

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 12/10/2021 4:40:08 PM AEDT and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Originating Application Starting a Representative Proceeding under Part IVA Federal Court of Australia Act 1976 - Form 19 - Rule 9.32
File Number:	NSD1210/2019
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
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



Sia Lagos

Dated: 13/10/2021 10:41:02 AM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 19
Rule 9.32

**Second further Further amended originating application starting a representative proceeding
under Part IVA of the Federal Court of Australia Act 1976**

No. NSD 1210 of 2019

Federal Court of Australia
District Registry: NSW
Division: General

Kenneth John Williams and another named in the schedule Schedule 1

Applicants

Toyota Motor Corporation Australia Limited (ACN 009 686 097)

Respondent

To the Respondent

The Applicant applies for the relief set out in this second further amended application.

The Court will hear this second further amended application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:
Place: 184 Phillip Street, Sydney NSW 2000

The Court ordered that the time for serving this second further amended application be abridged to

Date:

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



Signed by an officer acting with the authority of
the District Registrar

Representative action

The Applicants bring this second further amended application as representative parties under Part IVA of the *Federal Court of Australia Act 1976 (FCA Act)*.

The Group Members to whom this proceeding relates are described in paragraph 1 of the accompanying Second Further Amended Statement of Claim (**SFASOC**), being persons who:

- (a) at any time during the period from (and including) 1 October 2015 until (and including) 23 April 2020 (**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**);
- (b) either:
 - (i) acquired the Affected Vehicle:
 - (A) from a Dealer (as defined in paragraph 5 of the SFASOC) 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 (b)(a)(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.

Details of claim

On the grounds stated in the SFASOC, the Applicants claim the following relief on their own behalf and on behalf of Group Members:



Final Relief

1. An order or orders that the Respondent pay to the Applicants and Group Members damages:
 - 1.1 pursuant to section 236 of Schedule 2 of the *Competition and Consumer Act 2010* (Cth), being the Australian Consumer Law (**ACL**), for loss and damage suffered by the Applicants and Group Members because of the Respondent's contraventions of sections 18, 21, 29 and/or 33 of the ACL; and
 - 1.2 pursuant to sections 271 and 272 of the ACL for:
 - (a) the reduction in the value of the Affected Vehicles resulting from the failure to comply with the guarantee as to acceptable quality in section 54 of the ACL; and
 - (b) other reasonably foreseeable loss or damage suffered by the Applicants and Group Members because of the failure to comply with the guarantee as to acceptable quality in section 54 of the ACL; ~~and/or~~

including, at the conclusion of the initial trial:
 - 1.3 pursuant to subsections 33Z(1)(e) of the ACL, an award or awards of damages for Group Members, being damages consisting of specified amounts or amounts worked out in such manner as the Court specifies, in respect of:
 - (a) all of the damages described in Prayer 1.2(a) above to which Group Members are entitled; and
 - (b) some of the damages described in Prayer 1.2(b) above to which Group Members are entitled, being in respect of those heads of damages that are amenable to determination on a common basis; and
 - 1.4 ~~and (f) of the FCA Act, in respect of some or all of the damages suffered by Group Members, in the alternative to 1.3, pursuant to subsection 33Z(1)(f) of the ACL, an award of damages in an aggregate amount without specifying amounts awarded in respect of individual Group Members, in respect of:~~
 - (a) all of the damages described in Prayer 1.2(a) above to which Group Members are entitled; and
 - (b) some of the damages described in Prayer 1.2(b) above to which Group Members are entitled, being in respect of those heads of damages that are amenable to determination on a common basis;



2. Interest pursuant to section 51A of the FCA Act;
3. Costs; and
4. Such other orders as the Court thinks fit.

Questions common to claims of Group Members

The questions of law or fact common to the claims of the Group Members are: set out in Schedule 2 hereto.

