

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2023 05830

JEREMEY CLARKE

Plaintiff

v

JB Hi-Fi GROUP PTY LTD (ACN 093 114 286)

Defendant

JUDGE: Delany J
WHERE HELD: Melbourne
DATE OF HEARING: 22 July 2025
DATE OF RULING: 15 August 2025
CASE MAY BE CITED AS: Clarke v JB Hi-Fi Group Pty Ltd
MEDIUM NEUTRAL CITATION: [2025] VSC 497

PRACTICE AND PROCEDURE – Application for trial of preliminary question – Group proceeding – Questions not likely to be dispositive – Basis on which questions to be answered uncertain – Proceeding raises novel questions – Consideration of the alternative of a limited initial trial – Application refused – *Murphy v State of Victoria* (2014) 45 VR 119; [2014] VSCA 238, applied – *Doyle's Farm Produce Pty Ltd v Murray Darling Basin Authority (No 2)* 106 NSWLR 41; [2021] NSWCA 246, *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1; [2001] HCA 19, *Andrews v Australia and New Zealand Banking Group Ltd* (2011) 281 ALR 113; [2011] FCA 388, *Abdulrahim v Adult Parole Board of Victoria* [2023] VSC 101, referred to – *Williams v Toyota Motor Corporation Australia Limited* (2024) 419 ALR 373; [2024] HCA 38, discussed – *Competition and Consumer Act 2010* (Cth) Sch 2 ss 54, 259 – *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 47.04 – *Civil Procedure Act 2010* (Vic) ss 7, 8.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Rachel Doyle SC with Rachel Francois and James Page	Maurice Blackburn
For the Defendant	Rob Craig KC with Andrew McRobert	HSFK

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HIS HONOUR:

A. The application

- 1 These reasons concern an application by the defendant ('JB Hi-Fi') for the hearing and determination of four separate questions prior to the trial of the proceeding.
- 2 The proceeding is a group proceeding seeking compensation on behalf of group members who purchased 'Extended Warranties' from JB Hi-Fi. The proceeding alleges that JB Hi-Fi engaged in misleading or deceptive conduct or unconscionable conduct and/or that group members purchased the warranties on the basis of a mistake as to value.
- 3 The Extended Warranties relate to 12 broad categories of goods ranging from refrigerators and televisions to gaming consoles and fit/smart watches made by a wide variety of manufacturers.
- 4 The claim period extends over 12 years, between 1 January 2011 – 8 December 2023. The 'Principal Claim Period' concerns persons who purchased Extended Warranties between 9 December 2017 and 8 December 2023 and the 'Mistake Claim Period' concerns persons who purchased Extended Warranties, in the period between 1 January 2011 and 8 December 2017. The proceeding is an open class proceeding that is estimated to encompass 8.5 million group members.
- 5 By its summons dated 3 July 2025, JB Hi-Fi seeks an order pursuant to r 47.04 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) (the 'Rules') and/or ss 33Z(1) and/or 33ZF(1) of the *Supreme Court Act 1986* (Vic) ('Act'), that four questions be tried before all other questions in the proceeding.
- 6 The four questions are as follows:

Question 1

For a right or benefit to "automatically apply" under ss 259 to 266 of the Australian Consumer Law (ACL), must there be an identification of a fact or matter as to the state and condition of the Fridge which rendered the Fridge not of "acceptable quality" at the time of supply?

Question 2

If the Fridge purchased by the Plaintiff was of acceptable quality within the meaning of s 54 of the ACL at the time of its supply, did any “period of cover” or “benefits” (within the meaning of paragraph 26 of the Amended Statement of Claim (ASOC)) automatically apply by reason of s 54 of the ACL?

Question 3

Does the guarantee of “acceptable quality” in s 54 of the ACL and/or the rights under sections 259 to 266 of the ACL operate by reference to a temporal period such as the “period of cover” alleged in paragraphs 8 and 26 of the ASOC?

Question 4

If the answer to Question 3 is “yes” was that temporal period ascertainable at the time of supply of the Fridge purchased by the Plaintiff?

- 7 The summons does not specify whether the questions are proposed to be heard and determined on the basis of agreed or assumed facts, or whether evidence, and if so, what type of evidence, will be required, including evidence from witnesses.
- 8 JB Hi-Fi submits the determination of the questions would narrow the issues in dispute, focus discovery accordingly, enable the parties to better assess their respective risks and better inform the formulation of the common questions for any further trial.
- 9 At the outset of the hearing JB Hi-Fi estimated the substantive hearing of the separate questions, if ordered, would likely occupy one day. Towards the end of the nearly one day hearing of the application, JB Hi-Fi’s estimate of time for the trial of the proposed separate questions was expanded to one-two days. The plaintiff estimates three-four days because evidence from witnesses would be required for the hearing of the proposed questions.
- 10 Progress in the proceeding to date has been slow. The proceeding was issued in 2023. On 23 May 2025 Nichols J made a group costs order (‘GCO’) pursuant to s 33ZDA of the Act. Pleadings are not due to be completed until 4 September 2025.
- 11 The current pleadings are constituted by the Further Amended Statement of Claim dated 10 July 2025 (‘FASOC’), the Defence dated 2 August 2024 which responds to an

earlier Amended Statement of Claim ('Defence') and the Amended Reply dated 10 July 2025 ('Reply').

- 12 One of the drivers of the JB Hi-Fi application is an understandable desire to avoid extensive, expensive and prolonged discovery. There have been ongoing disputes concerning discovery, including as to the scope of discovery required from JB Hi-Fi. The parties provided a discovery dispute chart in advance of the 22 July 2025 hearing.
- 13 JB Hi-Fi contends, and I accept, that discovery and conferral relating to discovery has been impacted by differences between the parties regarding the proper construction of s 54 of schedule 2 to the *Competition and Consumer Act 2010* (Cth) (the 'ACL'), which the proposed questions are intended to address. These and other topics are dealt with in the affidavit of Ms Overington dated 3 July 2025 in support of the summons.
- 14 Ms Overington has given evidence that the plaintiff currently seeks discovery of:
- (a) documents which record or relate to the lifespan or design life of, trading/supplier agreements, reverse logistics agreements, and communications to or from manufacturers or suppliers concerning faults or failures in those products that were returned, repaired or replaced under manufacturer warranty, extended warranties or the ACL, in respect of the following 12 consumer goods categories:
 - (i) refrigerators;
 - (ii) televisions;
 - (iii) laptops;
 - (iv) headphones and headsets;
 - (v) speakers;
 - (vi) gaming consoles;
 - (vii) tablets;

- (viii) fit/smart watches;
- (ix) vacuum cleaners;
- (x) washing machines and washer/dryers;
- (xi) dryers; and
- (xii) dishwashers.

15 As the determination of the JB Hi-Fi summons will impact on how discovery proceeds hereafter, the determination of discovery disputes is most efficiently dealt with after the delivery of this ruling.

16 The parties have been communicating in relation to the identification of common questions for the first trial. Exhibited to the affidavit of Ms Overington is a letter from the plaintiff's solicitors dated 2 June 2025 responding, on behalf the plaintiff, in tabular form to JB Hi-Fi's proposed common questions for the initial trial. It was accepted by the plaintiff during the hearing that the common questions will need to be revisited in light of the particulars and expert evidence the plaintiff has indicated he intends to call at the initial trial.

17 On 13 June 2025 the plaintiff's solicitors sent a letter in which they outlined the proposed scope of the initial trial from his perspective. Relevant parts of the letter state:

8. As you are aware, the lead plaintiff Jeremey Clarke bought his Fridge and extended warranty in store during the Principal Claim Period. The Proposed FASOC supplied to you on 10 June 2025 contains detailed particulars in relation to his Fridge at [44].

9. The plaintiff also currently intends to adduce lay witness evidence from two group members, and that evidence will address:

- a. the circumstances of a group member (being a Principal Claim Group Member) who purchased a television and extended warranty online pursuant to the Online Sales Process (as defined in the ASOC); and
- b. the circumstances of a group member who purchased a laptop and extended warranty in store during the Mistake Claim Period (as

defined in the ASOC), being a group member who has a claim in mistake only

...

15. At present, the plaintiff expects to adduce evidence from experts regarding the following categories of consumer goods:

- a. refrigerators, washing machines and dishwashers;
- b. televisions; and
- c. laptops.

18 The plaintiff's proposal anticipates that three consumer claims referred to in that letter, those of the lead plaintiff and those of two sample group members, would be run to conclusion at the initial trial including in relation to their individual claims for loss.

