amounts based on precision. Absent clear words, the provision should not be construed as departing from the general damages principles described above (at [423]), which permit reasonable estimates or approximations: see *HTW Valuers* (at 663 [50]). This is distinct from the situation of attempting to value loss in respect of the Partial Period Group Members where, in the absence of evidence, the exercise is speculative.

446 For the reasons described in Sections E.2.2 and E.2.3, the evidence adduced provides a basis for the Court to make an award of aggregate damages pursuant to s 33Z(1)(e) in respect of group members other than 2020 Field Fix Group Members and the Partial Period Group Members. In summary, the damages methodology for which the applicants contend, and I accept, should form the basis of such an award, and has following key integers:

(1) a reduction in value percentage of 17.5 per cent, meaning each of the Relevant Vehicles should be found to have had a true value, for the purposes of s 272(1)(a), that is 82.5 per cent of the average retail price for that type of vehicle at that time;

(2) the average retail price for the particular vehicle is calculated using the steps described above (at [405]–[415]);

(3) for each Relevant Vehicle, it is necessary to determine whether the price that was in fact paid for that vehicle is lower than the average retail price for that type of vehicle at that time. Whichever of those measures is lower is the applicable comparator in that particular case; and

(4) in any given case, the difference between the true value of that defective vehicle (as calculated in (1)) and the applicable comparator in that particular case (as determined in (3)) is the amount recoverable under s 272(1)(a) in respect of that vehicle.

447 In order to apply the above formula or methodology to each Relevant Vehicle held during the Relevant Period, the only additional input that is required in respect of each claim is the actual purchase price of the vehicle when purchased. TMCA appears to suggest that because this information is presently unknown, it is an obstacle to making an order under s 33Z(1)(e). This assertion should be rejected – the information is ascertainable. This methodology is appropriate as it is consistent with the formula prescribed by s 272(1)(a) and, unlike the s 33Z(1)(f) case, can be applied accurately to each group member who is entitled to reduction in value damages.

E.2.4 *Income tax consequences for group members of a damages award*

448 It is also necessary to deal with TMCA's contention that some group members may have subsidised a portion of their reduction in value loss by claiming income tax deductions for the depreciation of their Relevant Vehicle. TMCA asserts that the damages award for such group members should be reduced to the extent that the reduction in value of their Relevant Vehicles was offset by the amount of income tax they saved through claiming a deduction. TMCA also appears to rely on this factor as a reason to avoid an award of damages on a common basis.

449 This issue can be put to one side. Group members who claimed tax deductions for depreciation would need to declare any reduction in value damages, and would need to pay income tax on those damages. Hence, unless those group members receive an award of damages for the full amount of the reduction in value of their Relevant Vehicle, they would be undercompensated. Put another way, the income tax they pay on their reduction in value damages would exceed any previous tax benefit received through depreciation deductions unless the damages award

matches the reduction in value suffered. Accordingly, they should be awarded the full amount of the reduction in value of their Relevant Vehicle with no deduction on account of income tax not paid.

450 The reason why group members who claimed tax deductions for depreciation of their Relevant Vehicle will have to pay income tax on their reduction in value damages can be stated shortly:

(1) under the *Income Tax Assessment Act 1997* (Cth) (**ITAA**), a "recoupment" of a loss or outgoing includes "any kind of recoupment, reimbursement, refund, insurance, indemnity or recovery, however described" (s 20-25(1)(a)) and a "grant in respect of the loss or outgoing" (s 20-25(1)(b));

(2) an amount that a taxpayer receives as a recoupment of a loss or outgoing for which the taxpayer previously had claimed a deduction, or can claim a deduction, under a provision listed in s 20-30(1) is an "assessable recoupment" that must be included in the taxpayer's assessable income (s 20-20(3)).

(3) a deduction claimed for depreciation of a motor vehicle is one that can be claimed under Div 40, which is listed at item 1.9 in the table in s 20-30(1); and

(4) accordingly, group members who claimed a depreciation deduction on a Relevant Vehicle will be required to include their reduction in value damages award as part of their assessable income, and incur income tax on that amount.

451 TMCA does not dispute this construction of the ITAA. Rather, the quarrel seems to be that the damages award in favour of some group members may need to be adjusted, because it is possible that some group members may not be subject to the same tax rate as they were when the deduction was claimed.

452 This submission is inconsistent with principle and should be rejected.

453 *First*, TMCA cites no relevant authority for its contention that the ordinary way that a Court would address this issue is to make an adjustment to the damages award so that the claimant does not receive a benefit.

454 The authorities establish that a damages award only needs to be reduced on account of tax that the claimant otherwise would have paid had the claimant received the amount at the original time if two conditions are met. The *first* is that the amounts for the loss in respect of which damages are awarded would, if they had been received by the claimant, have been subject to tax, and the *second* is that the damages awarded to the claimant would not be subject to tax:

see *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1979) 146 CLR 249 (at 302 per Aickin J). This is the rule in *British Transport Commission v Gourley* [1956] AC 185. The second condition is not met in this case, because it is common ground that group members will have to pay tax on their share of the damages award. This is sufficient for dismissing TMCA's contention, and demonstrates why the rule in *Gourley's Case* does not apply.

455 *Secondly*, in circumstances where it is theoretically possible but uncertain that some group members might pay less tax on their damages award than the tax benefit they previously received, the appropriate course is to award damages without any adjustment for tax. At least two matters support this conclusion. One is that if damages awards are made on a gross basis, it conveniently leaves it to the legislature to determine what tax should in fact be exacted. Another is that it avoids the wrongdoer receiving a windfall.

456 Indeed, in *Atlas Tiles Ltd v Briers* (1978) 144 CLR 202 (at 227), Gibbs J said that the rule in *Gourley's Case* does not apply even where "the tax payable on the award were considerably less than the notional tax on the lost earnings". That is, the mere fact that a claimant's marginal tax rate may differ by the time they receive the damages award does not mean the damages award should be adjusted for that difference. By contrast, if only a *small* proportion of the award would be subject to income tax (as it was in *Atlas*, being confined to 5 per cent), the rule would apply such that damages would be calculated on a net basis but adjusted for the proportion of the award that will bear tax. This reasoning was accepted in *Cullen v Trappell* (1980) 146 CLR 1 (at 11 per Gibbs J, with whom Stephen J agreed at 24, Mason J agreed at 24, and Wilson J agreed at 39).