- ~~1. Whether the Affected Vehicles suffer from the Vehicle Defects.~~
- ~~2. Whether, by reason of the Vehicle Defects, the Affected Vehicles suffer from one or more of the Vehicle Defect Consequences.~~
- ~~3. Whether the Respondent has known, since at least February 2016, of the existence of the Vehicle Defects and the Vehicle Defect Consequences in the Affected Vehicles.~~
- ~~4. Whether the Affected Vehicles were of an acceptable quality, within the meaning of section 54 of the ACL.~~
- ~~5. Whether the Respondent made:
 - ~~5.1 the Vehicle Representations;~~
 - ~~5.2 the Future Vehicle Representations;~~
 - ~~5.3 the DPF System Representations; and~~
 - ~~5.4 the Future DPF System Representations,~~**(Alleged Representations).**~~
- ~~6. Whether the Alleged Representations were misleading or deceptive.~~
- ~~7. Whether the Respondent engaged in the Omissions Conduct.~~
- ~~8. Whether the Omissions Conduct was misleading or deceptive.~~
- ~~9. Whether, in making the Alleged Representations and engaging in the Omissions Conduct, the Respondent engaged in conduct that was, in all the circumstances, unconscionable.~~



- ~~10. Whether there has been a reduction in value of the Affected Vehicles resulting from the failure to comply with the guarantee as to acceptable quality in section 54 of the ACL.~~
- ~~11. Whether Group Members have suffered loss or damage as measured by a reduction in value resulting from the failure of the Affected Vehicles to comply with the guarantee as to acceptable quality, below whichever of the following prices is lower:~~
- ~~11.1 the price paid or payable by the Group Member for the Group Member's Affected Vehicle(s); and~~
- ~~11.2 the average retail price of the Affected Vehicle at the time of supply.~~
- ~~12. Whether, by reason of the Vehicle Defects, the Affected Vehicles consumed fuel in excess of that which the Affected Vehicles would have consumed, but for the Vehicle Defects.~~
- ~~13. Whether, by reason of such excess fuel consumption, the Applicants and Group Members have suffered loss, and if so, what is the appropriate measure of loss.~~

Applicants' address

The Applicants' address for service is:

Place: Bannister Law Class Actions

Level 1, 107 Pitt Street

Sydney NSW 2000

Email: charles@bl.com.au

The Applicants' address is 14 Sycamore St, Redland Bay QLD 4165



Service on the Respondent

It is intended to serve this second further amended application on the Respondent.

Date: 12 October 2021 ~~20 January 2020~~

Signed by Charles Bannister

Lawyer for the Applicants



Schedule 1

No. NSD 1210 of 2019

Federal Court of Australia

District Registry: NSW

Division: General

Applicants

Second Applicant: Direct Claim Services Qld Pty Limited (ACN 167 519 968)

Date: 12 October 2021 ~~20 January 2021~~



Schedule 2

Questions common to claims of Group Members

Characteristics of Affected Vehicles

1. Throughout the Relevant Period, was it the case that:
 - 1.1. the DPF System in the Affected Vehicles was not designed to function effectively during all reasonably expected conditions of normal operation and use in the Australian market, including the High Speed Driving Pattern;
 - 1.2. in the event that the Affected Vehicles were exposed to (i) a High Speed Driving Pattern or (ii) the 2016/2017 Countermeasures, the DPF System was ineffective in preventing the formation of deposits on the DOC surface or coking within the DOC, which in turn prevented the DPF from regenerating effectively;
 - 1.3. if the Affected Vehicles were exposed to the High Speed Driving Pattern and/or the 2016/2017 Countermeasures, the Affected Vehicles experienced, or had a propensity to experience, the following mechanisms and physical manifestations of the “core defect” described above in Questions 1.1 and 1.2:
 - 1.3.1. the additional injector becomes blocked by deposits on its tip;
 - 1.3.2. fuel injected by the Additional Injector leads to deposits forming on the face of the DOC, or coking within the DOC;
 - 1.3.3. the DOC becomes blocked;
 - 1.3.4. Regeneration events fail to remove sufficient particulate matter from the DPF to prevent the DPF from becoming or remaining ‘full’ or blocked;
 - 1.3.5. the DPF System fails to prevent the DPF from becoming ‘full’ or blocked;
 - 1.3.6. the DOC does not function effectively;
 - 1.3.7. the catalytic efficiency of the DOC is diminished;
 - 1.3.8. the exhaust in the DPF does not reach a sufficiently high temperature to effect Thermal Oxidation;
 - 1.4. if the Affected Vehicles were exposed to the High Speed Driving Pattern and/or the 2016/2017 Countermeasures and experienced one or more of the mechanisms and



physical manifestations of the “core defect” identified in Question 1.3, those Affected Vehicles suffered, or had a propensity to suffer, from one or more of the following consequences:

- 1.4.1. the DOC becomes damaged;
- 1.4.2. excessive white smoke is emitted from the vehicle’s exhaust during and immediately following regeneration;
- 1.4.3. the DPF becomes partially or completely blocked;
- 1.4.4. increased fuel consumption/decreased fuel economy;
- 1.4.5. foul-smelling exhaust is emitted during and immediately following regeneration;
- 1.4.6. the vehicle 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;
- 1.4.7. the vehicle must be inspected, serviced and/or repaired more regularly than would otherwise be required;
- 1.4.8. the ECM must be reprogrammed more often than would otherwise be required; or
- 1.4.9. DPF Notifications are displayed on an excessive number of occasions and/or for an excessive period of time;
- 1.5. the Affected Vehicles were not free from defects by reason of the matters the subject of:
 - 1.5.1. Question 1.1;
 - 1.5.2. Question 1.2;
 - 1.5.3. Question 1.3;
 - 1.5.4. Question 1.4;
 - 1.5.5. some combination of the above;
- 1.6. insofar as the Affected Vehicles were not free from defects by reason of the matters set out in Question 1.5, the defects were not remedied;



- 1.7. Affected Vehicles that did not have a DPF Switch, which was not installed in any Affected Vehicles prior to the end of the 2017 Model Year, were not free from defects for the additional reason that Manual Regeneration could not be performed?
2. Were the Affected Vehicles subject to the statutory guarantee as to acceptable quality in section 54(1) of the *Australian Consumer Law*?
3. Were the Affected Vehicles of acceptable quality within the meaning of section 54(2) of the *Australian Consumer Law*, by reason of the matters the subject of:

 - 3.1. Question 1.1;
 - 3.2. Question 1.2;
 - 3.3. Question 1.3;
 - 3.4. Question 1.4;
 - 3.5. Question 1.5;
 - 3.6. Question 1.6;
 - 3.7. Question 1.7 (in the case of Affected Vehicles without a DPF Switch);
 - 3.8. some combination of the above?
4. Insofar as the Affected Vehicles experience any of the defects or defect consequences described in Question 1.1 to Question 1.4, was the 2020 Field Fix referred to in Defence [47(i)] effective in, and will it continue to be effective in, remedying all of the defects or defect consequences described in Question 1.1 to Question 1.4?

Vehicle Representations

5. During the Relevant Period, did Toyota Australia represent to the public at large that the Affected Vehicles:

 - 5.1. were, or were part of model lines that were, in their design and manufacturing:

 - 5.1.1. not defective;
 - 5.1.2. of good quality;
 - 5.1.3. reliable;



- 5.1.4. durable;
- 5.1.5. fit for purpose; and
- 5.1.6. suitable for use in any driving environment;
- 5.2. did not, or were part of model lines that did not, require unusual or abnormal maintenance;
- 5.3. provided, or were part of model lines that provided, a driving and/or passenger experience that was:
 - 5.3.1. comfortable;
 - 5.3.2. convenient; and
 - 5.3.3. consistent regardless of driving environment, including urban, off-road and extra-urban environments?
- 6. Was each Vehicle Representation made continuously by Toyota Australia throughout the Relevant Period?
- 7. Did Toyota Australia fail to correct or qualify the Vehicle Representations at any time during the Relevant Period?
- 8. Were the Vehicle Representations:
 - 8.1. misleading or deceptive, or likely to mislead or deceive, in contravention of section 18 of the Australian Consumer Law;
 - 8.2. false and misleading representations in contravention of subsections 29(1)(a) or 29(1)(g) of the Australian Consumer Law;
 - 8.3. 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 *Australian Consumer Law*?