19 The plaintiff submitted the initial trial for which he contends would require the Court to determine the questions of statutory construction raised on the pleadings. As it would involve the claims of sample group members, it would engage with the claims of the Mistake Claim Period group members. It would also involve the determination of the unconscionable conduct claim. Evidence would include documentary evidence about the JB Hi-Fi sales system and expert evidence concerning the three categories of consumer goods purchased by the lead plaintiff and the two sample group members. Such an initial trial is estimated to take four weeks.

20 JB Hi-Fi submitted the plaintiff's initial trial alternative 'is simply an inappropriate way in which to conduct this piece of litigation'. In contrast to the separate questions which, subject to the Court's availability, could be heard within a matter of weeks, an initial trial in the form proposed by the plaintiff is 'years away'.

21 In opposition to the summons the plaintiff relies on the affidavit of Ms Vavaa Mawuli dated 14 July 2025.

22 In advance of the hearing JB Hi-Fi filed submissions dated 3 July 2025. The plaintiff filed submissions dated 14 July 2025. JB Hi-Fi filed reply submissions dated 18 July 2025.

B. The principles

23 Rule 47.04(1) of the Rules is in the following terms:

Separate trial of question

The Court may order that –

- (a) any question in a proceeding be tried before, at or after the trial of the proceeding, and may state the question or give directions as to the manner in which it shall be stated;
- (b) different questions be tried at different times or places or by different modes of trial.

24 The principles to be applied were summarised by the Court of Appeal in *Murphy v State of Victoria*:¹

- 1) A separate trial should be ordered under r 47.04 only with great caution and only in a clear case.
- 2) The attraction of trials of issues rather than of cases in their totality, “are often more chimerical than real”, so that separate trials should “only be embarked upon when their utility, economy and fairness to the parties are beyond question”.
- 3) The advantages of trying separate questions for one party may unfairly disadvantage another party, including because the questions will be determined without the benefit of all the evidence relevant to the proceeding.
- 4) There should be no trial of a separate question on the basis of assumed facts unless the facts are agreed or can readily be determined judicially. Otherwise, the parties remain free to dispute the relevant facts at any later trial.
- 5) As a general rule, it is inappropriate to order that a preliminary issue be isolated for determination unless the determination of the issue in favour of the plaintiff or the defendant will put an end to the action, or where there is a clear line of demarcation between issues and the determination of one issue in isolation from the other issues in the case is likely to save inconvenience and expense.
- 6) Factors which tell against making order under r 47.04 include that the separate determination of the question:
 - a) may give rise to significant contested factual issues both at the time of the hearing of the preliminary question and at the time of trial;

¹ *Murphy v State of Victoria* (2014) 45 VR 119; [2014] VSCA 238 [28] (Nettle AP, Santamaria and Beach JJA) (“Murphy”) (citations omitted).

- b) may result in significant overlap between the evidence adduced on the hearing of the separate question and at trial; possibly involving the calling of the same witnesses at both stages of the hearing of the proceeding; and
- c) may prolong rather than shorten the litigation.

25 JB Hi-Fi emphasised, and I accept, that the principles set out in *Murphy* are not rigid. They are to be applied by reference to the circumstances of the particular case.

26 In *Doyle's Farm Produce Pty Ltd v Murray Darling Basin Authority (No 2)*, Bell P observed:²

[5] My reservations were overcome by the formulation of separate questions which were referred to this Court and which raised the same issue of statutory construction as had been determined by the primary judge on a strike-out basis albeit, unlike the strike-out application, against a set of agreed facts. This course obviated any possible objection that the answers to the questions posed were not “based on a concrete and established or agreed situation”, resulting in the quelling of at least one aspect of the controversy between the parties: *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334; [1999] HCA 9 at [45] (*‘Bass’*); see also at [49]–[50]. As the plurality in *Bass* said at [51]:

It cannot be doubted that in many cases the formulation of specific questions to be tried separately from and in advance of other issues will assist in the more efficient resolution of the matters in issue. However, that will be so only if the questions are capable of final answer and are capable of being answered in accordance with the judicial process.

[6] There has perhaps been a tendency on the part of counsel and some judges to fasten on to the well-known and critical observations of Kirby and Callinan JJ in their (dissenting) joint judgment in *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1; [2001] HCA 19 at [168]–[171] as to the perils of separate questions whenever their formulation is suggested or debated, with the result that the observations of the plurality in *Bass* set out above and made only two years earlier have seeped from professional procedural consciousness. As the plurality in *Bass* pointed out, however, in many cases and in the absence under the *Civil Procedure Act 2005* (NSW) and *Uniform Civil Procedure Rules 2005* (NSW) of any provision for a demurrer, the formulation of separate questions in an appropriate case will assist in the more efficient resolution of the matters in issue and thereby advance the overarching purposes identified in s 56 of the *Civil Procedure Act*. Sometimes, as in the present case, such questions, where based upon agreed facts, may appropriately also be removed to the Court of Appeal for their expeditious determination.

² *Doyle's Farm Produce Pty Ltd v Murray Darling Basin Authority (No 2)* (2021) 106 NSWLR 41; [2021] NSWCA 246 [6] (Bell P) (*‘Doyle's Farm Produce’*).

- 27 Although Leeming JA observed in *Doyle's Farm Produce* the formulation of separate questions will, in an appropriate case, advance the efficient resolution of the matters in issue, making sure the case at hand is an appropriate case is critical.
- 28 As stated in *Murphy*, the discretion is to be exercised with great caution, and only in a clear case. This is to give effect to the overarching purpose in s 7(1) of the *Civil Procedure Act 2010* (Vic) ('CPA'), namely to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.³
- 29 JB Hi-Fi submitted the determination of the summons 'requires a careful balancing of the prospective advantages and disadvantages, bearing in mind the uncertainties of litigation'.⁴ It submitted the discretion is to be exercised having regard to, and weighing, all the relevant considerations in a 'pragmatic balancing exercise'.⁵
- 30 In *CBS Productions Pty Ltd v O'Neill*, Kirby P (as his Honour then was) said that:⁶
- A matter is "ripe" for separate and preliminary determination where it is a central issue in contention between the parties, the resolution of which will either obviate the necessity of litigation altogether or substantially narrow the field of controversy.
- 31 In their joint judgment in *Tepko Pty Ltd v Water Board*, Kirby and Callinan JJ, with whom Gaudron J agreed, said that whether a 'single issue trial' ought to be ordered depends on matters such as whether there is likely to be an application for leave to appeal, having regard to its attendant delay and costs.⁷
- 32 JB Hi-Fi submitted, citing Leeming JA in *Doyle's Farm Produce*, that much 'turn[s] on the length of time required to determine the separate question, and the impact of its

³ *Civil Procedure Act 2010* (Vic) s 8(1).

⁴ *Inpex Operations Australia Pty Ltd v AIG Australia Ltd* [No 2] [2023] WASC 61 [63] (Lundberg J).

⁵ *Inpex Operations Australia Pty Ltd v AIG Australia Ltd* [No 2] [2023] WASC 61 [63], Lundberg J citing *Electrical Waste Recycling Group Limited v Philips Electronics UK Limited* [2012] EWHC 38 (Ch) [5]-[7] (Hildyard J) and *Daimler AG v Walleniusrederierna Aktiebolag* [2020] EWHC 525 (Comm) [28] (Bryan J). (1985) 1 NSWLR 604, 606.

⁷ *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1; [2001] HCA 19 [168]-[170] ('*Tepko*'). Cited with approval in *Re Sparkling Beverages Pty Ltd* [2023] VSC 258 [32] (Connock J); *Abdulrahim v Adult Parole Board of Victoria* [2023] VSC 101 [21] (Dixon J); *Doyle's Farm Produce Pty Ltd v Murray Darling Basin Authority (No 2)* (2021) 106 NSWLR 41; [2021] NSWCA 246 [24] (Leeming JA), citing *Todd Hadley Pty Ltd v Lake Maintenance (NSW) Pty Ltd* [2019] NSWCA 262 [15]-[16], [41]-[46] (Bell P) and [117]-[119] (Simpson AJA).

resolution on the balance of the litigation’.⁸ Factors that tend to support the making of an order include that the separate determination may contribute to the saving of time and cost by substantially narrowing the issues for trial, lead to disposal of the action, or contribute to the settlement of the litigation.⁹

33 The plaintiff submitted that where there is a lack of clarity regarding the materials required to determine a proposed application, it is likely to be inappropriate to order that questions be determined separately.¹⁰

34 The use of separate questions has been adopted in other group proceedings.¹¹

35 In *Andrews v ANZ*, where Gordon J ordered the trial of a separate question, her Honour said ‘Economy and fairness considerations may be tested by posing a rhetorical question – what happens if the court does not separately determine the Separate Questions?’¹²

36 In *Williams v Toyota Motor Corporation Australia Limited*,¹³ Lee J ordered the trial of separate questions for two reasons:

... First, consistent with the approach usually taken prior to the hearing of a large class action, the intention of the Court was to identify in advance of the initial trial: (a) all common questions of law and fact; (b) issues of commonality; and (c) any other issues, to be determined at that hearing. It followed that in undertaking this task of identification, the issue of what truly was a common question was brought into focus.

