

## NOTICE OF FILING

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### Details of Filing

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File Title: KENNETH JOHN WILLIAMS v TOYOTA MOTOR CORPORATION  
AUSTRALIA LIMITED (ACN 009 686 097)  
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF  
AUSTRALIA



*Sia Lagos*

Dated: 30/06/2020 7:52:30 AM AEST

Registrar

### Important Information

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**Amended Reply**

No. NSD 1210 of 2019

Federal Court of Australia  
District Registry: New South Wales  
Division: General

Kenneth John Williams  
Applicant

Toyota Motor Corporation Australia Limited (ACN 009 686 097)  
Respondent

- 1 Capitalised terms not defined in this Amended Reply have the meaning given in the Amended Statement of Claim filed by the applicant on ~~234 July~~ April 202019 (**SOC**) unless stated otherwise.
  
- 2 The applicant joins issue with the Amended Defence filed on behalf of the respondent on ~~418 October~~ June 202019 (**Defence**), save to the extent:
  - (a) the Defence contains admissions; or
  - (b) the allegations in the Defence are admitted in this Reply.
  
- ~~3 In respect of paragraph 1 of the Defence, the applicant:~~
  - ~~(a) denies subparagraph 1(c);~~
  - ~~(b) says further that in the context of subparagraph 1(c), the phrase “in the alternative to subparagraph 1(b) above” means “or”, such that Group Members are those persons who meet the criteria set out in either:~~

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Filed on behalf of	<u>Applicant</u>
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(i) ~~subparagraphs 1(a), (b) and (d) of the SOC; or~~

(ii) ~~subparagraphs 1(a), (c) and (d) of the SOC.~~

~~4 In respect of subparagraph 9 of the Defence, the applicant:~~

~~(a) denies subparagraph 9(b)(i);~~

~~(b) says further in relation to subparagraph 9(b)(i) that:~~

~~(i) Vehicle Standard (Australia Design Rule 79/04—Emission Control for Light Vehicles) 2011 (ADR 79/04) was the minimum emissions standard for new light vehicles in Australia with a manufacture date on or after 1 November 2016;~~

~~(ii) Vehicle Standard (Australian Design Rule 79/03—Emission Control for Light Vehicles) 2011 (ADR 79/03) was the minimum emissions standard for new light vehicles in Australia with a manufacture date on or after 1 November 2013 but before 1 November 2016; and~~

~~(iii) ADR 79/03 and ADR 79/04 were, together, the minimum emissions standards for new light vehicles in Australia throughout the Relevant Period; and~~

~~(c) admits subparagraph 9(b)(ii).~~

3 In respect of paragraph 8 of the Defence, the applicant:

(a) admits subparagraph 8(a);

(b) admits subparagraph 8(b);

(c) admits, in respect of subparagraph 8(c), that ADR 79/03 is a performance standard that defines the maximum level of exhaust emissions permitted under the Type I test specified by Annex 4a of ADR 79/03;

(d) admits, in respect of subparagraph 8(c), that ADR 79/04 is a performance standard that defines the maximum level of exhaust emissions permitted under the Type I test specified by Annex 4a of ADR 79/04; and

(e) otherwise does not admit the paragraph.

4 In respect of paragraph 11 of the Defence, the applicant:

(a) in respect of subparagraph 11(a)(i) and (iv), says that the ECM in the Affected Vehicles did not utilise data received from the Pressure Sensor for the purpose of

calculating the particulate matter accumulated in the DPF prior to about December 2018; and

(b) otherwise does not admit the paragraph.

5 In respect of paragraph 13 of the Defence, the applicant:

(a) admits that the Affected Vehicles are fitted with a turbocharger; and

(b) otherwise does not admit the paragraph.

6 In respect of paragraph 14 of the Defence, the applicant:

(a) admits subparagraph 14(a)(i)(A);

(b) admits subparagraph 14(a)(i)(B)(1);

(c) says, in respect of subparagraph 14(a)(ii), that:

(i) the rate of NOx Oxidation in the Affected Vehicles is suppressed by reason of the matters pleaded in paragraphs 31 to 32 of the SOC;

(ii) the rate of NOx Oxidation in the Affected Vehicles is insufficient to prevent the DPF from accumulating, or frequently accumulating, particulate matter in excess of the PM Base Level, by reason of the matters pleaded in paragraph 39 of the SOC;

(iii) the Affected Vehicles depend predominantly upon Thermal Oxidation to effect regeneration; and

(d) otherwise does not admit the paragraph.

