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Details of Filing

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



Sia Lagos

Dated: 5/11/2021 4:50:26 PM AEDT

Registrar

Important Information

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Amended Reply to Defence to Second Further Amended Statement of Claim

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

- 1 Capitalised terms not defined in this ~~Amended Reply to Defence to Second Further Amended Statement of Claim~~ Amended Reply to Defence to Second Further Amended Statement of Claim have the meaning given in the Second Further Amended Statement of Claim filed by the applicants on ~~23 April 2020~~ 13 October 2021 (SOC) unless stated otherwise.
- 2 The applicants joins issue with the ~~Amended Defence to Second Further Amended Statement of Claim~~ Statement of Claim filed on behalf of the respondent on ~~4 June 2020~~ 28 October 2021 (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 8 of the Defence, the applicants:
 - (a) admits subparagraph 8(a);
 - (b) admits subparagraph 8(b);

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|----------------------------|--|-----|-----------------------|
| Filed on behalf of | <u>Applicants</u> | | |
| Prepared by | <u>Charles Bannister</u> | | |
| Law firm | <u>Bannister Law Class Actions</u> | | |
| Tel | <u>(02) 8999 2888</u> | Tel | <u>(02) 8088 0731</u> |
| Email | <u>charles@bl.com.au</u> | | |
| Address for service | <u>Bannister Law Class Actions, Level 1, 107 Pitt Street, Sydney, 2000</u> | | |

- (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 applicants:
- (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 applicants:
- (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 applicants:
- (a) admits subparagraph 14(a)(i)(A);
 - (b) admits subparagraph 14(a)(i)(B)(1); and
 - (c) ~~says, in respect of subparagraph 14(a)(ii), that:~~
 - (i) ~~the rate of NO_x 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 NO_x 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 applicants:

(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; and

~~(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 applicants:

(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 deny 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); and

(i) otherwise does not admit the paragraph.

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

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

(b) otherwise ~~does~~ not admit the paragraph.

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

(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 applicants:

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

(b) otherwise does not admit the paragraph.

12 ~~[Deleted]~~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 applicants:

(a) refers to and repeats paragraphs 6 to 11 ~~12~~ above; and

(b) otherwise does not admit the paragraph.

14 ~~[Deleted]~~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.~~

15 In respect of paragraph 39 of the Defence, the applicants:

(a) as regards subparagraph 39(c), admit the facts pleaded in that subparagraph, but say that those facts were true of each Affected Vehicle at the time the Affected Vehicle was supplied, including 2018 Production Change Vehicles and Affected Vehicles to which the 2020 Field Fix was applied;

(b) as regards subparagraph 39(d), admit that it was true of each Affected Vehicle at the time it was supplied that, if the Affected Vehicle were to be subjected to the High Speed Driving Pattern or the countermeasures referred to in paragraph 47(f)(ii) of the Defence:

(i) the Additional Injector would become, or had a propensity to become, blocked by carbon deposits on its tip; and

(ii) the Additional Injector would cause, or had a propensity to cause, deposits on the face of the DOC and caused white smoke;

(c) refer to and repeat paragraph 17 below; and

(d) otherwise do not admit the paragraph.

16 In respect of paragraph 41 of the Defence, the applicants:

(a) admit that during the Relevant Period, it was true of each Affected Vehicle at the time it was supplied that, if the Affected Vehicle were to be subjected to the High Speed Driving Pattern or the countermeasures referred to in paragraph 47(f)(ii) of the Defence, the Affected Vehicle would experience one or more of the consequences pleaded in paragraph 41(b);

(b) refer to and repeat paragraph 17 below; and

(c) otherwise do not admit the paragraph.

17 In respect of paragraph 52 of the Defence, the applicants:

(a) in respect of subparagraph 52(a):

(i) say that the allegations in the subparagraph are contrary to the findings in the First Reference Report and the Supplementary Reference Report, have no reasonable prospects of success and are liable to be struck out; and

Particulars

The applicants refer to paragraphs 8, 11, 38 – 39 and 50 of the First Reference Report and paragraphs 32 – 35 and 37 of the Supplementary Reference Report.

(ii) otherwise deny the subparagraph;

(b) in respect of subparagraph 52(b):

(i) admit that countermeasures released by the respondent *after* the Relevant Period, being the countermeasures identified in paragraph 50 and footnote 32 of the First Reference Report, have been effective and will continue to be effective in remedying the Vehicle Defects and Vehicle Defect Consequences to which a “D” or “C” was allocated in Annexure F of the First Reference Report;

Particulars

The applicants refer to paragraph 50 and footnote 32 of First Reference Report and paragraph 32 of the Supplementary Reference Report.

- (ii) say further that the countermeasures attempted by the respondent during the Relevant Period were ineffective to remedy the Vehicle Defect and Vehicle Defect Consequences;

Particulars

The applicants refer to paragraph 11 of the First Reference Report.

- (iii) insofar as the respondent alleges that countermeasures attempted by it during the Relevant Period were effective to remedy the Vehicle Defect and Vehicle Defect Consequences, including the 2020 Field Fix in the form in which it was administered to Affected Vehicles between January 2020 and the end of the Relevant Period, that allegation is contrary to the findings of the First Reference Report and the Supplementary Reference Report, has no reasonable prospects of success and is liable to be struck out; and

Particulars

The applicants refer to paragraphs 8, 11, 38 – 39 and 50 of the First Reference Report and paragraphs 32 – 35 and 37 of the Supplementary Reference Report.

