

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 10/06/2022 1:15:39 PM AEST 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:	Notice of Appeal (Fee for Leave Not Already Paid) - Form 122 - Rule 36.01(1)(b)(c)
File Number:	NSD462/2022
File Title:	TOYOTA MOTOR CORPORATION AUSTRALIA LIMITED (ACN 009 686 097) v KENNETH JOHN WILLIAMS & ANOR
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



A handwritten signature in blue ink that reads 'Sia Lagos'.

Dated: 20/06/2022 3:24:43 PM AEST

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 122
Rules 36.01(1)(b); 36.01(1)(c)

Notice of appeal

No. _____ of 20____

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

On appeal from the Federal Court

Toyota Motor Corporation Australia Limited (ACN 009 686 097)

Appellant

Kenneth John Williams and another named in the Schedule

Respondents

To the Respondent

The Appellant appeals from the judgments as set out in this notice of appeal.

1. The papers in the appeal will be settled and prepared in accordance with the Federal Court Rules Division 36.5.
2. The Court will 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: Federal Court of Australia, Sydney

Date:

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

Filed on behalf of (name & role of party) Toyota Motor Corporation Australia Limited (Appellant)

Prepared by (name of person/lawyer) Andrew Morrison

Law firm (if applicable) Clayton Utz

Tel (03) 9286 6000 Fax (03) 9286 8488

Email amorrison@claytonutz.com

Address for service Level 18, 333 Collins Street, Melbourne VIC 3000

(include state and postcode)



The Appellant appeals from the judgments delivered on 26 October 2021 and 7 April 2022 and the orders of the Federal Court made on 26 October 2021 and 16 May 2022 at Sydney.

Grounds of appeal

Liability

1. The learned TJ erred in finding that he could determine whether section 54 of the Australian Consumer Law (**ACL**) had been breached with respect to each and every Group Member on a common basis: J[173], [189], [192], [208]-[212]. The TJ should have found that whether section 54 has been contravened in the context of the supply of a vehicle is not capable of being determined as a common question because it depends upon the circumstances of supply specific to each Group Member.
2. The learned TJ erred in finding that there is no distinction between a defect in the DPF System¹ and a defect in the vehicle: J[80]-[86]. In so doing, he:
 - (a) erred by failing to give sufficient weight to the Referee's finding that it was only the *DPF System* in Relevant Vehicles that was defective;
 - (b) erred by giving weight to the fact that there had been "*tens of thousands of customer complaints*" (J[85]):
 - (i) in circumstances where there was no evidence of whether those complaints arose from the Core Defect or not; and
 - (ii) without regard to the hearsay nature of the evidence of customer complaints such that there was no opportunity for the Appellant to test that evidence;
 - (c) erred by giving weight (at J[84]-[85]) to Mr Kenneth John Williams' evidence about his own experience with his own vehicle. The TJ ought not have inferred that Mr Williams' experience was shared by other vehicle owners or representative of their experience.
3. It follows from ground 2 that the learned TJ erred in concluding that the Vehicle Representations and Future Vehicle Representations were misleading or deceptive in contravention of section 18 of the ACL, false and misleading in contravention of subsections 29(1)(a) or 29(1)(g), and liable to mislead the public as to the nature,

¹ Capitalised terms have the meaning given to them in the Dictionary at Schedule 1 of the orders made on 16 May 2022.



characteristics, and/or suitability for purpose of the Relevant Vehicles in contravention of section 33 of the ACL: J[233], [234], [243] .

Damages

4. The learned TJ incorrectly applied the statutory test under sections 271(1) and 272(1)(a) of the ACL by finding that damages for any reduction in value must be assessed by reference to the time of supply, rather than by reference to the date on which any loss crystallises (including by reference to any later events): J[299]-[300], [309]-[326]. That was an error because:
- (a) section 272(1)(a) of the ACL requires an assessment of damages suffered by an affected person;
 - (b) sections 271(1) and 272(1) of the ACL, which create the cause of action, do not provide that damages for reduction in value must be assessed as at the date of supply;
 - (c) section 271(6) of the ACL expressly contemplates that events subsequent to the supply of the goods must be taken into account in determining whether any cause of action for damages for reduction in value can be maintained;
 - (d) there is nothing in the text of section 271(1) or 272(1) of the ACL which limits the post-supply events that can be considered in determining damages for reduction in value to the events in section 271(6) of the ACL;
 - (e) the statutory text and purpose of section 272(1)(a) of the ACL does not require that damages for reduction in value be assessed at the time of supply;
 - (f) insofar as sections 272(1)(a)(i) and (ii) refer to prices applying at the time of supply, those prices operate as a reference point for the determination of damages but do not require that damages for reduction in value be assessed at the time of supply;
 - (g) the TJ's approach is inconsistent with the compensatory principle: J[422]; and
 - (h) without an analysis of whether any loss has crystallised, it is not possible to determine whether the affected person has suffered damage, including by taking into account matters such as the existence of the 2020 Field Fix, whether and to what extent and when the Defect Consequences manifested in a Relevant Vehicle, the resale value of the Relevant Vehicles compared to comparable vehicles and



whether Group Members had sold their vehicles and the prices achieved for any such sales.

The learned TJ should have found that damages for any reduction in value under sections 271(1) and 272(1)(a) of the ACL must be assessed by reference to the date on which any loss crystallises.

5. The learned TJ incorrectly applied the statutory test under section 272(1)(a) of the ACL by finding that the hypothetical reasonable purchaser's decrease in willingness to pay is a "useful indicator" in ascertaining reduction in value without reference to the willingness of the supplier to sell and the market price that would prevail in the "but for" world (where the defect is disclosed): J[274]-[276], [289]-290, [293]-[297]. That was an error because that approach does not take into account the alternative bargain that would be struck between seller and hypothetical reasonable purchaser, which properly reflects the objective concept of value to be applied under section 272(1)(a).
6. The learned TJ incorrectly applied the statutory test under section 272(1)(a) of the ACL by finding that the cost of repairs, in this case, was a *prima facie* measure of reduction in value: J[291]-[292], [297]. That was an error because there was no necessary relationship between the cost of repairs and reduction in value.
7. The learned TJ erred in finding as a fact that market data cannot be relied upon in assessing whether, and if so the extent to which, there had been damages for a reduction in value under section 272(1)(a) because of the supposed limitations of that data: J[90], [92], [114], [117], [333]-[337]. The errors made by the learned TJ in this respect were as follows:
 - (a) The learned TJ found that ignorance of the Core Defect and Defect Consequences was profound and widespread and that the market was not informed of the Defect and Defect Consequences (J[117]). That was an error because there was sufficient evidence before the TJ to demonstrate increasing awareness in the market of the Defect and Defect Consequences, over time.
 - (b) The learned TJ concluded that a "critical premise in TMCA's reasoning" was that the market became fully informed of the Core Defect and Defect Consequences (J[90], [92]). That was an error because:
 - (i) the fact that information in the market was not complete did not mean that the secondary market data analysed by Mr Stockton could be ignored; and



- (ii) a fully informed market was not a “critical premise” in TMCA’s reliance, at trial, on that secondary market data.
- (c) The learned TJ erred in finding that the secondary market data analysed by Mr Stockton could not be relied upon in assessing whether, and if so the extent to which, there had been a reduction in value under section 272(1)(a): J[333]-[337]. The TJ ought to have considered the trends in that market data as relevant to the assessment of whether there had been any reduction in value in the Relevant Vehicles.
8. Because the learned TJ did not assess damages by reference to the date on which any loss crystallised (as referred to in ground 4), the learned TJ further erred in not taking into account the following evidence demonstrating that affected persons had not suffered any damage:
- (a) The secondary market data analysed by Mr Stockton;
- (b) The evidence of Mr Cuthbert and Mr O’Mara that there was no quantifiable reduction in value of the Second Respondent’s vehicle attributable to the defect, when assessed at the date of the trial;
- (c) The Referee’s finding that the 2020 Field Fix was effective.
9. In light of the errors in grounds 4, 7 and 8, the TJ erred by failing to take into account matters relevant to the assessment of damages for any reduction in value in the Relevant Vehicles including the secondary market data analysed by Mr Stockton, the existence of the 2020 Field Fix, whether and to what extent and when the Defect Consequences manifested in a Relevant Vehicle, the resale value of the Relevant Vehicles compared to comparable vehicles and whether Group Members had sold their vehicles and the prices achieved for any such sales. In light of those matters, the TJ should have concluded that the Respondents had not proved that Group Members suffered damages for reduction in value of the Relevant Vehicles.
10. In considering whether the Second Respondent had proved a reduction in value of 17.5% across all Relevant Vehicles (as part of the assessment of damages for any reduction in value), the learned TJ ought not have given any weight to or, alternatively, gave excessive weight to:



- (a) the evidence of Mr Graeme Cuthbert indicating a range of 23%-27.5% with respect to the Relevant Prado of the Second Respondent: J[344(1)], [356], [359], [392]-[393]. The TJ ought to have:
- (i) given no weight, or minimal weight, to Mr Cuthbert's evidence as it applied to the Second Respondent's case or to Relevant Vehicles generally; or
 - (ii) alternatively, limited his findings arising from Mr Cuthbert's evidence to the Second Respondent's case alone and not applied those findings to Relevant Vehicles generally;
- (b) the evidence of Mr Stefan Boedeker, based on a survey conducted by Mr Boedeker, indicating a reduction in value range of 20-30%: J[344(2)], [377], [379], [392]-[393]. The TJ ought to have:
- (i) rejected Mr Boedeker's evidence because the results of the survey upon which it was based were entirely unreliable; or
 - (ii) alternatively, subjected the figure provided by Mr Boedeker for reduction in value to a much more significant discount, in light of the unreliability of that evidence;
- (c) the evidence of Mr Edward Stockton which the TJ found indicated a "minimum" reduction of 2.9-7.3% based on the cost to the Appellant of repairing the DPF defect: J[344(3)], [390], [392]-[393]. The TJ ought to have disregarded that evidence, in coming to conclusions about reduction in value, because there was no necessary relationship between the cost of repairs and reduction in value.
11. In light of the matters set out in ground 10, there was no probative evidence before the TJ which would lead his Honour to conclude that a reduction in value of 17.5% should be applied across all Relevant Vehicles: J[393]. The TJ therefore erred in concluding that the Respondents had proved that all Relevant Vehicles were reduced in value by 17.5% and should have concluded that the Respondents had not proved that Group Members suffered damages for reduction in value of the Relevant Vehicles.
12. In light of the matters set out in grounds 10 and 11, the TJ erred in finding that the Relevant Prado was reduced in value by 17.5% and the Second Respondent was thereby entitled to damages for reduction in value of \$7,474.59: J[510], [513].



