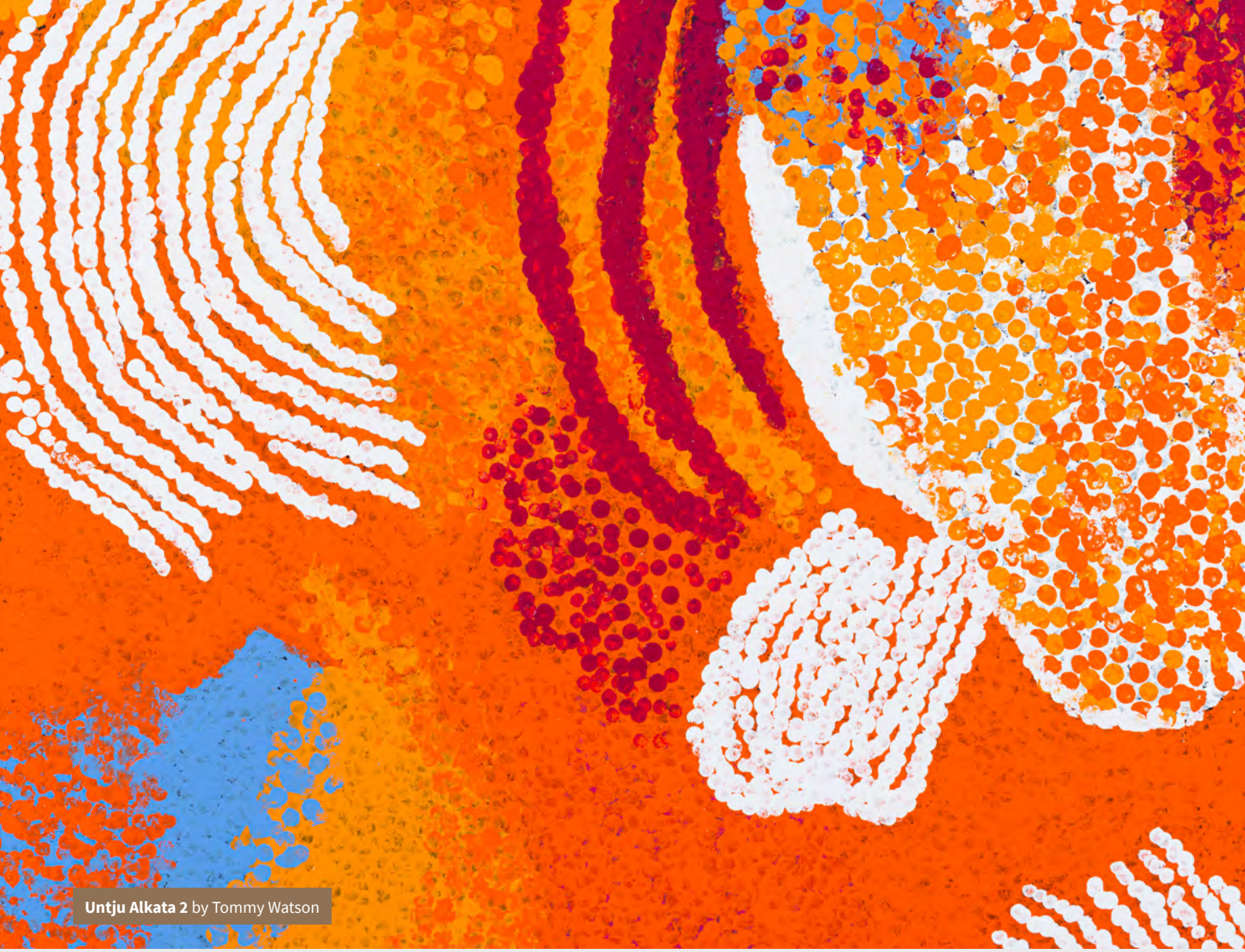

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THE REVIEW

CLASS ACTIONS IN AUSTRALIA 2024/2025

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‘NOT SEEING THE TREES FOR THE FOREST’ – THE ECONOMICS OF PROVING INDIVIDUAL LOSS IN MASS TORT CASES

The moniker of ‘mass torts’ litigation in Australia extends to a wide variety of class actions where the claim (both tortious and related claims) arises out of a single identifiable event or product affecting a large number of individuals by causing economic loss, property damage, and/or personal injury.

Mass tort claims have been prevalent since the class action regime was introduced by Part IVA of the FCA Act and are often among the highest profile, complicated and fiercely contested.

The threshold for commencing a class action in Australia is low, needing only 7 group members and 1 (non-trivial) common issue of fact or law. As a result, while a class action can be commenced on behalf of a large and disparate set of group members with relative ease, resolving individual claims (outside of settlement) is far more challenging. This is because the so-called ‘initial trial’ can only determine the individual claims of the representative applicant (and any sample or representative group members) and any issues common to all group members. If there are issues that are specific to the other group members’ individual circumstances (that is, issues that are not common to the class), these would need to be resolved at a subsequent stage.

