

# HIGH COURT OF AUSTRALIA

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

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BILJANA CAPIC

APPELLANT

AND

FORD MOTOR COMPANY OF AUSTRALIA  
PTY LTD

RESPONDENT

*Capic v Ford Motor Company of Australia Pty Ltd*  
[2024] HCA 39  
*Date of Hearing: 11 & 12 April 2024*  
*Date of Judgment: 6 November 2024*  
S25/2024

## ORDER

1. *Appeal allowed.*
2. *Cross-appeal dismissed.*
3. *Set aside orders 1 and 7 made by the Full Court of the Federal Court of Australia on 13 December 2023 and, in their place, order that:*
  - (a) *the appeal be allowed on ground 5 and ground 8(a) of the amended notice of appeal dated 19 May 2022 and the appeal otherwise be dismissed; and*
  - (b) *order 2 made by the primary judge on 13 August 2021 in NSD 724 of 2016 be set aside and the question of the respondent's (Ms Capic's) damages be remitted for redetermination by the primary judge:*
    - (i) *in accordance with the reasons of the High Court of Australia; and*



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(ii) *on the basis that Ms Capic is entitled to pre-judgment interest on the damages awards for excess amounts of GST, stamp duty and financing costs.*

4. *The respondent pay 75% of the appellant's costs of the proceedings in this Court.*

On appeal from the Federal Court of Australia

### **Representation**

F T Roughley SC with S L Gerber for the appellant (instructed by Corrs Chambers Westgarth)

S G Finch SC with M P Costello KC, T F B Farhall and M C Roberts for the respondent (instructed by Allens)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

### **Capic v Ford Motor Company of Australia Pty Ltd**

Damages – Assessment – Consumer law – Where appellant brought representative proceedings against respondent on behalf of persons who acquired motor vehicles fitted with "DPS6" transmission – Where vehicles had at least one of five defects – Where primary judge concluded vehicles did not comply with guarantee of "acceptable quality" in s 54(1) of *Australian Consumer Law* ("ACL") at time of supply – Where s 271(1) of ACL provides that if guarantee under s 54 is not complied with, "an affected person in relation to the goods may ... recover damages from the manufacturer" – Where s 272(1)(a) provides that "an affected person in relation to goods is entitled to recover damages for ... any reduction in the value of the goods, resulting from the failure to comply with the guarantee to which the action relates" – Where primary judge assessed damages payable under s 272(1)(a) – Where primary judge did not consider whether adverse consequences of each defect materialised in appellant's vehicle and fact that some defective components were replaced after date of supply – Where Full Court of Federal Court of Australia followed decision of Full Court in *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514 – Where Full Court held subsequent events were capable of bearing on assessment of damages under s 272(1)(a) and primary judge erred in not considering information known at time of trial and appellant's use of vehicle up until time of trial – Whether Full Court erred in finding that assessment of damages under s 272(1)(a) may require departure from time of supply or adjustment to avoid "over-compensation" – Whether Full Court erred in finding that assessment of damages under s 272(1)(a) required having regard to events after time of supply.

Words and phrases – "assessment of damages", "consumer", "damages", "defect", "guarantee of acceptable quality", "loss-based damages", "materialisation of risks", "over-compensation", "performance-based damages", "reduction in value", "repair", "state and condition of the goods", "time of supply", "time of trial".

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



1 GAGELER CJ, GORDON, STEWARD, GLEESON AND BEECH-JONES JJ. Like the two appeals decided by this Court in *Toyota Motor Corporation Australia Ltd v Williams* and *Williams v Toyota Motor Corporation Australia Ltd* ("*Williams*"),<sup>1</sup> this appeal concerns the approach to the assessment of damages under s 272(1)(a) of the *Australian Consumer Law*<sup>2</sup> ("the ACL") for any reduction in the value of a motor vehicle resulting from its failure to comply with the guarantee of acceptable quality provided for in s 54(1) of the ACL at the time of its supply to a consumer due to various defects, some of which were ultimately capable of repair.

2 This appeal was heard immediately following the appeals in *Williams*. The matters of principle contended for by the parties in this appeal are noted and addressed in *Williams*.

3 In this case, the Full Court of the Federal Court of Australia (Yates, Beach and Downes JJ) set aside the primary judge's assessment of damages under s 272(1)(a) and remitted the matter to his Honour to be determined in a manner that largely accorded with the reasons of the Full Court in *Toyota Motor Corporation Australia Ltd v Williams* ("*Toyota*"),<sup>3</sup> which was the subject of the appeals in *Williams*.<sup>4</sup> As this Court's decision in *Williams* overturns various parts of the Full Court's reasoning in *Toyota*, it follows that the Full Court's reasoning the subject of this appeal cannot be sustained. As the primary judge did not assess the damages payable under s 272(1)(a) in accordance with this Court's reasons in *Williams*, the proceedings will be remitted to his Honour to undertake that task.

## Background

4 The respondent, Ford Motor Company of Australia Pty Ltd ("*Ford*"), imported 73,451 motor vehicles into Australia in model lines of the Focus, Fiesta and EcoSport range, which were fitted with a 6-speed dry dual clutch PowerShift transmission known as the "DPS6" ("the relevant vehicles"). As the importer, Ford

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1 *Williams v Toyota Motor Corporation Australia Ltd* [2024] HCA 38 ("*Williams*").

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

3 (2023) 296 FCR 514.

4 See *Ford Motor Company of Australia Pty Ltd v Capic* (2023) 300 FCR 1 ("*Ford*") at 65 [315]-[316].

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was deemed to be the manufacturer of the vehicles for the purposes of s 7(1)(e) of the ACL.

5 In December 2012, the appellant, Biljana Capic, purchased a 2012 Ford Focus that was fitted with the DPS6 transmission from a dealer. Ms Capic experienced various mechanical difficulties associated with the DPS6. In 2016, Ms Capic commenced representative proceedings against Ford on behalf of persons who, between 1 January 2011 and 29 November 2018, purchased the relevant vehicles either new or second-hand. At least in the case of Ms Capic, there is no doubt that she acquired her vehicle, being a form of "goods",<sup>5</sup> as a "consumer" for the purposes of the ACL.<sup>6</sup>

6 The effect of the findings of the primary judge as modified by the Full Court was that, across the relevant vehicles, there were five defects, two of which were described as "architectural" deficiencies and three of which were described as "component" deficiencies.<sup>7</sup> One of the architectural defects was inadequate "damping" of torsional vibrations in the DPS6.<sup>8</sup> This affected all of the relevant vehicles. The defect carried a propensity to cause a slight vibration or shudder at low speeds or during a coast down and a slight audible rattle in the gears. The other architectural defect was inadequate heat management in the DPS6. This was said to have affected just under 95% of the relevant vehicles. Both architectural defects possessed a "*superadded* propensity" for the affected vehicles to experience "troubling" behaviours associated with the three component defects (emphasis in original).<sup>9</sup>

7 The three component defects were: leaking input shaft seals affecting just over 64% of the relevant vehicles; inadequate materials used for the clutch lining affecting 93.7% of the relevant vehicles; and a risk of solder cracking of separate integrated circuits (or chips) within the transmission control module ("TCM") affecting 87.9% of the relevant vehicles. The component defects carried risks of similar or overlapping consequences, including shuddering sensations while

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5 ACL, s 2(1).