13. In the alternative to grounds 10 and 11, if the Appeal is successful in respect of Grounds 10(a) and 10(b) but not 10(c), then the evidence of Mr Stockton could, at its highest, support a conclusion that Relevant Vehicles were reduced in value by somewhere between 2.9-7.3% and the TJ erred in determining that the reduction in value was 17.5%.
14. The learned TJ erred in concluding that there was sufficient evidence for the Court to make an award of aggregate damages under section 33Z(1)(e) of the *Federal Court of Australia Act 1976* (Cth) in respect of Entire Period Relevant Vehicles (other than 2020 Field Fix Relevant Vehicles and Post Relevant Period Replaced Vehicles): J[446], Order 2 made on 16 May 2022. By reason of the matters set out in grounds 7-11, there was insufficient evidence to so find.
15. The learned TJ erred in concluding that Group Members other than Group Members who acquired Entire Period Relevant Vehicles are entitled to damages in respect of excess GST: J[473]-[474], Order 4 made on 16 May 2022. By reason of the matters in grounds 4 to 13, the TJ should not have found that there had been any reduction in value under section 272(1)(a), and consequently no excess GST was paid.

Separate questions

16. The learned TJ erred in finding that on the proper construction of section 33Z of the *Federal Court of Australia Act 1976* (Cth), the Court had power at the conclusion of the initial trial to award aggregate damages under sections 33Z(1)(e) in respect of part (but not all) of the damages claimed on behalf of Group Members. The TJ should have found that this was not permitted by section 33Z: Order 1 made on 26 October 2021; [69], [73], [76] of the judgment delivered on 26 October 2021; J[419].

Orders sought

1. The appeal be allowed.
2. Set aside orders 1 to 6, 18 and 19 made on 16 May 2022 and order 3 made on 26 October 2021.
3. Stay the operation of the Reference that is set out in orders 7-13 of the orders made on 16 May 2022.
4. Set aside the answers of the trial judge in the orders of 16 May 2022 to the common questions and in lieu thereof, answer them in accordance with the amended answers in **Attachment A**.



5. Order 1 made on 26 October 2021 be varied as follows:

The separate questions identified by the order made on 8 October 2021 (as hereby varied in the terms set out below) be answered as follows:

- (a) Whether upon a proper construction of s 33Z of the *Federal Court of Australia Act 1976* (Cth), at the conclusion of the initial trial, if the Court is satisfied that it is able to determine, on a common basis, that group members are entitled to an award of damages in respect of the heads of damage that are in issue at the initial trial, does the Court have power to make an award of damages for group members in respect of those heads of damage?

Answer: ~~Yes.~~ No.

- (b) If the answer to question 1 is “no”, should prayers 1.3 and 1.4 of the second further amended originating application be dismissed?

Answer: ~~Does not arise.~~ Yes.

6. The Respondent pay the Appellant’s costs of this appeal and the costs of and incidental to the hearing of the separate questions and initial trial.
7. The matter be remitted to the trial judge to make any further orders for the conduct of the proceeding.

Appellant’s address

The Appellant’s address for service is:

Place: Clayton Utz, Level 18, 333 Collins Street, Melbourne VIC 3000.

Email: amorrison@claytonutz.com

The Appellant’s address is 155 Bertie Street, Port Melbourne VIC 3207.



Service on the Respondent

It is intended to serve this application on all Respondents.

Date: 10 June 2022

A handwritten signature in blue ink, appearing to read 'Andrew Morrison', written over a horizontal dotted line.

Signed by Andrew Morrison
Lawyer for the Appellant



Schedule

No. of 20

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

Respondents

Second Respondent: Direct Claim Services Qld Pty Ltd (ACN 167 519 968)

Date: 10 June 2022



Attachment A – amended answers to common questions

Characteristics of the Relevant Vehicles

Question 1(d) – Throughout the Relevant Period, was it the case that: if a Relevant Vehicle was exposed to the High Speed Driving Pattern, the Relevant Vehicles would experience one or more of the following consequences by reason of the Core Defect:

- 1.4.1 damage to the DOC;
- 1.4.2 the flow of unoxidized fuel through the DPF and the emission of white smoke from the vehicle's exhaust during and immediately following regeneration;
- 1.4.3 the emission of excessive white smoke and foul-smelling exhaust from the vehicle's exhaust during regeneration;
- 1.4.4 partial or complete blockage of the DPF;
- 1.4.5 the emission of foul-smelling exhaust from the exhaust pipe when the engine was on during and immediately following Automatic Regeneration;
- 1.4.6 the need to have the Relevant Vehicle 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 need to have the Relevant Vehicle inspected, serviced and/or repaired more regularly than would be required absent the Core Defect;
- 1.4.8 the need to program the ECM more often than would be required absent the Core Defect; or
- 1.4.9 the display of DPF Notifications on an excessive number of occasions and/or for an excessive period of time;
- 1.4.10 blockage of the Additional Injector due to carbon deposits on its tip;
- 1.4.11 the Additional Injector causes deposits forming on the face of the DOC, causing white smoke; and
- 1.4.12 an increase in fuel consumption and decrease in fuel economy.



A: No. Throughout the Relevant Period, if a Relevant Vehicle was exposed to the High Speed Driving Pattern, one or more of the consequences listed would follow in many, but not all, of the Relevant Vehicles: First Reference Report [55]. Yes: Reasons, [59].

Question 1(e) - Throughout the Relevant Period, was it the case that: by reason of the fact that the Core Defect was present in each Relevant Vehicle at the time it was supplied, each Relevant Vehicle had a propensity to experience one or more of the Defect Consequences;

A: No. Yes: Reasons, [62]-[63].

Question 3 – Can the question of whether the Relevant Vehicles were not of acceptable quality within the meaning of s 54(2) of the *Australian Consumer Law* be determined on a common basis?

A: No. Yes: Reasons, [212].

Question 4 – Were the Relevant Vehicles not of acceptable quality within the meaning of s 54(2) of the *Australian Consumer Law*?

A: Cannot be answered on a common basis. Yes, the Relevant Vehicles were not of acceptable quality within the meaning of s 54(2) of the ACL: Reasons, [173]-[213].

Vehicle Representations

Question 9 – Were the Vehicle Representations:

- (a) misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the *Australian Consumer Law*;
- (b) false and misleading representations in contravention of ss 29(1)(a) or 29(1)(g) of the *Australian Consumer Law*;
- (c) liable to mislead the public as to the nature, characteristics, and/or suitability for purpose of the Relevant Vehicles, in contravention of s 33 of the *Australian Consumer Law*?

A: No. Yes: Reasons, [233].



Future Vehicle Representations

Question 12 – Did TMCA have reasonable grounds for making the Future Vehicle Representations?

A: Yes. ~~No: Reasons, [243].~~

Question 14 – Were the Future Vehicle Representations:

- (a) misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the *Australian Consumer Law*;
- (b) false and misleading representations in contravention of ss 29(1)(a) or 29(1)(g) of the *Australian Consumer Law*;
- (c) liable to mislead the public as to the nature, characteristics, and/or suitability for purpose of the Relevant Vehicles, in contravention of s 33 of the *Australian Consumer Law*?

A: No. ~~Yes: Reasons, [223]-[225], [234], [243].~~

Damages under ACL s 272(1)(a)

Question 26 – If the Relevant Vehicles failed to comply with the guarantee of acceptable quality under s 54 of the *Australian Consumer Law*, has that failure resulted in a reduction in the value of those vehicles?

A: No. ~~Yes, the failure to comply with the guarantee of acceptable quality resulted in a reduction in value of all Relevant Vehicles of 17.5%, meaning that their true value was 82.5% of their Average Retail Price: Reasons, [330]-[331], [391], [393]-[394], [446(1)].~~

Question 27 – Are Group Members entitled to recover from TMCA any damages of the kind described in s 272(1)(a) of the *Australian Consumer Law* (**Reduction in Value Damages**)?

A: No. ~~Yes, Group Members who have not opted out are entitled to recover Reduction in Value Damages in respect of Entire Period Relevant Vehicles (other than 2020 Field Fix Relevant Vehicles and Post Relevant Period Replaced Vehicles) from TMCA. It is not possible to determine how such damages should be assessed or distributed in respect of Partial Period Relevant Vehicles except on an individualised basis, having regard to the individual circumstances of owners of Partial Period Relevant Vehicles:~~



~~Reasons, [330]-[331], [391], [393]-[394], [427], [432], [436], [446(1)]. The entitlement (if any) of Group Members to Reduction in Value Damages in respect of 2020 Field Fix Relevant Vehicles and Post Relevant Period Replaced Vehicles is yet to be determined: Reasons, [163].~~

Question 28(a) – In respect of any Reduction in Value Damages that Group Members are entitled to recover from TMCA, is it appropriate to: make an award of damages for Group Members pursuant to s 33Z(1)(e) of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**);

~~A: No. Yes, it is appropriate to make an award of Reduction in Value Damages to Group Members in respect of Entire Period Relevant Vehicles (other than 2020 Field Fix Relevant Vehicles and Post Relevant Period Replaced Vehicles) pursuant to s 33Z(1)(e) of the FCAA: Reasons, [446]—[447].~~

Question 29 – If it is appropriate to make an award of damages pursuant to ss 33Z(1)(e) or 33Z(1)(f) of the FCAA in respect of any damages of the kind described in s 272(1)(a) of the *Australian Consumer Law* that Group Members may be entitled to recover from TMCA:

- (a) what is the appropriate form of the order awarding damages;
- (b) what is the appropriate quantum of damages to be awarded?

