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Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)
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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: 20/01/2021 4:10:03 PM AEDT

Registrar

Important Information

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FURTHER AMENDED STATEMENT OF CLAIM

(amended on 20 January 2021 ~~23 April 2020~~ pursuant to orders made by Lee J on 19 January 2021 ~~5 March 2020~~)

No. NSD 1210 of 2019

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

KENNETH JOHN WILLIAMS and another

Applicants

TOYOTA MOTOR CORPORATION AUSTRALIA LIMITED (ACN 009 686 097)

Respondent

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OVERVIEW OF CLAIM

- A. Starting in October 2015 and continuing to the present day, the Respondent (**Toyota Australia**) has manufactured and sold around 250,000 vehicles in Australia that are defective.
- B. Each of the Affected Vehicles (as defined in paragraph 1 below) is equipped with a DPF System (as defined in paragraph 9 below), the purpose of which is to remove Pollutant Emissions (as defined in paragraph 7 below) from the exhaust gas of the diesel engine before that gas is released into the atmosphere. One of the components of the DPF System is the diesel particulate filter (**DPF**), which is designed to remove particulate matter from the exhaust prior to its release. For a DPF to function effectively, the particulate matter captured by and stored in the DPF must periodically be burned off in a process called "regeneration", where the exhaust temperature increases to the level required for the particulate matter to oxidise. When regeneration does not occur, or is ineffective, the DPF becomes blocked with particulate matter.
- C. In the Affected Vehicles, the DPF System fails, or has a propensity to fail, to prevent the DPF from becoming partially or completely blocked.
- D. This, in turn, causes the Affected Vehicles to experience a myriad of other issues, including decreased power, increased fuel consumption and the emission of excessive white smoke and Pollutant Emissions into the atmosphere. The Affected Vehicles experiencing these issues require time consuming and costly repairs, including repeated vehicle servicing and repeated replacement of components of the DPF System.
- E. By reason of these matters, the Affected Vehicles fail to comply with the statutory guarantee as to acceptable quality.
- F. Furthermore, since October 2015, Toyota Australia has represented to the Applicants and other Group Members (as defined in paragraph 1 below) that the Affected Vehicles were (amongst other things) durable, reliable, of good quality, and provided a driving and passenger experience that was comfortable and convenient. Toyota Australia also represented to the Applicants and other Group Members that the Affected Vehicles were equipped with a DPF System that was durable, reliable and of good quality.
- G. Those representations were misleading. The Affected Vehicles could not, and did not, deliver the advertised combination of durability, reliability, quality, comfort and convenience, and the DPF System in the Affected Vehicles was not durable, reliable and of good quality.
- H. Toyota Australia has known of issues affecting the DPF System in the Affected Vehicles since February 2016. In the circumstances, Toyota Australia's misleading conduct was also unconscionable.

- I. The Applicants and each Group Member suffered loss and damage by reason of the fact that the Affected Vehicles are not of an acceptable quality, and also because of Toyota Australia's misleading and unconscionable conduct.

A. PARTIES

A1. The Applicants and Group Members

- 1 This proceeding is commenced as a representative proceeding against the Respondent, Toyota Australia, pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) by the Applicants on their behalf and on behalf of other persons (**Group Members**) who:

- (a) at any time during the period from (and including) 1 October 2015 until (and including) 23 April 2020 ~~the date upon which this Amended Statement of Claim was filed~~ (**Relevant Period**), in Australia, acquired (including by way of purchase, exchange or taking on lease or on hire-purchase) one or more models of Toyota motor vehicle in the Hilux, Fortuner and Prado ranges fitted with a 1GD-FTV engine or 2GD-FTV engine (**Affected Vehicles**); and

Particulars

Schedule 1 of this Statement of Claim sets out an inclusive, but not exhaustive, list of Affected Vehicles.

- (b) either:
- (i) acquired the Affected Vehicle:
- (A) from a Dealer (as defined in paragraph 5 below) or other retailer selling Affected Vehicles, including used car dealers;
- (B) other than by way of sale by auction; and
- (C) other than for the purpose of re-supply; or
- (ii) acquired the Affected Vehicle from a person who acquired the Affected Vehicle in the circumstances described in subparagraph 1(b)(i) above, other than for the purpose of re-supply; and
- (c) are not:
- (i) a person described in subsection 33E(2) of the FCA Act; or
- (ii) a Justice of the Federal Court of Australia or the High Court of Australia.

- 2 As at the date of the commencement of this proceeding, seven or more Group Members have claims against Toyota Australia.
- 3 The First and/or Second Applicant acquired an Affected Vehicle, being a new 2016 Toyota Prado GXL 2.8L Diesel Automatic Wagon (**Applicant's' Affected Vehicle**), on or around 8 April 2016.

Particulars

The First and/or Second Applicant purchased the Applicant's' Affected Vehicle on or around 8 April 2016 from A.P. Motors (No 3) Pty Ltd (ACN 010 585 252) trading as Southside Toyota (**Toyota Southside**), an authorised Toyota dealership, in Woolloongabba, Queensland.

The First and/or Second Applicant paid \$60,315 to purchase the Applicant's' Affected Vehicle, comprising a \$1,000 deposit paid by the First and/or Second Applicant and \$59,315 in funds loaned to the Second Applicant by Toyota Finance Australia Limited (ACN 002 435 181) (**Toyota Finance**).

- 3A The Second Applicant is, and throughout the Relevant Period was, a corporation incorporated in Australia with the First Applicant as its sole director and only permanent employee.

A2. The Respondent

- 4 Toyota Australia is, and throughout the Relevant Period was:
- (a) a corporation incorporated in Australia;
 - (b) a trading corporation within the meaning of section 4(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**); and
 - (c) the manufacturer of the Affected Vehicles supplied in Australia, within the meaning of section 7 of the *Australian Consumer Law* (**ACL**) (being Schedule 2 of the CCA), in that:
 - (i) Toyota Australia imported the Affected Vehicles into Australia;
 - (ii) Toyota Australia was not (but for the operation of section 7 of the ACL) the manufacturer of the Affected Vehicles; and
 - (iii) at the time of importation, the manufacturer of the Affected Vehicles did not have a place of business in Australia.
- 5 Toyota Australia, throughout the Relevant Period:

- (a) supplied the Affected Vehicles in Australia through a network of approximately 200 Toyota dealerships (**Dealers**) located throughout Australia; and
- (b) advertised, marketed, and distributed the Affected Vehicles throughout Australia.

B. DPF SYSTEM IN THE AFFECTED VEHICLES

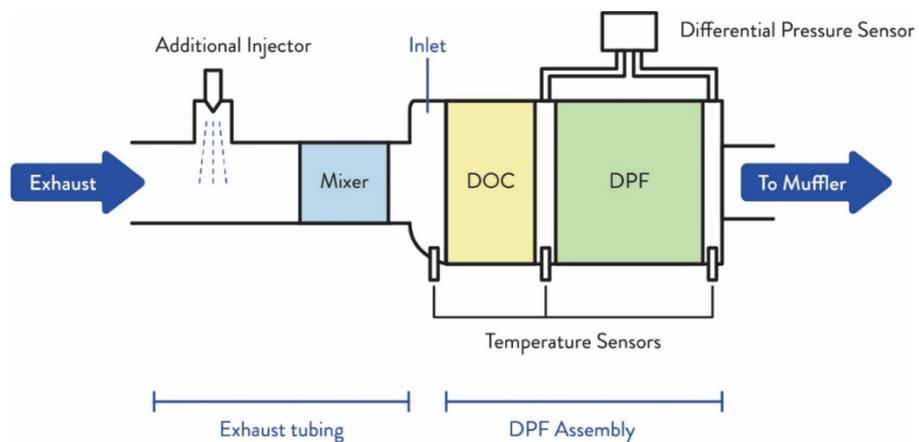
B1. Overview

- 6 Each of the Affected Vehicles is fitted with a 1GD-FTV or 2GD-FTV diesel combustion engine.
- 7 The operation of a diesel combustion engine, including the 1GD-FTV and 2GD-FTV engines, generates four principal pollutant emissions: (i) carbon monoxide; (ii) oxides of nitrogen (**NO_x**), including nitrogen dioxide (**NO₂**) and nitric oxide (**NO**); (iii) hydrocarbons; and (iv) particulate matter (together, **Pollutant Emissions**).
- 8 Throughout the Relevant Period:
- (a) the emission of Pollutant Emissions by the Affected Vehicles in Australia was regulated by:
 - (i) for new light vehicles with a manufacture date on or after 1 November 2013 but before 1 November 2016, the Vehicle Standard (Australian Design Rule 79/03 – Emission Control for Light Vehicles) 2011 (**ADR 79/03**); or
 - (ii) for new light vehicles with a manufacture date on or after 1 November 2016, the Vehicle Standard (Australian Design Rule 79/04 – Emission Control for Light Vehicles) 2011 (**ADR 79/04**); and
 - (b) ADR 79/03 and ADR79/04 imposed limitations upon the level of Pollutant Emissions that the Affected Vehicles were allowed to emit.
- 9 In order to comply with the emissions standards in ADR 79/03 or ADR79/04, as applicable, each of the Affected Vehicles is fitted with a diesel exhaust after-treatment system designed to capture and convert Pollutant Emissions into carbon dioxide and water vapour through a combination of filtration, combustion and chemical reactions (**DPF System**).
- 10 The DPF System comprises:
- (a) exhaust tubing;
 - (b) the “additional” fuel injector (**Additional Injector**);
 - (c) the mixer;

- (d) the inlet section connecting the exhaust tubing to the DOC (**Inlet**);
- (e) the Diesel Oxidation Catalyst (**DOC**);
- (f) the DPF, which is housed together with the DOC in the **DPF Assembly**;
- (g) the emission or exhaust gas temperature sensors; and
- (h) the differential pressure sensor (**Pressure Sensor**).