6 ACL, s 3; see *Williams* [2024] HCA 38 at [1].

7 *Capic v Ford Motor Company of Australia Pty Ltd* (2021) 154 ACSR 235 ("*Capic*") at 442 [930]; *Ford* (2023) 300 FCR 1 at 6 [10]-[11].

8 *Capic* (2021) 154 ACSR 235 at 344 [464].

9 *Ford* (2023) 300 FCR 1 at 48 [222]-[223].



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driving, difficulties with gear selection, a lack or loss of power, clutch odour, grinding noises and rattling noises.

- 8 Every relevant vehicle had at least one such defect. Ms Capic's vehicle had all five defects. The primary judge found that the "real risk" of the failures associated with each of the component defects in her vehicle had materialised.<sup>10</sup> Thus, Ms Capic's vehicle began exhibiting the various "troubling" behaviours within the first few months of her acquiring it. These vehicle behaviours recurred over many years. Between 14 April 2013 and 11 June 2019, Ms Capic arranged for her vehicle to be serviced on 15 occasions. The defect associated with the TCM was remedied when the TCM was replaced by a service on 10 February 2016. The difficulties associated with the input shaft seals were remedied when they were replaced during a service conducted on 30 May 2017. The clutch was also replaced on that same occasion, but this did not prove to be effective (although a different fix applied to some of the relevant vehicles was effective). Despite these repairs, Ms Capic continued to experience problems with her vehicle.

### **The primary judgment**

- 9 In assessing whether the relevant vehicles were supplied in circumstances where the guarantee of acceptable quality provided for in s 54(1) of the ACL was not complied with,<sup>11</sup> the primary judge addressed each of the applicable criteria in s 54(3), namely the nature and price of the goods<sup>12</sup> and various representations about some of the vehicles and the DPS6.<sup>13</sup> His Honour concluded that, as all the relevant vehicles were supplied with the DPS6 that contained the first of the two architectural defects, they were all supplied in circumstances involving a breach of the guarantee of acceptable quality.<sup>14</sup> His Honour also found that the guarantee of acceptable quality was not complied with in relation to each of the relevant

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10 *Capic* (2021) 154 ACSR 235 at 361-362 [537].

11 *Capic* (2021) 154 ACSR 235 at 390 [675].

12 *Capic* (2021) 154 ACSR 235 at 379 [615]-[616]; ACL, s 54(3)(a)-(b).

13 *Capic* (2021) 154 ACSR 235 at 379-383 [618]-[635]; ACL, s 54(3)(d).

14 *Capic* (2021) 154 ACSR 235 at 390 [675].

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vehicles affected by any of the three component defects.<sup>15</sup> His Honour answered common questions accordingly.

10 The primary judge also addressed Ms Capic's claim for damages but not those of the group members. His Honour awarded her \$6,820.91 in reduction in value damages under s 272(1)(a) of the ACL, on the basis that Ms Capic's vehicle was worth "30% less than [the] fair market value", which was taken to be the price paid by Ms Capic for her vehicle.<sup>16</sup> In doing so, his Honour rejected the expert valuation evidence provided by Ms Capic's valuer (Mr Vasilakis)<sup>17</sup> and Ford's valuer (Mr Cuthbert).<sup>18</sup> His Honour rejected Mr Cuthbert's evidence because he had valued Ms Capic's vehicle as at January 2020 and was not asked to assume that it suffered from any defects.<sup>19</sup> His Honour also did not have regard to whether or not the adverse consequences of each relevant defect materialised and the fact that some of the defective components were replaced after the date of supply, as his Honour held that such considerations were irrelevant to assessing "the value [of the vehicle] at the date of acquisition".<sup>20</sup>

11 The primary judge awarded Ms Capic damages under s 272(1)(b) of the ACL on account of excess payments of GST, stamp duty and financing costs.<sup>21</sup> His Honour also awarded Ms Capic interest on the damages under s 272(1)(a) but not on the damages awarded under s 272(1)(b) for excess GST, stamp duty and financing costs.<sup>22</sup> The total amount awarded to Ms Capic was \$17,248.19.

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15 *Capic* (2021) 154 ACSR 235 at 390 [677], 391 [682], [687].

16 *Capic* (2021) 154 ACSR 235 at 435 [890]; ACL, s 272(1)(a)(i).

17 *Capic* (2021) 154 ACSR 235 at 430-431 [865]-[870].

18 *Capic* (2021) 154 ACSR 235 at 433 [880]-[881].

19 *Capic* (2021) 154 ACSR 235 at 433 [880]-[881].

20 *Capic* (2021) 154 ACSR 235 at 434 [884]-[885].

21 *Capic* (2021) 154 ACSR 235 at 440 [916].

22 *Capic* (2021) 154 ACSR 235 at 244 [14].

## The Full Court's judgment

12 On appeal, the Full Federal Court rejected Ford's challenge to the primary judge's finding that there was a breach of the guarantee of acceptable quality in relation to the relevant vehicles.<sup>23</sup> In doing so, their Honours rejected Ford's contention that, in assessing whether "a reasonable consumer *fully acquainted with the state and condition of the goods*"<sup>24</sup> would regard the relevant vehicles to be of "acceptable quality",<sup>25</sup> consideration must be given to later acquired knowledge that "as problems emerged, fixes would be identified and made available" (emphasis in original).<sup>26</sup> The Full Court upheld a ground of cross-appeal by Ms Capic in relation to the primary judge's failure to find that the architectural defects gave rise to a "*superadded* propensity" on the part of the affected vehicles to experience "troubling" behaviours (emphasis in original).<sup>27</sup> The Full Court also upheld a ground of cross-appeal by Ms Capic that challenged the primary judge's finding that each defect constituted a separate breach of the guarantee of acceptable quality and a separate cause of action under s 271(1) of the ACL,<sup>28</sup> and instead found that "from a reasonable consumer's perspective, there was in substance only one failure to comply with the guarantee" in relation to the supply of each relevant vehicle.<sup>29</sup>

13 The Full Court held that the primary judge's assessment of damages under s 272(1)(a) of the ACL was inconsistent with the Full Court's approach in *Toyota*<sup>30</sup>

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23 *Ford* (2023) 300 FCR 1 at 18 [65], 19 [69], 20 [77]-[79], 21 [84]-[87], 27 [102], 28-29 [115]-[118].

24 *Ford* (2023) 300 FCR 1 at 16 [59].

25 ACL, s 54(2).

26 *Ford* (2023) 300 FCR 1 at 16 [59].

27 *Ford* (2023) 300 FCR 1 at 45 [210], 48 [222], 48-49 [227]-[229].