7 In respect of paragraph 15 of the Defence, the applicant:

(a) admits subparagraph 15(a)(i)(A);

(b) admits subparagraph 15(a)(i)(B);

(c) admits subparagraph 15(a)(i)(C);

(d) admits, in respect of subparagraph 15(a)(i)(D), that the DPF is designed to facilitate the oxidisation of captured particulate matter, which is then emitted through the exhaust as carbon dioxide and water vapour;

(e) refers to and repeats paragraph 6(c) above; and

(f) otherwise does not admit the paragraph.

8 In respect of paragraph 17 of the Defence, the applicant:

(a) in respect of subparagraph 17(b)(ii):

(i) refers to paragraph 11.5A of the particulars provided by Toyota by letter dated 28 November 2019 (**Particulars Letter**), in which paragraph Toyota states that “the temperature that must be reached within the DPF in order to ‘trigger’ Regeneration is at least 500°C”, and paragraph 12A, in which paragraph Toyota states that “the temperature within the Toyota DPF System must reach at least 500°C for Automatic Regeneration to occur”;

(ii) does not admit the matters referred to in paragraphs 11.5A and 12A of the Particulars Letter;

(iii) says that in all, or almost all, driving conditions, the operation of the engine in the Affected Vehicles without intervention of the ECM or the driver of the Affected Vehicle is not sufficient to generate a temperature within the DPF of 500°C or more;

(iv) says that in all, or almost all, driving conditions, without intervention of the ECM or the driver of the Affected Vehicle, the temperature in the DPF System does not reach a sufficient level to enable:

(A) Thermal Oxidation to occur; or

(B) Toyota Passive Regeneration (as defined in paragraph 17 of the Defence and further explained in paragraph 27 of the Defence) to occur;  
and

(v) otherwise denies subparagraph 17(b)(ii);

(b) in respect of subparagraph 17(b)(iii):

(i) refers to paragraph 10.2A of the Particulars Letter, in which Toyota states that “[s]hort trips are those which are not long enough to generate sufficient heat in the Toyota DPF System to trigger Passive Regeneration”;

(ii) repeats subparagraph (a)(iii) above;

(iii) repeats subparagraph (a)(iv) above;

(c) in respect of subparagraph 17(b)(iv):

(i) refers to and repeats paragraphs 6, 7 and 8(a) and (b) above;

(ii) says that, by reason of the matters pleaded in paragraphs 6, 7 and 8(a) and (b) above, the Affected Vehicles depend predominantly upon Active Regeneration to effect regeneration;

(iii) refers to and repeats paragraphs 39(b) and 40 of the SOC;

(d) in respect of subparagraph 17(b)(v):

(i) admits subparagraph 17(b)(v)(A);

(ii) admits, in respect of subparagraph 17(b)(v)(B), that during Active Regeneration, there is a noticeably different exhaust smell compared to a diesel engine not undergoing Active Regeneration;

(iii) admits, in respect of subparagraph 17(b)(v)(C), that during Active Regeneration, white smoke is emitted from the exhaust tail pipe, but does not admit that the amount of white smoke that is emitted is "small";

(iv) refers to and repeats the matters pleaded in paragraph 37 of the SOC;

(e) in respect of subparagraph 17(b)(vi):

(i) refers to and repeats paragraphs 6, 7 and 8(a), (b), (c) and (d) above;

(ii) refers to paragraph 12A of the Particulars Letter, in which paragraph Toyota states that "[g]enerally, in order for Automatic Regeneration to complete, the temperature within the Toyota DPF system must remain at at least 500°C for between 10 and 20 minutes", and paragraph 13.1A, in which paragraph Toyota states that "[o]nce the ECM detects that the accumulated amount of particulate matter in the DPF has fallen below 0.9 grams, Automatic Regeneration is completed";

(iii) does not admit that the matters referred to in paragraphs 12A and 13.1A of the Particulars Letter;

(iv) admits that, in order to effect a reduction in particulate matter captured and stored in the DPF from a level equal to or greater than the PM Base Level to

less than 0.9 grams by process of Thermal Oxidation, the temperature in the DPF System must remain at a sufficiently high level for a sufficiently long period of time;

(v) does not admit that in the Affected Vehicles, Toyota Automatic Regeneration completes in a period of between 10 and 20 minutes;