⁸ *Doyle’s Farm Produce Pty Ltd v Murray Darling Basin Authority (No 2)* (2021) 106 NSWLR 41; [2021] NSWCA 246 [24] (Leeming JA).

⁹ *Niclin Constructions Pty Ltd v Yatala Formwork Pty Ltd* [2023] QSC 285 [6(d)] (Martin SJA), citing *Reading Australia Pty Ltd v Australian Mutual Provident Society* (1999) 217 ALR 495; [1999] FCA 718 [8] (Branson J); *Village Building Company Ltd v Canberra International Airport Pty Ltd & Ors* [2003] FCA 1195 [8] (Finn J). See also *Re Sparkling Beverages Pty Ltd* [2023] VSC 258 [31(k)] (Connock J); *Abdulrahim v Adult Parole Board* [2023] VSC 101 [8] (Dixon J).

¹⁰ *Peros v Blackburn* [2024] FCA 177 [39] (Derrington J).

¹¹ See, for example, *Andrews v Australia and New Zealand Banking Group Ltd* (2011) 281 ALR 113; [2011] FCA 388 (see also *Andrews v Australia and New Zealand Banking Group Ltd* (2011) 211 FCR 53; [2011] FCA 1376; *Andrews v Australia and New Zealand Banking Group Limited* [2018] FCA 70 [10]); *Williams v Toyota Motor Corporation Australia Limited* (2021) 288 FCR 282; [2021] FCA 1425; *Evans v Davantage Group Pty Ltd* (2019) 291 FCR 663; [2019] FCA 884 (Beach J) (see also *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70 [10] (Beach J) (settlement approval)).

¹² *Andrews v Australia and New Zealand Banking Group Ltd* (2011) 281 ALR 113; [2011] FCA 388 [73] (‘Andrews’).

¹³ (2021) 288 FCR 282; [2021] FCA 1425[4]-[5] (Lee J) (‘Toyota’).

[5] Secondly, the respondent (Toyota) has made an application to amend its defence. It is unnecessary for the purposes of these reasons to detail the nature of these amendments, save to remark that, following argument at the interlocutory hearing on 8 October 2021, I reached the view that there could be no conceivable prejudice occasioned to the applicants upon the amendment of the defence, unless the applicants needed to confront a newly pleaded aspect of the proposed amended defence at the initial trial. This would only be the case if the claim for aggregate damages was maintainable.

37 In *Evans v Davantage Group Pty Ltd*, the separate question determined by the Court was ‘whether a contractual promise in a discretionary risk product [was] illusory’. In that case, the respondent issued financial products in the form of motor vehicle warranties. The claims in the class action included allegations that:¹⁴

the respondent’s obligations to the applicant and group members under the warranty agreements are illusory ... such that the warranty agreements fail for lack of consideration and that as a consequence the respondent ought to make restitution of the consideration paid by the applicant and group members.

38 The question was answered in favour of the applicant. The proceeding later settled.

C. The pleadings

39 The plaintiff alleges, and in broad terms JB Hi-Fi does not cavil with the allegation, that it is a company that:

- (a) offers, for sale to consumers, goods including electronic devices, home appliances and home entertainment products (the ‘Consumer Goods’); and
- (b) offers, for sale to consumers, warranties in connection with sales of the Consumer Goods (the ‘Extended Warranties’).

40 Paragraph 6 of the FASOC is in the following terms:

By reason of section 54(1) of the ACL, the Plaintiff and each Group Member, at the time of purchase of the Consumer Goods from JB Hi-Fi, *automatically* obtained the benefit of a guarantee that the Consumer Goods purchased were of “acceptable quality” within the meaning of section 54(2) of the ACL (the ‘Statutory Guarantee’).

[emphasis added]

¹⁴ (2019) 291 FCR 663; [2019] FCA 884 [1] (Beach J) (see also *Evans v Davantage Group Pty Ltd* (No 3) [2021] FCA 70 [10], [14]-[16] (Beach J) (settlement approval)).

41 In its Defence, in response to paragraph 6, JB Hi-Fi pleads that:

to the extent that a good sold by it was acquired by a “consumer” within the meaning of section 3 of the ACL ..., section 54(1) of the ACL operates to provide a guarantee that that good is of “acceptable quality” within the meaning of section 54(2) of the ACL (“Statutory Guarantee”);

42 Paragraph 8 of the FASOC alleges:

The period of time for which the Statutory Guarantee operated with respect to each of the Consumer Goods purchased from JB Hi-Fi by the Plaintiff and the Group Members was the period which the reasonable consumer would regard as “acceptable” having regard to the matters in subsection 54(3) of the ACL.

43 The particulars in support of the plea concerning the period the reasonable consumer would regard as ‘acceptable’ in paragraph 8 of the FASOC include:

- (d) any representation made about the goods by JB Hi-Fi or the manufacturer of the goods;
- (e) any other relevant circumstances relating to the supply of the goods, which included the expected lifespan of the Consumer Goods.

44 Paragraph 26 of the FASOC is central to the claims by the plaintiff and group members. That paragraph and the particulars sub-joined to it are in the following terms:

During the Relevant Period, the true position was that the Extended Warranties were of little or negligible value to the Plaintiff and Group Members because:

- (a) *the period of cover of the Extended Warranties substantially or wholly overlapped with the period of cover which automatically applied by reason of the Statutory Guarantee; and/or*
- (b) *the benefits which applied under the Extended Warranty substantially or wholly overlapped with the benefits which automatically applied by reason of the Statutory Guarantee.*

Particulars

1. The relevant benefits which automatically applied by reason of the Statutory Guarantee, including the period of cover, are set out at paragraphs 6 - 9 of this Statement of Claim.
2. The relevant benefits which applied under the Extended Warranty, including the period of cover, are set out at paragraphs 18, 18A, 19, 21, 22, 23 and Schedule 1 of this Statement of Claim.

3. *With respect to the overlap between the benefits which applied under the Extended Warranty and the benefits which automatically applied by reason of the Statutory Guarantee, the Plaintiff refers to and repeats paragraph 61 of this Statement of Claim.*
4. *The Extended Warranties were financial products within the meaning of s 12BAA(1)(b) and 5(a) of the ASIC Act and were a means by which Consumers sought to manage the financial consequences to them of a particular circumstance occurring. Those circumstances included the risk that a Consumer might suffer loss or damage in the event that the risks covered by the Extended Warranty materialised during its period of cover. The benefits which purported to apply under the Extended Warranties therefore included the benefit of protection against the risk of suffering loss or damage in the event that the risks covered by the Extended Warranties materialised during the period of cover.*
5. *The Statutory Guarantee also conferred a benefit on the Plaintiff and Group Members, namely the benefit of protection against the risk of suffering loss or damage in the event that the risks covered by the Statutory Guarantee materialised during its period of operation.*

[emphasis added]

45 In response to paragraph 26 of the FASOC, the Defence includes the following:

- (c) says further that *if the Fridge was of “acceptable quality” when it was supplied to the Plaintiff then:*
 - (i) *the Plaintiff has never been entitled to any remedy under the ACL by reason of the Statutory Guarantee;*
 - (ii) *there is no “period of cover” during which the Plaintiff has any right to any remedy under the ACL by reason of the Statutory Guarantee; and/or*
 - (iii) *there are no “benefits” to the Plaintiff under the ACL by reason of the Statutory Guarantee;*
- (d) says further that *if a good was of “acceptable quality” when it was supplied to a Group Member who acquired that good as a Consumer then:*
 - (i) *the Group Member has never been entitled to any remedy under the ACL by reason of the Statutory Guarantee;*
 - (ii) *there is no “period of cover” during which the Group Member has any right to any remedy under the ACL by reason of the Statutory Guarantee; and/or*
 - (iii) *there are no “benefits” to the Group Member under the ACL by reason of the Statutory Guarantee;*

- (e) says further that *whether any particular good was of “acceptable quality” when it was supplied to a Group Member requires consideration of the factors in section 54(2) of the ACL and the individual circumstances of that particular transaction, including the state of that particular good;*

[emphasis added]

- 46 As senior counsel for JB Hi-Fi correctly submitted, paragraph 26 of the FASOC and the Defence expose the central dispute in the litigation.
- 47 The plaintiff’s case is that the Statutory Guarantee exists, irrespective of whether the goods supplied are or are not of ‘acceptable quality’ at the time of supply. His case as pleaded in paragraph 26 of the FASOC is about the competition between the Statutory Guarantee and the Extended Warranties. The particulars allege ‘the period[s] of cover’ substantially or wholly overlap and that ‘the benefits’ substantially or wholly overlap. If the Statutory Guarantee automatically confers the rights alleged, there was no reason for the plaintiff and group members to purchase the Extended Warranties.
- 48 It is JB Hi-Fi’s case that the Statutory Guarantee does not apply unless the goods supplied were not of ‘acceptable quality’ at the time of supply. Other sections of the ACL, ss 259–266, create rights, which in turn depend upon whether the failure to comply was major or not major.
- 49 JB Hi-Fi submitted the rights that arise by reference to the obligation in s 54 depend first upon the absence of acceptable quality, second upon the absence of acceptable quality as at the time of supply, and then by reference to that particular good, the nature of the defect concerned and whether it is major or not major. It submitted the rights that flow by reference to the Statutory Guarantee have as their entire source the existence of a specific defect at the time of supply.
- 50 JB Hi-Fi submitted the separate questions proposed seek to set the proper principled identification of the basis of comparison between what the consumer is entitled to under the s 54 Statutory Guarantee, and what the consumer received under the Extended Warranties.