28 *Ford* (2023) 300 FCR 1 at 55 [266]-[268].

29 *Ford* (2023) 300 FCR 1 at 56 [271].

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

(which, as noted, was the subject of the appeals in *Williams*).<sup>31</sup> The Full Court followed *Toyota* in concluding that an award of damages under s 272(1)(a) permits or requires: (i) an "assessment of whether or not an applicant has suffered loss or damage resulting from a failure to comply with the consumer guarantee";<sup>32</sup> (ii) "a departure from the time of supply or an adjustment to avoid over-compensation";<sup>33</sup> (iii) the taking into account of events after the time of supply "if considered appropriate";<sup>34</sup> and (iv) that the assessment be undertaken on the basis that, "in most instances, the intrinsic value of consumer goods to a retail buyer ... lie[s] in their utility over their useful life".<sup>35</sup>

14 In remitting the assessment of damages payable under s 272(1)(a) of the ACL to the primary judge, the Full Court held that it followed from *Toyota* that the primary judge: "ought to have held that subsequent events were capable of bearing on the proper assessment of reduction in value damages";<sup>36</sup> erred in "not tak[ing] into account the facts known at the time of trial (being the repairs) and the use by Ms Capic of her vehicle up until the time of trial";<sup>37</sup> and ought to have had regard to "evidence as to the value of the vehicle at the time of trial ... [as that] would have enabled the primary judge to ensure that Ms Capic was not over-compensated".<sup>38</sup>

15 On 13 February 2024, this Court granted Ms Capic special leave to appeal.

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31 *Ford* (2023) 300 FCR 1 at 65 [315]-[317].

32 *Ford* (2023) 300 FCR 1 at 63 [307(3)], citing *Toyota* (2023) 296 FCR 514 at 539 [99].

33 *Ford* (2023) 300 FCR 1 at 63 [307(3)], citing *Toyota* (2023) 296 FCR 514 at 539 [99].

34 *Ford* (2023) 300 FCR 1 at 63 [307(5)], citing *Toyota* (2023) 296 FCR 514 at 539 [100].

35 *Ford* (2023) 300 FCR 1 at 63 [307(7)], citing *Toyota* (2023) 296 FCR 514 at 541-542 [110]-[111], 545 [127].

36 *Ford* (2023) 300 FCR 1 at 65 [315(1)].

37 *Ford* (2023) 300 FCR 1 at 65 [315(2)].

38 *Ford* (2023) 300 FCR 1 at 65 [315(3)].

## The appeal

16 Ms Capic sought the restoration of the primary judge's award save for a remittal for the primary judge to award an additional amount for pre-judgment interest on the award of damages for excess GST, stamp duty and financing costs (which Ford conceded before the Full Court should have been awarded to Ms Capic).<sup>39</sup> Ford sought to uphold the Full Court's orders by relying on the reasoning in *Toyota*. Ford further contended that what is known about the effectiveness, cost, inconvenience and timing of any repair at the time of trial forms part of the assessment of damages under s 272(1)(a) because the "reduction in the value of the goods" contemplated by that provision concerns the "real" or "intrinsic" value of the goods as assessed at the time of trial.<sup>40</sup> In its oral submissions, Ford also contended that this approach followed from attributing what was known about the possibility of a repair of the goods, as well as the defects to which such a repair related, to "a reasonable consumer fully acquainted with the state and condition of the goods" (including any hidden defects)<sup>41</sup> for the purposes of considering the extent of non-compliance with the guarantee of acceptable quality in s 54 of the ACL.<sup>42</sup> To an extent, this contention was accepted in *Williams*.<sup>43</sup>

17 Ms Capic raised five contentions on appeal. The first contention was that the Full Court erred in following *Toyota* by finding that an assessment of damages under s 272(1)(a) may require, depending on the circumstances, a departure from the time of supply as the time of the assessment or an adjustment to avoid "over-compensation".<sup>44</sup> For the reasons given in *Williams*, this complaint should be upheld.<sup>45</sup> Section 272(1)(a) of the ACL provides its own measure of damages,

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39 *Ford* (2023) 300 FCR 1 at 65 [318]-[319].

40 See, for example, *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at 657 [36].

41 ACL, s 54(2).

42 See *Williams* [2024] HCA 38 at [58]-[60].

43 *Williams* [2024] HCA 38 at [59]-[60].

44 *Ford* (2023) 300 FCR 1 at 63 [307(3)], citing *Toyota* (2023) 296 FCR 514 at 539 [99].

45 *Williams* [2024] HCA 38 at [51]-[55], [59]-[61], [79].

and there is no warrant to either depart from the time of supply or adjust the amount awarded to avoid "over-compensation".<sup>46</sup>

18 Ms Capic's second contention was that the Full Court erred in remitting the matter to the primary judge on the basis that damages should be assessed on the basis of whether the risks to the functioning of her vehicle posed by the identified defects had materialised. The Full Court found that "the primary judge ought to have held that subsequent events were capable of bearing on the proper assessment of reduction in value damages",<sup>47</sup> which appears to be a reference to the materialisation of the risks posed by each defect. For the reasons given in *Williams*, Ms Capic's contention on this point should also be upheld.<sup>48</sup> Unlike later acquired knowledge of the capacity of the defects to be repaired (as well as the effectiveness, cost, inconvenience and timing of such a repair), the materialisation of the risks posed by the defects "does not add anything to a hypothetical reasonable consumer's knowledge of the defect or the goods at the time of supply".<sup>49</sup>

19 Ms Capic's third contention was that the Full Court erred in finding that an assessment of damages under s 272(1)(a) requires having regard to what is known about the capacity to repair the various defects by the time of trial. This reflects Ms Capic's submission, noted in *Williams*, that other than the defects themselves, in assessing damages under s 272(1)(a) no account could be taken of events occurring after the time of supply or knowledge acquired after the time of supply.<sup>50</sup>

20 Ms Capic's third contention is rejected for the reasons given in *Williams* and Ford's contention to the opposite effect is upheld on the same basis.<sup>51</sup> *Williams* held that later acquired knowledge of a defect in the goods, including the effectiveness, cost, inconvenience and timing of any repair of the defect (being "characteristics" of the defect), is to be attributed to a hypothetical reasonable consumer with "full knowledge or acquaintance with" the "state and condition of the goods" (including

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46 *Williams* [2024] HCA 38 at [3], [51]-[55].

47 *Ford* (2023) 300 FCR 1 at 65 [315(1)].

48 *Williams* [2024] HCA 38 at [64]-[65].

49 *Williams* [2024] HCA 38 at [64].

50 *Williams* [2024] HCA 38 at [58].

51 *Williams* [2024] HCA 38 at [58]-[61].