457 The authorities cited by TMCA do not gainsay these propositions or the reasoning in *Atlas*.

458 In the first authority that TMCA cites – *Davinski Nominees Pty Ltd v I & A Bowler Holdings Pty Ltd & Ors* [2011] VSC 220 – Kaye J applied the reasoning of Gibbs J in *Atlas* (at [46]–[52] in particular). The reason why his Honour adjusted the damages award for taxation was because it would be subject to a *different* taxation regime from that which would have applied to the lost income, not merely lower taxation rates: see [76]–[77]. In *Construction, Forestry, Mining and Energy Union v Hall Creek Coal Pty Ltd* [2016] FCA 1032, which TMCA also cites, the issue was whether the applicant could receive *more* than the gross amount of lost income on the basis that his income tax rate now would be 40 per cent, an increase from the rate at the time (30 per cent). Reeves J "grossed up" the award to reflect the additional tax

liability (at [64]). This is different to the position in this case, where there is no suggestion that the relevant income tax regime has changed, or that the damages award would be subject to a different taxation regime.

459 In *Daniels v Anderson* (1995) 37 NSWLR 438, also relied on by TMCA, the issue before the New South Wales Court of Appeal was whether the damages award should be reduced to take into account the financial benefit to the claimant, namely the rate of company tax having decreased. Clarke and Sheller JJA held that this should not be taken into account, and that the award should not be reduced on account of such taxation implications. Relevantly, their Honours said (at 586):

> The need after judgment for inquiry about the consequences of the changed rate of company tax is a telling indicator that they are too remote to be taken into account … In most cases if damages to be awarded to a plaintiff are taxable, taxation should not be taken into account in their assessment. There may be exceptions, but this case is not one.

460 This supports the proposition advanced by the applicants, not the position advanced by TMCA.

E.2.5 *Conclusion on whether group members are entitled to damages under s 272(1)(a)*

461 It follows from the above analysis that group members other than 2020 Field Fix Group Members and the Partial Period Group Members are entitled to recover damages at this time under s 272(1)(a) if their Relevant Vehicles suffered a reduction in value resulting from the Core Defect as at the date of acquisition.

E.3 Other loss and damage

462 In addition to seeking damages under s 272(1)(a) for some group members, the applicants seek damages on behalf of *all* group members for the excess GST they incurred as derivative of the reduction in value of the Relevant Vehicles resulting from the non-compliance with s 54 of the ACL (that is, including the 2020 Field Fix Group Members). This kind of damage is sought under s 272(1)(b) of the ACL, which entitles affected persons to damages for certain consequential losses.

463 I should note from the outset, that the reason the GST damages are sought on behalf of all group members (including the 2020 Field Fix Group Members), is because it is said that a damages award under s 272(1)(b), unlike s 272(1)(a), is unconstrained by s 271(6). sFor similar reasons as expressed at [162], I accept this submission.

464 In addressing the claim for GST damages, it is necessary first to address two contested questions of principle: *first*, the proper construction of s 272(1)(b) of the ACL; and *secondly*, whether group members who claimed input tax credits would be required to account to the Australian Taxation Office (**ATO**) for damages received referable to excess GST. Following this I will turn to consider whether group members are entitled to damages under s 272(1)(b), and if so, whether this should be awarded on an aggregate basis.

E.3.1 *The proper construction of s 272(1)(b)*

465 Section 272 relevantly provides:

> **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:
>
> …
>
> (b) any loss or damage suffered by the affected person because of the failure to comply with the guarantee to which the action relates if it was reasonably foreseeable that the affected person would suffer such loss or damage as a result of such a failure.
>
> (2) Without limiting subsection (1)(b), the cost of inspecting and returning the goods to the manufacturer is taken to be a reasonably foreseeable loss suffered by the affected person as a result of the failure to comply with the guarantee.
>
> (3) Subsection (1)(b) does not apply to loss or damage suffered through a reduction in the value of the goods.

466 The s 272(1)(b) limb resembles the second component of compensatory damages available at common law for breach of contract. That is, the requirement of reasonable foreseeability in s 272(1)(b) resembles the second limb of the rule in *Hadley v Baxendale* (1854) 9 Ex 341: see *Moore v Scenic Tours Pty Ltd* [2020] HCA 17; (2020) 268 CLR 326 (at 348–349 [63]–[67] per Edelman J, speaking in respect of the similar provision in s 267(4) of the ACL); *Capic* (at 435 [891]). This suggests that the purpose of an award of damages under s 272(1)(b) is to put the affected person in the position they would have been in had the goods been of acceptable quality at the time of supply: *Capic* (at 435 [891]).

467 In this proceeding, the applicants allege that the Relevant Vehicles were worth less than what group members paid for them because they contained the Core Defect. In *Capic* (at 435–436 [892]), Perram J identified two broad ways in which this situation could be viewed, each leading to opposite conclusions on whether excess taxes are derivative of the reduction in value and therefore recoverable.

468 The *first* view characterises the situation as an "overpayment" at the point of supply (at 435–436 [892]). In this scenario, the purpose of reduction in value damages would be to put group members in the position they would have been in had they paid what their vehicle was worth (that is, purchase price less reduction in value). If so, it logically follows that any taxes levied on the "overpayment" portion of the purchase price are reasonably foreseeable consequential losses that ought to be recovered: *Capic* (at 435–436 [892], 439 [911]–[912]). The *second* view characterises the situation as an "under-delivery" at the point of supply (at 435–436 [892]). In this scenario, the purpose of reduction in value damages would be to put group members in the position they would have been in had they received a vehicle worth what they paid (that is, a non-defective vehicle). It follows that once compensated for the reduction in value, there is no need to refund excess derivative taxes, because group members would have paid the correct amounts of tax on their purchase: *Capic* (at 435–436 [892], 439 [911]).

469 In *Capic*, Perram J concluded (at 439 [912]) that the first view (the overpayment characterisation) was correct, because it best accords with logic and principle. That is, once an affected person recovers reduction in value damages, their position becomes akin to having paid what the vehicle was worth. In that position, they should not have paid the taxes that were levied on the overpayment portion of the purchase price. The applicants contend that this reasoning is correct, and applies with equal force to the excess GST that group members paid on the overpayment referable to the reduction in value of their Relevant Vehicles resulting from the Core Defect. In the applicants' submission, group members overpaid by the reduction in value amount, and this necessarily entailed that they paid an additional 10 per cent of that amount as GST which they are entitled to recover under s 272(1)(b).

