



IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
GROUP PROCEEDINGS LIST

Case: S ECI 2022 00313
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No. S ECI 2022 00313

BETWEEN

ADAM PETER ROWE

Plaintiff

and

TOYOTA MOTOR CORPORATION AUSTRALIA LIMITED (ACN 009 686 097)

Defendant

AMENDED DEFENCE TO SECOND FURTHER AMENDED STATEMENT OF CLAIM

Rule 36.04 (Filed pursuant to leave granted by orders made on 19 June 2024 by the Honourable Justice Watson)

Date of document: 9 August 2024 ~~23 June 2023~~

Filed on behalf of the defendant
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To the plaintiff's second further amended statement of claim filed on 18 June 2024 ~~8 March 2023~~ (2FASOC), the defendant (**Toyota Australia**) says as follows.

Note: In this Amended Defence capitalised terms have the same meanings as in the 2FASOC. No admissions are made by the use of those capitalised terms. In accordance with general principles and usual practice, the defendant does not plead to particulars in the 2FASOC, and nothing in this Amended Defence should be taken to be an admission of any fact or matter alleged in those particulars unless stated otherwise.

A. PARTIES

A1. The Proceeding

1. It admits the allegations in paragraph 1.

A2. The Plaintiff and Group Members

2. As to paragraph 2, it:
 - (a) says that the claims of Group Members who acquired an Affected Vehicle between 7 February 2016 and 17 October 2016 and who did not still have an interest in that vehicle as at 7 February 2022 are statute barred by section 236(2) of the Australian Consumer Law (**ACL**) contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) insofar as they seek damages under section 236 of the ACL;
 - (b) says that the claims of all Group Members for damages pursuant to section 82 of the *Trade Practices Act 1974* (Cth) (**TPA**) are statute barred by section 82(2) of the TPA; and
 - (c) otherwise does not admit the allegations in paragraph 2.
3. It admits the allegations in paragraph 3.
4. It admits the allegations in paragraph 4.

A3. The Defendant

5. As to paragraph 5, it:
 - (a) admits the allegations in sub-paragraphs (a) to (e), (f), (h), (i) and (l);
 - (b) as to sub-paragraph (g):
 - (i) admits the allegations in sub-paragraphs (i), (ii) and (iii);
 - (ii) otherwise does not admit the allegations in sub-paragraph (g);
 - (c) as to sub-paragraph (j):
 - (i) admits that it imported and supplied Affected Vehicles that fall within the definition of “new vehicle” in section 5 of the Motor Vehicle Standards Act;
 - (ii) otherwise does not admit the allegations in sub-paragraph (j); and
 - (d) as to sub-paragraph (k):
 - (i) says that the *Road Vehicle Standards Act* does not contain a definition of “new vehicles”; and

- (ii) otherwise does not admit the allegations in sub-paragraph (k).

B. COMPLIANCE REGIME FOR NEW CARS SOLD IN AUSTRALIA

B1. *Motor Vehicle Standards Act and Road Vehicle Standards Act*

6. As to paragraph 6, it:

- (a) denies the allegations in paragraph 6;
- (b) says further that the plates are relevantly referred to in the *Motor Vehicle Standards Act* as “identification plates”, and the term “compliance plate” is not defined in the *Motor Vehicle Standards Act*;
- (c) says further that at all material times up to and including 30 June 2021:
 - (i) a person may supply to the market a vehicle which was nonstandard or did not have an identification plate in prescribed circumstances or with the written approval of the Minister;
 - (ii) subject to the matters in sub-paragraph (i) above, section 14 of the *Motor Vehicle Standards Act* prohibited a person from supplying to the market a new vehicle that was nonstandard or did not have an identification plate.

Particulars

Sections 14 and 14A of the *Motor Vehicle Standards Act*.

The term “nonstandard” is defined in section 5 of the of the *Motor Vehicle Standards Act* as “in relation to a road vehicle or a vehicle component, means not complying with the national standards and not taken to comply with the national standards by virtue of an approval given under subsection 10A(2)”.

The term “identification plate” is defined in section 5 of the of the *Motor Vehicle Standards Act* as “a plate declaring the status of a road vehicle in relation to the national standards and approved to be placed on vehicles of that type or description under procedures and arrangements provided for in subsection 10(1)” (identification plate).