51 The recently amended Reply sets out the 'Plaintiff's Alternative Approach', assuming, which the plaintiff denies, that the JB Hi-Fi approach to statutory construction is correct. The Reply relevantly states:

As to paragraph[] ... [26] [of the Defence] ...:

- (a) these paragraphs of the Defence are embarrassing and mischaracterise the operation and effect of the statutory guarantees and remedies provided by the ACL;
- (b) *all consumers (within the meaning of the ACL), including the Plaintiff and each Group Member, automatically obtained the benefit of the guarantee of acceptable quality in section 54 of the ACL at the time of purchase of their goods;*
- (c) the benefit provided by section 54 of the ACL included that the goods would be as "fit for purpose", "free from defects", and "durable" as a reasonable consumer would regard as acceptable;
- (d) whether or not a good is of "acceptable quality", and whether or not a consumer may have the right to claim a remedy for breach of the statutory guarantee, is something which may only become evident to a consumer at a date after the initial supply of the goods, and the question whether goods are in fact of "acceptable quality" at the time of supply is to be ascertained on the basis of a retrospective analysis, having regard to the matters in s 54(2) of the ACL;
- (e) *the benefit and remedies provided by the statutory guarantee operated for the period of time which the reasonable consumer would regard as "acceptable" having regard to the matters in subsection 54(3) of the ACL; and*
- (f) *all consumers automatically obtained the benefit of the statutory guarantee, irrespective of whether they subsequently sought to invoke the remedies provided by the ACL, and irrespective of whether the goods they purchased were or were not of "acceptable quality" (ascertained in the manner set out in (d) above);*
- (g) *in the alternative, even if the correct construction of the statutory guarantee and remedies provided by the ACL is as alleged in Defence ..., namely to the effect that the obtaining of any rights or benefits pursuant to the statutory guarantee and the remedies under the ACL is not automatic and is conditioned upon whether goods purchased by the consumers were of "acceptable quality" at the time of supply (which is denied), then the consumers who purchased Extended Warranties from the Defendant have nevertheless purchased Extended Warranties which possessed little or negligible value, or which were of materially lower value than the price paid for them, because even on the Defendant's construction (the correctness of which is denied):*
 - (A) *if the goods purchased were, in fact, not of "acceptable quality" at the time of supply, then the statutory guarantee was enlivened at the time of supply, and the Extended Warranties offered little or*

negligible value to the consumers by reason of the matters pleaded at FASOC [26]; and

- (B) if the goods purchased were, in fact, of “acceptable quality” at the time of supply, then neither the statutory guarantee nor the Extended Warranties would have offered any right or benefit or remedy to the consumers, because (on the Defendant’s construction) no occasion to seek any benefit under the statutory guarantee or to make any claim under the Extended Warranty could have arisen; and
- (C) in the event of (A) (namely, if both the Defendant’s construction were correct and (A) was in fact the true position), then the Plaintiff and the Group Members would not have purchased the Extended Warranties, alternatively the Plaintiff and Group Members would not have paid the cost of the Extended Warranties, had they been made aware of the matters in (A) above; and
- (D) in the event of (B) above (namely, if both the Defendant’s construction were correct and (B) was in fact the true position), then the Plaintiff and the Group Members would not have purchased the Extended Warranties, had they been made aware of the matters in (B).

[emphasis added, underlining in the original]

D. The competing cases

52 As can be seen from the extracts of the pleadings reproduced above, the plaintiff’s primary case is that the ACL:

- (a) conferred rights and benefits on the plaintiff and group members pursuant to the Statutory Guarantee and ss 259–264 and 266, which included the rights and benefits pleaded at paragraph 9 of the FASOC and particularised at paragraph 26 of the FASOC (including a benefit in the nature of an insurance policy against the risk that the goods purchased by a consumer are not of acceptable quality); and
- (b) the Extended Warranties were of little or negligible value to the plaintiff and group members because both the period of cover of the Extended Warranties and the benefits which purportedly applied under those Extended Warranties substantially or wholly overlapped with the period of cover and the benefits which automatically applied by reason of the Statutory Guarantee.

53 The plaintiff's case is that by reason of the existence of the Statutory Guarantee and the remedies that are automatically available to consumers under the ACL in the event that a good is ultimately detected to have not been of acceptable quality at the time of supply, there was no material value to be gained by a consumer in purchasing an Extended Warranty. The amounts paid for the Extended Warranties by the lead plaintiff and sample group members were as follows:

- (a) \$62.67 in relation to the lead plaintiff's fridge purchase; and
- (b) \$149.00 and \$299.25 in relation to the sample group member purchases of a television and a laptop, respectively.

54 The plaintiff's case is that the Extended Warranties monetised, for the financial gain of JB Hi-Fi, the rights and benefits that were already conferred automatically by statute on consumers for free, which co-existed with the Extended Warranty.

55 The plaintiff submitted the absence of value in the Extended Warranties is established as soon as it is established that the 'period of cover' substantially or wholly overlaps. An analysis of 'the benefits' will require an analysis of what the Extended Warranty offers.

56 The plaintiff submitted the manner in which the claim is pleaded shows that the only hurdle he has to leap over to satisfy the case pleaded at paragraph 26(a) of the FASOC is to demonstrate that the Statutory Guarantee endures as long as or longer than Extended Warranty. The absence of value in the Extended Warranty is proven the moment the plaintiff shows the Statutory Guarantee is as long as or longer than the Extended Warranty period. While that is so, the plaintiff's case as particularised is that the Statutory Guarantee exists:

- (a) in the case of the plaintiff's fridge for 10-13 years;
- (b) in the case of the laptop purchased by Lawrence Pigot, a minimum of five years; and

(c) in the case of the television purchased by Amarnda Corlett, for seven years.

57 JB Hi-Fi's case is that if a relevant good was of 'acceptable quality' at the time of supply, the consumer who purchased the good is not (and was not ever) entitled to any remedy under the ACL. As a result, there is no 'period of cover', as pleaded in paragraph 26(a) of the FASOC, during which that consumer had any right to any remedy under the ACL by reason of the Statutory Guarantee. Concerning the allegation in paragraph 26(b) of the FASOC, JB Hi-Fi pleads that if a relevant good was of 'acceptable quality' at the time of supply, there were no 'benefits' to the consumer who purchased that good by reason of the Statutory Guarantee (the 'JB Hi-Fi ACL Construction').

58 The Plaintiff's Alternative Approach is to the effect that even if the JB Hi-Fi ACL Construction is correct, then the plaintiff's case and the claims of the group members still hold:

(a) if the goods were not of 'acceptable quality' at the time of supply, the Statutory Guarantee and its allied remedies were enlivened at the time of supply, such that the Extended Warranties offered little or negligible value to the group members; and

(b) if the goods were of 'acceptable quality' at the time of supply, neither the Statutory Guarantee nor the Extended Warranties offered any right, benefit or remedy to group members because, on the JB Hi-Fi ACL Construction, there would be no reason and no occasion for a group member to seek any remedy or benefit under either the Extended Warranty or the ACL. It follows that even if the JB Hi-Fi ACL Construction is correct, the Extended Warranties offered little or negligible value to group members, who purchased them.

59 The plaintiff submits that having regard to his 'Alternative Approach', a determination of the proposed questions will not be dispositive of the proceeding. Even if the plaintiff fails in relation to his primary construction argument, the Plaintiff's Alternative Approach case will remain to be determined. The core

proposition that the Extended Warranties were of little or negligible value to the plaintiff and group members remains intact and will require determination by the Court on the basis of evidence to be adduced at trial.