470 TMCA mounts two arguments to the contrary.

471 *First*, TMCA contends that Mr Stockton's Repair Cost Model evidence does not accord with the "overpayment" approach preferred in *Capic*. To the extent this is relevant, this is incorrect. Mr Stockton expressly characterises the reduction in value loss suffered by group members as an "overpayment": First Stockton Report (at [37], [47], [90]). Further, he describes the Repair Cost Model as estimating a "direct incremental Reduction in Value or Overpayment": First Stockton Report (at [42]). This follows from the fact that the repair "represents an observable and measurable increment by which to assess the degree to which the Affected Vehicles were less valuable at the point of acquisition": First Stockton Report (at [41]). To my mind, there is nothing inconsistent between describing the repair cost as the amount necessary to return a

vehicle to the bargained-for position and describing it as an overpayment: Second Stockton Report (at [44]). It reflects the same concept, namely that, if the repair cost differentiates in monetary terms the defective vehicle from its bargained for state, the vehicle actually delivered was worth less than what was paid.

472 *Secondly*, in *Capic* (at 439 [913]–[914]), Perram J also considered and rejected an argument that damages arising from the payment of excess GST could not be recovered under s 272(1)(b) because of s 272(3). Relevantly, his Honour stated that in order to fall within s 272(3), losses:

> … must be 'suffered through' the reduction in the value of the goods. The fact that the imposts and financing costs were paid on the purchase price rather than on the true value of the vehicle makes it difficult to see how they were 'suffered through' the reduction in value. 'Suffered through' is an expression which connotes a relationship of causation. In most contexts, there is more to causation than satisfaction of the 'but for' test. And, as has often been pointed out, where there are two sufficient causes (A and B) for an event C, the application of the but for test leads to the anomalous result that neither A nor B is causative of C. Even so, I think it is instructive in this case that the excess GST, stamp duty and financing costs would still have been incurred if there had not been a reduction in the value of [the applicant's] vehicle. That is a further reason for concluding that they have not been 'suffered through' the reduction in value for the purposes of s 272(3).

473 TMCA submits that Perram J's reasoning is erroneous and should not be followed. It is said that if, on the assumption given by his Honour, Mrs Capic did not prove any reduction in value, it is correct that she still would have paid GST (and stamp duty and financing costs), but the difference is that no part of those amounts could have been said to have been an overpayment or a payment made in error. In TMCA's submission, Mrs Capic's claim could not have succeeded. Indeed, it is said that the claim is wholly derivative and, for that reason, is "suffered through" a reduction in the value of the goods.

474 I am inclined to disagree, and in any event, I am far from reaching the level of satisfaction to conclude that Perram J's analysis is plainly wrong. It is certainly arguable that payment of excess GST is not a loss that is "suffered through" a reduction in value, particularly when it would have been paid in any event had there not been a reduction in value. More to the point, if TMCA's contention was correct, it would mean that excess taxes that are derivative of the overpayment embodied in a reduction in value could not be recovered. This is because the payment of an excess tax is not a reduction in value of the goods, so it is not recoverable under s 272(1)(a). It follows that it must surely be a consequential loss to which s 272(1)(b) applies. Indeed, it would be passing strange if Parliament intended for a loss which was reasonably foreseeable to be left out of s 272(1)(a) and (b). As Mr Free SC, senior counsel for the

applicants put it, there is not "some third category of just irrecoverable damages": T573.42–46.

E.3.2 *GST consequences for group members of a damages award*

475 TMCA contends that it is likely that some group members would not be entitled to recover excess GST, because if a group member claimed an input tax credit for the GST they paid on their Relevant Vehicle, that group member suffered no excess GST loss.

476 Like the issue of income tax deductions for depreciation, this issue is a distraction and can be put to one side. This is because group members who were registered for GST and claimed an input tax credit for the GST paid on their Relevant Vehicle would need to make an increasing adjustment in their Business Activity Statement (**BAS**) if they receive reduction in value damages. In doing so, they would need to treat the reduction in value damages as a reduction in the consideration they paid for the vehicle, which necessarily would oblige them to refund the GST portion of that reduction to the ATO. Accordingly, unless those group members receive an award of damages that includes the excess GST they paid on the reduction in value of their Relevant Vehicle, they would remain out of pocket. Put another way, unless TMCA pays the group members the excess GST, they would only be able to keep 10/11ths of their reduction in value damages, and would not be fully compensated.

477 The underlying reasoning for this conclusion may be mapped as follows.

478 The payment of GST is regulated by the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (**GST Act**). Section 19-70(1) of the GST Act provides that a GST registered group member would need to make an "adjustment" in their BAS for an acquisition for which they are entitled to an input tax credit if:

(1) in relation to the acquisition, one or more adjustment events occur during a tax period (s 19-70(1)(a)); and

(2) an input tax credit on the acquisition was attributable to an earlier tax period (or, if the acquisition was not a creditable acquisition, would have been attributable to an earlier tax period had the acquisition been a creditable acquisition) (s 19-70(1)(b)); and

(3) as a result of those adjustment events, the previously attributed input tax credit amount for the acquisition (if any) no longer correctly reflects the amount of the input tax credit (if any) on the acquisition (s 19-70(1)(c)) (the **corrected input tax credit amount**).

479 Relevant to this case, an "adjustment event" would include any event which has the effect of "changing the consideration for a supply or acquisition": s 19-10(1)(b) of the GST Act. In particular, s 19-10(2)(b) provides that "a change to the previously agreed consideration for a supply or acquisition, whether due to the offer of a discount or otherwise" is an adjustment event.

480 The key issue is whether receiving reduction in value damages under s 272(1)(a) of the ACL amounts to a change in the consideration paid by the group member for the acquisition of their Relevant Vehicle. If it does, an adjustment event has occurred.

481 I accept, as the applicants contend, that the receipt of a reduction in value damages award would create an adjustment event for the group member, because the concept of "consideration" is broadly defined. Specifically, s 195-1 (the Dictionary) defines "consideration" as meaning that which is given by ss 9-15 and 9-17. Relevantly, s 9-15 provides:

> **9-15 Consideration**
>
> (1) ***Consideration*** includes:
>
> (a) any payment, or any act or forbearance, in connection with a supply of anything; and
>
> (b) any payment, or any act or forbearance, in response to or for the inducement of a supply of anything.
>
> ...
>
> (2A) It does not matter:
>
> (a) whether the payment, act or forbearance was in compliance with an order of a court, or of a tribunal or other body that has the power to make orders; …

482 The phrase "in connection with a supply" is sufficiently broad to encompass a damages award that is referable to an overpayment, because such damages would represent a change in the requisite payment for the supply. This is particularly so given that s 9-15(2A) makes plain that a damages award can be regarded as consideration for an acquisition.