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any hidden defects) as at the time of supply.<sup>52</sup> Like *Williams*, there was no challenge in this Court to the findings made by the Full Court and the primary judge that the supply of each of the relevant vehicles involved a breach of the guarantee of acceptable quality provided for in s 54 of the ACL. However, as in *Williams*, given the findings about the timing of the repairs and their effectiveness in this case, there is no reason to suggest that any attribution of later acquired knowledge of the effectiveness, cost, inconvenience and timing of any available repair to a hypothetical reasonable consumer would affect a finding that the guarantee was not complied with.<sup>53</sup> Those findings are not to be disturbed.

21 Ms Capic's fourth contention was that the Full Court erred in finding that an assessment of damages under s 272(1)(a) requires having regard to Ms Capic's "use ... of [her] vehicle up until the time of trial".<sup>54</sup> Beyond that statement, the Full Court did not elaborate on the relevance of Ms Capic's use of her vehicle. The Full Court appears to have concluded that such use was relevant because, consistent with *Toyota*, there could be a departure from the time of supply as the relevant time for the assessment of damages,<sup>55</sup> and that such an assessment involved a determination of the loss in "utility" of the vehicle over the course of its "useful life".<sup>56</sup>

22 In any event, consistent with *Williams*, Ms Capic's use of her vehicle after its acquisition does not bear upon an assessment of the reduction in the value of her vehicle at the time of supply, save only to the extent that it might bear upon an assessment of what "a reasonable consumer fully acquainted with the vehicle" (including any hidden defects) would, at the time of supply, have expected its likely performance to have been prior to any repair.<sup>57</sup> As noted in *Williams*, damages for any sub-optimal performance of a consumer's goods over and above that assumed by a reasonable consumer at the time of supply are potentially

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52 *Williams* [2024] HCA 38 at [3], [33]-[34], [59].

53 *Williams* [2024] HCA 38 at [41]-[42].

54 *Ford* (2023) 300 FCR 1 at 65 [315(2)].

55 *Ford* (2023) 300 FCR 1 at 62-63 [307(1)-(3)].

56 *Ford* (2023) 300 FCR 1 at 63 [307(7)]; see also *Williams* [2024] HCA 38 at [18].

57 See *Williams* [2024] HCA 38 at [33]-[34], [55].

recoverable under s 272(1)(b).<sup>58</sup> It follows that this ground of Ms Capic's appeal should also be upheld. A notice of contention and grounds set out in the notice of cross-appeal filed by Ford on the same topic should be rejected.

23 Ms Capic's fifth contention was that the Full Court erred in concluding that the value of her vehicle at the time of trial was information relevant to the primary judge's assessment of damages under s 272(1)(a) as that "would have enabled the primary judge to ensure that Ms Capic was not over-compensated".<sup>59</sup> It follows from *Williams* that the relevant time to assess the reduction in the value of Ms Capic's vehicle was the time it was supplied to her.<sup>60</sup> It is not necessary to determine whether the value of the vehicle at the time of trial would necessarily be irrelevant to that assessment. Any such relevance would only lie in its capacity to throw light on the value of the vehicle at the time of supply. Its relevance would not lie in ensuring that Ms Capic was not "over-compensated". This ground of Ms Capic's appeal must also be upheld.

### **Relief and costs**

24 It follows that the proceedings should be remitted to the primary judge to reassess the damages payable to Ms Capic in accordance with the reasons in this judgment and *Williams*. As noted, the primary judge made an assessment of damages after rejecting the competing expert valuation evidence. In doing so, his Honour accurately characterised the process of "assessing what the value of a chattel was 9 years in the past when the defects it suffered from are risks not actualities" as "inherently impressionistic".<sup>61</sup> Consistent with this, his Honour's reasons for assessing Ms Capic's damages under s 272(1)(a) as \$6,820.91 were clear, albeit relatively brief.<sup>62</sup> That approach was entirely appropriate. It will be a matter for the primary judge, on remittal, to determine whether to allow the parties to lead further evidence or reassess damages based on the evidence that was previously tendered.

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58 See *Williams* [2024] HCA 38 at [61]; ACL, s 272(3).

59 *Ford* (2023) 300 FCR 1 at 65 [315(3)].

60 *Williams* [2024] HCA 38 at [79].

61 *Capic* (2021) 154 ACSR 235 at 434 [884].

62 *Capic* (2021) 154 ACSR 235 at 435 [890].



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25           Save for accepting Ford's contention that consideration may be given to the effectiveness, cost, inconvenience and timing of any available repair of the defects in assessing the reduction in the value of the relevant vehicles at the time of supply, Ms Capic has mostly succeeded. To reflect its limited success in the Full Court, Ford was ordered to pay 75% of the Ms Capic's costs of the proceedings in that Court. There is no reason to vary that order and not make a similar order in this Court.

26           The following orders should be made:

- (1)   Appeal allowed.
- (2)   Cross-appeal dismissed.
- (3)   Set aside orders 1 and 7 made by the Full Court of the Federal Court of Australia on 13 December 2023 and, in their place, order that:
  - (a)   the appeal be allowed on ground 5 and ground 8(a) of the amended notice of appeal dated 19 May 2022 and the appeal otherwise be dismissed; and
  - (b)   order 2 made by the primary judge on 13 August 2021 in NSD 724 of 2016 be set aside and the question of the respondent's (Ms Capic's) damages be remitted for redetermination by the primary judge:
    - (i)   in accordance with the reasons of the High Court of Australia; and
    - (ii)  on the basis that Ms Capic is entitled to pre-judgment interest on the damages awards for excess amounts of GST, stamp duty and financing costs.
- (4)   The respondent pay 75% of the appellant's costs of the proceedings in this Court.

EDELMAN J.

**Introduction**

27 This appeal, like the companion appeals in *Williams v Toyota Motor Corporation Australia Ltd*,<sup>63</sup> concerns a class action proceeding arising from defects in motor vehicles. The defects involved in this appeal are in vehicles in Ford model lines Focus, Fiesta and EcoSport. Those vehicles were imported into Australia by the respondent and supplied between 2010 and 2018. Each of the vehicles in this category failed to comply with the guarantee of acceptable quality in s 54 of the *Australian Consumer Law*.<sup>64</sup> As a consequence of extension of liability findings by the Full Court of the Federal Court of Australia,<sup>65</sup> the non-compliance with s 54 arose because each vehicle had up to five existing defects when purchased (three described as "[c]omponent [d]eficiencies" and two described as "[a]rchitectural [d]eficiencies") with propensities which, when they manifested, gave rise to what the primary judge described as "a troubling range of behaviours".<sup>66</sup>

28 The members of the group include purchasers of new and second-hand vehicles in this category. The appellant, Ms Capic, is the representative of the group in the class action. In December 2012, Ms Capic purchased a 2012 Ford Focus. Ms Capic's vehicle was found to have all five defects when purchased. Ms Capic brought her claim for damages against the respondent as a manufacturer of goods under s 271(1) of the *Australian Consumer Law*. The respondent falls within the definition of "manufacturer" in the *Australian Consumer Law* because it is an importer of goods into Australia, it is not the manufacturer of the goods, and at the time of importation the manufacturer of the goods did not have a place of business in Australia.<sup>67</sup>

29 As the primary judge explained, Ms Capic's case did not rely upon the materialisation of any or all of the troubling behaviours. Rather, her case was that her vehicle was not of acceptable quality because the defects with which it was

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63 [2024] HCA 38.