Particulars

The following diagram is representative of the basic design of the DPF System in the Affected Vehicles:



- 11 The following associated components also contribute to the operation of the DPF System:
- (a) the Engine Control Module (**ECM**);
 - (b) the operation of the engine;
 - (c) DPF Notifications (as defined in paragraph 19 below);
 - (d) the Engine Malfunction Indicator Lamp (**Engine MIL**); and
 - (e) in some Affected Vehicles only, the DPF Switch (as defined in paragraph 35(b)(i) below).

B2. Key components of the DPF System

12 The Additional Injector:

- (a) is controlled by the ECM;
- (b) is housed in a port mounted to the exhaust tubing, upstream of the mixer; and

- (c) is designed to spray fuel into the exhaust, perpendicular to the flow of the exhaust, in a pattern which aerosolises the injected fuel, during an Active Regeneration (as defined in paragraph 26(b) below).

13 The Inlet:

- (a) connects the exhaust tubing to the DOC;
- (b) is necessary because the diameter of the exhaust tubing is shorter than the diameter of the DOC; and
- (c) does not contain any perforated plate or other device to distribute the flow of exhaust across the face of the DOC.

Particulars

The Applicants refers to and repeats the particulars to paragraph 10 above.

14 The DOC:

- (a) comprises a cylindrical honeycomb ceramic flow-through monolith substrate with a catalyst coating containing precious metals, including platinum and palladium;
- (b) is designed to decrease the level of carbon monoxide and hydrocarbons in the exhaust by facilitating the oxidation of those substances, which converts those substances to carbon dioxide and water vapour, before the exhaust is released into the atmosphere; and
- (c) is designed to facilitate regeneration of the DPF (as pleaded in paragraphs 20 to 38 below) by:
 - (i) facilitating catalytic conversion of NO in the exhaust to NO₂, which reaction generates NO₂; and
 - (ii) facilitating the catalytic conversion of hydrocarbons in the exhaust (including fuel injected into the exhaust by the Additional Injector during Active Regeneration) into carbon dioxide and water vapour, which reaction generates heat.

15 The DPF:

- (a) comprises a cylindrical porous ceramic monolith wall-flow filter;

- (b) is designed to decrease the level of particulate matter in the exhaust emitted by capturing and storing particulate matter in the exhaust before the exhaust is released into the atmosphere; and
- (c) is designed to facilitate the oxidation of particulate matter that is captured and stored in the DPF through the process of regeneration.

B3. Accumulation of particulate matter in the DPF

- 16 The DPFs in the Affected Vehicles have a finite capacity for capture and storage of particulate matter.
- 17 As the level of accumulated particulate matter in the DPF increases, the DPF may become partially or completely blocked.
- 18 When the DPF becomes partially or completely blocked, the Affected Vehicles suffer adverse consequences.

Particulars

The Applicants repeats the matters pleaded in paragraph 41 below.

- 19 In the Affected Vehicles, when the amount of accumulated particulate matter in the DPF, as calculated by the ECM, reaches predetermined levels, one or more symbols or messages are displayed on the dashboard of the Affected Vehicles (**DPF Notifications**).

Particulars

The Applicants refers to the document entitled "DPF Summary All Models" dated 26 May 2017 (produced as document TAL.001.294.2420).

B4. Regeneration

- 20 To prevent the DPF from becoming or remaining partially or completely blocked with particulate matter, particulate matter that has been captured and stored in the DPF must be removed before or when the DPF becomes partially or completely blocked.
- 21 In the Affected Vehicles, particulate matter that has been captured and stored in the DPF is removed by a process known as "regeneration".
- 22 In regeneration, the removal of particulate matter from the DPF is effected by projecting exhaust through the DPF to achieve a chemical reaction known as "oxidation". When particulate matter that has been captured and stored in the DPF oxidises, it is converted into carbon dioxide, which is then emitted from the DPF through the muffler and into the atmosphere.

- 23 The oxidation of particulate matter can be achieved by:
- (a) reacting particulate matter with NO₂ (**NO₂ Oxidation**); or
 - (b) reacting particulate matter with oxygen (**Thermal Oxidation**).
- 24 In order for NO₂ Oxidation and Thermal Oxidation to occur, the exhaust projected through the DPF must reach a sufficiently high temperature.
- 25 NO₂ Oxidation occurs at a lower temperature than Thermal Oxidation.
- 26 In the Affected Vehicles, regeneration may occur in one of two ways, those being:
- (a) without intervention of the ECM or the driver of the Affected Vehicle, using NO₂ Oxidation (**Passive Regeneration**); or
 - (b) with intervention of the ECM or the driver of the Affected Vehicle, using Thermal Oxidation (**Active Regeneration**).

Particulars

The Applicants refers to paragraph 35 below.

B4.1 Passive Regeneration

- 27 Passive Regeneration occurs when the temperature and chemical composition of the exhaust generated by the operation of the engine are sufficient to enable NO₂ Oxidation of the particulate matter accumulated in the DPF.
- 28 In Passive Regeneration, regeneration is effected as follows:
- (a) the exhaust generated by the operation of the engine exits the engine and flows into the exhaust tubing;
 - (b) the exhaust flows from the exhaust tubing through the Inlet into the DOC;
 - (c) as the exhaust flows through the DOC, precious metals in the catalyst coating of the DOC cause a chemical reaction between NO and oxygen which produces NO₂;
 - (d) the exhaust (including the NO₂ produced in the DOC) then flows from the DOC into the DPF;
 - (e) as the exhaust (including the NO₂ produced in the DOC) flows through the DPF, NO₂ Oxidation of particulate matter captured and stored in the DPF occurs; and

- (f) NO₂ Oxidation converts particulate matter into carbon dioxide and nitrogen, which is then emitted from the DPF through the muffler and into the atmosphere.

B4.2 Rate of Passive Regeneration in the Affected Vehicles

- 29 The rate at which oxidation of particulate matter that is captured and stored in the DPF occurs during Passive Regeneration (**Rate of Passive Regeneration**) is dependent upon:
- (a) the level of NO_x in the exhaust that is generated by the operation of the engine; and
 - (b) the temperature of the exhaust that is generated by the operation of the engine.
- 30 Throughout the Relevant Period, ADR 79/03 and ADR 79/04 imposed standards limiting the level of NO_x that the Affected Vehicles were allowed to emit.
- 31 In order to comply with the NO_x emissions standards in ADR 79/03 or ADR 79/04, as applicable, the Affected Vehicles employ the following techniques to reduce the level of NO_x generated by the operation of the engine:
- (a) exhaust gas recirculation (**EGR**); and
 - (b) retarded or delayed fuel injection,
- (NO_x Emissions Reduction Techniques).**
- 32 In the Affected Vehicles, the NO_x Emissions Reduction Techniques have the effect of:
- (a) decreasing the level of NO_x generated by the operation of the engine;
 - (b) increasing the level of particulate matter generated by the operation of the engine;
 - (c) decreasing the ratio of NO_x to particulate matter in the exhaust (**NO_x:PM Ratio**), by reason of the matters pleaded in subparagraphs (a) and (b) above; and
 - (d) decreasing the temperature of the exhaust generated by the engine.
- 33 By reason of the matters pleaded in paragraph 32 above, the NO_x Emissions Reduction Techniques suppress the Rate of Passive Regeneration in the Affected Vehicles.

B4.3 Active Regeneration

- 34 Active Regeneration is necessary when the Rate of Passive Regeneration is insufficient to prevent the DPF from accumulating particulate matter in excess of the PM Base Level.

Particulars

The PM Base Level is:

- (i) in Affected Vehicles with a 1GD-FTV engine, 10.8 grams; and
- (ii) in Affected Vehicles with a 2GD-FTV engine, 13.4 grams.