This problem is arguably most pronounced in mass tort litigation, which often gives rise to a broad range of individual issues, particularly around causation and loss. Contributing further to the problem is that, unlike in shareholder class actions, there is no market-based or indirect theory of causation available in mass tort cases.

To illustrate this, we examine the long-running *Toyota* and *Ford* class actions regarding alleged vehicle defects. In each proceeding, the applicant claimed damages for breach of the ‘acceptable quality’ consumer guarantee required by s54 of the Australian Consumer Law (**ACL**) and sought a form of aggregated damages on behalf of group members.[45] Despite each applicant succeeding at the initial trial, the individual claims of group members still remain unresolved years later, demonstrating the complexities around determining individual claims and the limits of the Court’s powers to address such complexities (including the limits of aggregated damages).

LIMITS OF CASE MANAGEMENT AND CLASS ACTION REGIME

Typically, it is following an initial trial regarding common issues and the individual claims of the lead applicants that the Court will decide whether and how the claims of individual group members should be determined.

The Courts can establish a sub-group, appoint sample group members, permit an individual group member to appear, or essentially give any further ‘directions’ as to the conduct of the current or a new proceeding. Exactly what this might look like is case specific, and there are comparatively few examples of class actions that progress to this stage.

45 ACL contained in *Competition and Consumer Act 2010* (Cth) Sch 2; *Capic v Ford Motor Company of Australia Pty Ltd* [2021] FCA 715 (**Ford Initial Trial**); *Williams v Toyota Motor Corporation Australia Limited (Initial Trial)* [2022] FCA 344 (**Toyota Initial Trial**).

In addition, the Court has the power to award 2 forms of aggregated damages to group members:

- **formula based aggregated damages** - formula based, specifying how damages for an individual group member should be calculated,[46] and
- **lump sum aggregated damages** - a lump sum awarded across the group; the Court does not have to specify how the amount is to be divided among individual group members, which may be addressed later.[47]

Such orders, however, are rare – not just because few class actions go to trial, but also because the Courts have not interpreted them as a way to circumvent the usual rules for proving individual causation and loss (as the *Ford* and *Toyota* litigation demonstrate).[48]

VEHICLE TROUBLE – ONGOING SAGA OF TOYOTA AND FORD LITIGATION

The *Ford* litigation began in 2016 alleging defects in the transmissions of particular Ford vehicle models, while the *Toyota* litigation commenced in 2019 alleging defects in the diesel particulate filter in certain Toyota models.

In both class actions the lead applicant claimed, on their own behalf and on behalf of group members, damages under s272(1)(a) and s272(1)(b) of the ACL for breach of the 'acceptable quality' consumer guarantee. Section 272(1)(a) allows an affected person to recover damages for overpayment for the price paid of the goods (**reduction in value damages**), while s272(1)(b) allows an affected person to recover for reasonably foreseeable loss arising from the breach (**consequential loss**).

(a) Initial trials

Both lead applicants were successful at initial trial (held in 2021 and 2022), recovering damages for their own claims for breach of the 'acceptable quality' consumer guarantee.

Notably, both Lee J (*Toyota*) and Perram J (*Ford*) found that later events including the availability of future repairs or fixes were irrelevant to assessing reduction in value damages.

Further, as we will return to below, the Court was either unwilling to make an order for aggregated damages (in the case of *Ford*) or only willing to make such an order on a narrow basis (in the case of *Toyota*) leaving individual claims still largely unresolved.

(b) The appeals

Both matters were appealed to the Full Federal Court and then the High Court, including with respect to the proper means of assessing reduction in value damages and whether later events, including repairs, could be taken into account to lower the assessment.

While both the Full Federal Court (delivering judgment in 2021 and 2022)[49] and the High Court (delivering simultaneous judgments in 2024)[50] agreed that later events could be considered, the reasoning of each Court was quite different.

The Full Federal Court considered that the time for assessment of the damages was not fixed to the time of supply, but emphasised the 'utilisation value' of goods, meaning the damages could vary depending on how much the defect affected the consumer's ability to use and enjoy the product during the period before the repair.

In contrast, the High Court concluded that reduction in value damages must be assessed at the time of supply and found this should be done by attributing to a reasonable consumer at the time of supply all knowledge available at trial about the defect, including the timing, cost, and inconvenience of any repair. As such, the actual history of repairs for a consumer is not relevant, but 'what is relevant is the likely future repair trajectory as it appears to the hypothetical reasonable consumer' at the time of supply.[51]

The High Court's decision made clear that reduction in value damages are performance based and are not measured by reference to the actual consequences suffered by the affected person, but rather calculated by the difference in value between the performance that was received (ie the actual vehicle) and the one promised (ie a car of acceptable quality). On the other hand, s272(1)(b) encompasses individualised forms of loss, like loss of income or expenditure on repairs.