E. The legislation in issue

60 Section 54 of the ACL is 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.

- (4) If:
- (a) goods supplied to a consumer are not of acceptable quality; and
 - (b) the only reason or reasons why they are not of acceptable quality were specifically drawn to the consumer's attention before the consumer agreed to the supply;

the goods are taken to be of acceptable quality.

- (5) If:
- (a) goods are displayed for sale or hire; and
 - (b) the goods would not be of acceptable quality if they were supplied to a consumer;

the reason or reasons why they are not of acceptable quality are taken, for the purposes of subsection (4), to have been specifically drawn to a consumer's attention if those reasons were disclosed on a written notice that was displayed with the goods and that was transparent.

- (6) Goods do not fail to be of acceptable quality if:
- (a) the consumer to whom they are supplied causes them to become of unacceptable quality, or fails to take reasonable steps to prevent them from becoming of unacceptable quality; and
 - (b) they are damaged by abnormal use.

- (7) Goods do not fail to be of acceptable quality if:
- (a) the consumer acquiring the goods examines them before the consumer agrees to the supply of the goods; and
 - (b) the examination ought reasonably to have revealed that the goods were not of acceptable quality.

61 The relief claimed by the plaintiff and group members relies on, and the proposed questions refer to, ss 259–266 of the ACL. It is sufficient for present purposes to reproduce s 259:

259 Action against suppliers of goods

- (1) A consumer may take action under this section if:
- (a) a person (the *supplier*) supplies, in trade or commerce, goods to the consumer; and

- (b) a guarantee that applies to the supply under Subdivision A of Division 1 of Part 3-2 [which includes s 54] is not complied with.
- (2) If the failure to comply with the guarantee can be remedied and is not a major failure:
 - (a) the consumer may require the supplier to remedy the failure within a reasonable time; or
 - (b) if such a requirement is made of the supplier but the supplier refuses or fails to comply with the requirement, or fails to comply with the requirement within a reasonable time – the consumer may:
 - (i) otherwise have the failure remedied and, by action against the supplier, recover all reasonable costs incurred by the consumer in having the failure so remedied; or
 - (ii) subject to section 262, notify the supplier that the consumer rejects the goods and of the ground or grounds for the rejection.
- (3) If the failure to comply with the guarantee cannot be remedied or is a major failure, the consumer may:
 - (a) subject to section 262, notify the supplier that the consumer rejects the goods and of the ground or grounds for the rejection; or
 - (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.
- (4) The consumer may, by action against the supplier, recover damages for any loss or damage suffered by the consumer because of the failure to comply with the guarantee if it was reasonably foreseeable that the consumer would suffer such loss or damage as a result of such a failure.
- (5) Subsection (4) does not apply if the failure to comply with the guarantee occurred only because of a cause independent of human control that occurred after the goods left the control of the supplier.
- (6) To avoid doubt, subsection (4) applies in addition to subsections (2) and (3).
- (7) The consumer may take action under this section whether or not the goods are in their original packaging.

62 As the plaintiff accepted to be the case, the Statutory Guarantee applies not only in
favour of the consumer who purchased the goods from the supplier, it also applies in
favour of a subsequent purchaser of the goods.¹⁵

F. The JB Hi-Fi submissions

63 JB Hi-Fi submitted the early determination of the proposed questions would promote
the overarching purpose in the CPA, would likely result in a significant saving of
public resources and has the potential to save millions of dollars in costs.

64 It submitted the questions raise issues of law, require little (if any) evidence and will
inevitably arise in the proceeding. Each of the questions concern ‘the proper
construction’ and ‘manner of operation of s 54’. The answers to the questions are
supplied largely (if not wholly) by the words of the statute (which directs itself to the
state and condition of the goods, not a temporal period) and the application of the
joint reasons in *Williams v Toyota Motor Corporation Australia*.

65 The determination of the separate questions would have a direct bearing upon the
evidence the parties would need to adduce at trial in order to establish, or refute, the
alleged contraventions of the ACL. Their determination would ‘allow identification
of common questions and also allow settlement discussions as to the resolution of the
class action to proceed on a more secure footing’.¹⁶

66 The proper construction of s 54 of the ACL directly impacts the ‘central issue pleaded
in the FASOC’ and the composition of the class. If the questions are answered in JB
Hi-Fi’s favour, there is the potential that the proceeding will need to be de-classified.

67 JB Hi-Fi submitted Question 1 identifies what the ACL gives the purchaser at the time
of acquisition. If JB Hi-Fi’s construction prevails, the plaintiff’s claim cannot proceed
as currently formulated. As pleaded in the Defence, s 54 gives the consumer nothing
unless they have a good which is defective at the time of supply. There is no right

¹⁵ *Williams v Toyota Motor Corporation Australia Limited* (2024) 419 ALR 373; [2024] HCA 38 [144]-[145] (Jagot J), see also [120]-[121], [124]-[125] (Edelman J) (*Williams v Toyota Motor Corporation*).

¹⁶ *Williams v Toyota Motor Corporation Australia Limited* (2021) 288 FCR 282; [2021] FCA 1425[6] (Lee J).

which arises under s 259–266 if the goods are of ‘acceptable quality’ at the time of supply. This issue is exposed by Question 1.

68 There is no allegation the plaintiff’s fridge was not of ‘acceptable quality’ at the time of its supply (or otherwise). The position under the statute is to be compared with the Extended Warranty that gives rights to repair and replacement which are not dependent upon establishing the item was not of acceptable quality at the time of supply.

69 JB Hi-Fi submitted Question 2 squarely raises for determination the ‘period of cover’ issue pleaded in paragraph 26(a) of the FASOC but which does not form part of the statutory language. An appropriate basis for comparison is that there is ‘no period of cover’ or other ‘benefit’ under s 54 if an acceptable quality exists at the time supply.

70 During the hearing JB Hi-Fi accepted the decision of the High Court in *Williams v Toyota Motor Corporation Australia* did not involve the Court considering a concept of ‘period of cover’. It accepted that whether there is a temporal period arising with respect to a category of goods at the time of supply is a novel question. It submitted that while that is the case, the concept of a ‘period of cover’ is doctrinally flawed as something that exists under the ACL. Obtaining expert evidence to deal with this topic would be wholly inutile.

71 Question 2 is asking the Court to identify whether, as a matter of statutory construction, the ‘period of cover’ automatically arises by reason of s 54 with respect to each and every good. JB Hi-Fi submitted that while it might be open to find, as a matter of fact, that a reasonable consumer might reasonably anticipate a particular lifespan for particular goods, it would not be open for the Court to find that, as a fact, the statute automatically created a period of cover by reference to which that guarantee operated. That is because the statute directs attention to the state and condition of the goods by reference to everything that is known, including how the good was used and the nature of the defect that manifested.

- 72 JB Hi-Fi submitted Question 3 deals with the circumstances of a group member who purchased a fridge that was not of 'acceptable quality'. Question 4 assumes Question 3 is answered against the case put by JB Hi-Fi. If the Court finds as a matter of statutory construction there is a 'period of cover' then, can that period be ascertained at the time of supply? If there is no temporal period ascertainable at the time of supply then, JB Hi-Fi contends the claim advanced in paragraph 26 of the FASOC falls away completely.
- 73 JB Hi-Fi submitted that even if the plaintiff's construction of s 54 of the ACL is correct, expert evidence of the kind proposed by the plaintiff to be adduced at the initial trial, which is proposed to be by reference to product categories, is likely to ignore the peculiarities of individual models of consumer goods which fall within the broad categories identified by the plaintiff. Such evidence will not engage with the 'characteristics of the nature and seriousness of [any] defect and, in turn, the state and condition of the goods'.¹⁷ If Question 1 is determined adversely to the plaintiff, neither the plaintiff nor the sample group members are an appropriate vehicle for determining the fact-intensive enquiries that are required by the statute.
- 74 A product category such as 'televisions' over the 12 year claim period includes a variety of models, with different price points, various features and a range of different component parts. The plaintiff's proposed expert evidence about a product category such as 'televisions' is unlikely to yield information at a sufficiently granular level to assist the Court. Making an order for a separate trial of the questions proposed will avoid wasting resources on expert evidence of the type foreshadowed by the plaintiff (i.e. evidence regarding the design and lifespan of categories of consumer goods, experience in product testing and statistical analysis of claims data and failure rates). If the questions are answered as JB Hi-Fi contends they should be answered, the need for expert evidence concerning how long a consumer might reasonably expect products such as a fridge to last may fall away as an enquiry. This is due to an

¹⁷ *Williams v Toyota Motor Corporation Australia Limited* (2024) 419 ALR 373; [2024] HCA 38[34] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ).

acceptance of the JB Hi-Fi case that there is no certain or defined period of cover that arises under the Statutory Guarantee.