(vi) says that in all, or almost all, driving conditions, the operation of the engine in the Affected Vehicles without intervention of the ECM or the driver of the Affected Vehicle is not sufficient to generate a temperature within the DPF of 500°C or more for a period of between 10 and 20 minutes;

(vii) does not admit that in the Affected Vehicles, Toyota Automatic Regeneration completes if the temperature within the DPF system remains at at least 500°C for between 10 and 20 minutes;

(viii) says that the Affected Vehicles experience Active Regeneration for periods in excess of 20 minutes;

(ix) says that the Affected Vehicles experience Active Regeneration for periods that are not sufficient to effect a reduction in particulate matter captured and stored in the DPF from a level equal to or greater than the PM Base Level to less than 0.9 grams;

(x) says that, by reason of the matters pleaded in paragraphs 6, 7 and 8 above, the number of kilometres travelled by an Affected Vehicle whilst experiencing Active Regeneration expressed as a percentage of total kilometres travelled by the Affected Vehicle is excessive;

### **Particulars**

The Affected Vehicles experience a higher percentage of total vehicle kilometres travelled in Active Regeneration than is reflected in the certification materials in respect of the Affected Vehicles.

The Affected Vehicles experience a higher percentage of total vehicle kilometres travelled in Active Regeneration than is reasonably to be expected of light duty vehicles fitted with a diesel engine and a periodically regenerating system.

(xi) refers to and repeats the matters pleaded in paragraph 37 of the SOC;

(f) admits subparagraph 17(b)(vii);

(g) admits subparagraph 17(b)(viii), and says further that the vehicle must remain stationary and the engine must remain running until the Manual Regeneration has completed;

(h) admits subparagraph 17(b)(ix);

(i) otherwise does not admit the paragraph.

9 In respect of paragraph 23 of the Defence, the applicant:

(a) refers to and repeats paragraphs 6 to 8 above;

(b) otherwise does not admit the paragraph.

10 In respect of paragraph 27 of the Defence, the applicant:

(a) refers to and repeats paragraphs 6 to 9 above; and

(b) otherwise does not admit the paragraph.

11 In respect of paragraph 28 of the Defence, the applicant:

(a) refers to and repeats paragraphs 6 to 10 above; and

(b) otherwise does not admit the paragraph.

12 In respect of paragraph 29 of the Defence, the applicant:

(a) refers to and repeats paragraphs 6 to 11 above; and

(b) says, in respect of subparagraph 29(b), that the rate at which Regeneration occurs is also dependent upon the amount of particulate matter generated by the operation of the engine; and

(c) otherwise does not admit the paragraph.

13 In respect of paragraph 36 of the Defence, the applicant:

(a) refers to and repeats paragraphs 6 to 12 above;

(b) otherwise does not admit the paragraph.

14 In respect of paragraph 37 of the Defence, the applicant:



- (a) admits, in respect of subparagraph 37(a)(i), that during Active Regeneration, there is a noticeably different exhaust smell compared to a diesel engine not undergoing Active Regeneration;
- (b) admits, in respect of subparagraph 37(a)(ii), that during Active Regeneration, white smoke is emitted from the exhaust tail pipe, but does not admit that the amount of white smoke that is emitted is “small”; and
- (c) otherwise does not admit the paragraph.

515 In respect of paragraph 5433 of the Defence, the applicant adopts the admission in subparagraph 5433(a)(ii) that the DPF Vehicles were subject to the statutory guarantee of acceptable quality in s. 54 of the ACL.

16 In respect of paragraph 5837 of the Defence, the applicant adopts the admission in subparagraph 5837(a)(ii) that the DPF Vehicles were subject to the statutory guarantee of acceptable quality in s. 54 of the ACL.

17 In respect of paragraph 87 of the Defence, the applicant:

- (a) says that events occurring after the Admitted Representations were made cannot constitute reasonable grounds for the making of the Admitted Representations;
- (b) otherwise denies the paragraph.

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Date: ~~12 December 2019~~ 29 June 2020



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Signed by Charles Bannister  
Lawyer for the Applicant

The pleading was prepared by Charles Bannister, lawyer, and settled by Matthew Darke SC and Patrick Meagher of Counsel.

The amendments to this pleading were prepared by Patrick Meagher of Counsel.

**Certificate of lawyer**

I, Charles Bannister certify to the Court that, in relation to the Amended Reply filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: ~~12 December 2019~~ 29 June 2020



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Signed by Charles Bannister  
Lawyer for the Applicant