~~A: Does not arise. The following formula or methodology is to be applied to determine the ‘Reduction in Value Damages’ awarded pursuant to s 33Z(1)(e) in respect of Entire Period Relevant Vehicles (other than 2020 Field Fix Relevant Vehicles and Post Relevant Period Replaced Vehicles):~~

~~(a) the true value of the Relevant Vehicle is to be determined by applying a ‘reduction in value percentage’ of 17.5% to the Average Retail Price for that model line and build year of Relevant Vehicle, meaning that each of the Relevant Vehicles has a true value, for the purposes of s 272(1)(a), that is 82.5% of the Average Retail Price for that model line and build year of Relevant Vehicle;~~

~~(b) for each Relevant Vehicle, the lower of: (i) the Price Paid and (ii) the Average Retail Price for that that model line and build year of Relevant Vehicle is to be determined, with the lower of those two prices being the applicable comparator for the purposes of applying this formula; and~~



~~(c) for each Relevant Vehicle, the amount recoverable under s 272(1)(a) by the relevant Group Member in respect of the vehicle is the amount (if any) by which the applicable comparator price in respect of the vehicle (as determined in (b) above) exceeds the true value of the vehicle (as calculated in (a) above), reduced by an amount equal to any payment(s) made by the respondent to the Group Member in respect of that vehicle prior to the date of these orders for the reduction in value of the vehicle and/or for the difference between the price the Group Member paid to acquire the vehicle and the price at which they traded it in to the respondent or sold it, as part of a redress program conducted by the respondent: Reasons, [405]-[408], [446].~~

Damages under ACL s 272(1)(b)

Question 30 – If the Relevant Vehicles failed to comply with the guarantee of acceptable quality under s 54 of the *Australian Consumer Law*, have Group Members suffered loss or damage arising from any excess GST they incurred because of that failure?

A: No. Yes: Reasons, [465]-[474], [492].

Question 31 – Are Group Members entitled to recover from TMCA damages pursuant to s 272(1)(b) of the *Australian Consumer Law* in respect of loss or damage arising from any excess GST they incurred because of the Relevant Vehicles failing to comply with the guarantee under s 54 of the *Australian Consumer Law* (**GST Damages**)?

A: No. Yes, Group Members who have not opted out are entitled to recover excess GST calculated as 10% of the Reduction in Value Damages in respect of any Entire Period Relevant Vehicle (including 2020 Field Fix Relevant Vehicles and Post Relevant Period Replaced Vehicles falling within that description). It is not possible to determine how such damages should be assessed or distributed in respect of Partial Period Relevant Vehicles except on an individualised basis: Reasons, [492]-[493].

Question 32(a) – In respect of any GST Damages that Group Members are entitled to recover from TMCA, is it appropriate to: make an award of damages for Group Members pursuant to s 33Z(1)(e) of the FCAA

A: No. Yes, it is appropriate to award GST Damages to Group Members who have not opted out in respect of Entire Period Relevant Vehicles (including 2020 Field Fix Relevant Vehicles and Post Relevant Period Replaced Vehicles falling within that description) pursuant to s 33Z(1)(e) of the FCAA: Reasons, [493].



Question 33 – If it is appropriate to make an award of damages pursuant to ss 33Z(1)(e) or 33Z(1)(f) of the FCAA in respect of any GST Damages that Group Members are entitled to recover from TMCA:

- (a) what is the appropriate form of the order awarding damages;
- (b) what is the appropriate quantum of damages to be awarded?

~~A: Does not arise. The following formula or methodology is to be applied to determine the GST Damages awarded pursuant to s 33Z(1)(e) in respect of Entire Period Relevant Vehicles (including the 2020 Field Fix Relevant Vehicles and Post Relevant Period Replaced Vehicles):~~

~~(a) determine the amount of Reduction in Value Damages recoverable by the relevant Group Member in respect of the vehicle (or, in respect of 2020 Field Fix Relevant Vehicles and Post Relevant Period Replaced Vehicles, the amount of Reduction in Value Damages that would be recoverable by the Group Member in respect of the vehicle had an entitlement to such damages been established under this judgment) in accordance with the answer to common question 29 above;~~

~~(b) the amount of GST Damages to which the Group Member is entitled in respect of the vehicle is equal to 10% of the amount in item (a) above: Reasons, [492].~~

Pre-judgment interest

Question 35 – Is it appropriate to make an order or orders pursuant to ss 33Z(1)(e) or 33Z(1)(f) of the FCAA that includes pre-judgment interest in respect of any Reduction in Value Damages and/or GST Damages?

~~A: No. Yes, it is appropriate to make an award of pre-judgment interest on any Reduction in Value Damages and/or GST Damages pursuant to s 33Z(1)(e) of the FCAA to the Group Members entitled to receive those Reduction in Value Damages and/or GST Damages: Reasons, [494].~~



Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD1210/2019

KENNETH JOHN WILLIAMS and another named in the schedule
Applicant

TOYOTA MOTOR CORPORATION AUSTRALIA LIMITED (ACN 009 686 097)
Respondent

ORDER

JUDGE: JUSTICE LEE

DATE OF ORDER: 26 October 2021

WHERE MADE: Sydney

THE COURT ORDERS THAT:

1. The separate questions identified by the order made on 8 October 2021 (as hereby varied in the terms set out below) be answered as follows:

(a) Whether upon a proper construction of s 33Z of the *Federal Court of Australia Act 1976* (Cth), at the conclusion of the initial trial, if the Court is satisfied that it is able to determine, on a common basis, that group members are entitled to an award of damages in respect of the heads of damage that are in issue at the initial trial, does the Court have power to make an award of damages for group members in respect of those heads of damage?

Answer: Yes.

(b) If the answer to question 1 is “no”, should prayers 1.3 and 1.4 of the second further amended originating application be dismissed?

Answer: Does not arise.

2. An order pursuant to s 33ZB of the *Federal Court of Australia Act 1976* (Cth) that all group members who have not opted out are bound by Order 1.

3. The respondent pay the costs of the applicants of the hearing of the separate questions.



4. For the purposes of r 35.13(b) of the *Federal Court Rules 2011* (Cth), the time by which any application for leave to appeal from these orders must be filed is fixed as being 28 days after the date the orders are made pursuant to s 33ZB of the *Federal Court of Australia Act 1976* (Cth), following the delivery of judgment after the initial trial listed to commence on 29 November 2021.

Date that entry is stamped: 17 November 2021

Sia Lagos
Registrar



Schedule

No: NSD1210/2019

Federal Court of Australia

District Registry: New South Wales

Division: General

Second Applicant

DIRECT CLAIM SERVICES QLD PTY LTD ACN 167 519 968



Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD1210/2019

KENNETH JOHN WILLIAMS and another named in the schedule
Applicants

TOYOTA MOTOR CORPORATION AUSTRALIA LIMITED (ACN 009 686 097)
Respondent

ORDER

JUDGE: JUSTICE LEE

DATE OF ORDER: 27 May 2022

WHERE MADE: Sydney

THE COURT ORDERS BY CONSENT THAT:

1. The orders made by Justice Lee on 16 May 2022 be amended so that:
 - (a) The date by which the parties are to confer in good faith to attempt to agree on the amount of the costs, pursuant to Order 11, be extended to 8 July 2022.
 - (b) The time by which the Referee is to deliver the Report to the Court and to the parties, pursuant to Order 12(b), be extended to 4pm on 15 July 2022.
 - (c) The time period within which the applicants are to cause a copy of the Electronic Notice to be sent, pursuant to Order 17(a), be extended to between 17 June 2022 and 24 June 2022.
 - (d) The date on which the applicants are to cause a copy of the Postal Notice to be sent, pursuant to Order 17(b), be extended to 1 July 2022.
 - (e) The date from which documents are to be displayed on various websites, pursuant to Orders 17(c)–(e), be extended to 17 June 2022.
 - (f) The date by which the applicants are to submit to the Associate to Justice Lee proposed orders establishing and providing for the terms of the Distribution Scheme, and to file material in support, pursuant to Order 18(a), be extended to 25 August 2022.



- (g) The date by which the Funder is to file and serve any affidavit material and/or written outline of submissions in relation to the Distribution Scheme Orders, pursuant to Order 18(c), be extended to 30 August 2022.
 - (h) The date by which the respondent and the contradictor is to file and serve material, pursuant to Order 18(e), be extended to 13 September 2022.
2. The case management hearing listed at 9:30am on 17 June 2022 be vacated.
 3. The matter be listed for a case management hearing at 9:30am on 21 July 2022.

Date that entry is stamped: 27 May 2022

Sia Lagos
Registrar



Schedule

No: NSD1210/2019

Federal Court of Australia

District Registry: New South Wales

Division: General

Second Applicant

DIRECT CLAIM SERVICES QLD PTY LTD ACN 167 519 968



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

No: NSD1210/2019

KENNETH JOHN WILLIAMS and another named in the schedule
Applicant

TOYOTA MOTOR CORPORATION AUSTRALIA LIMITED (ACN 009 686 097)
Respondent

ORDER

JUDGE: JUSTICE LEE

DATE OF ORDER: 16 May 2022

WHERE MADE: Sydney

THE COURT NOTES THAT:

- A. Capitalised terms used but not defined in these orders have the meanings ascribed to them in the Dictionary at Schedule 1 to these orders.

THE COURT ORDERS THAT:

Applicants' damages

1. Judgment for the second applicant against the respondent in the sum of \$18,401.76.

Group Members' damages

Reduction in value damages

2. Subject to Orders 3, 18 and 19 below, pursuant to s 33Z(1)(e) of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**), damages be awarded to each Group Member who has not opted out for the reduction in value of any Entire Period Relevant Vehicle (other than a 2020 Field Fix Relevant Vehicle or a Post Relevant Period Replaced Vehicle) to which that Group Member's claim relates resulting from the failure to comply with the guarantee of acceptable quality, in amounts to be worked out in the following manner:



- (a) if the Price Paid for that Group Member's Entire Period Relevant Vehicle is equal to or lower than the Average Retail Price for that vehicle, the Price Paid minus the True Value of that vehicle; or
 - (b) if the Price Paid for that Group Member's Entire Period Relevant Vehicle(s) is greater than the Average Retail Price for that vehicle, the Average Retail Price minus the True Value of that vehicle.
3. The amount of any damages awarded to any Group Member pursuant to Order 2 above in respect of any Entire Period Relevant Vehicle is to be reduced by an amount equal to any payment(s) made by the respondent to the Group Member in respect of that vehicle prior to the date of these Orders for the reduction in value of the vehicle and/or for the difference between the price the Group Member paid to acquire the vehicle and the price at which they traded it in to the respondent or sold it, as part of a redress program conducted by the respondent.