- 75 Determining the separate questions would also enable lay evidence to be targeted to goods which were not of acceptable quality when supplied, 'the nature and seriousness of the defect and, in turn, the state and condition of the goods',¹⁸ as well as the remedies which may be available in relation to any faults. The 'utility, economy and fairness to the parties' of a trial of the separate questions in these circumstances is 'beyond question'.¹⁹
- 76 In the immediate term, the Plaintiff's Alternative Approach will cause JB Hi-Fi to incur very substantial costs in relation to discovery. Discovery conferral has been ongoing for more than 12 months. JB Hi-Fi has already produced approximately 5,500 documents. Further documents are to be discovered and produced in accordance with orders made on 27 May 2025. JB Hi-Fi has furnished over 100 pages of substantive information, responded to approximately 300 questions from the plaintiff and provided a range of sample documents, all at a cost to JB Hi-Fi of more than \$1 million (in legal costs alone). It is estimated that the additional cost of the discovery yet to be performed is approximately \$2 million.
- 77 If the questions proposed are answered in its favour, the extent to which JB Hi-Fi will be required to search for and make discovery of documents relating to the life span of particular consumer goods, for example, every refrigerator of a particular make sold within the 12 year claim period, is likely to be significantly narrowed. The evidence of Ms Overington is that at least \$1 million of expenditure on discovery will not have to be incurred in that event. There are also likely to be substantial savings relating to expert evidence.
- 78 JB Hi-Fi submits that the plaintiff ignores that, if the separate questions are determined adversely to him, the comparison called for on the Plaintiff's Alternative Approach is

¹⁸ (2024) 419 ALR 373; [2024] HCA 38 [34] (Gageler CJ, Gordon, Steward, Gleeson and Beech-Jones JJ).

¹⁹ *Andrews v Australia and New Zealand Banking Group Ltd* (2011) 281 ALR 113; [2011] FCA 388 [72] (Gordon J); *Wadren Pty Ltd & Anor v Probuild Constructions (Aust) Pty Ltd & Ors* [2024] VSC 724.[103].

one in which a consumer has no period of cover and no benefits by reason of the Statutory Guarantee. If so, that too would have a profound impact on the scope of the case and common issues at trial. No evidence would be needed as to the nature of the benefits and coverage under the Statutory Guarantee (because, in this scenario, there are no benefits and no coverage). Instead, the Court would simply be called upon to consider the nature and significance of those benefits for which the terms of the 'Extended Warranties' provide and which do not depend on whether the goods acquired were of 'acceptable quality' within the meaning of the ACL.

79 JB Hi-Fi submitted the claims of the plaintiff and the two sample group members are not an appropriate vehicle for determining issues of statutory construction. Given the fact-specific inquiry that would be required (i.e. as to the reason(s) why particular goods were not of acceptable quality), there would be a real question as to whether this proceeding is an efficient and effective means of dealing with the claims of group members.

80 According to JB Hi-Fi, the Court can have little confidence in the plaintiff's estimate that the common issues trial would run for approximately 4 weeks, given the early stage of the proceeding, the fact that the number and identities of the witnesses to be called by JB Hi-Fi is not known to the plaintiff and because little to no explanation has been given as to how the plaintiff has arrived at his estimate.

G. The plaintiff's submissions

81 The plaintiff submits first, that an important consideration is the context in which the application for trial of the separate questions is made. That is, in a representative proceeding on behalf of an open class relating to important consumer protection legislation involving an estimated 8.5 million group members. The nature of the proceedings and the size of the claims involve efficiencies, economies of scale and access to justice. This broader context must be weighed against whatever cost savings or efficiencies JB Hi-Fi says might be achieved by limiting matters such as discovery prior to the hearing of separate questions.

82 Second, the plaintiff submits the questions proposed are not narrow or discrete, either factually or legally. The proposed questions call for an examination of matters well beyond confined questions relating to the construction of the ACL. Those matters include the nature and value of the rights and benefits provided by the ACL, the meaning of ‘period of cover,’ and the question of what constitutes a ‘fact or matter’ which renders a consumer good not of ‘acceptable quality’ at the time of supply. In order for the Court to answer the questions, it will require evidence.

83 In his written submissions, the plaintiff submitted that evidence of the following kind will be required in order for the Court to have a sufficient evidentiary basis upon which to answer the proposed questions.

1. The scope of what constitutes a ‘right or benefit’ in the context of consumer protection legislation, including whether, on any construction of the ACL, the plaintiff and sample group members perceived that they had rights or benefits by reason of the operation of the ACL (for example, the benefit of protection against the risk of the harm that would flow should their goods not be of ‘acceptable quality’).
2. The lifespan of the plaintiff’s fridge, including the sorts of matters, circumstances or things that would render it of acceptable or unacceptable quality at the time of supply.
3. The ‘period of cover’ in the context of the plaintiff’s pleaded case.

84 Each of the classes of evidence identified was submitted to overlap with evidence the plaintiff intends to adduce at the initial trial. The plaintiff’s case is that there is a period of cover and that the ascertainment of the temporal period is referable to all of the limbs in s 54 including durability, and ‘all other relevant circumstances relating to the to the supply of the goods’ as provided for in s 54(3)(e). The plaintiff submits that durability may be sensitive to categories of goods but does not need to be and is no more granular than broad categories; fridges, dishwashers, televisions, laptops, etc. He submits that durability is a question that is amenable to expert opinion and that it would be dangerous for the Court to embark on answering questions that concern the case pleaded at paragraph 26 of the FASOC without the assistance of expert evidence. The plaintiff submitted that expert evidence about fridges and the reasonable expectations of the plaintiff and group members will be required in relation to the

questions. If an order were to be made as per the summons it is anticipated the lead plaintiff would also be called to give evidence with respect to questions 1 and 2 and possibly 4. This raises the prospect of the expert about fridges and the lead plaintiff being required to give evidence twice.

- 85 Third, none of the questions is capable of wholly disposing of the proceeding either on its own or even in combination with the other questions. Question 1 asks whether, for a 'right or benefit' to 'automatically apply' under ss 259 to 266 of the ACL, there must be an identification of a fact or matter as to the state and condition of the plaintiff's fridge which rendered it not of 'acceptable quality' at the time of its supply. The answer to this question will require evidence and will not be dispositive of the plaintiff's case in any event.
- 86 Question 2 will also require evidence and will not be dispositive of the proceeding. It is possible this question could be answered in part 'yes' and in part 'no'. That is the case having regard to the fact that 'period of cover' and 'benefits' are separate matters relied on in paragraph 26(a) and (b) of the FASOC and are both matters about which there is as yet no evidence. If the questions are answered differently, for example the question of benefits is answered favourably to the plaintiff, there will need to be a trial of that limb. This is sufficient basis alone to refuse the application in relation to Question 2.
- 87 The plaintiff submits it is not apparent that any of the proposed separate questions is capable of standing alone. Nor is it clear what the effect of mixed answers would be. For example, if the answer to Question 1 is no, then will it be necessary to answer the other questions? If Question 1 (which relates to ss 259 to 266 of the ACL) is answered 'yes', and Question 2 (which relates to s 54 of the ACL and benefits beyond ss 259 and 266 of the ACL) is answered yes, then what? What if, in relation to Question 2, the Court concludes that no 'period of cover' automatically applied, but a 'benefit' did attach to group members?

- 88 The plaintiff also submits there are difficulties with the way the questions are framed. For example, Question 4, 'ascertainable' – by whom?
- 89 Fourth, the plaintiff submits the proposed separate questions do not raise pure questions of law. The answers to the questions are not supplied largely or wholly by the ACL, the answers are required to be determined by ascertaining the content of the alleged rights and benefits, including those particularised at paragraph 26 of the FASOC. The 'benefits' elements of the plaintiff's case will require an analysis of what the extended warranty offers compared to the statutory warranty.
- 90 Fifth, the plaintiff submitted that even if the JB Hi-Fi ACL Construction is held to be correct, the Plaintiff's Alternative Approach will remain 'live'. There will still be a need for a trial which will not be very different in terms of the evidence, documentary and otherwise, that will be required. Determination of this alternative case will require lay and expert evidence. The Court will continue to be required to determine the issues of law and evidence which are germane to the plaintiff's Alternative Approach. Those issues include the plaintiff's contention that the Statutory Guarantee confers on group members a benefit in the nature of a protection against the risk of suffering loss or damage in the event that the risks covered by the Statutory Guarantee materialise during its period of operation.
- 91 The notion of risk also arises as an element of the plaintiff's primary case. The particulars to paragraph 26 of the FASOC assert that the Extended Warranties are 'financial products' within the meaning of s 12BAA(1)(b) and 5(a) of the *Australian Securities And Investments Commission Act 2001* (Cth). They are alleged to be a means by which consumers sought to manage the financial consequences to them of a particular circumstance occurring, including the risk that the consumer might suffer loss or damage in the event the risks covered by the extended warranty materialised during the period of cover. Recently added particulars assert that the Statutory Guarantee also conferred a benefit 'namely, the benefit of protection against the risk of suffering loss or damage in the event that the risks covered by the Statutory Guarantee materialised during its period of operation'.