483 Further, in the context of s 9-5(a), which defines a "taxable supply" as a "supply *for* consideration" (emphasis added). Gummow, Hayne, Kiefel and Bell JJ in *Federal Commissioner of Taxation v Qantas Airways Ltd* [2012] HCA 41; (2012) 247 CLR 286 explained (at 292 [14]) that the phrase "for consideration" simply "requires a connection or relationship between the supply and the consideration". A reduction in value damages award – which in substance refunds an overpayment for a good – has that connexion or relationship to

the original supply of the good. As such, it amounts to a change in the consideration for the original acquisition.

484 The implication for group members who previously claimed an input tax credit for the GST they paid on acquiring their Relevant Vehicle is that the reduction in value damages they receive under s 272(1)(a) have the effect of reducing the consideration they paid. This means that the input tax credit they previously claimed will be greater than the input tax credit to which they are entitled on the reduced consideration.

485 The ultimate result under s 19-80 of the GST Act is that group members will have an "increasing adjustment" to make, equal to the difference between the corrected tax input credit amount and the previously attributed input tax credit amount. This will need to be refunded to the ATO in their BAS: see also the examples provided in the Australian Taxation Office's Goods and Services Tax Ruling 2001/4: *Goods and services tax: GST consequences of court orders and out-of-court settlements* (GSTR 2001/4, 20 June 2001) (at [123]–[125]).

486 In opening submissions, TMCA accepted that group members would need to make an increasing adjustment to their BAS if they received a further payment that changed the consideration for the supply or acquisition. It now contends that a damages award paid by TMCA would not be "in connection with" the acquisition of the Relevant Vehicle (in the sense that it reduces the consideration paid), because TMCA was not the supplier of the Relevant Vehicle if the group member acquired the Relevant Vehicle from a dealer. However, that submission fails to grapple with the breadth and commercial substance of the phrase "in connection with". The damages award in this case would be akin to a person receiving a cashback rebate from the manufacturer upon purchase from a dealer. Such a payment would be made "in connection with" the consideration for the acquisition of the Relevant Vehicle.

487 This is also made clear by Div 134 of the GST Act which relates to "Third party payments" and provides for this particular circumstance. Section 134-1 provides:

> You may have a decreasing adjustment if you make a payment to an entity that acquires something that you had supplied to another entity. **The entity receiving the payment may have an increasing adjustment.**
>
> (Emphasis added).

488 Section 134-10 concerns increasing adjustments for payments received by third parties, and relevantly provides:

> (1) You have an ***increasing adjustment*** if:

(a) you receive a payment from an entity (the ***payer***) that supplied a thing that you acquire from another entity (whether or not that other entity acquired the thing from the payer); and

(b) your acquisition of the thing from the other entity:

(i) was a creditable acquisition; or

(ii) would have been a creditable acquisition but for a reason to which subsection (3) applies; and

(c) the payment is one or more of the following forms:

(i) payment of money or digital currency;

(ii) an offset of an amount of money or digital currency that you owe to the payer;

(ii) a crediting of an amount of money or digital currency to an account that you hold; and

(d) **the payment is made in connection with, in response to or for the inducement of your acquisition of the thing**; and

(e) the payment is not consideration for a supply you make.

(Emphasis added).

489 To the extent a group member acquired their Relevant Vehicle from a dealer, any damages payment by TMCA would be in connexion with the group member's acquisition of a Relevant Vehicle that TMCA supplied, and that the group member acquired from another entity. This would be so whether the Relevant Vehicle was new or used. Therefore, the group member would have an increasing adjustment, even if they purchased their Relevant Vehicle from a dealer, not TMCA.

490 Finally, I should note that there is also no applicable time limit that would preclude a group member from being obliged to make this increasing adjustment. Pursuant to s 29-20(1) of the GST Act, the adjustment that a group member would need to make would be attributed to the tax period when they become aware of the adjustment. The adjustment is included in their BAS for the period in which they receive the damages.

491 Accordingly, this issue can be put to one side, because it does not affect the amount of any group member's loss. Most relevantly, it is not a logical reason to refrain from awarding damages to any group member in respect of GST that has been overpaid as a result of the overpayment in respect of the Relevant Vehicles.

E.3.3 *Whether group members are entitled to damages under s 272(1)(b)*

492 Given I am satisfied there was a reduction in value of the Relevant Vehicles of 17.5 per cent resulting from the failure to comply with s 54 of the ACL, it follows from what I have explained above that group members are entitled to recover the excess GST they paid on that reduction in value. The GST damages are to be calculated as 10 per cent of the reduction in value.

493 The complication is whether such damages should be awarded on an aggregate basis and to whom. Given GST damages are derivative of the reduction in value of the Relevant Vehicles, consistently with my findings above, the appropriate course is to award such damages on an aggregate basis under s 33Z(1)(e) of the Act. The only group members who I am not satisfied should be awarded GST damages at this stage, for the same reasons I expressed in relation to reduction in value damages, are the Partial Period Group Members. The 2020 Field Fix Group Members are, however, entitled to GST damages.

E.4 Pre-judgment interest

494 In accordance with s 51A of the Act, group members are entitled to pre-judgment interest on any reduction in value and GST damages award. This is not disputed by TMCA. There is no reason why the award of pre-judgment interest should not also be made on an aggregate basis pursuant to s 33Z(1)(e) to the relevant group members entitled.

E.5 Duty to mitigate

495 TMCA alleges that the applicants and group members: *first*, had a duty to mitigate their claimed losses; and *secondly*, failed to mitigate their losses by failing to cause TMCA to repair their Relevant Vehicles under their express warranties. Although not expressly pleaded, it may be inferred that TMCA also contends that any damages to be awarded should be reduced on account of such failure.

496 This submission as to "mitigation" is based on TMCA's assertion that where a claimant is otherwise entitled to recover damages for misleading or deceptive conduct, any damages award may be reduced by reason of the claimant's failure to mitigate, that is, to take reasonable steps to reduce the losses arising from the misleading or deceptive conduct.