7. As to paragraph 7, it:

- (a) denies the allegations in paragraph 7;
- (b) says further that at all material times up to and including 30 June 2021:
 - (i) a person may import a nonstandard road vehicle or a road vehicle that does not have an identification plate in the circumstances set out in section 19 or 20 of the *Motor Vehicle Standards Act*,
 - (ii) subject to the matters in sub-paragraph (i) above, section 18 of the *Motor Vehicle Standards Act* prohibited a person from importing a road vehicle that was nonstandard or did not have an identification plate.

Particulars

Sections 18, 19 and 20 of the *Motor Vehicle Standards Act*.

8. As to paragraph 8, it:

- (a) denies the allegations in paragraph 8; and
- (b) says further that at all material times up to and including 30 June 2021, the importation of a road vehicle that complied with the national standards and had an identification plate was subject to the following conditions:
 - (i) the importer would do all things reasonable and necessary to ensure that, when the vehicle was supplied to the market, it still complied with the national standards and still had an identification plate;
 - (ii) the importer would not modify the vehicle in a way that made it nonstandard.

Particulars

Section 17 of the *Motor Vehicle Standards Act*.

9. It admits the allegation in paragraph 9.

10. As to paragraph 10, it:

- (a) refers to and repeats paragraph 6(b) above;

- (b) says that at trial it will refer to Schedule 3, Part 2, Item 2; Part 3, Sub-Item 4(1)-(3); Part 4, Item 13 and 14 of the *Transitional Provisions Act* for their full terms and effect; and
 - (c) otherwise admits the allegations in paragraph 10.
- 11. As to paragraph 11, it:
 - (a) refers to and repeats paragraph 6(b) above;
 - (b) says that at trial it will refer to Schedule 3, Part 3, Item 5(1) of the *Transitional Provisions Act* for their full terms and effect; and
 - (c) otherwise admits the allegations in paragraph 11.
- 12. It admits the allegation in paragraph 12.
- 13. As to paragraph 13, it:
 - (a) says that a person contravenes section 16(1) of the *Road Vehicle Standards Act* if the person enters a vehicle on the RAV and the vehicle does not satisfy the requirements of an entry pathway, unless the matters in section 16(3) are satisfied; and
 - (b) otherwise admits the allegations in paragraph 13.
- 14. As to paragraph 14, it:
 - (a) says that on or after 1 July 2021, section 24(1) of the *Road Vehicle Standards Act* prohibits a person from providing a road vehicle to another person in Australia, where the vehicle is provided for the first time in Australia, and the vehicle is not on the RAV, unless any of the matters in sub-sections 24(3) or (4) apply;
 - (b) says that the RAV is an online database of vehicles that meet the requirements of the applicable national standards and have been approved for provision to the Australian market; and
 - (c) otherwise denies the allegations in paragraph 14.
- 15. It denies the allegations in paragraph 15 and relies on the terms of section 22 of the *Road Vehicle Standards Act* for their full force and effect.

16. It denies the allegations in paragraph 16 and relies on the terms of section 26 of the *Road Vehicle Standards Act* for their full force and effect.
17. As to paragraph 17, it:
 - (a) says that the condition as pleaded in paragraph 17 of the ASOC does not apply if section 26(3) applies;
 - (b) relies on the terms of section 26 for their full force and effect; and
 - (c) otherwise admits the allegations in paragraph 17.

B2. National Standards – Australian Design Rule 79

18. It admits the allegations in paragraph 18.
19. As to paragraph 19, it:
 - (a) says that at all material times, ADR 79 was a prescribed consumer product safety standard for the purpose of section 65C (other than subsection 65C(8)) of the TPA and a safety standard for the purpose of section 106 (other than section 106(7)) of the ACL;
 - (b) says that the word “mandatory” does not appear in any of the statutory provisions under the particulars of paragraph 19 of the ASOC; and
 - (c) otherwise admits the allegations in paragraph 19.
20. It admits the allegations in paragraph 20 and refers to and repeats paragraph 21 below.
21. It admits the allegations in paragraph 21 and says further that:
 - (a) ADR 79/02 specified that:
 - (i) United Nations – Economic Commission for Europe Regulation No. 83 Uniform Provisions Concerning the Approval of Vehicles with Regard to the Emissions of Pollutants According to Engine Requirements (UNECE Reg 83 or the Alternative Standard), Revision 3, incorporating the 05 series of Amendments, was an alternative standard for the purposes of ADR 79/02 in that the technical requirements of the Alternative Standard were deemed to be equivalent to the technical requirements of ADR 79/02;