46 FCA Act s33Z(1)(e) and state cognates

47 FCA Act s33Z(1)(f) and state cognates.

48 Indeed, the power to award lump sum aggregated damages under s33Z(1)(f) is expressly conditional on the Court's ability to make a 'reasonably accurate assessment … of the total amount to which group members will be entitled under the judgment'. And while the power under s33Z(1)(e) is not expressly subject to the same condition, Courts have held that general damages principles are still applicable such that while reasonable approximations or estimates might be allowed, merely speculative exercises are not: see eg Toyota Initial Trial at [445].

49 *Ford Motor Company of Australia Pty Ltd v Capic* [2023] *FCAFC 179; Toyota Motor Corporation Australia Limited v Williams* (2023) 296 FCR 514; [2023] FCAFC 50.

50 *Williams v Toyota Motor Corporation Australia Limited* [2024] HCA 38; *Capic v Ford Motor Company of Australia Pty Ltd* [2024] HCA 39.

51 *Capic v Ford Motor Company of Australia Pty Ltd (Remitter)* [2025] FCA 670 at [33] (the judgment delivered following remittal).

Obstacle to resolving individual claims

Despite the lead applicants' success at the initial trials and appeals to the Full Federal Court and then the High Court, the claims of group members still remain substantially unresolved. The fact that the lead applicant in each proceeding claimed one or both forms of aggregated damages on behalf of group members has done seemingly little to expedite that process.

To understand why, one must consider both the individual nature of some the damages claimed and certain defences:

- *First*, s271(6) of the ACL bars a person who had the benefit of an express guarantee from recovering reduction in value damages unless the manufacturer had refused a repair or not done so in a reasonable time.
- *Second*, unlike many other causes of action, the limitation period for a breach of the acceptable value guarantee is determined by reference to the group member's individual or constructive knowledge of when the guarantee was breached.[52]
- *Third*, consequential loss may encompass much more individualised forms of loss.

(i) Hesitancy to award aggregated damages

In *Ford*, at the initial trial Perram J refused to make an order for lump sum aggregated damages. In particular, his Honour observed that it was unknown which group members' claims for reduction in value damages might be barred under s271(6) of the ACL.[53]

In *Toyota*, at the initial trial Lee J refused to order lump sum aggregated damages (including because a reasonably accurate assessment was not possible). His Honour did, however, award formula based aggregated damages (dependent on the vehicles having a true value of 82.5% of the average retail price), but only with respect to a subset of group members (being those who had owned their vehicle the entire period, and had not received a fix) and only for reduction in value damages (and not consequential loss). As such, the order far from resolved the claims of all group members.

(ii) Where things are at – back to first instance

Following the High Court's decision in both matters, each was remitted to the trial judge (ie Lee J and Perram J) to determine the damages in light of the High Court's ruling.

Justice Perram delivered further judgment in *Ford* on 20 June 2025. His Honour's assessment of the reduction in value damages was unchanged despite applying the High Court's reasoning (because his Honour considered that the prospect of repairs was balanced out by the potential inconvenience, including of obtaining those repairs). The matter is relisted in late October to address further issues. The remittal hearing in *Toyota* is set down to be heard in 2026.

Importantly, multiple aspects of individual group member claims remain unresolved across one or both proceedings, including: the application of limitation periods (Perram J appointed sample group members to assist with this issue); whether any previously received fix has barred a group member's right to recover under s271(6) (Lee J has ordered the appointment of sample group members to assist with this issue); how group members who purchased their vehicle second hand should be treated (there being some indication that there will be further appeal on this matter); and the quantification of any consequential loss for group members.

TAKEAWAYS

Defendants (especially in mass tort claims) should identify the individual nature of group members' claims from the outset - most importantly to ensure that any individual issues are preserved and not artificially subsumed by the plaintiff into the list of common issues. As *Toyota* and *Ford* demonstrate, in most cases even some success by the lead applicant at an initial trial should not (as a matter of principle and fairness) translate to liability to an entire class of group members, as their individual claims might differ in important respects.

52 Under ACL s273. A similar issue arises in relation to determining the limitation period for safety defects under ACL s143, as seen in *Turner v Bayer* [2024] VSC 760 at [2090].

53 Although his Honour ultimately left open whether such an award of aggregated damages could be made including once known which vehicles had been repaired: *Capic v Ford Motor Company of Australia Pty Ltd (Revised Common Questions)* [2021] FCA 1320 at [6].

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