Excess GST Damages

4. Subject to Orders 18 and 19 below, pursuant to s 33Z(1)(e) of the FCAA, damages be awarded to each Group Member who has not opted out for excess GST paid by that Group Member in connection with acquiring any Entire Period Relevant Vehicle to which that Group Member's claim relates, in an amount equal to 10% of an amount calculated in accordance with the formula in subparagraphs (a) and (b) of Order 2 above (as adjusted pursuant to Order 3 above (if at all)).

Interest

5. Subject to Orders 18 and 19 below, pursuant to s 51A of the FCAA, interest be awarded on the damages awarded to Group Members pursuant to Order 2 above (as adjusted pursuant to Order 3 above (if at all)) and Order 4 above at the rates specified in paragraph 2.2 of the *Interest on Judgments Practice Note* (GPN-INT) published by the Federal Court of Australia where the amount of interest will be calculated:
 - (a) for the period commencing on the day after the Group Member acquired the Relevant Vehicle and concluding on 15 May 2022 where both the start and end date are included in that period; and
 - (b) using simple interest.



Costs

6. The respondent is to pay the applicants' costs of the proceeding up until the date of these Orders as agreed, as determined following the reference process described in Order 7 below or as otherwise fixed by order of the Court.
7. The following questions be referred to the Costs Referee (as defined in the Orders made by Justice Lee on 7 November 2019) for the purposes of the Costs Referee conducting an inquiry into the questions and making a report in writing to the Court on the questions stating the Cost Referee's opinion in relation thereto (**Report**), subject to Order 11 below:
 - (a) What is the amount of the costs reasonably incurred by the applicants in relation to the proceedings up until the date of these Orders, having regard to the matters set out at Order 9(a) of the Orders made by Justice Lee on 7 November 2019)?
 - (b) What is the amount of the applicants' costs of the proceedings up until the date of these Orders which is recoverable from the respondent on a party-party basis?

(Reference).
8. The Reference is to commence forthwith and be conducted without undue formality or delay, subject to any communications between the Costs Referee and either of the parties relating to the Reference being copied to both the applicants' and the respondent's solicitors (unless otherwise agreed by the parties' solicitors).
9. The Costs Referee has the same rights in conducting the Reference as those conferred on her by Orders 16, 17 and 19 of the Orders made by Justice Lee on 7 November 2019.
10. The applicants' solicitors are within 2 working days of these Orders to provide a copy of the Orders to the Costs Referee and thereafter are to make available to the Costs Referee upon request all information and records which the Costs Referee believes are relevant to the Reference.
11. The parties are to confer in good faith to attempt to agree the amount of the costs described in Order 7(b) above by no later than 17 June 2022 and, if such agreement is reached, the applicants' solicitors are to:



- (a) inform the Costs Referee of this outcome, in which case the Costs Referee need not inquire into these costs as part of the Reference; and
 - (b) provide to the Associate to Justice Lee proposed consent orders giving effect to the parties' agreement in relation to party-party costs.
12. The Referee is to:
 - (a) address in the Report:
 - (i) in respect of the costs described in Order 7(a) above, the matters set out in paragraphs 11(a) to (c) of the Orders made by Justice Lee on 7 November 2019; and
 - (ii) subject to Order 11 above, the amount of the applicants' costs of the proceedings up until the date of these Orders which are recoverable from the respondent on a party-party basis; and
 - (b) deliver the Report to the Court and to the parties on or before 4.00pm on 24 June 2022 or such other date as the Court thinks fit.
13. The Referee's reasonable costs shall be paid by the applicants in the first instance (or on their behalf), but otherwise shall be costs in the proceeding.

Common Questions

14. The questions of law or fact common to the claims of the Group Members be answered as set out in Schedule 2 to these Orders.

Persons affected by judgment

15. Pursuant to s 33ZB(a) of the FCAA, all Group Members other than those who have opted out are affected by this judgment of the Court and bound by these Orders.

Receipt and Application of the Group Damages Award

16. Pursuant to s 33X(5) of the FCAA, the form and content of the email correspondence and notice set out in Schedule 3 to these Orders (**Electronic Notice**) and the form and content of the cover letter and notice set out in Schedule 4 to these Orders (**Postal Notice**) be approved.
17. Pursuant to ss 33X(5) and 33Y of the FCAA, the Electronic Notice and the Postal Notice be distributed to Group Members according to the following procedure:



- (a) on 3 June 2022, the applicants will cause:
- (i) a copy of the Electronic Notice to be sent by email with the subject line “An important notice from the Federal Court of Australia about your Toyota diesel vehicle”; or
 - (ii) if an email address is not available but a mobile telephone number is available, a copy of the Electronic Notice to be sent as a link included in an SMS message,

to each person who:

- (iii) has registered with the applicants’ solicitors through the website maintained by the applicants’ solicitors in relation to this proceeding; and/or
 - (iv) was sent a copy of the opt out notice distributed in this proceeding in accordance with Orders made on 26 June 2020 and/or the supplementary opt out notice distributed in this proceeding in accordance with Orders made on 23 October 2020 (other than those people who have since opted out of the proceedings);
- (b) on or before 16 June 2022, the applicants will cause a copy of the Postal Notice to be sent by prepaid ordinary post in an envelope marked “*This envelope contains an important notice from the Federal Court of Australia about your Toyota diesel vehicle*” to the people described in subparagraphs (a)(iii) and (a)(iv) of Order 17 above for whom:
- (i) no email address is available; and/or
 - (ii) an email or SMS sent pursuant to Order 17(a) above experiences a delivery failure or is not opened within 2 weeks of receipt (with the applicants to cause a copy of the Postal Notice to be sent to these people as soon as practicable after 16 June 2022);
- (c) continuously from 3 June 2022 until further Court order, the applicants will cause copies of the Electronic Notice, Second Further Amended Originating Application, Second Further Amended Statement of Claim, Defence to the Second Further Amended Statement of Claim, the reasons for judgment delivered on 7 April 2022 (**Reasons**) and these Orders, to be displayed on the website maintained by the applicants’ solicitors in relation to this proceeding;



- (d) continuously from 3 June 2022 until further Court order, the District Registrar of the New South Wales Registry of the Federal Court of Australia shall cause copies of the Electronic Notice and these orders to be posted on the class action page of the website of the Federal Court; and
- (e) continuously from 3 June 2022 until further Court order, the respondent will cause copies of the Electronic Notice and these orders to be displayed on the respondent's website, together with a link to the Federal Court website referenced in Order 17(d) above.

18. The amounts awarded to Group Members under Orders 2 to 5 above (**Group Damages Award**) shall be paid and distributed to Group Members in accordance with a scheme for distribution (**Distribution Scheme**) to be approved by the Court according to the following procedure:

- (a) by 11 August 2022, the applicants are to:
 - (i) submit to the Associate to Justice Lee proposed orders establishing and providing for the terms of the Distribution Scheme (**Distribution Scheme Orders**), including any order seeking payment of any amount from the Group Damages Award to any funder of the proceeding as reimbursement of the costs of the proceeding and/or as consideration for the funding of the proceeding (**CFO**);
 - (ii) file:
 - A. any affidavit material in support of the Distribution Scheme Orders;
 - B. any written outline of submissions in support of the Distribution Scheme Orders;
- (b) leave be granted to any funder of the proceeding to intervene and be heard in respect of the Distribution Scheme Orders;
- (c) by 16 August 2022, the Funder is to file and serve any affidavit material and/or written outline of submissions in relation to the Distribution Scheme Orders;
- (d) a contradictor be appointed to provided independent assistance to the Court in relation to the relief sought in any CFO;
- (e) by 30 August 2022:



- (i) the respondent is to file and serve any affidavit material and/or written outline of submissions in relation to the Distribution Scheme Orders; and
 - (ii) the contradictor is to file and serve any affidavit material and/or written outline of submissions in relation to the CFO; and
 - (f) the proceedings be listed for hearing in respect of the Distribution Scheme Orders on a date to be determined by the Court.
19. Orders 2 to 6 above are made subject to any further order of the Court in respect of the Distribution Scheme and/or any CFO.

Other orders

20. By 26 May 2022, the respondent is to provide to the applicants an Excel spreadsheet (in the same form as documents numbered TAL.800.101.1000, TAL.800.103.0001, TAL.800.105.0001 and TAL.100.119.0001 produced in the proceeding) containing extracts from the respondent's WINPAQ database for each Relevant Vehicle in respect of which a reimbursement claim has been made by a Dealer in the period 1 January 2020 to 15 May 2022 (inclusive).
21. By 26 May 2022, the respondent is to provide to the applicants an Excel spreadsheet identifying each Relevant Vehicle:
- (a) that was returned to the respondent or a Dealer prior to the date of these orders in exchange for:
 - (i) a refund under a redress program conducted by the respondent, and in respect of each such vehicle: the date on which the refund was made; the amount refunded; and the identity of the person to whom the refund was paid; or
 - (ii) a replacement vehicle under a redress program conducted by the respondent, and in respect of each such vehicle: the date on which the replacement vehicle was provided; the make, model and VIN of the replacement vehicle (in sufficient detail to allow the applicants to determine whether the replacement vehicle was a Relevant Vehicle); and the identity of the person to whom the replacement vehicle was provided; and



- (b) in respect of which the respondent has made a payment to a Group Member prior to the date of these orders for the reduction in value of the vehicle and/or for the difference between the price the Group Member paid to acquire the vehicle and the price at which they traded it in to the respondent or sold it, as part of a redress program conducted by the respondent, and in respect of each such vehicle: the date on which the payment was made; the amount of the payment; and the document IDs of the completed and signed buyback checklist and terms of agreement relating to that vehicle (with copies of any of these documents which have not already been discovered by the respondent in the proceedings to also be provided to the applicants).

Date that entry is stamped: 16 May 2022



Schedule 1

Dictionary

2020 Field Fix means the following countermeasure offered to Relevant Vehicles from May 2020:

- (a) a Euro 6 DOC unit, which contained a modified substrate with a different distribution of precious metals;
- (b) a modified additional injector housing assembly, which incorporates a narrower fuel passage, together with a cooling jacket; and
- (c) programmed software changes to the ECM, which removed the cooling pulse and added a "soot blow", which clears the front of the diesel oxidation catalyst prior to regeneration.