- (iv) otherwise deny the subparagraph.

- 18 In respect of paragraph 54 of the Defence, the applicants adopts the admission in subparagraph 54(a)(ii) that the DPF Vehicles (as that term is defined at paragraph 5(a)(i) of the Defence) were subject to the statutory guarantee of acceptable quality in s. 54 of the ACL.
- 19 In respect of paragraph 58 of the Defence, the applicants adopts the admission in subparagraph 58(a)(ii) that the DPF Vehicles (as that term is defined at paragraph 5(a)(i) of the Defence) were subject to the statutory guarantee of acceptable quality in s. 54 of the ACL.
- 20 In respect of paragraph 87 of the Defence, the applicants:
- (a) says that events occurring after the Admitted Representations were made cannot constitute reasonable grounds for the making of the Admitted Representations; and
- (b) otherwise denies deny the paragraph.
- 21 In respect of paragraph 100 of the Defence, the applicants:

- (a) in respect of subparagraph 100(c):
 - (i) refer to and repeat paragraph 17 above;
 - (ii) otherwise deny the subparagraph;
- (b) in respect of subparagraph 100(d):
 - (i) admit that a warranty was given to the first applicant at the time of purchasing the Applicants' Affected Vehicle;

Particulars

Warranty and service booklet [APP.001.001.0003].

- (ii) do not know and cannot admit that the Express Warranties as defined in subparagraph 100(d) were provided with all DPF Vehicles (as that term is defined at paragraph 5(a)(i) of the Defence);
- (iii) admit that in about August 2020, the first applicant received a letter from TMCA purporting to extend the warranty offered in respect of the Applicants' Affected Vehicle for 10 years from the first delivery date of the vehicle;

Particulars

Undated letter from TMCA to the first applicant [APP.002.001.0055 at .0003].

- (iv) do not know and cannot admit that TMCA issued letters to all Group Members from on or about 31 July 2020 by which TMCA purported to extend its warranty, so as to apply for 10 years from delivery of each vehicle when new, for issues with the DPF System;
- (v) otherwise deny the subparagraph;
- (c) deny subparagraph 100(e):
- (d) in respect of subparagraph 100(f):
 - (i) refer to and repeat paragraph 17 above;
 - (ii) otherwise deny the subparagraph;
- (e) in respect of subparagraph 100(g):

- (i) refer to and repeat subparagraph 21(b)(iii) above;
 - (ii) admit that the 2020 Field Fix has not been implemented in the Applicants' Affected Vehicle;
 - (iii) otherwise deny the subparagraph;
- (f) do not know and cannot admit the allegations in subparagraph 100(h);
- (g) deny subparagraph 100(i);
- (h) in respect of subparagraph 100(j):
- (i) refer to and repeat paragraph 17 above;
 - (ii) otherwise deny the subparagraph;
- (i) in respect of subparagraph 100(k):
- (i) in respect of subparagraph 100(k)(i):
 - (A) refer to and repeat subparagraph 21(b) above;
 - (B) otherwise do not know and cannot admit the allegations in subparagraph 100(k)(i);
 - (ii) in respect of subparagraph 100(k)(ii):
 - (A) refer to and repeat paragraph 17 above;
 - (B) otherwise do not know and cannot admit the allegations in subparagraph 100(k)(ii);
 - (iii) deny subparagraph 100(k)(iii);
 - (iv) deny subparagraph 100(k)(iv);
 - (v) in further response to subparagraph 100(k), say that:
 - (A) the issue of whether, by reason of the matters in subparagraphs 100(k)(i) to 100(k)(iii) of the Defence and s 271(6) of the ACL, a Group Member is not entitled to commence an action to recover damages of a kind referred to in s 272(1)(a) of the ACL;

(1) arises only in respect of Group Members whose claims for damages of the kind described in s 272(1)(a) against the respondent are in relation to an Affected Vehicle in which the 2020 Field Fix has been implemented (2020 Field Fix Group Members); and

(2) does not arise in respect of Group Members who are not 2020 Field Fix Group Members;

(B) the response of the 2020 Field Fix Group Members to the allegations in subparagraph 100(k) relating to them will be a matter to be addressed in separate pleadings in respect of subsequent trials in respect of the claims of the 2020 Field Fix Group Members;

(C) at the initial trial, the Applicants will not seek a determination of the issue of whether 2020 Field Fix Group Members are entitled to recover damages of the kind referred to in s 272(1)(a) of the ACL from Toyota Australia;

(D) the entitlement of Group Members who are not 2020 Field Fix Group Members to recover damages of the kind referred to in s 272(1)(a) of the ACL is not affected by the allegations in subparagraph 100(k) and at the initial trial the Applicants will press for a determination of such entitlement; and

(vi) otherwise deny paragraph 100.

Date: ~~29 June 2020~~ 5 November 2021



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Signed by Charles Bannister
Lawyer for the Applicants

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.~~

The amendments to this pleading were prepared by Stephen Free SC and Patrick Meagher of Counsel.

Certificate of lawyer

I, Charles Bannister certify to the Court that, in relation to the Reply to Defence to Second Further Amended Statement of Claim filed on behalf of the Applicants, 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: 5 November 2021



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Signed by Charles Bannister
Lawyer for the Applicants