92 Sixth, the plaintiff submitted the competing efficiencies do not support the hearing and determination of separate questions in advance of the initial trial. The 13 June 2025 letter articulated the plaintiff's alternative vision for the initial trial:

[T]he initial trial will comprise lay evidence from the plaintiff, two group members and at least five experts ["in relation to the expected lifespan and durability of [categories] of consumer goods" such as "washing machines", "refrigerators" and "televisions"] as well as a documentary case including in relation to the following matters: the written representations made to group members, the JB Hi-Fi sales system, training, staff incentives, the setting of prices for extended warranties, profit margins in relation to extended warranties, corporate knowledge of the lack of value of the extended warranties and data in relation to claims made and failure rates of consumer goods.

93 The efficiencies which JB Hi-Fi asserts may be achieved through the proposed separate questions is required to be assessed against what the plaintiff says will be the scope of the initial trial, as set out in the 13 June 2025 letter and further developed in submissions.

94 The plaintiff's proposal for an initial trial would be most efficiently conducted if it also covered brochures, for example those that fall between the periods during which the lead plaintiff and sample group members bought their three items. If the first trial were reduced to three categories of goods it would still be important to run the entire sales system case. Discovery categories would pertain to claims data relating to the failure rate of goods in the three categories, for each fridge, television and laptop. It would be relevant for JB Hi-Fi to discover documents that it holds relating to durability and lifespan of those three categories of goods. Discovery would support lay and expert evidence on those product categories. That is, not simply the make and model of the fridge that the plaintiff purchased.

95 Separately, the plaintiff submitted that while discovery is not irrelevant, it is necessary to first identify the correct basis for comparison and then evaluate any savings. It is also the case that if JB Hi-Fi succeeds it will be entitled to its costs of discovery.

96 As outlined in the 13 June 2025 letter, the plaintiff anticipates if he were to run an initial trial with the lead plaintiff and two sample group members, he would call four

or five experts who have sufficient diversity and breadth of experience to opine on the 12 categories of goods, including by way of example, an expert on fridges who knows a lot about washing machines and dryers.

97 In addition to a consideration of the comparative length of a trial of the proposed questions and of the plaintiff's proposed initial trial, the Court must take into consideration that if the trial of separate questions is ordered, there is a real risk of satellite appeals in relation to the construction of the ACL. That is, before any evidence in relation to the core matters in dispute are heard. As a result, the efficiencies contended by JB Hi-Fi are mostly illusory.

98 The decision of the High Court in *Williams v Toyota Motor Corp Australia Ltd* does not answer the construction question about whether the Statutory Guarantee operates for a temporal period, nor does it engage with the reference to 'durability' in s 54(2)(e). That case was concerned with a latent defect in a motor vehicle with a focus on hindsight analysis.²⁰ The High Court did not address the question of whether the Statutory Guarantee only operates with respect to goods that are not of acceptable quality at the time of supply. The Court did not address the 'automatically' point or the 'temporal' point. The Court was not concerned with whether the Statutory Guarantee attaches automatically because, on the facts of that case, all of the group members had by definition purchased the car with the defect. The Court was focused on whether acceptable quality is something that must be interrogated by reference to the time of supply or at the point of supply.²¹

99 Sixth, to the extent that JB Hi-Fi's application rests on a premise that resolving the separate question will reduce the discovery burden, this is unlikely to be the case. The need to hear and determine the Plaintiff's Alternative Approach regardless of the way in which the separate questions are answered will require discovery of the same or similar documents as are presently relevant to the initial trial.

²⁰ (2024) 419 ALR 373; [2024] HCA 38 [103].

²¹ (2024) 419 ALR 373; [2024] HCA 38 [3].

H. Consideration

- 100 Applying the principles in *Murphy*, I am not satisfied this is an appropriate case to order the trial of separate questions as per the JB Hi-Fi summons. I am not satisfied that to order a trial of the separate questions proposed would give effect to, would be consistent with, or would facilitate, the overarching purpose in the CPA. There are a number of reasons why that is the case.
- 101 The first reason is that the questions posed for determination are not likely to be dispositive of the proceeding.
- 102 If it is assumed that all of the separate questions were to be answered as JB Hi-Fi contends they should be answered, the Plaintiff's Alternative Approach case will remain. That case will require its own trial. As the scope of evidence to be led on any separate trial in accordance with the JB Hi-Fi summons is uncertain, the extent to which a trial of the Plaintiff's Alternative Approach would be different in terms of evidence, is also uncertain. While that is so, I accept that a substantial trial involving documentary and other evidence would likely be required in order for the Court to deal with the Plaintiff's Alternative Approach. The possibility of such an outcome, one which would flow as a result of JB Hi-Fi succeeding on its construction arguments, means that it is unclear whether time and resources would be saved even if all of the questions were answered in favour of JB Hi-Fi.
- 103 If the questions are all answered in favour of JB Hi-Fi, on the Plaintiff's Alternative Approach, a comparison would still be required between the period of cover and the benefits received by a consumer at the time of supply of a good of acceptable quality and what the consumer receives by reason of the Extended Warranty. It is correct, as submitted on behalf JB Hi-Fi, that a trial involving those issues would be more confined and would be a different trial to that which also involves a comparison of the operation of the Statutory Guarantee where goods supplied were not of 'acceptable quality' compared to the rights and benefits that apply by reason of the Extended Warranty. However, it is not clear that a trial on that basis would involve a materially

smaller cohort of group members or that the scope of the trial would be materially different, even if the questions are each answered in favour of JB Hi-Fi.

104 There is also a real prospect that the proposed questions will be answered partly 'yes' and partly 'no'. The prospect of such an outcome is highlighted by Question 2. While drafted as a single question, Question 2 picks up the two limbs of the pleading in paragraph 26 of the FASOC, 'period of cover' and 'benefit'. There is as yet no evidence directed to these allegations.

105 On the face of s 54, at the time the goods were supplied, the consumer had a right, if a problem arose, to a remedy. At first blush it is difficult to conceive of that potential right not constituting a 'benefit' enjoyed by the consumer. If that was determined to be the position following the trial of the separate questions, whether or not consumers obtained 'benefits' under the Extended Warranty that 'substantially or wholly overlapped' with the benefits that applied under the Statutory Guarantee would need to be determined at a later trial.

106 JB Hi-Fi (appropriately) accepts that the determination of Questions 3 and 4 will not be dispositive of the proceeding.

107 The second reason concerns the lack of clarity regarding what materials and evidence will be required or permitted at the trial of the proposed questions so that the Court is in a position to answer each of the questions.

108 It is highly undesirable to embark upon a trial of separate questions without having first identified the agreed or assumed facts or the evidence by reference to which the questions are to be answered. There is force in the plaintiff's submission that the novelty of the temporal point supports the Court dealing with these issues on the basis of evidence.

109 The proposed questions were not put forward by JB Hi-Fi on the basis of agreed or assumed facts. Nor was the evidence proposed to be adduced agreed upon. JB Hi-Fi submitted there would be little if any evidence. The plaintiff was clear that he would

seek to lead both lay and expert evidence. JB Hi-Fi seemed to contend that such evidence was not necessary and, by inference, I assume, would not be admissible at the trial of the separate questions.

110 Where the issue of whether any, and if so what, evidence should be allowed at the trial of separate questions is in dispute, the hearing of the questions is likely to be beset by questions of admissibility and relevance. Those disputes are likely to prolong the hearing beyond the estimate provided by either party.

111 To answer Question 2, concerning ‘period of cover’, in a manner that is likely to be of utility to the overall conduct of the proceeding, and therefore in the interests of group members as a whole, may require consideration of how the word ‘durable’ and how any ‘representation’ made by a manufacturer about the life expectancy of the goods is to be taken into account. It is difficult to see how a question that grapples with those issues could be answered in the absence of evidence.

112 To deal with the pleaded allegation of ‘period of cover’ in the context of the statutory scheme requires the conventional text, context and purposive approach to the proper construction of s 54. Such an analysis cannot be undertaken without considering the meaning of the word ‘durable’ and how the matters referred to in s 54(3)(a) the nature of the goods, (b) the price, (d) any representation by the supplier or manufacturer, and (e) ‘any other relevant circumstances relating to the supply of goods’ bear on the pleaded case. It would be problematic to embark on an analysis of the section without either assumed or agreed facts, or without evidence.