2020 Field Fix Relevant Vehicle means a Relevant Vehicle that received the 2020 Field Fix prior to 15 May 2022.

Additional Injector means the fifth fuel injector in the Relevant Vehicles.

Automatic Regeneration means Regeneration that occurs in the course of operating the vehicle when initiated by the ECM.

Average Purchase Price % MSRP means the percentage discount specified in the column headed "*Average Purchase Price % MSRP*" in Schedule 5 to these orders applicable to a particular model line and build year of Relevant Vehicle.

Average Retail Price means the MSRP for a Relevant Vehicle at the time of initial supply (ie. the first supply of the vehicle occurring in the Relevant Period) multiplied by the Average Purchase Price % MSRP applicable to that model line and build year of Relevant Vehicle.

Core Defect means the failure of the DPF System to be designed to function effectively during all reasonably expected conditions of normal operation and use in the Australian market, in particular the High Speed Driving Pattern.

Dealer means a franchise, which is a separate corporate entity to the respondent, through which the Relevant Vehicles were supplied.

Defect Consequences means the consequences of the Core Defect, including at least that:



- (a) the DOC becomes damaged;
- (b) unoxidised fuel flows through the DPF and is emitted as white smoke from the vehicle's exhaust during and immediately following regeneration;
- (c) excessive white smoke and foul-smelling exhaust is emitted from the vehicle's exhaust during regeneration;
- (d) the DPF becomes partially or completely blocked;
- (e) foul-smelling exhaust is emitted from the exhaust pipe when the engine was on during and immediately following Automatic Regeneration;
- (f) the Relevant Vehicle must be inspected, serviced and/or repaired by a service engineer for the purpose of cleaning, repairing or replacing the DPF, DPF System (or components thereof);
- (g) the Relevant Vehicle must be inspected, serviced and/or repaired more regularly than would be required absent the Core Defect;
- (h) the ECM must be programmed more often than would be required absent the Core Defect;
- (i) DPF Notifications are displayed on an excessive number of occasions and/or for an excessive period of time;
- (j) the Additional Injector becomes blocked by carbon deposits on its tip;
- (k) the Additional Injector causes deposits forming on the face of the DOC, causing white smoke; and
- (l) an increase in fuel consumption and decrease in fuel economy.

DOC means diesel oxidation catalyst.

DPF means diesel particulate filter.

DPF Notifications means a series of symbols or messages that are:

- (a) displayed in the Relevant Vehicles;



- (b) illuminated when the amount of accumulated particulate matter in the DPF, as calculated by the ECM, reaches predetermined levels; and
- (c) referred to in the owners' manual.

DPF System means the diesel exhaust after-treatment system in the Relevant Vehicles.

DPF System Representations means the representations referred to in question 15 of Schedule 2 of these orders.

Earlier Countermeasures means the countermeasures referred to in the second sentence of paragraph 46 of the First Reference Report and paragraphs 47(f)(i)(A) and 47(f)(ii) of TMCA's Defence.

ECM means the engine control module in the Relevant Vehicles.

Entire Period Relevant Vehicle means a Relevant Vehicle that was supplied to a Group Member in circumstances where:

- (a) the vehicle had not previously been supplied to a consumer;
- (b) the Group Member did not dispose of their interest in the vehicle during the Relevant Period (except where they did so by returning the vehicle to the respondent or a Dealer in exchange for a replacement Relevant Vehicle provided during the Relevant Period as part of a redress program conducted by the respondent and did not subsequently dispose of their interest in that replacement vehicle during the Relevant Period, in which case the vehicle initially supplied, and not the replacement vehicle, will be the relevant Entire Period Relevant Vehicle for the purposes of these orders); and
- (c) as at the date of these orders, the Group Member has not returned the vehicle (or any replacement Relevant Vehicle provided in the circumstances in subparagraph (b) above) to the respondent or a Dealer in exchange for a refund in respect of the vehicle.

First Reference Report means the reference report of David P Garrett dated 15 October 2020.

Future DPF System Representations means the representations referred to in question 19 of Schedule 2 of these orders.



Future Vehicle Representations means the representations referred to in question 10 of Schedule 2 of these orders.

Group Member means any person who:

- (a) during the Relevant Period, in Australia acquired (including by way of purchase, exchange or taking on lease or on hire-purchase) one or more models of Relevant Vehicle; and
- (b) either:
 - (i) acquired the Relevant Vehicle:
 - (A) from a Dealer or other retailer selling Relevant 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 Relevant Vehicle from a person who acquired the Relevant Vehicle in the circumstances described in subparagraph (b)(i) above, other than for the purpose of re-supply; and
- (c) is not:
 - (i) a person described in s 33E(2) of the FCAA; or
 - (ii) a Justice of the Federal Court of Australia or the High Court of Australia.

High Speed Driving Pattern means regular continuous driving at approximately 100km per hour.

MSRP means the manufacturer's suggested retail price for an applicable Relevant Vehicle as specified in column L (titled "RRP"), tab "Final" of the MSRP Data, excluding any GST and luxury car tax that is included in that amount, as specified in Schedule 6 to these orders.

MSRP Data means the data contained in document numbered APP.003.003.0280 produced in the proceeding.



Omissions Conduct means the conduct described in question 24 of Schedule 2 of these orders.

Partial Period Relevant Vehicle means a Relevant Vehicle that is not an Entire Period Relevant Vehicle.

Post Relevant Period Replaced Vehicle means a Relevant Vehicle that, after the Relevant Period but prior to the date of these orders, was returned to the respondent or a Dealer in exchange for a replacement vehicle, as part of a redress program conducted by the respondent.

Price Paid means the price paid by a consumer for a Relevant Vehicle at the time of initial supply (ie the first supply of the vehicle occurring in the Relevant Period):

- (a) excluding GST, stamp duty, other statutory charges (such as registration), the cost of compulsory third party insurance and any luxury car tax paid on the vehicle; and
- (b) excluding the price of any accessories acquired with the vehicle at the time of supply; and
- (c) excluding any discount arising from the trade-in of a vehicle owned by the consumer; and
- (d) including any discount other than that in subparagraph (c); and
- (e) including any dealer delivery fee.

Relevant Period means the period from (and including) 1 October 2015 until (and including) 23 April 2020.

Relevant Prado means the new 2016 Toyota Prado GXL 2.8L Diesel Automatic Wagon acquired by the second applicant on or around 8 April 2016.

Relevant Vehicles means those models of Toyota motor vehicles in the Hilux, Fortuner and Prado ranges which are fitted with a 1GD-FTV or 2GD-FTV diesel combustion engine acquired in Australia during the Relevant Period.

TMCA means Toyota Motor Corporation Australia Limited.



True Value means in respect of a Relevant Vehicle, 82.5% of the Average Retail Price of that vehicle.

Vehicle Representations means the representations referred to in question 6 of Schedule 2 of these orders.



Schedule 2

Questions Common to Group Members

References below to paragraphs of the reasons for judgment delivered by Justice Lee on 7 April 2022 (**Reasons**) are included for convenience only and do not, and should not be understood to, limit the Reasons.

The questions of law or fact common to the claims of the group members, and the answers to those questions, are:

Characteristics of the Relevant Vehicles

1 Throughout the Relevant Period, was it the case that:

- (a) the DPF System in the Relevant 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;

A: Yes: Reasons, [15(6)], [15(7)].

- (b) in the event that the Relevant Vehicles were exposed to the High Speed Driving Pattern or the Earlier 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;

A: Yes: Reasons, [15(6)], [15(8)].

- (c) if the Relevant Vehicles were exposed to the High Speed Driving Pattern and/or the Earlier Countermeasures:

1.c.1 the DOC became blocked by deposits forming on the face of the DOC;

1.c.2 regeneration events failed to remove sufficient particulate matter from the DPF to prevent the DPF from becoming or remaining 'full' or blocked;

1.c.3 the DPF System failed to prevent the DPF from becoming 'full' or blocked;

1.c.4 the DOC and DPF did not function effectively;

1.c.5 the catalytic efficiency of the DOC was diminished;



1.c.6 the exhaust in the DPF did not reach a sufficiently high temperature to effect thermal oxidation;

A: Yes: Reasons, [15(8)].

- (d) if a Relevant Vehicle was exposed to the High Speed Driving Pattern, the Relevant Vehicles would experience one or more of the following consequences by reason of the Core Defect:
- 1.4.1 damage to the DOC;
 - 1.4.2 the flow of unoxidized fuel through the DPF and the emission of white smoke from the vehicle's exhaust during and immediately following regeneration;
 - 1.4.3 the emission of excessive white smoke and foul-smelling exhaust from the vehicle's exhaust during regeneration;
 - 1.4.4 partial or complete blockage of the DPF;
 - 1.4.5 the emission of foul-smelling exhaust from the exhaust pipe when the engine was on during and immediately following Automatic Regeneration;
 - 1.4.6 the need to have the Relevant Vehicle 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 need to have the Relevant Vehicle inspected, serviced and/or repaired more regularly than would be required absent the Core Defect;
 - 1.4.8 the need to program the ECM more often than would be required absent the Core Defect; or
 - 1.4.9 the display of DPF Notifications on an excessive number of occasions and/or for an excessive period of time;
 - 1.4.10 blockage of the Additional Injector due to carbon deposits on its tip;



1.4.11 the Additional Injector causes deposits forming on the face of the DOC, causing white smoke; and

1.4.12 an increase in fuel consumption and decrease in fuel economy.

A: Yes: Reasons, [59].

(e) by reason of the fact that the Core Defect was present in each Relevant Vehicle at the time it was supplied, each Relevant Vehicle had a propensity to experience one or more of the Defect Consequences;

A: Yes: Reasons, [62]-[63].

2 Were all Relevant Vehicles subject to the statutory guarantee as to acceptable quality in s 54(1) of the *Australian Consumer Law*?

A: Yes: Reasons, [155], [162].

3 Can the question of whether the Relevant Vehicles were not of acceptable quality within the meaning of s 54(2) of the *Australian Consumer Law* be determined on a common basis?