- (ii) Vehicles were required to comply with the relevant limit values in row “B(2005)” of paragraph 5.3.1.4 of UNECE Reg 83;
- (b) ADR 79/03 specified that UNECE Reg 83, Revision 4, incorporating the 06 series of amendments, was an alternative standard for the purposes of ADR 79/03 in that the technical requirements of the Alternative Standard were deemed to be equivalent to the technical requirements of ADR 79/03;
- (c) ADR 79/04 specified that UNECE Reg 83, Revision 4, incorporating the 06 series of amendments, was an alternative standard for the purposes of ADR 79/04 in that the technical requirements of the Alternative Standard were deemed to be equivalent to the technical requirements of ADR 79/04;

Particulars

- (i) ADR 79/02, s 6.
- (ii) ADR 79/03, s 6.
- (iii) ADR 79/04, s 6.
- (d) in circumstances where:
 - (i) ADR 79 specified UNECE Reg 83 as an alternative standard;
 - (ii) a type (of vehicle or component) had been approved in accordance with Article 2 of the Agreement Concerning the Adoption of Harmonized Technical United Nations Regulations for Wheeled Vehicles, Equipment and Parts which can be Fitted and/or be Used on Wheeled Vehicles and the Conditions for Reciprocal Recognition of Approvals Granted on the Basis of these United Nations Regulations (1958 Agreement) for UNECE Reg 83 and by a Contracting Party to the 1958 Agreement applying UNECE Reg 83 (Overseas Type Approval);
 - (iii) the Overseas Type Approval corresponded to the same version of UNECE Reg 83 specified as the Alternative Standard or the version of UNECE Reg 83 in force from time to time,

a new vehicle (or vehicle component) of the type approved was taken to comply with ADR 79, except where:

- (iv) the Overseas Type Approval was not valid or was no longer valid; or
- (v) the Overseas Type Approval (or relevant products the subject of the Overseas Type Approval) were subject to remedial action in accordance with Article 4 of the 1958 Agreement;

Particulars

Vehicle Standard (Australian Design Rule – Harmonisation) 2012 (Cth), s 5 (Harmonisation Standard).

- (e) at all material times, a vehicle to which a relevant Overseas Type Approval applied was deemed to comply with ADR 79 and the technical requirements thereof;

Particulars

Sub-paragraphs (a) to (d) above are repeated.

- (f) each of the Affected Vehicles (other than Granvia vehicles fitted with a 2.8L 1GD-FTV engine) has, and at all materials times had, a valid and effective Overseas Type Approval and no relevant approval has been cancelled or withdrawn;

Particulars

The Overseas Type Approvals for the Affected Vehicles were issued as follows:

- A. for Landcruiser vehicles fitted with a 4.5L 195kW to 200kW 1VD-FTV engine:
 - 1) Approval number E6-83R-060727-J granted on 10 September 2015 by Bruxelles Mobilité - Service Public Régional de Bruxelles (Belgium) (**Bruxelles Mobilité**) (TMA.001.030.0055);
 - 2) Approval number E6-83R02-050491 granted on 10 September 2007 by Service Public Fédéral Mobilité et Transports (Belgium) (**Service Public Fédéral**) (TMA.001.029.3452); and
 - 3) Approval number E6-83R-060749-M granted on 10 September 2015 by Bruxelles Mobilité (TMA.001.029.3969);
- B. for RAV-4 vehicles fitted with a 2.2L 2AD-FHV or 2AD-FTV engine:
 - 1) Approval number E6-83R02-050664 granted on 21 November 2012 by Service Public Fédéral (TMA.001.030.0820);
 - 2) Approval number E6-83R-060751-J granted on 15 October 2015 by Bruxelles Mobilité (TMA.001.030.0587); and