497 But a point should be made at the outset: in a statutory cause of action, speaking of a "duty to mitigate", a concept drawn from the common law, is apt to distract from the required statutory task. Contrary to TMCA's submissions, the common law duty to mitigate has no role to play in an action for compensation under statute: see, analogously, *Trilogy Funds Management Ltd*

v Sullivan (No 2) [2015] FCA 1452; (2015) 331 ALR 185 (at 330–331 [712]–[716] per Wigney J and the authorities cited by his Honour). To the contrary, in *Henville v Walker*, McHugh J said in respect of ss 53 and 82 of the TPA (at 505 [140]) that:

> Nothing in the common law, in s 52 or s 82 or in the policy of the [TPA] supports the conclusion that a claimant's damages under s 82 should be reduced because the loss or damage could have been avoided by the exercise of reasonable care on the claimant's part.

498 Having said this, in respect of statutory compensation, the basal notion called in aid by TMCA arises from the statutory requirement of necessary connexion or causation, that is, that damage be caused "by" the conduct of the defendant: *Henville v Walker* (at 505 [140] per McHugh J); *Murphy v Overton Investments Pty Ltd* [2001] FCA 500; (2001) 112 FCR 182 (at 197–198 [47] per Branson J); *Murphy v Overton Investments Pty Ltd* [2004] HCA 3; (2004) 216 CLR 388 (at 414 [68] per Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

499 In the present case, the same requirement arises from the statutory language of ss 236 and 272 of the ACL: in ss 236 and 272(1)(b) it arises by reason of the words "because of"; and in s 272(1)(a) it arises by reason of the words "resulting from". It is said that both forms of statutory wording identify the need for the claimed loss to result from the statutory contravention, and where a claimant fails to take reasonable steps to reduce such losses, the damages that would have been avoided by those steps are not recoverable.

500 TMCA submits that these principles apply in the present proceeding in respect of group members who have not taken advantage of the 2020 Field Fix. Relevantly, it is said that:

(1) TMCA gave express warranties to all group members with respect to their vehicles. There were two sets of warranties – the New Vehicle Warranty and the Toyota Warranty Advantage. The parties agree those documents are representative of the warranties provided to purchasers of new vehicles throughout the Relevant Period (SAF [9]–[10]); and

(2) in August 2020, TMCA sent letters to group members who owned Pre-MY2018 Production Vehicles which extended the warranties so as to apply to DPF repairs for 10 years from delivery of the vehicle. That letter provided links to a webpage and booklet with information about the DPF issues and invited group members to contact their dealers, stating: "[i]f required, they will organize [*sic*] a replacement system that incorporates changes made to address the operational issues that some guests have experiences [*sic*] … at no cost to you." (AF [178](c)–(d)]).

501 TMCA asserts it made it known to group members that they were able to have the defect repaired at no cost to them and group members who have not taken up that offer have behaved unreasonably such that they should not be compensated for loss attributable to that unreasonable behaviour. It is said that because the 2020 Field Fix removed the defect it also eliminated any reduction in value such that group members are *prima facie* not entitled to any damages for loss in value at all. Alternatively, it is said that if the Court found that a loss of value arises from the use of the vehicles prior to August 2020, there would need to be a proportionate reduction in damages by reference to the fraction of the vehicle's working life constituted by the period between purchase and August 2020.

502 Irrespective of the precise words of statutory causation, it must be right that if part of the loss would not have occurred but for the applicant's own unreasonable conduct, it is reasonable for the Court to consider how much of the loss was caused by the contravening conduct and to award damages accordingly. But such a concept does not apply on the facts of this case, where TMCA relies upon the failure by group members to take advantage of a repair – the 2020 Field Fix – years after they purchased a Relevant Vehicle. This is because there can be no suggestion that the failure to take up the repair *caused* any part of a group member's reduction in value loss, when that loss resulted from the presence of the Core Defect at the date of acquisition, before the 2020 Field Fix was available. Nor do I accept TMCA's assertion that the loss suffered by group members could have been cured by taking up the 2020 Field Fix. The fix cannot change the historical fact that at the time of supply each Relevant Vehicle was not of acceptable quality and was less valuable as a result.

503 This analysis is also supported by the scheme provided for under ss 271 and 272 of the ACL. The notion that where a manufacturer of goods offers to remedy defective goods under an express warranty, and the consumer of the goods does not take up that offer, the consumer has failed to mitigate its loss, such that its "reduction in value" damages are nil is incompatible with the statutory regime.

504 Section 271(6) deals specifically with the circumstance of repairs under warranty. It provides:

> (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.

505 The proper construction of s 271(6) of the ACL was considered at length in *Capic* (at 392–402 [694]–[740]). There is nothing in s 271(6) that *compels* a consumer to request that their goods be repaired under warranty, where an effective repair is available: see *Capic* (at 398–399 [717]–[723]). Rather, the consumer may make an election between requiring the manufacturer to repair their goods, or bringing an action against the manufacturer for damages of the kind described in s 272(1)(a). As Perram J explained in *Capic* (at 399 [719]):

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

506 Indeed, his Honour rejected the argument that the ACL, and specifically Pt 5-4 Div 2 (in which ss 271 and 272 appear) "in general abhors the consumer seeking compensation as a first step": *Capic* (at 399 [720]). Reading into the statutory regime an *obligation* upon the consumer to "mitigate" its loss by requiring the manufacturer to repair goods under warranty would do violence to the statutory scheme embodied in Pt 5-4 Div 2 of the ACL.

507 Accordingly, neither ss 271 nor 272 of the ACL, properly construed, impose upon consumers a so-called duty to mitigate of the kind for which TMCA contends (or, more relevantly, impact upon the quantum of casually related loss as TMCA contends).

508 In any event, even assuming that there was some obligation to "mitigate" damage, it cannot sensibly be said that a failure to take up the invitation to have the 2020 Field Fix applied is unreasonable in circumstances where TMCA asserts that to take up that invitation has the effect, under s 271(6), of extinguishing altogether any entitlement to damages under s 272(1)(a). TMCA submits that it is unjust for consumers to obtain monetary damages for reduction in value instead of taking up a repair years later. However, this argument misses the point, because the statutory provisions are clear: see *Capic* (at 399 [721]). In any event, the result compelled by the statute is not unjust – a later repair does not compensate the consumer for having paid more than the vehicle was worth at the time of supply.