A: Yes: Reasons, [212].

4 Were the Relevant Vehicles not of acceptable quality within the meaning of s 54(2) of the *Australian Consumer Law*?

A: Yes, the Relevant Vehicles were not of acceptable quality within the meaning of s 54(2) of the ACL: Reasons, [173]-[213].

5 Was the 2020 Field Fix effective in, and will it continue to be effective in, remedying the Core Defect and its consequences in all Relevant Vehicles to which the 2020 Field Fix has been applied?

A: Yes: Reasons, [15(10)].

Vehicle Representations

6 During the Relevant Period, did TMCA represent to the public at large that the Relevant Vehicles:



(a) were, or were part of model lines that were, in their design and manufacturing:

6.a.1 not defective;

6.a.2 of good quality;

6.a.3 reliable;

6.a.4 durable;

6.a.5 suitable for use in any driving environment; and

(b) provided, or were part of model lines that provided, a driving and/or passenger experience that was comfortable?

A: Yes: Reasons, [215(1)(a) and (b)].

7 Was each Vehicle Representation made continuously by TMCA throughout the Relevant Period?

A: Yes: Reasons, [217].

8 Did TMCA fail to correct or qualify the Vehicle Representations at any time during the Relevant Period?

A: Yes: Reasons, [217].

9 Were the Vehicle Representations:

(a) misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the *Australian Consumer Law*;

(b) false and misleading representations in contravention of ss 29(1)(a) or 29(1)(g) of the *Australian Consumer Law*;

(c) liable to mislead the public as to the nature, characteristics, and/or suitability for purpose of the Relevant Vehicles, in contravention of s 33 of the *Australian Consumer Law*?

A: Yes: Reasons, [233].



Future Vehicle Representations

10 During the Relevant Period, did TMCA represent to the public at large that the Relevant Vehicles:

(a) would be, or were part of model lines that would be, in their design and manufacturing:

10.a.1 not defective;

10.a.2 of good quality;

10.a.3 reliable;

10.a.4 durable;

10.a.5 suitable for use in any driving environment; and

(b) would provide, or were part of model lines that would provide, a driving and/or passenger experience that was comfortable?

A: Yes: Reasons, [215(1)(c) and (d)].

11 Was each Future Vehicle Representation made continuously by TMCA throughout the Relevant Period?

A: Yes: Reasons, [217].

12 Did TMCA have reasonable grounds for making the Future Vehicle Representations?

A: No: Reasons, [243].

13 Did TMCA fail to correct or qualify the Future Vehicle Representations at any time during the Relevant Period?

A: Yes: Reasons, [217].

14 Were the Future Vehicle Representations:

(a) misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the *Australian Consumer Law*;



- (b) false and misleading representations in contravention of ss 29(1)(a) or 29(1)(g) of the *Australian Consumer Law*;
- (c) liable to mislead the public as to the nature, characteristics, and/or suitability for purpose of the Relevant Vehicles, in contravention of s33 of the *Australian Consumer Law*?

A: Yes: Reasons, [223]-[225], [234], [243].

DPF System Representations

15 During the Relevant Period, did TMCA represent to the public at large that the Relevant 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) did not have a propensity to fail;
- (f) completed a regeneration cycle with sufficient regularity to prevent the DPF from becoming partially or completely blocked?

A: Yes: Reasons, [215(2)(a)-(f)].

16 Was each DPF System Representation made continuously by TMCA throughout the Relevant Period?

A: Yes: Reasons, [217].

17 Did TMCA fail to correct or qualify the DPF System Representations at any time during the Relevant Period?

A: Yes: Reasons, [217].

18 Were the DPF System Representations:



- (a) misleading or deceptive, or likely to mislead or deceive, in contravention of s18 of the *Australian Consumer Law*;
- (b) false and misleading representations in contravention of ss 29(1)(a) or 29(1)(g) of the *Australian Consumer Law*;
- (c) liable to mislead the public as to the nature, characteristics, and/or suitability for purpose of the Relevant Vehicles, in contravention of s33 of the *Australian Consumer Law*?

A: Yes: Reasons, [232].

Future DPF Representations

- 19 During the Relevant Period, did TMCA represent to the public at large that the Relevant 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 not have a propensity to fail;
- (f) would complete a regeneration cycle with sufficient regularity to prevent the DPF from become partially or completely blocked?

A: Yes: Reasons, [215(2)(g)-(I)].

- 20 Was each Future DPF System Representation made continuously by TMCA throughout the Relevant Period?

A: Yes: Reasons, [217].

- 21 Did TMCA have reasonable grounds for making the Future DPF System Representations?

A: No: Reasons, [243].



22 Did TMCA fail to correct or qualify the Future DPF System Representations at any time during the Relevant Period?

A: Yes: Reasons, [217].

23 Were the Future DPF System Representations:

- (a) misleading or deceptive, or likely to mislead or deceive, in contravention of s18 of the *Australian Consumer Law*;
- (b) false and misleading representations in contravention of ss 29(1)(a) or 29(1)(g) of the *Australian Consumer Law*;
- (c) liable to mislead the public as to the nature, characteristics, and/or suitability for purpose of the Relevant Vehicles, in contravention of s 33 of the *Australian Consumer Law*?

A: Yes: Reasons, [223]-[225], [234], [243].

Omissions conduct

24 During the Relevant Period, did TMCA fail to disclose, or disclose adequately, to prospective purchasers of, or persons acquiring, a Relevant Vehicle:

- (a) the existence, nature and extent of the Core Defect in the Relevant Vehicles;
- (b) the Defect Consequences;
- (c) that the Core Defect had not been remedied; and
- (d) from February 2016, TMCA knew of the Core Defect and its consequences?

A: Yes: Reasons, [244]-[246].

25 Was the Omissions Conduct:

- (a) misleading or deceptive, or likely to mislead or deceive, in contravention of s 18 of the Australian Consumer Law;
- (b) liable to mislead the public as to the nature, characteristics, and/or suitability for purpose of the Relevant Vehicles, in contravention of s 33 of the Australian Consumer Law?

A: Yes: Reasons, [247]-[250].

Damages under ACL s 272(1)(a)

26 If the Relevant Vehicles failed to comply with the guarantee of acceptable quality under s 54 of the *Australian Consumer Law*, has that failure resulted in a reduction in the value of those vehicles?

A: Yes, the failure to comply with the guarantee of acceptable quality resulted in a reduction in value of all Relevant Vehicles of 17.5%, meaning that their true value was 82.5% of their Average Retail Price: Reasons, [330]-[331], [391], [393]-[394], [446(1)].

27 Are Group Members entitled to recover from TMCA any damages of the kind described in s 272(1)(a) of the *Australian Consumer Law* (**Reduction in Value Damages**)?

A: Yes, Group Members who have not opted out are entitled to recover Reduction in Value Damages in respect of Entire Period Relevant Vehicles (other than 2020 Field Fix Relevant Vehicles and Post Relevant Period Replaced Vehicles) from TMCA. It is not possible to determine how such damages should be assessed or distributed in respect of Partial Period Relevant Vehicles except on an individualised basis, having regard to the individual circumstances of owners of Partial Period Relevant Vehicles: Reasons, [330]-[331], [391], [393]-[394], [427], [432], [436], [446(1)]. The entitlement (if any) of Group Members to Reduction in Value Damages in respect of 2020 Field Fix Relevant Vehicles and Post Relevant Period Replaced Vehicles is yet to be determined: Reasons, [163].

28 In respect of any Reduction in Value Damages that Group Members are entitled to recover from TMCA, is it appropriate to:

(a) make an award of damages for Group Members pursuant to s 33Z(1)(e) of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**);

A: Yes, it is appropriate to make an award of Reduction in Value Damages to Group Members in respect of Entire Period Relevant Vehicles (other than 2020 Field Fix Relevant Vehicles and Post Relevant Period Replaced Vehicles) pursuant to s 33Z(1)(e) of the FCAA: Reasons, [446] – [447].



- (b) alternatively, award damages in an aggregate amount for Group Members pursuant to s 33Z(1)(f) of the FCAA?

A: No, it is not appropriate to make an award of Reduction in Value Damages to Group Members in an aggregate amount pursuant to s 33Z(1)(f) of the FCAA: Reasons, [443].

29 If it is appropriate to make an award of damages pursuant to ss 33Z(1)(e) or 33Z(1)(f) of the FCAA in respect of any damages of the kind described in s 272(1)(a) of the *Australian Consumer Law* that Group Members may be entitled to recover from TMCA:

- (a) what is the appropriate form of the order awarding damages;
- (b) what is the appropriate quantum of damages to be awarded?

A: The following formula or methodology is to be applied to determine the 'Reduction in Value Damages' awarded pursuant to s 33Z(1)(e) in respect of Entire Period Relevant Vehicles (other than 2020 Field Fix Relevant Vehicles and Post Relevant Period Replaced Vehicles):

- (a) **the true value of the Relevant Vehicle is to be determined by applying a 'reduction in value percentage' of 17.5% to the Average Retail Price for that model line and build year of Relevant Vehicle, meaning that each of the Relevant Vehicles has a true value, for the purposes of s 272(1)(a), that is 82.5% of the Average Retail Price for that model line and build year of Relevant Vehicle;**
- (b) **for each Relevant Vehicle, the lower of: (i) the Price Paid and (ii) the Average Retail Price for that that model line and build year of Relevant Vehicle is to be determined, with the lower of those two prices being the applicable comparator for the purposes of applying this formula; and**
- (c) **for each Relevant Vehicle, the amount recoverable under s 272(1)(a) by the relevant Group Member in respect of the vehicle is the amount (if any) by which the applicable comparator price in respect of the vehicle (as determined in (b) above) exceeds the true value of the vehicle (as calculated in (a) above), reduced by an amount equal to any payment(s) made by the respondent to the Group Member in respect of that vehicle prior to the date of these orders for the reduction in value of the vehicle**

and/or for the difference between the price the Group Member paid to acquire the vehicle and the price at which they traded it in to the respondent or sold it, as part of a redress program conducted by the respondent: Reasons, [405]-[408], [446].

Damages under ACL s 272(1)(b)

30 If the Relevant Vehicles failed to comply with the guarantee of acceptable quality under s 54 of the *Australian Consumer Law*, have Group Members suffered loss or damage arising from any excess GST they incurred because of that failure?