Future Vehicle Representations

- 9. During the Relevant Period, did Toyota Australia represent to the public at large that the Affected Vehicles:
 - 9.1. would be, or were part of model lines that would be:
 - 9.1.1. not defective;



- 9.1.2. of good quality;
 - 9.1.3. reliable;
 - 9.1.4. durable;
 - 9.1.5. fit for purpose; and
 - 9.1.6. suitable for use in any driving environment?
- 9.2. would not, or were part of model lines that would not, require unusual or abnormal maintenance?
- 9.3. would provide, or were part of model lines that would provide, a driving and/or passenger experience that was:
- 9.3.1. comfortable;
 - 9.3.2. convenient; and
 - 9.3.3. consistent regardless of driving environment, including urban, off-road and extra-urban environments?
10. Was each Future Vehicle Representation made continuously by Toyota Australia throughout the Relevant Period?
11. Did Toyota Australia fail to correct or qualify the Future Vehicle Representations at any time during the Relevant Period?
12. Were the Future Vehicle Representations:
- 12.1. misleading or deceptive, or likely to mislead or deceive, in contravention of section 18 of the Australian Consumer Law;
 - 12.2. false and misleading representations in contravention of subsections 29(1)(a) or 29(1)(g) of the Australian Consumer Law;
 - 12.3. 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 Australian Consumer Law?



DPF System Representations

13. During the Relevant Period, did Toyota Australia represent to the public at large that the Affected Vehicles contained, or were part of model lines that contained, a DPF System that, in its design and manufacturing:
 - 13.1. was not defective;
 - 13.2. was of good quality;
 - 13.3. was reliable;
 - 13.4. was durable;
 - 13.5. was fit for purpose;
 - 13.6. did not have a propensity to fail;
 - 13.7. did not require unusual or abnormal maintenance;
 - 13.8. completed a regeneration cycle with sufficient regularity to prevent the DPF from becoming partially or completely blocked;
 - 13.9. prevented the DPF from becoming partially or completely blocked; and/or
 - 13.10. was effective at removing sufficient particulate matter from the DPF to prevent the DPF from becoming or remaining partially or completely blocked?
14. Was each DPF System Representation made continuously by Toyota Australia throughout the Relevant Period?
15. Did Toyota Australia fail to correct or qualify the DPF System Representations at any time during the Relevant Period?
16. Were the DPF System Representations:
 - 16.1. misleading or deceptive, or likely to mislead or deceive, in contravention of section 18 of the Australian Consumer Law;
 - 16.2. false and misleading representations in contravention of subsections 29(1)(a) or 29(1)(g) of the Australian Consumer Law;
 - 16.3. 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 Australian Consumer Law?



Future DPF System Representations

17. During the Relevant Period, did Toyota Australia represent to the public at large that the Affected Vehicles contained, or were part of model lines that contained, a DPF System that:
- 17.1. would not be defective;
 - 17.2. would be of good quality;
 - 17.3. would be reliable;
 - 17.4. would be durable;
 - 17.5. would be fit for purpose;
 - 17.6. would not have a propensity to fail;
 - 17.7. would not require unusual or abnormal maintenance;
 - 17.8. would complete a regeneration cycle with sufficient regularity to prevent the DPF from becoming partially or completely blocked;
 - 17.9. would prevent the DPF from become partially or completely blocked; and/or
 - 17.10. would be effective at removing sufficient particulate matter from the DPF to prevent the DPF from becoming or remaining partially or completely blocked?
18. Was each Future DPF System Representation made continuously by Toyota Australia throughout the Relevant Period?
19. Did Toyota Australia fail to correct or qualify the Future DPF System Representations at any time during the Relevant Period?
20. Were the Future DPF System Representations:
- 20.1. misleading or deceptive, or likely to mislead or deceive, in contravention of section 18 of the *Australian Consumer Law*;
 - 20.2. false and misleading representations in contravention of subsections 29(1)(a) or 29(1)(g) of the *Australian Consumer Law*;
 - 20.3. 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 *Australian Consumer Law*?