F THE CLAIM OF DCS FOR LOSS AND DAMAGE

509 It is then necessary to turn to the claim of DCS for loss and damage.

F.1 Acceptable quality

F.1.1 *Whether there was a reduction in value of the Relevant Prado*

510 DCS brings an individual claim under s 272(1)(a) of the ACL for reduction in value damages resulting from the non-compliance with the statutory guarantee. As noted, it is common ground that DCS owned the vehicle and it was the party that therefore suffered any reduction in value loss. Given the reduction in value I have found of 17.5 per cent is the same across all Relevant Vehicles, that figure applies to the Relevant Prado. The way in which that percentage is applied in order to determine the quantum of damages under s 272(1)(a) of the ACL is explained above: see Section E.2.3.

511 The Relevant Prado was purchased on 8 April 2016: First Williams Affidavit (at [78]). It cost $60,315, inclusive of GST, stamp duty, "Perfexion Window Tint 2 Windows", dealer delivery, registration fee and Compulsory Third Party insurance: First Williams Affidavit (at [82]–[83]). The price exclusive of GST, stamp duty, other statutory charges and window tint, but inclusive of dealer delivery which forms part of the consideration for the vehicle, was $52,214.32. Dealer delivery should be included in the purchase price, because it is an amount paid for the acquisition of the vehicle itself, in contrast to a tax or other benefit such as CTP insurance or registration: see definition of "price" in s 2(1) of the ACL. This analysis is also consistent with the Agreed Facts, which records the total "drive away" price, and the amount of GST and stamp duty: AF [80]. While the Agreed Facts does not identify the tax exclusive purchase price without accessories, the identification of that amount from the evidence does not contradict the Agreed Facts.

512 There was no disclosure of the Core Defect or Defect Consequences to Mr Williams (and hence DCS) before the Relevant Prado was purchased: First Williams Affidavit (at [96]–[97]). The agreed purchase price was therefore not based on a common appreciation of the existence of the Core Defect. Accordingly, for the reasons described above in Sections E.2.2 and E.2.3, the Relevant Prado was worth less than an identical vehicle without the Core Defect at the time of acquisition.

513 As to the amount of that reduction in value, it is necessary to descend into an exercise of calculation. I note that all figures are rounded to two decimal places. The reduction in value for

damages for DCS is **$7,474.59**, which is calculated by applying the following methodology derived from the statutory formula in s 272(1)(a):

(1) the reduction in value is 17.5 per cent;

(2) the MSRP applicable to the Relevant Prado was $61,990: AF [78]. The average retail price (excluding tax) applicable to the Relevant Prado can be calculated using Mr Stockton's evidence, which identifies average purchase price as a percentage of MSRP for each model and time period. For the 2016 Prado, the average purchase price was 96.23 per cent of MSRP: First Stockton Report (at tab 8, p 2). The formula is therefore 96.23 per cent of $61,990, divided by 1.1 (in order to remove GST from the MSRP). This equates to an average purchase price for the 2016 Prado of $54,229.98;

(3) the "true" value of the Relevant Prado (that is, the value of the goods had the existence of the Core Defect been known at the time of purchase) is derived by reducing the average purchase price, $54,229.98, by 17.5 per cent. This equals $44,739.73

(4) the "price paid" for the Relevant Prado, being the actual tax exclusive purchase price paid by DCS, was $52,214.32;

(5) for the purposes of s 272(1)(a) of the ACL, in the case of the Relevant Prado, the "lower" of the "price paid" and the "average retail price" was the "price paid"; and

(6) the recoverable reduction in value, therefore, is the difference between the "price paid" ($52,214.32) and the "true" value of the Relevant Prado (as reduced on account of the Core Defect ($44,739.73)); that is, $7,474.59.

F.1.2 *Whether DCS suffered other consequential loss*

514 DCS claims damages under s 272(1)(b) for other reasonably foreseeable loss or damage resulting from the non-compliance with s 54 of the ACL, namely: (1) excess GST, stamp duty and financing costs incurred because of the Core Defect; (2) lost income on days when Mr Williams could not work (for the benefit of DCS) because the vehicle was being serviced due to the Core Defect; and (3) excess fuel costs incurred because of the Core Defect.

515 I will consider each of these heads of damage in turn.

Excess GST, stamp duty and financing costs

516 For the reasons described above (at Section E.3), the excess GST, stamp duty and financing costs (that is, excess interest) are all derivative of the reduction in value amount, because this

amount is akin to an overpayment at the time of acquisition. Had DCS paid only what the vehicle was worth, it would not have incurred these additional amounts.

517 On the basis that the reduction in value percentage is 17.5 per cent and that the recoverable reduction in value is $7,474.59:

(1) the excess GST is 10 per cent of the reduction in value amount – **$745.46**; and

(2) the excess stamp duty is 3 per cent of the sum of the reduction in value amount and the excess GST – **$246.60**.

518 The excess financing costs are in substance the interest paid on the additional amount borrowed because of the overpayment. This is calculated by multiplying the tax inclusive reduction in value, on a month by month basis, using the percentage figures set out in Mr Stockton's excess interest amortisation schedule: Second Stockton Report (at tab KAW 4, p 1U). I will leave it to the parties to calculate this exact figure, which is somewhat complex. TMCA does not dispute the arithmetic involved.

Lost income

519 On three occasions when the Relevant Prado had to be serviced for issues associated with its DPF System, Mr Williams was unable to conduct his usual work, on behalf of DCS, of performing inspections for AAMC. This occurred on 27 April 2018, 12 April 2019 and 20 March 2020, causing DCS to lose, on each occasion, between $1,350 and $1,800 (excluding GST) in revenue: First Williams Affidavit (at [237]–[239]).

520 These amounts were reasonably foreseeable losses that resulted from the failure to comply with the statutory guarantee of acceptable quality. Indeed, it is reasonably foreseeable that the owner of a defective vehicle will take steps to try to have the vehicle fixed, and that this may cause that person to lose work opportunities as a result. Mr Williams agreed to take those bookings for a service because they were the first available dates offered, and he was understandably frustrated with the condition of his vehicle and wanted the issues addressed as soon as possible: First Williams Affidavit (at [236]). There was nothing put to Mr Williams in cross-examination to suggest that it was unreasonable for him to have taken this course.