A: Yes: Reasons, [465]-[474], [492].

31 Are Group Members entitled to recover from TMCA damages pursuant to s 272(1)(b) of the *Australian Consumer Law* in respect of loss or damage arising from any excess GST they incurred because of the Relevant Vehicles failing to comply with the guarantee under s 54 of the *Australian Consumer Law* (**GST Damages**)?

A: Yes, Group Members who have not opted out are entitled to recover excess GST calculated as 10% of the Reduction in Value Damages in respect of any Entire Period Relevant Vehicle (including 2020 Field Fix Relevant Vehicles and Post Relevant Period Replaced Vehicles falling within that description). It is not possible to determine how such damages should be assessed or distributed in respect of Partial Period Relevant Vehicles except on an individualised basis: Reasons, [492]-[493].

32 In respect of any GST Damages that Group Members are entitled to recover from TMCA, is it appropriate to:

(a) make an award of damages for Group Members pursuant to s 33Z(1)(e) of the FCAA; or

A: Yes, it is appropriate to award GST Damages to Group Members who have not opted out in respect of Entire Period Relevant Vehicles (including 2020 Field Fix Relevant Vehicles and Post Relevant Period Replaced Vehicles falling within that description) pursuant to s 33Z(1)(e) of the FCAA: Reasons, [493].

(b) award damages in an aggregate amount for Group Members pursuant to s 33Z(1)(f) of the FCAA?



A: No: Reasons, [443], [493].

33 If it is appropriate to make an award of damages pursuant to ss 33Z(1)(e) or 33Z(1)(f) of the FCAA in respect of any GST Damages that Group Members are entitled to recover from TMCA:

- (a) what is the appropriate form of the order awarding damages;
- (b) what is the appropriate quantum of damages to be awarded?

A: The following formula or methodology is to be applied to determine the GST Damages awarded pursuant to s 33Z(1)(e) in respect of Entire Period Relevant Vehicles (including the 2020 Field Fix Relevant Vehicles and Post Relevant Period Replaced Vehicles):

- (a) **determine the amount of Reduction in Value Damages recoverable by the relevant Group Member in respect of the vehicle (or, in respect of 2020 Field Fix Relevant Vehicles and Post Relevant Period Replaced Vehicles, the amount of Reduction in Value Damages that would be recoverable by the Group Member in respect of the vehicle had an entitlement to such damages been established under this judgment) in accordance with the answer to common question 29 above;**
- (b) **the amount of GST Damages to which the Group Member is entitled in respect of the vehicle is equal to 10% of the amount in item (a) above: Reasons, [492].**

Pre-judgment interest

34 Are Group Members entitled to recover pre-judgment interest on any damages awarded?

A: Yes, any Group Member awarded damages is entitled to pre-judgment interest on that damages award at the rates specified in paragraph 2.2 of the Interest on Judgments Practice Note (GPN-INT) published by the Federal Court of Australia: Reasons, [494].

35 Is it appropriate to make an order or orders pursuant to ss 33Z(1)(e) or 33Z(1)(f) of the FCAA that includes pre-judgment interest in respect of any Reduction in Value Damages and/or GST Damages?



A: Yes, it is appropriate to make an award of pre-judgment interest on any Reduction in Value Damages and/or GST Damages pursuant to s 33Z(1)(e) of the FCAA to the Group Members entitled to receive those Reduction in Value Damages and/or GST Damages: Reasons, [494].

Mitigation

36 Do Group Members have a duty to mitigate their losses in respect of damages of the kind described in s 272(1)(a) and/or 272(1)(b) of the *Australian Consumer Law*?

A: No: Reasons, [497], [507].

37 Even assuming that Group Members did have some obligation to “mitigate” damage, was it unreasonable for Group Members not to take up the invitation to have the 2020 Field Fix applied in circumstances where TMCA asserts that to take up that invitation has the effect, under s 271(6) of the ACL, of extinguishing altogether any entitlement to damages under s 272(1)(a) of the ACL?

A: No: Reasons, [508].



Schedule 3

Electronic Notice

This is not a scam. The notice below is issued to you by the Federal Court of Australia. It provides important information about a class action relating to certain Toyota Hilux, Prado and Fortuner diesel vehicles.

Dear [NAME]

You are receiving this correspondence because records provided to us by Toyota Motor Corporation Australia Limited and/or a state or territory vehicle registration authority indicate that you may have acquired the following Toyota Hilux, Prado or Fortuner motor vehicle(s) with a diesel engine between 1 October 2015 and 23 April 2020:

Registered Owner Name	VIN
[NAME]	[VIN]

If you did, you may be entitled to be paid money under a judgment delivered by the Federal Court of Australia on [4 May 2022].

The notice below is important and provides information about:

- how you can register your interest to receive any money to which you are entitled under the judgment; and
- the information you will need to provide to establish your eligibility to receive money under the judgment and to assist us to calculate the amount of any money to which you are entitled.

It is important that you read the notice below carefully. If you have any questions, please contact Gilbert + Tobin, the representative applicants' solicitors, by submitting your query [\[here\]](#), calling us on [\[phone\]](#) or requesting a call back [\[here\]](#).

Kind regards

Matt Mackenzie
Partner
Gilbert + Tobin



CLASS ACTION RELATING TO CERTAIN TOYOTA HILUX, PRADO & FORTUNER DIESEL VEHICLES

THIS IS AN IMPORTANT NOTICE ISSUED TO YOU BY THE FEDERAL COURT OF AUSTRALIA

This notice concerns a CLASS ACTION relating to certain TOYOTA HILUX, PRADO & FORTUNER diesel vehicles.

It is sent to you because:

- it is likely that you are a Group Member because you acquired one of the relevant Toyota vehicles (and you have not opted out of the class action); and
- you may be entitled to be paid money under a judgment delivered by the Court.

It is in your interests to register so that your eligibility to receive any money to which you are entitled under the judgment (and the amount of money) may be determined.

To register your interest and establish your eligibility to receive any money to which you are entitled, please click on the following link: <"[Register your interest to receive money under the judgment](#)" [\[hyperlink\]](#)>.

If you do not register, you will not be able to receive any money to which you may otherwise be entitled under the judgment.

This is not a scam. If you are concerned about clicking on the hyperlink above, you can verify that this is a genuine process by visiting the website of the Federal Court (see <https://www.comcourts.gov.au/file/Federal/P/NSD1210/2019/actions>) or by contacting Gilbert + Tobin [\[here\]](#), calling Gilbert + Tobin on [\[phone\]](#) or requesting a call back [\[here\]](#).

A. THE COURT'S JUDGMENT

- 1 On 15 May 2022, the Court delivered judgment in the class action brought by Kenneth John Williams and Direct Claim Services Qld Pty Ltd (**DCS**) against Toyota for defects in the diesel particulate filter (**DPF**) system in Toyota Hilux, Prado and Fortuner vehicles with a 1GD-FTV or 2GD-FTV diesel engine acquired between 1 October 2015 and 23 April 2020 (**Relevant Vehicles**).
- 2 A copy of the Court's reasons for judgment (published on 7 April 2022) is available at <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2022/2022fca0344>.



- 3 The Court found that:
- (a) the Relevant Vehicles were not of acceptable quality because of their defective DPF systems;
 - (b) Toyota engaged in misleading or deceptive conduct in connection with marketing and selling the Relevant Vehicles;
 - (c) the value of the Relevant Vehicles at the time of initial supply was reduced because of their defective DPF systems;
 - (d) the amount of the reduction in value was 17.5% (measured against Average Retail Price); and
 - (e) eligible Group Members are entitled to be paid money to compensate them for this reduction in value and for the excess GST they paid as a result of acquiring their vehicles at prices which were higher than the true value of those vehicles.
- 4 By way of example, DCS (the second applicant) was awarded **\$7,474.59** for the **reduction in value** of its Toyota Prado, a **further \$747.46** for the **excess GST** it paid to acquire the vehicle and **interest** on these amounts.
- 5 Some affected buyers have already obtained refunds, replacement vehicles and/or compensation payments from Toyota relating to the defective DPF systems in their vehicles. Where this has occurred, that may be taken into account in assessing that person's eligibility to receive money under the judgment (and the amount of any such money). This will be worked out as part of the "distribution scheme" (see paragraph 8 below).

B. REGISTER YOUR INTEREST TO RECEIVE MONEY UNDER THE JUDGMENT

- 6 **You can register your interest to receive money under the judgment by clicking on the link below** to visit [**website**]. You will then need to complete the "registration of interest" form located at that website.

<"[Register your interest to receive money under the judgment](#)" [**hyperlink**]>

- 7 You will be asked to provide information which is needed to:
- (a) confirm your identity as a Group Member and the details of your Relevant Vehicle(s); and



- (b) establish the date on which you acquired your Relevant Vehicle(s) and the price you paid to acquire your Relevant Vehicle(s) exclusive of taxes, government charges and accessories.
- 8 This information will then be used to confirm whether you are eligible to receive compensation under the judgment and the amount of that compensation. Money will then be distributed under what is known as a “distribution scheme”. A distribution scheme is a Court approved and supervised process for assessing the eligibility of each Group Member to receive money under the judgment and paying that money to eligible Group Members.
- 9 If you are not able to complete the “registration of interest” form online (or have any difficulties doing so), you can contact Gilbert + Tobin by submitting your query [\[here\]](#), calling Gilbert + Tobin on [\[phone\]](#) or requesting a call back [\[here\]](#) to discuss alternative methods by which you may be able to provide the necessary information.
- 10 **Please register your interest to receive money under the distribution scheme by completing the “registration of interest” form as soon as possible.**
- 11 You will not be required to pay any “out of pocket” legal costs in order to register your interest to receive money under the judgment. That is because a company called Balance Legal Capital I UK Ltd (**Balance**) agreed to pay the costs of bringing the Toyota DPF class action, including to pay the legal costs of Toyota if the class action was unsuccessful, in return for reimbursement of those costs plus a funding commission in the event the class action was successful (that is, if money was recovered from Toyota). Because it funded the litigation, Balance intends to ask the Court to deduct an amount from the damages to be paid to all eligible Group Members. Whether such a deduction can be made and, if so, the amount of that deduction, will be determined by the Court and you have a right to raise before the Court any issues you have in respect of such a deduction. You will be informed about this process when you register. If there is to be a deduction, this will occur before any money is paid to eligible Group Members. Balance does not intend to seek an amount exceeding 25% of the damages to be paid to eligible Group Members (and it may seek a lesser amount if more Group Members register their interest in receiving money under the judgment).
- 12 **If you do not register, you will not be able to receive any money to which you may otherwise be entitled under the judgment.**



C. FURTHER INFORMATION

Group Members' claims for additional damages

- 13 You may have claims against Toyota that relate to the defective DPF system in your vehicle but which go beyond those claims which have already been determined by the Court's judgment. We will send you a notice in the future regarding how you can pursue any such additional claims if you wish to do so.