35 Active Regeneration is initiated:

(a) upon the intervention of the ECM, where:

- (i) the engine is operating; and
- (ii) the particulate matter accumulated in the DPF, as calculated by the ECM, reaches the PM Base Level,

(Automatic Active Regeneration); or

(b) upon the intervention of the driver of the vehicle, where:

- (i) the vehicle is fitted with a DPF switch (**DPF Switch**);
- (ii) the vehicle is stationary and the engine is operating; and
- (iii) the driver of the Affected Vehicle presses the DPF Switch,

(Manual Active Regeneration).

36 In both Automatic and Manual Active Regeneration, regeneration is effected as follows:

- (a) the ECM causes temporary changes in the engine settings to increase the temperature of the exhaust generated by the operation of the engine;
- (b) if the engine is operating and the vehicle is idle, the ECM causes the engine idling speed to be increased;

Particulars

In Affected Vehicles having a manual transmission, the ECM causes the engine idling speed to be increased to 1,200 revolutions per minute (**rpm**).

In Affected Vehicles having an automatic transmission, the ECM causes the engine idling speed to be increased to 900 rpm.

- (c) the exhaust generated by the operation of the engine exits the engine and flows into the exhaust tubing;
- (d) as the exhaust flows through the exhaust tubing, the Additional Injector sprays fuel into the exhaust in the exhaust tubing, perpendicular to the flow of the exhaust;
- (e) the exhaust and fuel in the exhaust tubing flow through the mixer, which forces turbulent mixing of the exhaust and the fuel;
- (f) the exhaust/fuel mixture then flows through the Inlet into the DOC;
- (g) as the exhaust/fuel mixture flows through the DOC, precious metals in the catalyst coating of the DOC cause a chemical reaction between the fuel and oxygen which produces heat;
- (h) the heated exhaust then flows from the DOC into the DPF;
- (i) as the heated exhaust flows through the DPF, Thermal Oxidation of the particulate matter captured and stored in the DPF occurs; and
- (j) Thermal Oxidation converts particulate matter into carbon dioxide, which is then emitted from the DPF through the muffler and into the atmosphere.

37 Both Automatic and Manual Active Regeneration cause:

- (a) the Affected Vehicle to consume more fuel than it would otherwise consume during Passive Regeneration (all else being equal);
- (b) greater wear and tear on the Affected Vehicle than would otherwise be caused during Passive Regeneration (all else being equal);
- (c) the Affected Vehicle to emit more Pollutant Emissions, including particulate matter, than would otherwise be caused during Passive Regeneration (all else being equal);
- (d) the Affected Vehicle to emit white smoke from the exhaust pipe, whereas Passive Regeneration does not; and
- (e) the Affected Vehicle to emit exhaust that has a noticeably different odour (compared to the exhaust from an Affected Vehicle that is not undertaking Active Regeneration), whereas Passive Regeneration does not.

Particulars

Diesel Particulate Filter (DPF) Information Booklet applying to vehicles in the Fortuner, Hilux and Prado ranges.

38 Further, Manual Active Regeneration:

- (a) requires the Affected Vehicle to be stationary in order for regeneration to occur, whereas Passive Regeneration does not; and
- (b) requires the driver of the Affected Vehicle to remain with the stationary Affected Vehicle while the Manual Active Regeneration takes place, in order for the regeneration to occur safely and lawfully.

Particulars

In Australia, subject to limited exceptions, it is contrary to law for a driver of a vehicle to leave that vehicle unattended while the engine is running.

Road Rules 2014 (NSW), Reg 213(3)

Road Traffic Code 2000 (WA), Reg 181

Road Safety Road Rules 2009 (Vic), Reg 213

Transport Operations (Road Use Management Road Rules) Regulation 2009 (Qld), Reg 213

Road Traffic (Road Rules - Ancillary and Miscellaneous Provisions) Regulations 2014 (SA), Reg 23

Australian Road Rules (SA), Reg 213

Road Rules 2009 (Tas), Reg 213

Road Transport (Road Rules) Regulation 2017 (ACT), Reg 213

Traffic Regulations 1999 (NT), Reg 71 and 81D

C. THE VEHICLE DEFECTS AND THEIR CONSEQUENCES

39 The Affected Vehicles suffer, and during the Relevant Period have suffered, from the following defects (each a **Vehicle Defect**):

(a1) the Affected Vehicles are designed so that regeneration is principally achieved through Automatic Active Regeneration and, where a DPF Switch was fitted, also through Manual Active Regeneration, rather than through regeneration which occurs in the course of operating the Affected Vehicles without further intervention by the vehicle's operator or ECM (i.e., "Passive Regeneration" as defined in Schedule 1 to the Reference Report of David P. Garrett dated 15 October 2020);

(a) the ~~r~~Rate of ~~Passive r~~Regeneration which occurs in the course of operating the Affected Vehicles without further intervention by the vehicle's operator or ECM is insufficient to prevent the DPF from accumulating, or frequently accumulating, particulate matter in excess of the PM Base Level because:

(i1) of the design defect pleaded in subparagraph (a1) above;

(i) the NO_x Emissions Reduction Techniques and the NO_x:PM Ratio suppress the Rate of Passive Regeneration (as defined in paragraph 29 above);

~~(ii) the exhaust temperature that must be achieved to effect Passive Regeneration cannot be achieved, or is unlikely to be achieved, unless the Affected Vehicle is driven continuously at a speed of approximately 60 km/hr or faster for a period of approximately 30 minutes;~~

~~(iii) the driving conditions pleaded in paragraph 39(a)(ii) are difficult to achieve, and are unlikely to be achieved, through ordinary usage of the Affected Vehicle; and~~

Particulars

~~Ordinary usage of a vehicle involves driving in a manner or style that does not involve, or involve regularly, driving continuously at a speed of approximately 60 km/hr or faster for a period of approximately 30 minutes.~~

(iv) the defects pleaded in subparagraphs 39(c) to (f) below, individually and cumulatively, diminish the catalytic efficiency of the DOC, which inhibits NO₂ Oxidation during Passive Regeneration (as defined in paragraph 26 above);

(v) the exhaust temperature that must be achieved to effect Thermal Oxidation in the Affected Vehicles can only be achieved without further intervention by the Affected Vehicle's operator or ECM during sustained operation of the Affected Vehicles at or above 90% of maximum torque; and

(vi) the driving conditions pleaded in paragraph 39(a)(v) are difficult to achieve, and are unlikely to be achieved, through ordinary usage of the Affected Vehicles;

- (b) the Affected Vehicles experience excessive Active Regeneration;

Particulars

In the Affected Vehicles, Active Regeneration occurs:

- (i) at a frequency (as measured by the kilometres driven between occurrences of Active Regeneration); and/or
- (ii) for a duration (as measured by the time taken by, or kilometres driven during, a single occurrence of Active Regeneration),

that is excessive compared to:

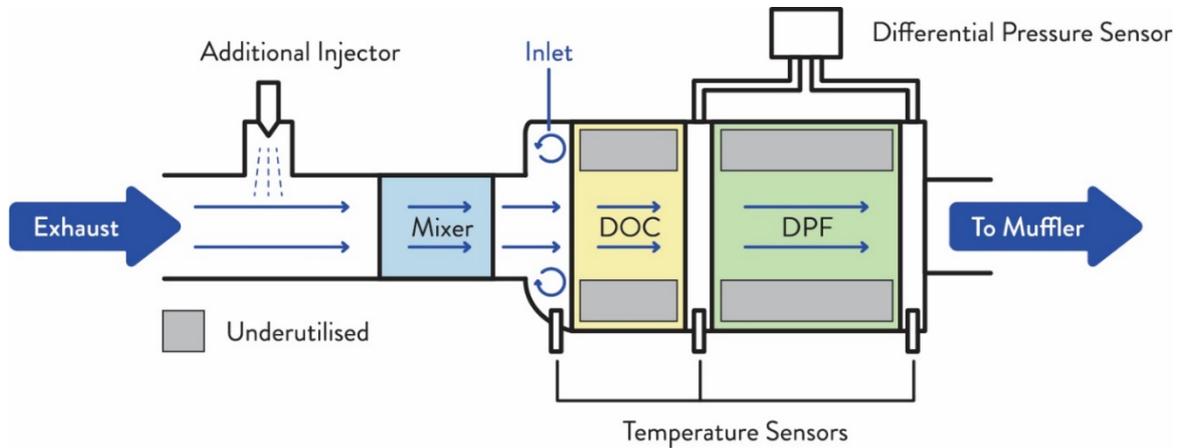
- (iii) the frequency and duration of Active Regeneration that would occur in the Affected Vehicles but for the Vehicle Defects alleged in subparagraphs 39(a1), (a), (c), (d), (e), (f), (h) and (i), individually and cumulatively;
- (iv) the frequency and duration of Active Regeneration in light duty vehicles fitted with a diesel engine and a periodically regenerating system generally; and
- (v) Toyota's representations as to the frequency and duration of automatic regeneration in the Affected Vehicles as pleaded in paragraphs 63(h) and 67(h) below.

Further and better particulars will be provided following completion of discovery and/or the expert reference.