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

65 *Ford Motor Company of Australia Pty Ltd v Capic* (2023) 300 FCR 1 at 45 [210], 48 [222], 48-49 [227]-[229].

66 *Capic v Ford Motor Company of Australia Pty Ltd* (2021) 154 ACSR 235 at 242 [3], [6], 243 [12].

67 *Australian Consumer Law*, s 7(1)(e).

supplied gave rise to the propensity for the troubling range of behaviours.<sup>68</sup> This appeal therefore requires the application of the principles of law concerning the assessment of damages under s 272(1)(a) of the *Australian Consumer Law* set out by this Court in the appeals in *Williams*. I agree with the manner in which the joint reasons in this appeal apply s 272(1)(a) and the legal principles set out by the majority in *Williams* to the facts before this Court. These additional reasons address the foundational basis for the appeal: that the Full Court erred in its focus on "over-compensation".

### Over-compensation

#### *The focus of this appeal*

30 Both grounds of Ms Capic's appeal before this Court were concerned with "qualification[s]" applied to the assessment of damages under s 272(1)(a) by the Full Court for the purpose of ensuring "that the amount of compensation for any reduction in value be appropriate".<sup>69</sup> The first ground asserted that the Full Court erred in finding that the assessment of damages under s 272(1)(a) may need to be made at a time other than the time of supply or be subject to "an adjustment to avoid 'over-compensation'". In so finding, the Full Court held that "it is necessary to ensure that there is no over-compensation given the circumstances known at the time of trial".<sup>70</sup> The second ground of appeal challenged the conclusion of the Full Court that in a "propensity case" damages under s 272(1)(a) must be assessed having regard to post-supply circumstances and events for the purpose of "ensur[ing] that Ms Capic was not over-compensated".<sup>71</sup>

31 In response to Ms Capic's powerful attack on "over-compensation", the concept was the subject of a comprehensive defence in the lucid submissions of the respondent. As senior counsel for the respondent submitted, the respondent's point was that the meaning of "damages" in s 272(1) of the *Australian Consumer Law* is "compensation", that "compensation" means "loss", and thus that "the whole point of [the respondent's] focus" concerned an interpretation of s 272(1)

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68 *Capic v Ford Motor Company of Australia Pty Ltd* (2021) 154 ACSR 235 at 242 [4].

69 *Ford Motor Company of Australia Pty Ltd v Capic* (2023) 300 FCR 1 at 63 [307(4)], referring to *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514 at 539 [99].

70 *Ford Motor Company of Australia Pty Ltd v Capic* (2023) 300 FCR 1 at 63 [307(6)], referring to *Toyota Motor Corporation Australia Ltd v Williams* (2023) 296 FCR 514 at 546 [131].

71 *Ford Motor Company of Australia Pty Ltd v Capic* (2023) 300 FCR 1 at 65 [315(3)].

that "must avoid overcompensation". In contrast with Ms Capic's assertion that the Full Court erred by taking into account post-supply circumstances for the purposes of avoiding over-compensation, the respondent's cross-appeal and notice of contention asserted that, in assessing compensation under s 272(1)(a), it was appropriate to take into account post-supply circumstances (specifically, use of the vehicle). The legitimate or illegitimate use of the concept of "over-compensation" was therefore the central focus of submissions to this Court.

32 The term "over-compensation" has been used previously by this Court to describe an award for consequential loss that exceeds the amount of consequential loss suffered by a plaintiff.<sup>72</sup> But, as this appeal shows, when applied to other types of damages, "over-compensation" is a term which can invite a syllogism based on flawed premises: (i) damages are only available to compensate; (ii) compensation can only be made for loss suffered in the sense of the plaintiff being left in a worse position than they would have been in but for the wrong; (iii) ergo, it is an error to award damages if the plaintiff is not in a worse position than they would have been in but for the wrong. The first and second premises are wrong. Hence, over-compensation is a term that should be used with great care and should be confined to claims for consequential loss, or otherwise avoided. The short, and underlying, point upon which this appeal must be resolved is that s 272(1)(a) is not concerned with consequential loss.

*"Over-compensation" and the varieties of compensation*

33 The term "over-compensation" is usually used to suggest a conclusion that it is illegitimate for an award of damages to be made which exceeds a person's consequential loss, in the sense that the award does not merely respond to a person being in a worse position (financially or otherwise) than they would otherwise have been in but for a defendant's wrongdoing. If compensation is only sought for a person's consequential loss then the term presents no difficulty. But if the compensation that is sought is not for consequential loss<sup>73</sup> then inherent in the term "over-compensation" is a false premise. There are many legitimate awards of damages, sometimes described as "compensation", which do not merely seek to redress consequential loss in the sense of aiming to rectify a person's worsened position that has arisen due to a defendant's wrongdoing. Most relevantly to the present case are instances where contractual damages are assessed at the time of a

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72 See, eg, *O'Brien v McKean* (1968) 118 CLR 540 at 547; *Cullen v Trappell* (1980) 146 CLR 1 at 19; *Pennant Hills Restaurants Pty Ltd v Barrell Insurances Pty Ltd* (1981) 145 CLR 625 at 679; *Todorovic v Waller* (1981) 150 CLR 402 at 414, 433, 438, 443, 467, 476.

73 See *Williams v Toyota Motor Corporation Australia Ltd* [2024] HCA 38 at [97].

breach of duty, as representing the lost economic value of the promised performance due to the breach.

34 Three of the many such examples were cited by Ms Capic. In the first, *Jones v Just*,<sup>74</sup> the buyers of hemp were supplied hemp of inferior quality to that which was promised. The market price for hemp then rose substantially and the buyers sold the inferior hemp on the market, recouping much of their consequential loss. Nevertheless, it was held that the jury had been correctly directed to assess damages by reference to the difference in value at the date of supply of the hemp due to its inferior state, "thus, in effect, giving the [buyers] the benefit of the rise in the market".<sup>75</sup>

35 The second example given by Ms Capic was *Slater v Hoyle & Smith Ltd.*<sup>76</sup> In that case, manufacturers supplied cotton under a contract with their purchasers which was inferior to the quality promised. The purchasers made a profit from the sale by using the inferior cotton to fulfill their sub-contract with third parties to whom they had promised to sell cotton. No claim was made against the purchasers by the third parties. The manufacturers submitted that the purchasers should not be awarded any damages because they had suffered no consequential loss.<sup>77</sup> The trial judge and the Court of Appeal rejected this submission. In applying the principle that the damages are measured by the difference in value at the date of supply under the contract, Warrington LJ said that where a purchaser "has received inferior goods of smaller value than those [they] ought to have received ... [they have] lost the difference in the two values".<sup>78</sup> Scrutton LJ accepted "that on these principles the plaintiff may recover more than an indemnity" but said that a plaintiff "sometimes recovers more than [their] real loss".<sup>79</sup>

36 The third example given by Ms Capic was *Clark v Macourt*.<sup>80</sup> In that case, in breach of contract, 1,996 straws of frozen donated sperm, which would have been usable if supplied as promised by the vendor, were unusable. The purchaser obtained replacement straws from the United States. The cost of the replacement

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74 (1868) LR 3 QB 197.