[Bracketed section below to only be included if Toyota files a notice of appeal and/or application for leave to appeal]

[Toyota's appeal]

- 14 Toyota has appealed the Court's judgment. If that appeal is successful, you may lose your present entitlement to receive money under the judgment and/or the amount of money to which you are entitled may be reduced. The process for working out your entitlements will proceed despite the appeal, but payment of any money will not occur until after Toyota's appeal has been resolved. Balance intends to fund the applicants' defence of Toyota's appeal.
- 15 **You should still register your interest to receive money under the judgment notwithstanding Toyota's appeal and it is in your interests to do so.**

If you have any questions about this notice, please contact Gilbert + Tobin, the representative applicants' solicitors, by submitting your query [\[here\]](#), calling Gilbert + Tobin on [\[phone\]](#) or requesting a call back [\[here\]](#).



Schedule 4

Postal Notice

This is not a scam. The notice below is issued to you by the Federal Court of Australia. It provides important information about a class action relating to certain Toyota Hilux, Prado and Fortuner diesel vehicles.

Dear [NAME]

You are receiving this correspondence because records provided to us by Toyota Motor Corporation Australia Limited and/or a state or territory vehicle registration authority indicate that you may have acquired the following Toyota Hilux, Prado or Fortuner motor vehicle(s) with a diesel engine between 1 October 2015 and 23 April 2020:

Registered Owner Name	VIN
[NAME]	[VIN]

If you did, you may be entitled to be paid money under a judgment delivered by the Federal Court of Australia on [4 May 2022].

The notice below is important and provides information about:

- how you can register your interest to receive any money to which you are entitled under the judgment; and
- the information you will need to provide to establish your eligibility to receive money under the judgment and to assist us to calculate the amount of any money to which you are entitled.

It is important that you read the notice below carefully. If you have any questions, please contact Gilbert + Tobin, the representative applicants' solicitors, by submitting your query at [URL], calling us on [phone] or requesting a call back at [URL].

Kind regards

Matt Mackenzie
Partner
Gilbert + Tobin



CLASS ACTION RELATING TO CERTAIN TOYOTA HILUX, PRADO & FORTUNER DIESEL VEHICLES

THIS IS AN IMPORTANT NOTICE ISSUED TO YOU BY THE FEDERAL COURT OF AUSTRALIA

This notice concerns a CLASS ACTION relating to certain TOYOTA HILUX, PRADO & FORTUNER diesel vehicles.

It is sent to you because:

- it is likely that you are a Group Member because you acquired one of the relevant Toyota vehicles (and you have not opted out of the class action); and
- you may be entitled to be paid money under a judgment delivered by the Court.

It is in your interests to register so that your eligibility to receive any money to which you are entitled under the judgment (and the amount of money) may be determined.

To register your interest and establish your eligibility to receive any money to which you are entitled, please visit the following website: [\[URL\]](#)>.

If you do not register, you will not be able to receive any money to which you may otherwise be entitled under the judgment.

This is not a scam. If you are concerned about visiting the website above, you can verify that this is a genuine process by visiting the website of the Federal Court (see <https://www.comcourts.gov.au/file/Federal/P/NSD1210/2019/actions>) or by contacting Gilbert + Tobin at [\[URL\]](#), calling Gilbert + Tobin on [\[phone\]](#) or requesting a call back at [\[URL\]](#).

D. THE COURT'S JUDGMENT

16 On [4] May 2022, the Court delivered judgment in the class action brought by Kenneth John Williams and Direct Claim Services Qld Pty Ltd (**DCS**) against Toyota for defects in the diesel particulate filter (**DPF**) system in Toyota Hilux, Prado and Fortuner vehicles with a 1GD-FTV or 2GD-FTV diesel engine acquired between 1 October 2015 and 23 April 2020 (**Relevant Vehicles**).

17 A copy of the Court's reasons for judgment (published on 7 April 2022) is available at <https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/2022/2022fca0344>.



18 The Court found that:

- (a) the Relevant Vehicles were not of acceptable quality because of their defective DPF systems;
- (b) Toyota engaged in misleading or deceptive conduct in connection with marketing and selling the Relevant Vehicles;
- (c) the value of the Relevant Vehicles at the time of initial supply was reduced because of their defective DPF systems;
- (d) the amount of the reduction in value was 17.5% (measured against Average Retail Price); and
- (e) eligible Group Members are entitled to be paid money to compensate them for this reduction in value and for the excess GST they paid as a result of acquiring their vehicles at prices which were higher than the true value of those vehicles.

19 By way of example, DCS (the second applicant) was awarded **\$7,474.59** for the **reduction in value** of its Toyota Prado, a **further \$747.46** for the **excess GST** it paid to acquire the vehicle and **interest** on these amounts.

20 Some affected buyers have already obtained refunds, replacement vehicles and/or compensation payments from Toyota relating to the defective DPF systems in their vehicles. Where this has occurred, that may be taken into account in assessing that person's eligibility to receive money under the judgment (and the amount of any such money). This will be worked out as part of the "distribution scheme" (see paragraph 8 below).

E. REGISTER YOUR INTEREST TO RECEIVE MONEY UNDER THE JUDGMENT

21 **You can register your interest to receive money under the judgment by** visiting the following website: **[URL]**. You will then need to complete the "registration of interest" form located at that website.

22 You will be asked to provide information which is needed to:

- (a) confirm your identity as a Group Member and the details of your Relevant Vehicle(s); and



- (b) establish the date on which you acquired your Relevant Vehicle(s) and the price you paid to acquire your Relevant Vehicle(s) exclusive of taxes, government charges and accessories.
- 23 This information will then be used to confirm whether you are eligible to receive compensation under the judgment and the amount of that compensation. Money will then be distributed under what is known as a “distribution scheme”. A distribution scheme is a Court approved and supervised process for assessing the eligibility of each Group Member to receive money under the judgment and paying that money to eligible Group Members.
- 24 If you are not able to complete the “registration of interest” form online (or have any difficulties doing so), you can contact Gilbert + Tobin by submitting your query at [URL], calling Gilbert + Tobin on [phone] or requesting a call back at [URL] to discuss alternative methods by which you may be able to provide the necessary information.
- 25 **Please register your interest to receive money under the distribution scheme by completing the “registration of interest” form as soon as possible.**
- 26 You will not be required to pay any “out of pocket” legal costs in order to register your interest to receive money under the judgment. That is because a company called Balance Legal Capital I UK Ltd (**Balance**) agreed to pay the costs of bringing the Toyota DPF class action, including to pay the legal costs of Toyota if the class action was unsuccessful, in return for reimbursement of those costs plus a funding commission in the event the class action was successful (that is, if money was recovered from Toyota). Because it funded the litigation, Balance intends to ask the Court to deduct an amount from the damages to be paid to all eligible Group Members. Whether such a deduction can be made and, if so, the amount of that deduction, will be determined by the Court and you have a right to raise before the Court any issues you have in respect of such a deduction. You will be informed about this process when you register. If there is to be a deduction, this will occur before any money is paid to eligible Group Members. Balance does not intend to seek an amount exceeding 25% of the damages to be paid to eligible Group Members (and it may seek a lesser amount if more Group Members register their interest in receiving money under the judgment).
- 27 **If you do not register, you will not be able to receive any money to which you may otherwise be entitled under the judgment.**



F. FURTHER INFORMATION

Group Members' claims for additional damages

28 You may have claims against Toyota that relate to the defective DPF system in your vehicle but which go beyond those claims which have already been determined by the Court's judgment. We will send you a notice in the future regarding how you can pursue any such additional claims if you wish to do so.

[Bracketed section below to only be included if Toyota files a notice of appeal and/or application for leave to appeal]

[Toyota's appeal

29 Toyota has appealed the Court's judgment. If that appeal is successful, you may lose your present entitlement to receive money under the judgment and/or the amount of money to which you are entitled may be reduced. The process for working out your entitlements will proceed despite the appeal, but payment of any money will not occur until after Toyota's appeal has been resolved. Balance intends to fund the applicants' defence of Toyota's appeal.

30 **You should still register your interest to receive money under the judgment notwithstanding Toyota's appeal and it is in your interests to do so.**

If you have any questions about this notice, please contact Gilbert + Tobin, the representative applicants' solicitors, by submitting your query at [URL], calling Gilbert + Tobin on [phone] or requesting a call back at [URL].



Schedule 5
Discount Schedule

Model Line	Build Year	Average Purchase Price % MSRP
Hilux 4x4	2015	94.55%
	2016	95.65%
	2017	95.57%
	2018	95.72%
	2019	94.97%
	2020	93.46%
Hilux 4x2	2015	92.64%
	2016	88.20%
	2017	91.45%
	2018	91.14%
	2019	89.34%
	2020	90.46%
Prado	2015	95.61%
	2016	96.23%
	2017	96.67%
	2018	96.54%
	2019	96.13%
	2020	95.19%
Fortuner	2015	95.63%
	2016	96.19%
	2017	94.83%
	2018	96.59%
	2019	96.31%
	2020	90.94%



Schedule 6

MSRP for Relevant Vehicles

The document located at Court Book tab 506, being the Excel spreadsheet entitled "*O – Information sought in paragraph 3 of Annexure A to the Orders dated 19 January 2021*", is deemed to be reproduced in this Schedule 6.

Date that entry is stamped:

Sia Lagos
Registrar



Schedule

No: NSD1210/2019

Federal Court of Australia

District Registry: New South Wales

Division: General

Second Applicant

DIRECT CLAIM SERVICES QLD PTY LTD ACN 167 519 968