- (c) the design of the Inlet in the Affected Vehicles causes, or has a propensity to cause, non-uniform distribution of exhaust flow through the DOC, such that:
- (i) the Inlet projects the majority of the exhaust flowing from the exhaust tubing through the centre of the DOC, leaving the outer perimeter of the DOC underutilised; and
 - (ii) in Active Regeneration:
 - (A) the exhaust/fuel mixture recirculates at a low velocity around the outer perimeter of the DOC (**Recirculation Zone**), before passing through the DOC; and
 - (B) the low velocity of exhaust/fuel mixture in the Recirculation Zone causes deposits comprising a mixture of particulate matter and fuel to form on the face of the DOC at the outer perimeter of the DOC;

Particulars

The following diagram depicts the flow of exhaust from the exhaust tubing through the Inlet into the DOC and then DPF:



- (d) in the Affected Vehicles, the Additional Injector becomes, or has a propensity to become, partially or completely blocked by carbon deposits on its tip, which:
- (i) causes a deterioration in the Additional Injector spray pattern;
 - (ii) impedes or prevents the Additional Injector from aerosolising the fuel that is injected into the exhaust tubing during Active Regeneration;
 - (iii) causes, or has a propensity to cause, (A) deposits comprising a mixture of particulate matter and fuel to form on the face of the DOC and/or (B) "coking" (being a build up of hard, sooty residue) which blocks platinum group metal catalyst material in the DOC; and
 - (iv) causes, or has a propensity to cause, unburned fuel to be emitted from the Affected Vehicles in the form of white smoke;
- (e) the Affected Vehicles use an Additional Injector, which, even if not affected by the defect described in subparagraph 39(d) above:
- (i) causes, or has a propensity to cause, (A) deposits comprising a mixture of particulate matter and fuel to form on the face of the DOC and/or (B) "coking" (being a build up of hard, sooty residue) which blocks platinum group metal catalyst material in the DOC; and
 - (ii) causes, or has a propensity to cause, unburned fuel to be emitted from the Affected Vehicles in the form of white smoke;

- (f) the DOC in the Affected Vehicles becomes, or has a propensity to become, (i) partially or wholly blocked by deposits comprising a mixture of particulate matter and fuel forming on the face of the DOC and/or (ii) adversely affected by “coking” (being a build up of hard, sooty residue) which blocks platinum group metal catalyst material in the DOC;
- (g1) Manual Active Regeneration cannot be performed unless the Affected Vehicle is fitted with a DPF Switch, which was not installed in any Affected Vehicles prior to the end of the 2017 Model Year;
- (g) Manual Active Regeneration cannot be performed unless the Affected Vehicle is fitted with a DPF Switch, the Affected Vehicle is parked in an unenclosed space with the engine running for a period of approximately 30 minutes, and the driver remains with the Affected Vehicle for that period;
- (h) Automatic and Manual Active Regeneration fail, or have a propensity to fail, to effect the removal of sufficient particulate matter from the DPF to prevent the DPF from becoming or remaining partially or completely blocked, including by reason of the Vehicle Defects pleaded in subparagraphs 39(a1)(a) to (f) above; and
- (i) the DPF System in the Affected Vehicles fails, or has a propensity to fail, to prevent the DPF from becoming or remaining partially or completely blocked, including by reason of the defects pleaded in subparagraphs 39(a1)(a) to (h) above, individually and cumulatively.

Particulars

Further particulars of the Vehicle Defects will be provided following completion of discovery and/or the expert reference.

- 40 Each Vehicle Defect pleaded in subparagraphs 39(a1)(a) to (i) above has a compounding effect in that each such Vehicle Defect exacerbates one or more of the other Vehicle Defects.
- 41 By reason of the Vehicle Defects, individually and cumulatively, the Affected Vehicles suffer, and during the Relevant Period have suffered, from one or more of the following consequences (each a **Vehicle Defect Consequence**):
- (a) the DOC does not function effectively;
- (b) the DPF does not function effectively;
- (c) the catalytic efficiency of the DOC is diminished;
- (d) the DOC becomes damaged;

- (e) the exhaust in the DPF does not reach a sufficiently high temperature to effect Thermal Oxidation;
- (f) NO₂ Oxidation during Passive Regeneration is inhibited;
- (g) unoxidized fuel flows through the DPF and is emitted from the Affected Vehicle as white smoke;
- (h) the DPF becomes partially or completely blocked;
- (i) engine back-pressure is increased;
- (j) fuel consumption is increased and fuel economy is decreased;
- (k) foul smelling white smoke is emitted from the exhaust pipe when the engine is on;
- (l) engine power is diminished;
- (m) engine power is intermittently lost whilst driving;
- (n) wear and tear on the engine components and the DPF System is increased;
- (o) the Affected Vehicles must be inspected, serviced and/or repaired by a service engineer for the purpose of cleaning, repairing or replacing the DPF, the DPF System, or components thereof;
- (p) the Affected Vehicles must be inspected, serviced and/or repaired more regularly than would be required absent the Vehicle Defects (or any one of them);
- (q) the ECM must be reprogrammed more often than would be required absent the Vehicle Defects;
- (r) the Affected Vehicles inconvenience their drivers, including by reason of having to undertake Manual Active Regenerations; and
- (s) the DPF Notifications are displayed on an excessive number of occasions and/or for an excessive period of time.

Particulars

Further particulars of the Vehicle Defect Consequences will be provided following completion of discovery and/or the expert reference.

D. THE APPLICANT'S_ AFFECTED VEHICLE

42 The Applicant's_ Affected Vehicle suffers, and during the Relevant Period suffered, from the Vehicle Defects and Vehicle Defect Consequences.

Particulars

The Applicant's_ Affected Vehicle suffers, and during the Relevant Period suffered, from:

- (i) each of the Vehicle Defects identified in paragraph 39 above; and
- (ii) one or more of the Vehicle Defect Consequences identified in paragraph 41 above.

43 On multiple occasions during the Relevant Period:

- (a) the First Applicant has complained to Dealers about the Vehicle Defects and/or Vehicle Defect Consequences;

Particulars

The First Applicant raised the Vehicle Defects and Vehicle Defect Consequences with Oldmac T Pty Ltd (ACN 126 291 165) (**Oldmac Toyota**) in Cleveland, Queensland, being a licensed Toyota Dealership, on at least seven occasions during the Relevant Period, including:

- (i) when providing the Applicant's_ Affected Vehicle for service, including on or about 19 June 2017, 10 July 2017, 16 November 2017, 27 April 2018, 11 June 2018 and 12 April 2019; and
 - (ii) via a written complaint on 19 April 2018.
- (b) the Applicant's_ Affected Vehicle has been inspected and/or serviced by a Dealer for the purpose of attempting to address the Vehicle Defects and/or Vehicle Defect Consequences;

Particulars

The Applicant's_ Affected Vehicle was serviced by Oldmac Toyota on at least six occasions during the Relevant Period in connection with the Vehicle Defects and/or Vehicle Defect Consequences, including on or about 19 June 2017, 10 July 2017, 16 November 2017, 27 April 2018, 11 June 2018 and 12 April 2019.

- (c) the DPF in the Applicant's' Affected Vehicle has been replaced;

Particulars

The DPF in the Applicant's' Affected Vehicle has been replaced on at least two occasions, including on or about 10 July 2017 and 11 June 2018.

- (d) Dealers have performed forced regenerations on the Applicant's' Affected Vehicle; and

Particulars

Oldmac Toyota performed forced regenerations on the Applicant's' Affected Vehicle on at least two occasions during the Relevant Period, including on or about 27 April 2018 and 11 June 2018.

- (e) the ECM in the Applicant's' Affected Vehicle has been reprogrammed.

Particulars

Oldmac Toyota performed ECM reprogramming on the Applicant's' Affected Vehicle at least three times during the Relevant Period, including on or about 19 June 2017, 16 November 2017 and 12 April 2019.

44 A DPF Switch was installed in the Applicant's' Affected Vehicle on or around 12 April 2019.

45 Notwithstanding the matters pleaded in paragraphs 43 to 44 above, the Applicant's' Affected Vehicle still suffers from the Vehicle Defects and Vehicle Defect Consequences.

E. TOYOTA AUSTRALIA'S KNOWLEDGE

46 Since at least February 2016, Toyota Australia has known of the existence of all, or alternatively at least some, of the Vehicle Defects and/or the Vehicle Defect Consequences in the Affected Vehicles.

Particulars

The Applicants' refers to:

- (i) the admission made on behalf of Toyota Australia by its lawyers in a letter dated 18 December 2018; and
- (ii) the matters pleaded in paragraphs 47 to 49 below.

Further particulars will be provided following completion of discovery.

- 47 Since at least February 2016, Toyota Australia and its Dealers have received complaints from consumers concerning all, or alternatively at least some, of the Vehicle Defects and the Vehicle Defect Consequences.

Particulars

The Applicants refers to the admission made on behalf of Toyota Australia by its lawyers in a letter dated 18 December 2018.