521 The applicants submit that the Court should find that DCS suffered lost income on each occasion in the amount of $1,575, being the mid-point of the range between $1,350 and $1,800, meaning the total amount recoverable under s 272(1)(b) for lost income would be **$4,725**. This figure appears to be common ground, and I accept it to be appropriate.

Excess fuel

522 I have already determined the contest in respect of the referee's report on this topic, finding that the referee concluded that there was an increase in fuel consumption, but that he was unable to settle on a "reliable single estimate for increased fuel consumption to be applied globally for all Relevant Vehicles": see [68]. This creates some difficulties in approaching the individual claims of group members, including that of DCS.

523 The applicants contend that the Court should apply a 3 per cent average increase in fuel consumption in respect of the Relevant Prado, in the light of the findings of the referee and Mr Williams' evidence. While I have dealt with the findings of the referee on this point above, it is necessary to recall that the referee concluded in his Second Report (at [27]):

> While the simple average of the mean fuel consumption increase estimates of the vehicles in the Toyota Fuel Consumption Study is 3%, **more than half of the vehicles are estimated to have no more than a marginal impact on fuel consumption**, as I expected in my earlier report. I note, however, that the driving patterns associated with the ECM downloads and the corresponding regeneration/non-regeneration distances reported in the TFCS are unknown and may not be directly comparable to the driving pattern of the NEDC used for the Fuel Consumption values from Type Approval, adding uncertainty to the estimates. **Further, the ECM downloads reported in the TFCS do not represent a statistically significant sample of any vehicle type or model**.
>
> (Emphasis added).

524 Further, Mr Williams' evidence in respect of increased fuel consumption was as follows (see First Williams Affidavit (at [127]–[128])):

> 127. During this period between the 18 month/30,000 km service on 7 November 2016 and the 24 month/40,000 km service on 1 February 2017, I also started to notice other issues with the Prado.
>
> 128. First, I noticed that the Prado was using more fuel than it had previously. I had not previously noticed the Prado's fuel consumption or looked at the average fuel consumption recorded on the vehicle's trip computer. However, I recall noticing at around this time that I was having to refuel the Prado more often than I had previously and needing to use a greater amount of fuel to "top up" the Prado than I had previously. I recall checking the average fuel consumption recorded in the Prado's trip computer at around this time. I did this because I had noticed the Prado using more fuel than it had previously. I do not specifically recall the average fuel consumption I observed in the Prado's trip computer in late 2016 or early 2017. However, since this time, I have periodically checked the average fuel consumption recorded in the Prado's trip computer and, to the best of my recollection, the average fuel consumption I have observed from time to time in the Prado's trip computer has been in the range of 10.5 U100 kms to 10.8 L/100 kms. I do not recall ever seeing an average fuel consumption outside this range recorded in the Prado's trip computer. I have not observed any improvement in the Prado's fuel consumption since around the time the Prado started to emit white smoke.

525 Notably, Mr Williams was not challenged on this evidence, nor was this evidence the subject of a limitation under s 136 of the Evidence Act (limiting its use to the fact of the representation not its truth).

526 TMCA submits that with respect to the referees conclusions, within those "statistically insignificant" results, the only Prado which was considered by the Referee showed 0 per cent increased fuel consumption, which is of significance given the vehicle in question is a Prado. It is said that the referee's more generalised findings (based on mean values across all vehicles) cannot support a conclusion that the Relevant Prado was the subject of any increased fuel consumption particularly in light of the referee's comments about the limitations of his analysis. TMCA further submits that a failure to cross-examine Mr Williams on his evidence in this respect, or seek a limitation in relation to this evidence, is unimportant. That is because, even if it could be said the Relevant Prado did suffer an increase in fuel consumption as a result of the Core Defect, Mr Williams' evidence is so hopelessly vague that it cannot form a rational basis upon which to reach an affirmative state of satisfaction as to the precise increase in fuel consumption. Alternatively stated, on the current state of the evidence, quantifying the increase in fuel consumption is nothing but speculation.

527 DCS, on the other hand, submits that the parties co-operated with a view to extracting data from the Electronic Control Unit (**ECU**) in the Relevant Prado concerning the increased rate of active regeneration experienced by the Relevant Prado as a result of the Core Defect. If this data could be obtained, it would enable the excess fuel costs to be quantified in accordance with the methodology endorsed by the referee, but the diagnostic analysis performed has not been able to identify the relevant data on the ECU of the Relevant Prado, meaning that precise quantification of the excess fuel costs has not been possible. In the circumstances, DCS submits that the most appropriate course is for the Court to assess the recoverable excess fuel costs by reference to the referee's findings concerning increased fuel consumption and Mr Williams' evidence as to the fuel costs that DCS incurred. This is an example, it is said, of a situation "where the Court must do the best it can".

528 DCS submits that the fact that the only Prado in the sample of 12 vehicles in TMCA's fuel study had 0 per cent excess fuel consumption does not gainsay that the Core Defect had a propensity for a negative impact on fuel consumption in Relevant Vehicles including the Relevant Prado, particularly in circumstances where: (1) an owner's driving style could affect the level of fuel consumption (Second Referee's Report (at [30(a)])); and (2) Mr Williams gave

unchallenged evidence that the Relevant Prado's fuel consumption increased at times when it was suffering the Defect Consequences. Indeed, senior counsel for the applicant was cautious to emphasise that the Prado assessed in the TFCS should not be taken to be representative of Prado's generally.

529 This issue has caused me some pause. On the one hand, one must appreciate the finding of the referee that the Core Defect caused an increase in fuel consumption. On the other hand, one must appreciate the lacuna in the evidence in quantifying what this increase in fuel consumption is in relation to the Relevant Prado with any degree of specificity. I accept that as a matter of logic, the increase in fuel consumption should be assessed as somewhere between 0 per cent and 3 per cent, and that Mr Williams' evidence provides a basis to infer that there was an increase in fuel consumption. But there is simply no indication of what that increase actually was. Indeed, Mr Williams' reference to the fact he "observed from time to time … the Prado's trip computer has been in the range of 10.5 U100 kms to 10.8 L/100 kms" is hollow without a comparator figure before the Defect Consequences manifested. In all the circumstances, the evidence does not allow me to reach a state of reasonable satisfaction as to the Relevant Prado's increase in fuel consumption caused by the Core Defect. To proceed otherwise on the evidence adduced would be to engage in impermissible speculation.