75 (1868) LR 3 QB 197 at 201.

76 [1920] 2 KB 11.

77 [1920] 2 KB 11 at 14.

78 [1920] 2 KB 11 at 18; quoted with approval in *Clark v Macourt* (2013) 253 CLR 1 at 32 [111].

79 [1920] 2 KB 11 at 24.

80 (2013) 253 CLR 1.

straws was charged to patients who used them. Although the purchaser was in no worse a position as a consequence of the breach, a majority of this Court held that the purchaser was entitled to damages assessed at the value of the 1,996 straws of unusable frozen sperm as at the date of completion of the contract.

37 All four of the Justices in the majority decided the case by recognising, in various language, a difference between performance-based damages and loss-based damages. Although Hayne J spoke generally of damages for loss, his Honour explained that in the context of performance-based damages the word "loss" was not used in its ordinary sense to describe "the amount by which the *promisee* is *worse off*" but instead to describe "the value of what the *promisee* would have *received* if the promise had been performed".<sup>81</sup> It was irrelevant that the purchaser had charged patients the amount paid to acquire the replacement frozen sperm.<sup>82</sup> Similarly, Keane J held that:<sup>83</sup>

"The value to be paid in accordance with the ruling principle is assessed at the date of breach of contract, not as a matter of discretion, but as an integral aspect of the principle, which is concerned to give the purchaser the economic value of the performance of the contract at the time that performance was promised."

Crennan and Bell JJ agreed with both Hayne J and Keane J that the performance-based measure of damages "required assessment of the value of what should have been delivered in accordance with the vendor's contractual promise to the appellant".<sup>84</sup>

38 Only Gageler J dissented. His Honour considered that the only damages to which the purchaser could have been entitled were to the extent to which the purchaser was "worse off" through the much smaller costs of obtaining the replacement straws that could not be recouped from patients. On this approach, no damages would have been recoverable because the purchaser did not seek to recover any of those consequential losses.<sup>85</sup> As an assessment of loss-based damages for the purchaser's consequential loss, the approach of Gageler J is impeccable. But, with great respect, that approach is an incomplete statement of the common law because it does not recognise that species of damages, independent of consequential loss, which provides the plaintiff with the equivalent

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81 (2013) 253 CLR 1 at 7 [9]-[10] (emphasis in original).

82 (2013) 253 CLR 1 at 10 [22].

83 (2013) 253 CLR 1 at 31 [109].

84 (2013) 253 CLR 1 at 11 [25].

85 (2013) 253 CLR 1 at 18 [57]-[58], 22 [71]-[73].

of the promised performance. In circumstances that are even more stark than *Clark v Macourt*, the failure to recognise such a species of damages can give rise to results that have been described as "absurd".<sup>86</sup>

39 The recognition of a measure of damages in *Clark v Macourt* based on the performance interest was not a new or novel approach in this country, although it has been said that there is a "common failure" to recognise the distinction between the two types of damages.<sup>87</sup> The recognition of performance-based damages can also be seen in the approach unanimously taken by this Court in *Bellgrove v Eldridge*,<sup>88</sup> where this Court held that a landowner was entitled to damages from a builder of a defective building to "give to her the equivalent of a building on her land which is substantially in accordance with the contract".<sup>89</sup> Since the measure of damages was not concerned with whether the landowner had suffered loss, or was worse off, the Court held that it was "quite immaterial" that the landowner might not repair the defects with the effect that "she will still have a house together with [damages amounting to] the cost of erecting another one".<sup>90</sup>

40 As this Court recognised in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*,<sup>91</sup> this measure of damages is the money equivalent of any specific performance or any negative injunction that would have compelled performance of the contract terms. Other than, arguably, in exceptional cases where a promisee might be treated as though they no longer had a continued entitlement to performance,<sup>92</sup> damages which are based upon rectifying or ensuring performance—performance-based damages—reflect that continued entitlement and "the essence of contract law as performance".<sup>93</sup>

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86 *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 AC 518 at 547-548.

87 Winterton, "*Clark v Macourt*—Defective Sperm and Performance Substitutes in the High Court of Australia" (2014) 38 *Melbourne University Law Review* 755 at 793.

88 (1954) 90 CLR 613.

89 (1954) 90 CLR 613 at 617.

90 (1954) 90 CLR 613 at 620.

91 (2009) 236 CLR 272 at 285 [12]. See also *Semelhago v Paramadevan* [1996] 2 SCR 415 at 428 [19], referring to "the principle that damages are to be a true equivalent of specific performance".

92 See *Bellgrove v Eldridge* (1954) 90 CLR 613 at 618-619.

93 *Cessnock City Council v 123 259 932 Pty Ltd* (2024) 98 ALJR 719 at 746 [126]. See also Winterton, *Money Awards in Contract Law* (2015) at 180-183.

41 For the reasons that I gave in *Williams*,<sup>94</sup> the measure of damages concerning the money equivalent of the plaintiff's entitlement to performance reflects the plaintiff's "performance interest" rather than any consequential loss suffered by the plaintiff. Both measures are reflected in s 272(1) of the *Australian Consumer Law*, in s 272(1)(a) and s 272(1)(b) respectively. The error that arose in this case from the use of the expression "over-compensation" is the treatment of the former as though it were the latter with the consequence that where the two measures did not coincide Ms Capic was denied the damages to which she was entitled for protection of her performance interest.

### Conclusion

42 The appeal must be allowed and the cross-appeal dismissed, with orders made as proposed in the joint reasons.

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94 [2024] HCA 38 at [95]-[99].



JAGOT J.

### The appeal

43 The issues in this appeal overlap with those raised in the appeals heard immediately before it, *Toyota Motor Corporation Australia Ltd v Williams* (S155/2023) and *Williams v Toyota Motor Corporation Australia Ltd* (S157/2023). Accordingly, my reasons for judgment in *Williams v Toyota Motor Corporation Australia Ltd*<sup>95</sup> ("the Toyota reasons") are to be taken as forming part of these reasons for judgment. The reasons for judgment of Gageler CJ, Gordon, Steward, Gleeson and Beech-Jones JJ identify the circumstances in which this appeal has arisen.<sup>96</sup>

### Factual background

44 In summary, the appellant, Ms Capic, is a representative of group members in a representative proceeding who acquired from the respondent, Ford Motor Company of Australia Pty Ltd ("Ford Australia"), certain vehicles (Ford Australia cars in the Focus, the Fiesta, and the EcoSport ranges) manufactured between July 2010 and December 2016 ("the Affected Vehicles"). Ms Capic bought her new Ford Focus from a Ford Australia dealer in December 2012. Ford Australia, as the importer of the Affected Vehicles, is within the definition of "manufacturer" under s 7(1)(e) of the *Australian Consumer Law*<sup>97</sup> ("the ACL").