Further particulars will be provided following completion of discovery.

- 48 In around April 2017, Toyota Australia determined that, by reason of the Vehicle Defects and/or Vehicle Defect Consequences:
- (a) 94% of Affected Vehicles would fail after 10 years in service;
 - (b) 40% of Affected Vehicles would fail after 5 years in service; and
 - (c) Toyota Australia would experience a high number of claims out of warranty.

Particulars

The Applicants refers to the AuCQE – Field Action Proposal Form dated 21 April 2017 (produced as document TAL.850.006.0383).

- 49 In around September 2018, Toyota Australia determined that, by reason of the Vehicle Defects and/or Vehicle Defect Consequences:
- (a) 99.9% of Affected Vehicles in the Hilux and Fortuner ranges would fail after 10 years in service;
 - (b) 75% of Affected Vehicles in the Hilux and Fortuner ranges would fail after 5 years in service; and
 - (c) Toyota Australia would experience a high number of claims out of warranty.

Particulars

The Applicants refers to the AuCQE – Field Action Proposal Form dated 21 September 2018 (produced as document TAL.850.016.0084).

- 50 From a time not known to the Applicants but known to Toyota Australia, Toyota Australia has sought to remedy some or all of the Vehicle Defects.

Particulars

Undated Toyota Customer Service Exercise Notification.

Further particulars will be provided following completion of discovery.

- 51 Toyota Australia has sought to remedy some or all of the Vehicle Defects by:
- (a) from approximately December 2016, implementing a software programming update to the ECM designed to retard or delay fuel injection into the engine and reduce turbo boost pressure;
 - (b) from a time unknown to the Applicants but known to Toyota Australia, implementing one or more software programming updates to the ECM designed to, among other things:
 - (i) decrease EGR during Active Regeneration;
 - (ii) decrease the duration of an Active Regeneration;
 - (iii) decrease the amount of fuel injected by the Additional Injector during Active Regeneration; and
 - (iv) utilise data from the Pressure Sensor to calculate the level of particulate matter accumulated in the DPF for the purpose of determining when to initiate an Active Regeneration;
 - (c) from approximately 2018, in new Affected Vehicles only, implementing the following hardware changes:
 - (i) altering the distribution of precious metals in the DOC so as to place a higher quantity of precious metals towards the front of the DOC; and
 - (ii) altering the distribution of precious metals in the DPF so as to place a higher quantity of precious metals towards the front of the DPF;
 - (d) from approximately March 2018, retrofitting the DPF Switch in some Affected Vehicles;
 - (e) from approximately July 2018, installing or causing to be installed a DPF Switch in all new Affected Vehicles in the Hilux, Prado and Fortuner ranges sold after that date; and

Particulars

<https://www.caradvice.com.au/671488/toyota-hilux-landcruiser-prado-gain-diesel-particulate-filter-regeneration-switch/>

<https://www.drive.com.au/motor-news/toyota-introduce-dpf-saving-switch-119248>
Undated Toyota Customer Service Exercise Notification.

Further particulars will be provided following completion of discovery.

- (f) from a time unknown to the Applicants but known to Toyota Australia, instructing customer service centres to:
 - (i) clean the face of the DOC with an aerosol spray; and
 - (ii) clean the Additional Injector using an ultrasonic bath, to remove carbon deposits.

52 The Vehicle Defects and/or the Vehicle Defect Consequences have not been remedied.

53 Since at least February 2016, Toyota Australia has known that the Vehicle Defects and/or the Vehicle Defect Consequences have not been remedied.

F. TOYOTA AUSTRALIA'S REPRESENTATIONS

F1. Vehicle Representations

54 During the Relevant Period, Toyota Australia represented that the Affected Vehicles:

- (a) were, or were part of model lines that were, in their design and manufacturing:
 - (i) not defective;
 - (ii) of good quality;
 - (iii) reliable;
 - (iv) durable;
 - (v) fit for purpose; and
 - (vi) suitable for use in any driving environment;
- (b) did not, or were part of model lines that did not, require unusual or abnormal maintenance;
- (c) had a fuel efficiency consistent with the fuel efficiency stated in the promotional and instructional materials relevant to the Affected Vehicle and any fuel consumption label applied to the windscreen of the Affected Vehicle; and/or

Particulars

Particulars of the fuel efficiency stated in the promotional and instructional materials relevant for each Affected Vehicle and in any fuel consumption label applied to the windscreen of the Affected Vehicle will be provided following completion of discovery.

- (d) provided, or were part of model lines that provided, a driving and/or passenger experience that was:
 - (i) comfortable;
 - (ii) convenient; and
 - (iii) consistent regardless of driving environment, including urban, off-road and extra-urban environments,

(together, the **Vehicle Representations**).

Particulars

The Vehicle Representations were express or implied. The Applicantss refers to:

- (i) Toyota HiLux E-brochure printed October 2015;
- (ii) Toyota HiLux E-brochure printed September 2016;
- (iii) Toyota HiLux E-brochure printed January 2017;
- (iv) Toyota HiLux E-brochure printed March 2018;
- (v) Toyota HiLux E-brochure printed September 2018
- (vi) Toyota Prado E-brochure printed October 2015;
- (vii) Toyota Prado E-brochure printed August 2016;
- (viii) Toyota Prado E-brochure printed September 2017;
- (ix) Toyota Prado E-brochure printed October 2017;
- (x) Toyota Prado E-brochure printed October 2018;
- (xi) Toyota Fortuner E-brochure printed October 2015;
- (xii) Toyota Fortuner E-brochure printed August 2016;

- (xiii) Toyota Fortuner E-brochure printed July 2017;
- (xiv) Toyota Fortuner E-brochure printed September 2018;
- (xv) Toyota Press Release, 'Toyota HiLux SR5 - Australia's Best Ute', 25 February 2016;
- (xvi) Toyota Press Release, 'Toyota HiLux 4X4 Posts Half a Million Sales', 26 May 2016;
- (xvii) Toyota Press Release, 'Toyota HiLux and Corolla in Close Battle for Sales', 5 December 2016;
- (xviii) Toyota Press Release, 'Toyota HiLux - Australia's Best Selling Car', 5 January 2017;
- (xix) Toyota Press Release, 'Toyota Revamps Top-Selling HiLux Range', 20 September 2017;
- (xx) Toyota Press Release, 'Aussie Styled Face Fronts Updated HiLux SR, SR5', 22 August 2018;
- (xxi) Toyota Press Release, 'Toyota Fortuner - A Modern, Capable 'Aussie' SUV', 20 October 2015;
- (xxii) Toyota Press Release, 'Early Christmas for Fortuner Buyers', 12 October 2017;
- (xxiii) Toyota Press Release, 'Toyota Prado Takes to New Heights', 3 April 2017
- (xxiv) Toyota Press Release, 'LandCruiser Prado Upgrade Adds Safety and Value', 9 November 2017;
- (xxv) Toyota Press Release, 'Toyota Hybrids and QDR Heritage Will Feature in Frankfurt', 31 August 2017;
- (xxvi) Toyota Press Release, 'Hats Off for Rural Aid', 18 January 2019;
- (xxvii) Toyota Press Release, 'Toyota Previews Updated LandCruiser Prado', 12 September 2017;
- (xxviii) Toyota commercial, 'The Hilux: The Making of Unbreakable - Engine Power', 14 June 2016;

- (xxix) Toyota commercial, 'The Hilux: The Making of Unbreakable - IMT Transmission and Technology', 14 June 2016;
- (xxx) Toyota commercial, 'The Hilux: The Making of Unbreakable – Driveability', 14 June 2016; ~~and~~
- (xxxi) the fuel consumption labels applied to the windscreen of each Affected Vehicle_;
- (xxxii) pages on the Toyota Australia website promoting the Toyota Prado range and featuring information about, describing features of, and displaying photographs of these vehicles, as described in paragraphs 50 to 52 of the affidavit of Kenneth John Williams sworn 11 December 2020 (First Applicant's Affidavit); and
- (xxxiii) technical specifications for models in the Toyota Prado range published on the Toyota Australia website, as described in paragraphs 50 to 52 of the First Applicant's Affidavit.

Further particulars will be provided following completion of discovery.

55 The Vehicle Representations were:

- (a) made to the public at large; and
- (b) made to the Applicants_; and Group Members.

56 Each of the Vehicle Representations was a continuing representation.

57 Toyota Australia failed to correct or qualify the Vehicle Representations at any time during the Relevant Period.

F2. Future Vehicle Representations

58 During the Relevant Period, Toyota Australia also represented that the Affected Vehicles:

- (a) would be, or were part of model lines that would be:
 - (i) not defective;
 - (ii) of good quality;
 - (iii) reliable;
 - (iv) durable;

- (v) fit for purpose; and
 - (vi) suitable for use in any driving environment;
- (b) would not, or were part of model lines that would not, require unusual or abnormal maintenance;
- (c) would, or were part of model lines that would, have a fuel efficiency consistent with the fuel efficiency stated in the promotional and instructional materials relevant to the Affected Vehicle and any fuel consumption label applied to the windscreen of the Affected Vehicle; and/or
- (d) would provide, or were part of model lines that would provide, a driving and/or passenger experience that was:
- (i) comfortable;
 - (ii) convenient; and
 - (iii) consistent regardless of driving environment, including urban, off-road and extra-urban environments,

(collectively, the **Future Vehicle Representations**).