Toyota Australia's Knowledge

21. Did Toyota Australia know, from at least February 2016, of the existence of all, or alternatively at least some of, the matters the subject of:

21.1. Question 1.1;

21.2. Question 1.2;

21.3. Question 1.3;

21.4. Question 1.4;

21.5. Question 1.5;

21.6. Question 1.7?

22. Did Toyota Australia know, from at least February 2016 through to the end of the Relevant Period, the matters the subject of Question 1.6?

Omissions Conduct

23. During the Relevant Period, did Toyota Australia fail to disclose, or disclose adequately, to prospective purchasers of, or persons acquiring, an Affected Vehicle, or members of the public, the matters the subject of:

23.1. Question 1.1;

23.2. Question 1.2;

23.3. Question 1.3;

23.4. Question 1.4;

23.5. Question 1.5;

23.6. Question 1.6;

23.7. Question 1.7;

23.8. Question 21;

23.9. Question 22?

24. Was the Omissions Conduct:



24.1. misleading or deceptive, or likely to mislead or deceive, in contravention of section 18 of the *Australian Consumer Law*;

24.2. 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 *Australian Consumer Law*?

Cumulative Misleading Conduct

25. Were the Vehicle Representations, the Future Vehicle Representations, the DPF System Representations, the Future DPF System Representations and the Omissions Conduct, taken together (the **Misleading Conduct**), conduct that was:

25.1. misleading or deceptive, or likely to mislead or deceive, in contravention of section 18 of the *Australian Consumer Law*;

25.2. 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 *Australian Consumer Law*?

Unconscionable Conduct

26. Was the Misleading Conduct, in all the circumstances, unconscionable, in contravention of section 21 of the *Australian Consumer Law*?

Damages under 272(1)(a) of the *Australian Consumer Law*

27. Are Group Members entitled to recover from Toyota Australia any damages of the kind described in section 272(1)(a) of the *Australian Consumer Law*?

28. In respect of any damages of the kind described in section 272(1)(a) of the *Australian Consumer Law* that Group Members are entitled to recover from Toyota Australia, is it appropriate to:

28.1. make an award of damages for Group Members pursuant to section 33Z(1)(e) of the *Federal Court of Australia Act 1976* (Cth); or

28.2. award damages in an aggregate amount pursuant to section 33Z(1)(f) of the *Federal Court of Australia Act 1976* (Cth)?

29. If it is appropriate to make an award of damages pursuant to sections 33Z(1)(e) or 33Z(1)(f) of the *Federal Court of Australia Act 1976* (Cth) in respect of any damages of the kind described in section 272(1)(a) of the *Australian Consumer Law* that Group Members may be entitled to recover from Toyota Australia:



29.1. what is the appropriate form of the order awarding damages;

29.2. what is the appropriate quantum of damages to be awarded?

Damages under 272(1)(b) of the Australian Consumer Law

30. Are Group Members entitled to recover from Toyota Australia damages pursuant to section 272(1)(b) of the Australian Consumer Law in respect of loss or damage arising from any excess taxes and/or financing costs they incurred by reason of the Affected Vehicles failing to comply with the guarantee under section 54 of the Australian Consumer Law?

31. In respect of any damages of the kind described in Question 30 that Group Members are entitled to recover from Toyota Australia, is it appropriate to:

31.1. make an award of damages for Group Members pursuant to section 33Z(1)(e) of the Federal Court of Australia Act 1976 (Cth); or

31.2. award damages in an aggregate amount pursuant to section 33Z(1)(f) of the Federal Court of Australia Act 1976 (Cth)?

32. If it is appropriate to make an award of damages pursuant to sections 33Z(1)(e) or 33Z(1)(f) of the Federal Court of Australia Act 1976 (Cth) in respect of any damages of the kind described in Question 30 that Group Members are entitled to recover from Toyota Australia:

32.1. what is the appropriate form of the order awarding damages;

32.2. what is the appropriate quantum of damages to be awarded?