45 It is no longer in dispute that the Affected Vehicles failed to comply with the guarantee of acceptable quality in s 54(1) of the ACL. In the relevant period, the Affected Vehicles were each fitted with a particular transmission system known as "the DPS6", being a six-speed dry dual clutch PowerShift transmission. The failure to comply relates to the DPS6 and involves two classes of deficiencies, called the "Component Deficiencies" and the "Architectural Deficiencies". Every Affected Vehicle has or had a propensity to manifest at least one of the deficiencies,<sup>98</sup> and therefore every Affected Vehicle failed to comply with the guarantee of acceptable quality. Ms Capic's Affected Vehicle had all five of the deficiencies, and the consequences of those deficiencies manifested themselves

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95 [2024] HCA 38.

96 Joint reasons at [4]-[15].

97 Schedule 2 to the *Competition and Consumer Act 2010* (Cth).

98 Subject to differences resulting from the time of manufacture of the Affected Vehicle within the relevant period. See the answers to the common questions which the Full Court of the Federal Court of Australia gave in its orders of 13 December 2023.

within months of purchase. The primary judge (Perram J) rightly accepted the characterisation of Ms Capic's car as a "lemon".<sup>99</sup>

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The consequences of the Component Deficiencies and the Architectural Deficiencies, if they manifested in an Affected Vehicle, were summarised in the submissions for Ms Capic as follows:

Deficiency	Propensity towards...
Input shaft seals (CD [Component Deficiency] 1)	"difficulties with gear selection, sudden deceleration, jerking, grinding noises and appearance of the check engine light ... intermittent revving of the engine, slower response times, loss of power and roll back whilst in gear" and "rattling noises, shudder both on launch and during gear shifts, and sudden or delayed gear shifts": PJ <sup>[100]</sup> [225].
Clutch lining material (CD 2)	"a shuddering sensation" for the driver (PJ [241]); "difficulty changing gears" (PJ [242]-[243]), "harsh and jerky gear shifts, a lack or loss of power, noise, vibration and harshness issues, a degree of clutch odour and green shudder": PJ [251].
Transmission control module (TCM) (CD 3)	"shudder ... which may be followed by very brief, but discernible, losses of driving power" and "a loss of driving power for a substantial period of time (in the order of many seconds)": PJ [347].
Architectural issues (AD [Architectural Deficiency] 1 and AD 2)	Exacerbating the componentry-related issues: FC <sup>[101]</sup> [210], [222]-[223], [227], [229]. One of the architectural issues – to do with the damping of torsional vibrations – also gives rise to a propensity to exhibit "a slight vibration or shudder at slow speeds or during a coast down as the transmission upshifts or downshifts" and "a slight audible rattle, particularly when operated within an enclosed area such as a carpark": PJ [521], [524], [528]-[530].

<sup>99</sup> *Capic v Ford Motor Company of Australia Pty Ltd* (2021) 154 ACSR 235 at 390 [674].

<sup>100</sup> *Capic v Ford Motor Company of Australia Pty Ltd* (2021) 154 ACSR 235.

<sup>101</sup> *Ford Motor Company of Australia Pty Ltd v Capic* (2023) 300 FCR 1.

47 It is also no longer in dispute that, Ms Capic having purchased her Affected Vehicle in December 2012 and having experienced the consequences of the Component Deficiencies and the Architectural Deficiencies from soon after purchase: (a) Component Deficiency 3, the transmission control module ("the TCM"), was rectified by replacement of the TCM on 10 February 2016, being the tenth service of the Affected Vehicle; (b) Component Deficiency 1, the input shaft seals, was rectified by their replacement on 30 May 2017, being the thirteenth service of the Affected Vehicle; (c) Component Deficiency 2, the clutch lining material, has not been rectified and no satisfactory rectification is available; and (d) Architectural Deficiencies 1 and 2 have not been rectified and no satisfactory rectification is available.

48 Ms Capic paid \$22,736.36 for her Affected Vehicle. The primary judge had the evidence of two car valuers, Mr Vasilakis and Mr Cuthbert. Because Mr Vasilakis assumed facts contrary to those found by the primary judge in some respects, the primary judge did not consider that he could "recalibrate" Mr Vasilakis' conclusion of the reduction in value of the Affected Vehicle at the date of purchase to accord with the facts as the primary judge found.<sup>102</sup> Mr Cuthbert only valued the vehicle as at January 2020 (that being his time of valuation and date of valuation as explained in the *Toyota* reasons<sup>103</sup>). The primary judge rightly characterised Mr Cuthbert's evidence as "irrelevant" because Mr Cuthbert's assumptions about the vehicle did not match the facts and because Mr Cuthbert was asked to assess the (then) current value of the vehicle, not its value at the date of supply.<sup>104</sup> The primary judge said that "[c]onsequently, there is no useful evidence about the fair market value of Ms Capic's vehicle on 24 December 2012 on the assumption that it suffered from the risks of failure I have found that it did".<sup>105</sup>

### Consideration

49 Those parts of the *Toyota* reasons dealing with issues of statutory construction, judicial valuation, and appellate review of judicial valuation apply in this appeal. To the extent more should be said, I confine myself to the following.

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102 *Capic v Ford Motor Company of Australia Pty Ltd* (2021) 154 ACSR 235 at 431 [870].

103 *Williams v Toyota Motor Corporation Australia Ltd* [2024] HCA 38 at [194].

104 *Capic v Ford Motor Company of Australia Pty Ltd* (2021) 154 ACSR 235 at 433 [881].

105 *Capic v Ford Motor Company of Australia Pty Ltd* (2021) 154 ACSR 235 at 433 [882].

50 First, little to nothing is to be gained by parties making forensic decisions to instruct their valuers to undertake valuations on only one highly contestable basis. Valuers can provide different valuations at different dates and on different assumptions. Parties who do not take advantage of that capacity cannot expect to be given a further opportunity to adduce valuation evidence on remittal if, as here, the primary judge has rejected evidence as reflecting incorrect assumptions as to facts and law.

51 Second, a judicial valuer is not bound merely to choose between competing expert valuations. A judicial valuer is also not bound to accept valuation evidence even if it is based on correct assumptions as to facts and law. Subject to any statutory direction to the contrary, a judicial valuer is entitled to reach their own view of the evidence.

52 Third, the primary judge referred to "the risks of failure" because Ms Capic put her case on that basis.<sup>106</sup> Subject to complying with obligations of procedural fairness, the primary judge was not bound to accept the whole or part of either party's case. The operation of s 272(1)(a) of the ACL depends on its proper construction. The primary judge, and appellate courts (including this Court), are bound to apply what they determine to be the proper construction of s 272(1)(a).