Particulars

The Applicants ~~refers~~ to and repeats the particulars to paragraph 54 above.

59 The Future Vehicle Representations were:

- (a) made to the public at large; and
- (b) made to the Applicants and Group Members.

60 The Future Vehicle Representations were representations with respect to future matters, within the meaning of section 4 of the ACL.

61 Each of the Future Vehicle Representations was a continuing representation.

62 Toyota Australia failed to correct or qualify the Future Vehicle Representations at any time during the Relevant Period.

F3. DPF System Representations

63 During the Relevant Period, Toyota Australia represented that the Affected Vehicles contained, or were part of model lines that contained, a DPF System that, in its design and manufacturing:

- (a) was not defective;
- (b) was of good quality;
- (c) was reliable;
- (d) was durable;
- (e) was fit for purpose;
- (f) did not have a propensity to fail;
- (g) did not require unusual or abnormal maintenance;
- (h) completed an automatic regeneration every 250 to 300 kilometres of driving, depending on driving conditions and driving style;
- (i) completed a regeneration cycle with sufficient regularity to prevent the DPF from becoming partially or completely blocked;
- (j) prevented the DPF from becoming partially or completely blocked; and/or
- (k) was effective at removing sufficient particulate matter from the DPF to prevent the DPF from becoming or remaining partially or completely blocked,

(collectively, the **DPF System Representations**).

Particulars

The DPF System Representations were express or implied.

The Applicants refers to:

- (i) the particulars pleaded in paragraph 54 above;
- (ii) the Toyota DPF Information Booklet;
- (iii) the Toyota DPF Information Card; and
- (iv) Toyota Owner's Manual for each Affected Vehicle.

Further particulars will be provided following completion of discovery.

64 The DPF System Representations were:

- (a) made to the public at large; and
- (b) made to the Applicants and Group Members.

65 Each of the DPF System Representations was a continuing representation.

66 Toyota Australia failed to correct or qualify the DPF System Representations at any time during the Relevant Period.

F4. Future DPF System Representations

67 During the Relevant Period, Toyota Australia also represented that the Affected Vehicles contained, or were part of model lines that contained, a DPF system that:

- (a) would not be defective;
- (b) would be of good quality;
- (c) would be reliable;
- (d) would be durable;
- (e) would be fit for purpose;
- (f) would not have a propensity to fail;
- (g) would not require unusual or abnormal maintenance;
- (h) would complete an automatic regeneration every 250 to 300 kilometres of driving, depending on driving conditions and driving style;
- (i) would complete a regeneration cycle with sufficient regularity to prevent the DPF from become partially or completely blocked;
- (j) would prevent the DPF from become partially or completely blocked; and/or
- (k) would be effective at removing sufficient particulate matter from the DPF to prevent the DPF from becoming or remaining partially or completely blocked,

(collectively, the **Future DPF System Representations**).

Particulars

The Applicants ~~refers~~ to and repeats the particulars to paragraph 63 above.

68 The Future DPF System Representations were:

- (a) made to the public at large; and
- (b) made to the Applicants and Group Members.

69 The Future DPF System Representations were representations with respect to future matters, within the meaning of section 4 of the ACL.

70 Each of the Future DPF System Representations was a continuing representation.

71 Toyota Australia failed to correct or qualify the Future DPF System Representations at any time during the Relevant Period.

G. TOYOTA AUSTRALIA'S OMISSIONS

72 During the Relevant Period, Toyota Australia did not disclose, or adequately disclose, to prospective purchasers or persons acquiring an Affected Vehicle, or to the public:

- (a) the existence, nature and extent of the Vehicle Defects (or any of them) in the Affected Vehicles;
- (b) the Vehicle Defect Consequences (or any of them);
- (c) that Toyota Australia knew of the Vehicle Defects and the Vehicle Defect Consequences (or any of them); and
- (d) that the Vehicle Defects (or any of them) in the Affected Vehicles had not been remedied,

(the **Omissions Conduct**).

73 The Omissions Conduct pleaded in subparagraphs 72(a), 72(b) and 72(d) continued from at least the start of the Relevant Period until at least the end of the Relevant Period.

74 The Omissions Conduct pleaded in subparagraph 72(c) continued from at least February 2016 until at least the end of the Relevant Period.

H. FAILURE TO COMPLY WITH STATUTORY GUARANTEE AS TO ACCEPTABLE QUALITY

75 The Affected Vehicles were supplied:

- (a) in trade or commerce; and
 - (b) other than by way of sale by auction.
- 76 The Affected Vehicles were supplied by:
- (a) Toyota Australia, through Dealers;
 - (b) Dealers; and/or
 - (c) other retailers selling Affected Vehicles, including used car dealers,
- (each a **Supplier**).
- 77 The Affected Vehicles were goods of a kind ordinarily acquired for personal, domestic or household use or consumption.
- 78 The Affected Vehicles were acquired from Suppliers by persons who did not acquire the goods for the purpose of re-supply.
- 79 By reason of the matters pleaded in paragraphs 77 and 78 above, persons who acquired the Affected Vehicles from Suppliers are taken to have acquired the Affected Vehicles as consumers.
- 80 By reason of the matters pleaded in paragraphs 75 to 79 above, in respect of each of the Affected Vehicles, there was a guarantee of acceptable quality within the meaning of section 54 of the ACL.
- 81 The purposes for which goods such as the Affected Vehicles are commonly supplied include the purpose of ordinary usage of the Affected Vehicle.

Particulars

The Applicant ~~u~~ refers to and repeats the particulars to subparagraph 39(a)(iii).

- 82 By reason of the Vehicle Defects and the Vehicle Defect Consequences, the Affected Vehicles were not as:
- (a) fit for all the purposes for which goods such as the Affected Vehicles are commonly supplied;
 - (b) acceptable in appearance and finish;
 - (c) free from defects;

- (d) safe; or
- (e) durable,

as a reasonable consumer fully acquainted with the state and condition of the goods (including the Vehicle Defects) would regard as acceptable having regard to:

- (f) the nature of the Affected Vehicles;
- (g) the price of the Affected Vehicles; and
- (h) the representations and omissions pleaded in paragraphs 54 to 72 above.

Particulars

The Applicants ~~refers to and repeats~~ paragraphs 39 to 41 above and paragraphs 86 to 89 below.

- 83 By reason of the matters pleaded in paragraph 82, individually and cumulatively, the Affected Vehicles were not of acceptable quality within the meaning of section 54 of the ACL.
- 84 ~~The~~ Each Applicant and each Group Member is an affected person within the meaning of subsection 271(1) of the ACL, in that each was:
- (a) a consumer who acquired an Affected Vehicle;
 - (b) a person who acquired an Affected Vehicle from a consumer (other than for the purpose of re-supply); or
 - (c) a person who derived title to the goods through or under a consumer.

I. MISLEADING OR DECEPTIVE CONDUCT

- 85 The following conduct was conduct engaged in by Toyota Australia in trade or commerce:
- (a) making, and failing to correct or qualify, the Vehicle Representations;
 - (b) making, and failing to correct or qualify, the Future Vehicle Representations;
 - (c) making, and failing to correct or qualify, the DPF System Representations;
 - (d) making, and failing to correct or qualify, the Future DPF System Representations; and
- (together, the **Misleading Representations**),
- (e) the Omissions Conduct,

(together with the Misleading Representations, the **Misleading Conduct**).

86 At the time Toyota Australia made the Vehicle Representations, and throughout the Relevant Period, the Affected Vehicles:

- (a) were not, or were part of model lines that were not, in their design and manufacturing:
 - (i) not defective;
 - (ii) of good quality;
 - (iii) reliable;
 - (iv) durable;
 - (v) fit for purpose; and
 - (vi) suitable for use any driving environment;
- (b) required unusual or abnormal maintenance;
- (c) had a fuel efficiency that was materially worse than the fuel efficiency stated in the promotional and instructional materials relevant to the Affected Vehicle and any fuel consumption label applied to the windscreen of the Affected Vehicle; and/or

Particulars

The Applicants refers to and repeats the particulars to subparagraph 54(c) above.

Further particulars will be provided after the Applicants have ~~has~~ served expert evidence.

- (d) did not provide, or were part of model lines that did not provide, a driving and/or passenger experience that was:
 - (i) comfortable;
 - (ii) convenient; and
 - (iii) consistent regardless of driving environment, including urban, off-road and extra urban environments.