113 If the plaintiff’s view of what evidence should be permitted were to be acted upon, it carries with it the prospect of an overlap between the evidence adduced at the hearing of the separate question and the evidence at trial. That also gives rise to the possibility of witnesses being called at both stages of the hearing, one of the matters identified in *Murphy* as a matter that tells against making an order under r 47.04.

114 The uncertainty about the basis upon which the proposed trial of separate questions is to proceed gives rise to a separate difficulty. If the Court were to embark upon a

trial of the proposed questions only to determine at the end of the hearing that some of the questions were incapable of being answered without further evidence, the time and resources of the parties and the Court would have been entirely wasted.

115 The third matter concerns the manner in which the questions are framed. I acknowledge that parties often encounter difficulty in drafting questions that are suitable for a r 47.04 trial. However, it is not my role to revise or to seek to re-write the proposed questions.

116 The questions are not questions of statutory construction that are framed solely by reference to the language of the statute.

117 As submitted on behalf the plaintiff, Question 1 does not address when the Statutory Guarantee begins to operate and when it ends. Is there no temporal limitation?

118 It is not clear that answering the questions posed will deal satisfactorily with the issues of substance raised on the pleadings. The manner in which the 'period of cover' is pleaded in the FASOC is not tied to any particular part of the language of s 54. The pleading alleges the existence of a 'period of cover' is a consequence of the Statutory Guarantee. It is not clear that Questions 1 and 2 adequately expose that issue for determination.

119 It is also the case that neither Question 1 or Question 2 satisfactorily address the plaintiff's higher-level case that consumers obtain a 'benefit' from s 54 when they purchase goods in the form of the Statutory Guarantee akin to taking out a policy of insurance which may or may not be the subject of a claim. That claim is expressly advanced in the particulars to paragraph 26 of the FASOC.

120 The statute arguably provides a 'benefit' to all group members regardless of whether they make a claim. The Statutory Guarantee runs in favour of both used goods and original goods. An acquirer of a second-hand fridge originally purchased from JB Hi-Fi still has the benefit of the statutory warranty. This suggests the statutory

warranty carries some value, both to the original purchaser if that person wishes to on-sell the goods and to the subsequent purchaser of those goods.

121 The parties agree that the Statutory Guarantee and the Extended Warranty need to be compared. The questions proposed do not satisfactorily grapple with this part of the case, which is best articulated in subparagraph (g) of the Reply.

122 Question 2 does not deal with a comparison of the right of the consumer to claim pursuant to s 259, for example, should a latent defect later emerge, as a basis for comparison with the rights and benefits available under the Extended Warranty.

123 The fourth reason concerns the very real possibility of an application for leave to appeal following any trial of the separate questions. The concept of a ‘period of cover’ is a matter the High Court was not called upon to consider in *Williams v Toyota Motor Corporation Australia Limited*. This part of the claim was described by senior counsel for JB Hi-Fi as raising a ‘novel question’. Immediately those facts acknowledged, in a case of this potential magnitude, the prospect of at least an application for leave to appeal to the Court of Appeal. As Dixon J observed in *Abdulrahim v Adult Parole Board of Victoria*:²²

a preliminary determination introduces the possibility of an application for leave to appeal, with attendant delay and costs.

124 To order the trial of separate questions as proposed has the very real potential to delay and to derail the trial of this already delayed proceeding, considerations to which Kirby and Callinan JJ referred in *Tepko* as considerations going against making an order for a trial of separate questions.

125 The fifth reason that it is not appropriate to order the trial of separate questions is because the ‘utility, economy, and fairness to the parties’²³ of doing so is not beyond question’. It is unclear whether the Court’s time and resources would be saved even if all questions were answered in favour of JB Hi-Fi.

²² [2023] VSC 101 [21] (Dixon J).

²³ *Tepko Pty Ltd v Water Board* (2001) 206 CLR 1; [2001] HCA 19 [170].

- 126 As the proposed two to four day trial of separate questions will not resolve the proceeding unless the case settles in the meantime, an initial trial will be needed. The scope and duration of the initial trial to follow is difficult to assess because that depends upon the answers to the separate questions. However, an initial trial that follows a four day trial of the separate questions is almost certain to involve both witnesses and documentary evidence. There can be no certainty that there will be a material reduction in the scope of discovery required prior to such an initial trial.
- 127 The objective behind the proposed questions is laudable, that is, to narrow the issues in dispute and to reduce the scope of discovery. However, there are other ways that those objectives could be promoted, including limiting the first trial to three categories of appliances.
- 128 The separate trial proposal needs to be weighed against other options for an initial trial. That is, to see what will happen if the Court does not separately determine the separate questions.²⁴ The plaintiff's initial trial proposal is one option. Although not fully developed and with an estimate that seems unduly optimistic, the plaintiff's proposal provides a sound basis from which to begin to map out the scope and content of an initial trial. If the parties are unable to agree upon the scope and content of the initial trial using the plaintiff's proposal as a starting point, aspects of the trial that cannot be agreed can be determined by the Court using the extensive case management powers provided in the CPA.
- 129 Such an initial trial will not be years away. Subject to hearing from the parties, I propose to fix the proceeding for trial on **3 August 2026**. I will do so on a provisional estimate of six weeks. Fixing the initial trial on that date should provide more than sufficient time for the completion of discovery, which will be limited and for a staggered timetable for expert evidence followed by joint reports in advance of the trial.

²⁴ *Andrews v Australia and New Zealand Banking Group Ltd* (2011) 281 ALR 113; [2011] FCA 388 [73].

- 130 An initial trial based on the plaintiff's proposal will enable the questions of statutory construction raised by the separate questions to be determined. The initial trial will have sufficient factual content across three different product categories to provide a blueprint either for a further trial involving other categories of goods or for resolution of claims relating to those categories depending upon the outcome of the initial trial.
- 131 The plaintiff's proposal is to lead expert evidence at the initial trial directed to the three categories of goods across the 12 year claim period. I appreciate that JB Hi-Fi does not accept that it would be feasible to lead expert evidence about each of those categories of goods covering that period. However, that is the plaintiff's problem. If the plaintiff fails to adduce admissible expert evidence that supports its 'period of cover' case for the three categories of goods over the 12 year claim period, the plaintiff's case regarding those goods will fail on the facts, even if it succeeds as a matter of statutory construction. JB Hi-Fi should be given the opportunity to file its expert evidence in reply, once it sees the nature and content of the plaintiff's evidence.
- 132 The plaintiff's approach for an initial trial means that the discovery to be provided by JB Hi-Fi in advance of the initial trial should be limited to discovery of documents relating to the three categories of goods only. Documents relating to the JB Hi-Fi sales system should also be limited to sales system documents and the like relating to the three categories of goods. While the discovery task will still be a significant one, and will be both time consuming and expensive, that is a consequence of the nature of the proceeding and the manner in which the plaintiff puts his claim on his own behalf and on behalf of the group members. If the plaintiff fails in his claim relating to the three categories of goods then the legal costs associated with discovery will be payable by Maurice Blackburn pursuant to the GCO.
- 133 I propose to order that by no later than **9 September 2025** counsel and solicitors who have the conduct of the proceeding on behalf of the respective clients confer and seek to reach agreement in relation to the scope and content of the initial trial, based on the plaintiff's initial trial proposal. I also propose to order that the parties confer in relation to further discovery, limited to such documents as are relevant to the issues

to be dealt with at the initial trial. Given the 12 year claim, I would encourage the parties to seek to agree upon a limited number of particular products across that period and a limited number of manufacturers. For example, one model television made by one manufacturer in each year or three year period. While if such an approach discovery is not agreed I will hear argument and determine the matters that remain in dispute, it is important for the parties to firmly bear in mind their obligation to keep costs reasonable and proportionate and to take steps to ensure that occurs when engaged in the conferral process.

- 134 I will fix the matter for a Case Management Conference on **12 September 2025**. At that time I anticipate dealing with any outstanding issues concerning the scope and content of the initial trial, any outstanding disputes concerning discovery and making orders for lay and expert evidence, including joint expert reports. If issues relating to security for costs are not resolved by agreement prior to 28 August 2025 the parties should inform my Chambers and I will refer that issue to another judicial officer for determination.
- 135 Although this application was not successful, it was heard as part of a scheduled case management hearing and combined with the plaintiff's initial trial proposal, and has assisted in identifying the steps that need to be taken to advance the proceeding to trial. In those circumstances I propose to make an order that the costs of the summons be reserved.

CERTIFICATE

I certify that this and the 38 preceding pages are a true copy of the reasons for ruling of the Honourable Justice Delany of the Supreme Court of Victoria delivered on 15 August 2025.

DATED this fifteenth day of August 2025.