53 Fourth, the proper construction of s 272(1)(a) is resolved in the *Toyota* reasons.<sup>107</sup> On that construction, the ultimate control is that an affected person in relation to goods is only entitled to "recover" damages under s 272(1)(a) and, depending on the existence and extent of that entitlement at the date of judgment of the action, the amount to which the entitlement may relate is the amount of the reduction in value of the goods below the lower of the two fixed amounts at the time of supply (namely, price paid or payable, or average retail price) "resulting from the failure to comply with the guarantee to which the action relates". This requires the judicial valuer to: (a) for the purpose of applying para (a) of s 272(1), attribute to the hypothetical reasonable consumer at the time of the supply of the goods knowledge of the nature, quality, and extent of the failure to comply with the guarantee to which the action relates and knowledge of all facts, matters, and circumstances resulting from the failure to comply with that guarantee (as they exist up to the date of the judgment); (b) determine in accordance with para (a) of s 272(1) the amount of the reduction in value of the goods at the time of supply by reference to that hypothetical construct; and (c) as required by the opening words of s 272(1), determine, at the date of judgment of the action, the existence and

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**106** *Capic v Ford Motor Company of Australia Pty Ltd* (2021) 154 ACSR 235 at 433 [882].

**107** *Williams v Toyota Motor Corporation Australia Ltd* [2024] HCA 38 at [131]-[132].

extent of the entitlement to recover that amount of damages (which depends on such loss subsisting at that date).

54 The Full Court of the Federal Court of Australia (Yates, Beach and Downes JJ), applying the reasoning in *Toyota Motor Corporation Australia Ltd v Williams*,<sup>108</sup> concluded that: (a) "the primary judge ought to have held that subsequent events were capable of bearing on the proper assessment of reduction in value damages"; (b) "when assessing the damages payable to Ms Capic, the primary judge did not take into account the facts known at the time of trial (being the repairs) and the use by Ms Capic of her vehicle up until the time of trial"; and (c) "evidence as to the value of the vehicle at the time of trial was relevant information which would have enabled the primary judge to ensure that Ms Capic was not over-compensated".<sup>109</sup> As explained in the *Toyota* reasons, these conclusions involve error.

55 Fifth, insofar as Ms Capic is concerned, the necessary attributed knowledge of the hypothetical reasonable consumer at the time of supply of the Affected Vehicle includes: (a) the presence of all deficiencies in her Affected Vehicle and their propensity to manifest with potentially significant consequences; (b) that two of the Component Deficiencies, the TCM and the input shaft seals, would be rectified on 10 February 2016 and 30 May 2017 respectively; and (c) that one Component Deficiency, the clutch lining material, and both Architectural Deficiencies would not be rectified and no satisfactory rectification would be available. Knowledge of all these matters resulting from the failure to comply with the guarantee of acceptable quality under s 54(1) of the ACL is to be attributed to the hypothetical reasonable consumer at the date of supply of the Affected Vehicle to Ms Capic to ascertain the amount of the reduction in value in accordance with para (a) of s 272(1).

56 Sixth, the facts supported the primary judge's conclusion that it was "obvious" that "Ms Capic's vehicle was worth less at the time of its acquisition than she paid for it".<sup>110</sup> The primary judge concluded that Ms Capic's vehicle was worth 30 per cent (or \$6,820.91) less than the amount she paid for it at the time of her purchase.<sup>111</sup> When the correct approach to para (a) of s 272(1) is applied, the

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108 (2023) 296 FCR 514.

109 *Ford Motor Company of Australia Pty Ltd v Capic* (2023) 300 FCR 1 at 65 [315].

110 *Capic v Ford Motor Company of Australia Pty Ltd* (2021) 154 ACSR 235 at 433 [883].

111 *Capic v Ford Motor Company of Australia Pty Ltd* (2021) 154 ACSR 235 at 435 [890].

substance of the primary judge's valuation assessment is manifestly within the reasonable range of tolerance.

57       Seventh, evidence of the value of Ms Capic's vehicle at the time of the hearing could not inform the primary judge as to the value of her vehicle at the time of supply (or her entitlement to recover damages under s 272(1)(a)). While it is in theory possible that the market for such a vehicle was unaffected by changing market conditions and years of use (extraneous events which are irrelevant to the assessment of the amount of the reduction in value under s 272(1)(a)), that theoretical possibility was not proved in this case. As such, the evidence of the value of Ms Capic's vehicle at the time of the hearing was immaterial to the amount of her entitlement to recover damages under s 272(1)(a) of the ACL. It was immaterial because: (a) the hearing occurred some eight years after the supply of the vehicle to Ms Capic and, in the ordinary course, it would be inferred that the market had materially changed over that period; and (b) by the time of the hearing, Ms Capic's car was also some eight years old.

58       Eighth, Ms Capic continued to own the Affected Vehicle, so no question arises about the existence or extent of her entitlement to recover damages. Further, the eventual repair of some (but not other) aspects of the failure to comply with the statutory guarantee, in the circumstances, does not displace Ms Capic's entitlement to recover damages or ameliorate the reduction in the value of Ms Capic's Affected Vehicle at the time of supply.

59       Therefore, the appeal to this Court must be allowed because the Full Court erroneously applied to the case the reasoning in *Toyota Motor Corporation Australia Ltd v Williams*.<sup>112</sup>

60       Ms Capic also filed a notice of contention in the Full Court to the effect that the primary judge's assessment of the reduction in value of Ms Capic's vehicle in accordance with s 272(1)(a) of the ACL (that is, a 30 per cent reduction in value below the price Ms Capic paid for the vehicle) should be affirmed. There is real force in this contention. Ms Capic purchased a lemon. Facts resulting from the failure to comply with the guarantee of acceptable quality include that: only two of the three Component Deficiencies could be (belatedly) fixed (and, even then, only years after purchase); and neither of the Architectural Deficiencies could be fixed. On this basis, the primary judge's assessment of the reduction in value of 30 per cent at the time of supply is well within the reasonable range for the reduction in value under para (a) of s 272(1). Therefore, his Honour's orders of 13 August 2021 (order 2 of which is the order for the payment of damages) are unaffected by material error.

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112 (2023) 296 FCR 514.

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It is not apparent that the primary judge made any other order that would preclude application of the proper construction of s 272(1)(a) to Ms Capic or to other group members. In these circumstances, the appeal to this Court should be allowed. Because the orders of the Full Court of the Federal Court of Australia made on 13 December 2023 include variations to the primary judge's answers to separate questions that are no longer in dispute, other consequential orders would need to be made to reflect those now undisputed matters. Subject to this necessity, I would reinstate the order of the primary judge made on 13 August 2021 that the "Respondent [Ford Australia] pay the Applicant [Ms Capic] damages, including interest, in the sum of \$17,248.19". There would appear to be no reason for Ms Capic not to have orders for costs in her favour in this Court and in respect of the proceedings in the Full Court.