530 This head of damage must fail. I stress that this is an individual assessment in relation to DCS, and it may be that other group members are able to prove, to the relevant standard, that they suffered loss due to increased fuel consumption.

F.2 Misleading and deceptive conduct

531 DCS also seeks damages pursuant to s 236 of the ACL for the difference between the purchase price and the true value of the Relevant Prado as at the date of purchase and other consequential losses (namely, the excess GST and stamp duty paid on the overpayment at the time of acquisition, excess financing costs, lost income and excess fuel expenses).

532 On any view, the measure of damages in respect of the misleading and deceptive conduct case would be the same as I have found in respect of the acceptable quality case. One might then sensibly ask: why is the claim for misleading and deceptive conduct being pressed?

533 The reason advanced by the applicants relates to the interaction of the relevant statutory provisions. Relevantly, s 236(1) of the ACL provides:

236 Actions for damages

(1) If:

(a) a person (the ***claimant***) suffers loss or damage because of the conduct of another person; and

(b) the conduct contravened a provision Chapter 2 or 3;

the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.

534 It is said that if it is the case that s 271(6) disentitles the 2020 Field Fix Group Members to an award of reduction in value damages pursuant to s 272(1)(a)(i) (a matter that does not currently arise for determination), the claim for damages under s 236 is brought into sharp focus. This is because the award of damages under s 236 is unaffected by s 271(6) or any like provision. It is said that the case of DCS therefore provides an example of a claim for misleading and deceptive conduct and should be determined. Given the individual misleading and deceptive conduct claim of DCS is pressed and could be of utility, I propose to deal with it notwithstanding the measure of damages is the same as the acceptable quality case.

535 The use of the phrase "because of" indicates that the entitlement to damages under s 236(1) is predicated on a causal connexion between the misleading or deceptive conduct on the one hand (which amounts to a contravention of Chapter 2 or 3 of the ACL) and the loss or damage suffered on the other hand: see *Campbell v Backoffice* (at 341 [102] per Gummow, Hayne, Heydon and Kiefel JJ).

536 The appropriate measure of damages in a claim under s 236(1) concerning a good acquired by misrepresentation has long been said to be the difference between purchase price and the true value of the good as at the date of acquisition: *Potts v Miller* (at 297–298 per Dixon J); *Kizbeau Pty Ltd v WG & B Pty Ltd* (1995) 184 CLR 281 (at 291 per Brennan, Deane, Dawson, Gaudron and McHugh JJ). However, this is not an inflexible rule: *HTW Valuers* (at 657 [36] per Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ). Nor did Dixon J even suggest it was inflexible in *Potts v Miller*. The Court can, where appropriate, take into account subsequent events to illuminate what the goods were worth at the date of acquisition: *Potts v Miller* (at 298–299); *Kizbeau* (at 291); *HTW Valuers* (at 658–659 [39]). In doing so, the Court needs to be careful to distinguish between possible causes of the decline in value after the date of acquisition: *HTW Valuers* (at 659 [40]). If the cause is inherent in the thing itself, then its existence should be taken into account in arriving at the true value at the time of acquisition: *Potts v Miller* (at 298); *HTW Valuers* (at 659 [40]). However, if the cause is "independent", "extrinsic", "supervening"

or "accidental", then the additional loss is not the consequence of the misrepresentation: *Potts v Miller* (at 298); *HTW Valuers* (at 659 [40]).

537 Further, the Court needs to be discerning before relying on "market values" at the time of acquisition or subsequent to acquiring the good. For example, it would not be appropriate to use market values as the basis for assessing the true value as at the time of acquisition if those market values were infected by misinformation or were mistaken: *HTW Valuers* (at 657–658 [37]). To the extent that TMCA seeks to rely on resale market data in the present case, it suffers from this problem for the reasons dealt with above: see [87]–[117].

538 It is common ground that TMCA made the representations, including in brochures such as the Toyota Prado e-Brochure printed October 2015. TMCA also admits that it engaged in the Omissions Conduct, including failing to disclose the Core Defect and Defect Consequences to prospective purchasers. These representations and omissions were misleading for the reasons described above: see Section D.

539 Mr Williams' evidence, summarised above (at [118]–[152]), establishes that he relied on the Vehicle Representations, Future Vehicle Representations and the Omissions Conduct in deciding to cause DCS to purchase the Relevant Prado. Accordingly, I am satisfied that TMCA's misleading conduct has caused DCS' reduction in value loss.

540 In addition to reduction in value damages, DCS seeks compensation for other consequential loss, namely excess GST and stamp duty paid on the overpayment at the time of acquisition, excess financing costs, lost income and excess fuel expenses. The excess tax and financing costs have a sufficient causal connexion with the misleading conduct because they are derivative of the difference between the purchase price and the true value. Lost income also has a sufficient causal connexion with the misleading conduct, because those losses would not have occurred but for that conduct. That is, but for the misleading conduct, the Relevant Prado would not have been purchased, so those losses would not have been incurred. Any contention in respect of increased fuel costs runs into the same difficulty I have canvassed in respect of the acceptable quality case.

541 Of course, it is necessary to stress that the question of reliance is an inherently subjective matter and whether it can be made out by group members can only be determined on a case by case basis. Nor, even though DCS has been successful on both fronts, can DCS engage in an exercise of double recovery: see [422].

G CONCLUSION AND ORDERS

542 In short, by reason of the Core Defect, the Relevant Vehicles were worth less at the time of supply than they would have been worth if they were not defective. The conduct in marketing the vehicles as being of acceptable quality was misleading. The individual claim of DCS should succeed. So should the representative claims made on behalf of group members with regard to common issues. These conclusions accord with what might have been thought to be the intuitive, common sense response to the facts presented, and it is regrettable the case has become more complicated than it ought to have been.

543 The parties were largely in agreement as to the common questions to be determined at the initial trial. I can see no reason why those common questions, and the answers to those common questions, should now not be the subject of agreement. Accordingly, the parties are to file an agreed minute or competing minutes of order reflecting these reasons, in the form of answers to common questions, and any ancillary orders that are necessary.

544 Finally, despite my views as to length of the submissions, and whether concessions should have reduced the ambit of the liability dispute, I should note that counsel and the solicitors for the parties conducted the hearing with great efficiency, courtesy and professionalism, which has been of great assistance in preparing these reasons.

I certify that the preceding five-hundred-and-forty-four (544) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Lee.

Associate: 

Dated: 7 April 2022