Particulars

The Applicants refers to and repeats paragraphs 39 to 41 above and the particulars thereto.

- 87 At the time Toyota Australia made the Future Vehicle Representation, Toyota Australia did not have reasonable grounds to make the Future Vehicle Representations.

Particulars

The Applicants refers to and repeats paragraphs 39 to 41 and 46 to 53 above and the particulars thereto.

The Applicants rely ~~relies~~ upon section 4 of the ACL.

- 88 At the time Toyota Australia made the DPF System Representations, and throughout the Relevant Period, the Affected Vehicles did not contain, or were part of model lines that did not contain, a DPF System that:
- (a) was not defective;
 - (b) was of good quality;
 - (c) was reliable;
 - (d) was durable;
 - (e) was fit for purpose;
 - (f) did not have a propensity to fail;
 - (g) did not require unusual or abnormal maintenance;
 - (h) completed an automatic regeneration every 250 to 300 kilometres of driving, depending on driving conditions and driving style;
 - (i) completed a regeneration cycle with sufficient regularity to prevent the DPF from become partially or completely blocked;
 - (j) prevented the DPF from becoming partially or completely blocked; and/or
 - (k) was effective at removing sufficient particulate matter from the DPF to prevent the DPF from becoming or remaining partially or completely blocked,

Particulars

The Applicants refers to and repeats paragraphs 39 to 41 above and the particulars thereto.

- 89 At the time Toyota Australia made the Future DPF System Representations, Toyota Australia did not have reasonable grounds to make the Future DPF System Representations.

Particulars

The Applicants refers to and repeats paragraphs 39 to 41 and 46 to 53 above and the particulars thereto.

The Applicants rely ~~relies~~ upon section 4 of the ACL.

- 90 At the time Toyota Australia engaged in the Omissions Conduct:

- (a) the Applicants and Group Members had a reasonable expectation that Toyota Australia would disclose any information of the kind which was the subject of the Omissions Conduct; and
- (b) the information the subject of the Omissions Conduct was material to the Applicant's' and Group Members' decision whether to acquire an Affected Vehicle.

- 91 The making of each of the Misleading Representations was:

- (a) conduct in connection with the supply or possible supply of the Affected Vehicles and/or in connection with the promotion of the supply or use of the Affected Vehicles, within the meaning of subsection 29(1) of the ACL;
- (b) the making of a representation that the Affected Vehicles were of a particular standard, quality, composition, and/or style, within the meaning of subsection 29(1)(a) of the ACL; and/or
- (c) the making of a representation that the Affected Vehicles had performance characteristics or uses, within the meaning of subsection 29(1)(g) of the ACL.

- 92 By reason of the matters pleaded in paragraphs 85 to 91 above:

- (a) the Misleading Conduct was, individually and cumulatively, conduct that was misleading or deceptive, or likely to mislead or deceive, in contravention of section 18 of the ACL;
- (b) each of the Misleading Representations was a false or misleading representation, in contravention of subsections 29(1)(a) and/or 29(1)(g) of the ACL; and

- (c) the Misleading Conduct was, individually and cumulatively, conduct that was liable to mislead the public as to the nature, characteristics, and/or suitability for purpose of the Affected Vehicles, in contravention of section 33 of the ACL.

J. UNCONSCIONABLE CONDUCT

93 The Misleading Conduct was conduct engaged in by Toyota Australia in connection with the supply or possible supply of the Affected Vehicles to a person, within the meaning of section 21 of the ACL.

94 Toyota Australia engaged in the Misleading Conduct in circumstances where:

- (a) since at least February 2016; Toyota Australia has known of the existence of the Vehicle Defects and Vehicle Defect Consequences in the Affected Vehicles;

Particulars

The Applicants refers to and repeats paragraphs 46 to 51 above and the particulars thereto.

- (b) since at least February 2016, Toyota Australia has deliberately failed to disclose the existence of the Vehicle Defects and Vehicle Defect Consequences;
 - (c) by reason of the matters pleaded in subparagraphs 94(a) and 94(b) above, since at least February 2016, Toyota Australia has known that the Misleading Conduct was misleading;
 - (d) each of the Applicants and Group Members was in a position of vulnerability, in that they had no means of knowing about the Vehicle Defects and/or the Vehicle Defect Consequences at the time they acquired an Affected Vehicle; and
 - (e) the Misleading Conduct was on a widespread scale and engaged in in relation to a large number of consumers across Australia.
- 95 By reason of the matters pleaded in paragraphs 93 to 94 above, Toyota Australia has engaged in conduct that was, in all the circumstances, unconscionable, in contravention of section 21 of the ACL (**Unconscionable Conduct**).

K. CAUSATION

96 By reason of the Affected Vehicles not complying with the statutory guarantee of acceptable quality as pleaded in paragraphs 75 to 84:

- (a) the value of the Affected Vehicles has been reduced;

- (b) the First and/or Second Applicant and Group Members have been required to purchase fuel for the Affected Vehicles in excess of that which the Affected Vehicles would have consumed, but for their failure to comply with the guarantee as to acceptable quality;
- (c) the First and/or Second Applicant and at least some Group Members have been required to:
 - (i) inspect the Affected Vehicles, or have the Affected Vehicles inspected by a service engineer;
 - (ii) have the Affected Vehicles serviced by a service engineer;
 - (iii) repair the Affected Vehicles and/or have the Affected Vehicles repaired by a service engineer or qualified professional; and
- (d) the First and/or Second Applicant and at least some Group Members have not been able to work at the times that his or her Affected Vehicle was being inspected, serviced or repaired.

97 But for the Misleading Conduct and the Unconscionable Conduct, the Applicants and Group Members:

- (a) would not have acquired the Affected Vehicle(s) they acquired;
- (b) would not have acquired services related to the acquisition of the Affected Vehicle(s), such as financial services; and/or
- (c) in the alternative to subparagraphs 97(a) and 97(b), would not have acquired the Affected Vehicle(s) at the price at which they in fact acquired the Affected Vehicle(s).

L. LOSS OR DAMAGE SUFFERED BY THE APPLICANTS AND GROUP MEMBERS

98 The First and/or Second Applicant and the Group Members have suffered loss and damage as a result of the failure of the Affected Vehicles to comply with the statutory guarantee as to acceptable quality in section 54 of the ACL.

Particulars

The particulars of loss and damage caused by the Affected Vehicles not complying with the statutory guarantee as to acceptable quality are set out in Schedule 2 of this Amended Statement of Claim.

Full particulars of the extent to which the failure of the Affected Vehicles to comply with the statutory guarantee as to acceptable quality has caused the Applicants

and Group Members to suffer loss and damage will be provided after the Applicants have ~~has~~ served expert evidence.

- 99 The First and/or Second Applicant and the Group Members have suffered loss and damage because of Toyota Australia's contraventions of sections 18, 21, 29 and/or 33 of the ACL.

Particulars

The particulars of loss and damage caused by Toyota Australia's contraventions of sections 18, 21, 29 and/or 33 of the ACL are set out in Schedule 3 of this Amended Statement of Claim.

Full particulars of the extent to which Toyota Australia's Misleading Conduct and Unconscionable Conduct caused the Applicants and Group Members to suffer loss and damage will be provided after the Applicants have ~~has~~ served expert evidence.

M. RELIEF

- 100 The Applicants claims, in their ~~his~~ own right and on behalf of the Group Members, the relief specified in the application, namely:

- (a) damages or compensation pursuant to section 236 of the ACL;
- (b) damages or compensation pursuant to sections 271 and 272 of the ACL;
- (c) pursuant to subsections 33Z(1)(e) and (f) of the FCA Act, an award in respect of some or all of the damages or compensation suffered by the Group Members in an aggregate amount;
- (d) interest;
- (e) costs; and
- (f) such other orders as the Court thinks fit.

Date: 20 January 2021 ~~23 April 2020~~

Lawyer for the Applicants



Signed by Charles Bannister

This pleading was prepared by Charles Bannister, Bannister Law Class Actions, and settled by John Sheahan QC, Matthew Darke SC, Robert White and Patrick Meagher of Counsel.

The amendments to this pleading were prepared by Patrick Meagher and settled by Matthew Darke SC of Counsel.

The further amendments to this pleading were prepared and settled by Charles Bannister, Bannister Law Class Actions, and Matthew Darke SC.

Schedule 1: Affected Vehicles

	Model	Year of Manufacture
Hilux		
	SR 2.8L 5 SP MAN	2015 – 2017
	Rogue (4x4) 2.8L 6 SP AUTO	2018
	Rugged (4x4) 2.8L 6 SP AUTO	2018
	Rugged (4x4) 2.8L 6 SP MAN	2018
	Rugged X (4x4) 2.8L 6 SP AUTO	2018
	Rugged X (4x4) 2.8L 6 SP MAN	2018
	SR (4x4) 2.8L 6 SP AUTO	2015 – 2018
	SR (4x4) 2.8L 6 SP MAN	2015 – 2018
	SR Hi-Rider 2.8L 6 SP AUTO	2015 – 2018
	SR Hi-Rider 2.8L 6 SP MAN	2015 – 2018
	SR+ (4x4) 2.8L 6 SP AUTO	2017 – 2018
	SR+ (4x4) 2.8L 6 SP MAN	2017 – 2018
	SR5 (4x4) 2.8L 6 SP AUTO	2015 – 2018
	SR5 (4x4) 2.8L 6 SP MAN	2015 – 2018
	SR5 Hi-Rider 2.8L SP MAN	2015 – 2018
	SR5+ (4x4) 2.8L 6 SP AUTO	2017 – 2018
	SR5+ (4x4) 2.8L 6 SP MAN	2017 – 2018
	TRD Black (4x4) 2.8L 6 SP AUTO	2017
	TRD Black (4x4) 2.8L 6 SP MAN	2017
	TRD White (4x4) 2.8L 6 SP AUTO	2017
	TRD White (4x4) 2.8L 6 SP MAN	2017
	WorkMate (4x2) 2.4L 5 SP MAN	2015 – 2018
	WorkMate (4x4) 2.4L 6 SP AUTO	2015 – 2018
	WorkMate (4x4) 2.4L 6 SP MAN	2015 – 2018
	WorkMate (4x2) Hi-Rider 2.4L 6 SP AUTO	2017 – 2018
	Hilux 4x2 SR 2.8L T Diesel Automatic	2015 – 2018
	Hilux 4x2 SR5 2.8L T Diesel Automatic	2015 – 2018
	Hilux 4x2 SR 2.8L T Diesel Manual	2015 – 2018
	Hilux 4x2 SR5 2.8L T Diesel Manual	2015 – 2018
	Hilux 4x2 Workmate 2.4 L T Diesel Automatic	2015 – 2018
	Hilux 4x4 2.8L T Diesel Manual	2015 – 2018
Prado		
	Altitude (4x4) 2.8L 6 SP	2017
	GX (4x4) 2.8L 6 SP AUTO	2015 – 2018
	GX (4x4) 2.8L 6 SP MAN	2015 – 2018
	GX 7 SEAT (4x4) 2.8L 6 SP AUTO	2017 – 2018
	GXL (4x4) 2.8L 6 SP AUTO	2015 – 2018
	GXL (4x4) 2.8L 6 SP MAN	2015 – 2018
	Kakadu (4x4) 2.8L 6 SP AUTO	2015 – 2018
	VX (4x4) 2.8L 6 SP AUTO	2015 – 2018
	SE 2.8L T Diesel Automatic Wagon	2015 – 2018
Fortuner		
	Crusade 2.8L 6 SP AUTO	2015 – 2018
	Crusade 2.8L 6 SP MAN	2015 – 2016
	GX 2.8L 6 SP AUTO	2015 – 2018
	GX 2.8L 6 SP MAN	2015 – 2017
	GXL 2.8L 6 SP AUTO	2015 – 2018
	GXL 2.8L 6 SP MAN	2015 – 2017

Schedule 2: Particulars of loss caused by failure of the Affected Vehicles to comply with the statutory guarantee as to acceptable quality

The Applicants

- 1 The Applicants says that the First and/or Second Applicant ~~he~~ has suffered the following loss and damage:
 - (a) the reduction in value of the Applicant's' Affected Vehicle resulting from the failure of the Affected Vehicle to comply with the guarantee as to acceptable quality, below whichever of the following prices is lower:
 - (i) the price paid or payable by the First and/or Second Applicant for the Applicants' Affected Vehicle; and
 - (ii) the average retail price of the Applicants' Affected Vehicle at the time of supply;
 - (b) the cost of fuel consumed by the Applicant's' Affected Vehicle in excess of that which would have been consumed, but for the Vehicle Defects and/or the Vehicle Defect Consequences;
 - (c) costs incurred in having the Applicant's' Affected Vehicle inspected, serviced and/or repaired in order to address the Vehicle Defects and/or the Vehicle Defect Consequences; and
 - (d) income forgone on days the First and/or Second Applicant was not able to work because the Applicant's' Affected Vehicle was being inspected, serviced and/or repaired in order to address the Vehicle Defects and/or the Vehicle Defect Consequences.
- 2 It was reasonably foreseeable that the Applicants would suffer the loss and damage particularised in subparagraphs 1(b) to 1(d) above as a result of the failure of the Applicant's' Affected Vehicle to comply with the statutory guarantee in section 54 of the ACL.

Group Members

- 3 The Applicants says that each Group Member has suffered the following loss or damage:
 - (a) the reduction in value of the Group Member's Affected Vehicle resulting from the failure of the Affected Vehicle to comply with the guarantee as to acceptable quality, below whichever of the following prices is lower:
 - (i) the price paid or payable by the Group Member for the Affected Vehicle; and
 - (ii) the average retail price of the Affected Vehicle at the time of supply; and

- (b) the cost of fuel consumed by the Group Member's Affected Vehicle in excess of that which would have been consumed, but for the Vehicle Defects and/or the Vehicle Defect Consequences.
- 4 Further, the Applicants ~~says~~ that the precise nature and quantum of other loss and damage suffered by each Group Member is not presently known to the Applicants but may include:
 - (a) costs incurred in having the Group Member's Affected Vehicle inspected, serviced and/or repaired in order to address the Vehicle Defects and/or the Vehicle Defect Consequences; and
 - (b) income forgone on days the Group Member was not able to work because the Group Member's Affected Vehicle was being inspected, serviced and/or repaired in order to address the Vehicle Defects and/or the Vehicle Defect Consequences.
- 5 It was reasonably foreseeable that Group Members would suffer the loss and damage particularised in subparagraph 3(b) and paragraph 4 above as a result of the failure of the Affected Vehicles to comply with the guarantee as to acceptable quality.

Schedule 3: Particulars of loss caused by Toyota Australia's contravention of sections 18, 21, 29 and/or 33 of the ACL.

The Applicants

- 1 The Applicants says that the First and/or Second Applicant ~~he~~ has suffered the following loss and damage:
- (a) the difference between:
 - (i) the purchase price paid by the First and/or Second Applicant to acquire the Applicant's' Affected Vehicle, and the true value of the Applicant's' Affected Vehicle as at the date of the acquisition; or
 - (ii) in the alternative, the purchase price paid by the First and/or Second Applicant to acquire the Applicant's' Affected Vehicle, and the market value of the Applicant's' Affected Vehicle as at the date of trial;
 - (b) costs of services acquired in connection with the First and/or Second Applicant's acquisition of the Applicant's' Affected Vehicle, such as financial services;
 - (c) the cost of fuel consumed by the Applicant's' Affected Vehicle in excess of that which Toyota Australia represented that the Affected Vehicle would consume;
 - (d) costs incurred in having the Applicant's' Affected Vehicle inspected, serviced and/or repaired in order to address the Vehicle Defects and/or the Vehicle Defect Consequences; and
 - (e) income forgone on days the First and/or Second Applicant was not able to work because the Applicant's' Affected Vehicle was being inspected, serviced and/or repaired in order to address the Vehicle Defects and/or the Vehicle Defect Consequences.

Group Members

- 2 The Applicants says that each Group Member has suffered the following loss or damage:
- (a) the difference between:
 - (i) the purchase price paid by the Group Member to acquire the Group Member's Affected Vehicle, and the true value of the Group Member's Affected Vehicle as at the date of the acquisition;
 - (ii) in the alternative, the purchase price paid by the Group Member to acquire the Group Member's Affected Vehicle, and:

- (A) the market value of the Group Member's Affected Vehicle as at the date of trial; of
 - (B) if the Group Member has sold or otherwise disposed of their interest in the Group Member's Affected Vehicle, the price for which the Group Member sold or disposed of their interest in the Group Member's Affected Vehicle; and
- (b) the cost of fuel consumed by the Group Member's Affected Vehicle in excess of that which Toyota Australia represented that the Affected Vehicles would consume.
- 3 Further, the Applicants says that the precise nature and quantum of other loss and damage suffered by each Group Member is not presently known to the Applicants but may include:
- (a) costs of services acquired in connection with the Group Member's acquisition of the Group Member's Affected Vehicle, such as financial services;
 - (b) costs incurred in having the Group Member's Affected Vehicle inspected, serviced and/or repaired in order to address the Vehicle Defects and/or the Vehicle Defect Consequences; and
 - (c) income forgone on days the Group Member was not able to work because the Group Member's Affected Vehicle was being inspected, serviced and/or repaired in order to address the Vehicle Defects and/or the Vehicle Defect Consequences.

Certificate of lawyer

I, Charles Bannister, certify to the Court that, in relation to the statement of claim filed on behalf of the Applicants, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 20 January 2021 ~~23 April 2020~~

Lawyer for the Applicants

A handwritten signature in black ink, appearing to be 'C. Bannister', written in a cursive style.

Signed by Charles Bannister