- 3) Approval number E6-83R-060750-J granted on 15 October 2015 by Bruxelles Mobilité (TMA.001.030.0448);
- C. for Hilux vehicles fitted with a 2.4L 2GD-FTV engine:
- 1) Approval number 83R-068385-M granted on 1 May 2015 by the Vehicle Certification Agency (UK) (VCA) (TMA.001.029.1752);
 - 2) Approval number E11*83R06/10/M*8385*03 granted on 13 April 2018 by VCA (TMA.001.029.1602);
 - 3) Approval number E11*83R06/10/M*8199*06 granted on 13 April 2018 by VCA (TMA.001.029.1114); and
 - 4) Approval number 83R-068199-M granted on 1 May 2015 by VCA (TMA.001.029.0868);
- D. for Hilux vehicles fitted with a 2.8L 1GD-FTV engine:
- 1) Approval number 83R-068383-M granted on 1 May 2015 by VCA (TMA.001.029.0719);
 - 2) Approval number E11*83R06/10/M*8382*03 granted on 13 April 2018 by VCA (TMA.001.029.0001); and
 - 3) Approval number 83R-068382-M granted on 1 May 2015 by VCA (TMA.001.029.0508);
- E. for Fortuner vehicles fitted with a 2.8L 1GD-FTV engine:
- 1) Approval number 83R-068507-J granted on 5 June 2015 by VCA (TMA.001.029.2440);
 - 2) Approval number E11*83R06/15/J*10667*00 granted on 12 November 2021 by VCA (TMA.001.029.2078); and
 - 3) Approval number E11*83R06/13/J*10105*00 granted on 20 March 2020 by VCA (TMA.001.029.1880);
- F. for Landcruiser vehicles fitted with a 2.8L 1GD-FTV engine, approval number E6-83R-060714-J granted on 12 June 2015 by Bruxelles Mobilité (TMA.001.029.3023);
- G. for Hiace vehicles fitted with a 2.8L 1GD-FTV engine, approval number E6*83R06/10/M*0887*00 granted on 10 December 2018 by Departement Mobiliteit and Openbare Werken (Belgium) (Departement Mobiliteit) (TMA.001.029.2792);

H. for Landcruiser vehicles fitted with a 3.3L F33A-FTV engine, approval number E6*83R06/14/J*0951*00 granted 10 April 2021 by Departement Mobiliteit (TMA.001.029.4272).

Granvia vehicles fitted with a 2.8L 1GD-FTV engine were not the subject of any Overseas Type Approval.

- (g) by reason of the matters in sub-paragraphs (a) to (f) above, the Affected Vehicles referred to in sub-paragraph (f) above:
- (i) at the time the Overseas Type Approval numbers were submitted to the Commonwealth, were required to be accepted as complying with ADR 79; and
- (ii) at all material times have been taken to comply with ADR 79 and the technical requirements thereof.

B3. Requirements of ADR 79

22. As to paragraph 22, it:

- (a) says that at all material times, ADR 79 specified the maximum permitted levels of average exhaust emissions, including oxides of nitrogen (**NO_x**), under tests carried out using the Type I test procedure in the prescribed test conditions (including those at Annex 4a in Appendix A) and by applying the calculations prescribed in ADR 79 (including rules 5.3.1.4 to 5.3.1.5.2 in Appendix A);
- (b) says that the maximum permitted levels of average exhaust emissions, including NO_x, referred to in the preceding sub-paragraph depended on the ADR Category of the vehicle (M, N1 or N2), the reference mass of the vehicle and whether its engine was positive ignition or compression ignition;
- (c) says that ADR 79 does not specify the maximum permitted levels of exhaust emissions outside the prescribed test conditions; and
- (d) otherwise denies the allegations in paragraph 22 and refers to and repeats paragraph 21 above.

23. It denies the allegations in paragraph 23 and refers to the terms of rule 3.1 in Appendix A of ADR 79 for their full force and effect.

24. It admits the allegations in paragraph 24.
25. It admits the allegations in paragraph 25.
26. As to paragraph 26, it:
 - (a) says that at all relevant times, ADR 79 provided that an element of design which otherwise meets the definition of a defeat device may not be considered a defeat device if:
 - (i) the need for the device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle; or
 - (ii) the device does not function beyond the requirements of an engine starting; or
 - (iii) conditions are substantially included in the Type I or Type VI test procedures; and
 - (b) otherwise admits that ADR 79 defined a defeat device substantially in the terms alleged, and says that at trial it will refer to the definition of defeat device for its full terms and effect.

B4. Registration Requirements

27. As to paragraph 27, it:
 - (a) admits that there were provisions of the relevant laws substantially to the effect alleged, and at trial it will refer to those provisions for their full terms and effect; and
 - (b) denies that any offence has been committed by the plaintiff or any Group Member, and says further that no person has been charged with such an offence.
28. As to paragraph 28, it admits that there were provisions of the relevant laws substantially to the effect alleged, and at trial it will refer to those provisions for their full terms and effect.
29. As to paragraph 29, it admits that there were provisions of the relevant laws substantially to the effect alleged, and at trial it will refer to those provisions for their full terms and effect.

30. As to paragraph 30, it:
- (a) admits the allegations in respect of the laws of New South Wales, Victoria, Western Australia, the Australian Capital Territory, the Northern Territory; and
 - (b) otherwise does not admit the allegations in paragraph 30.
31. As to paragraph 31, it admits that there were provisions of the relevant laws substantially to the effect alleged, and at trial it will refer to those provisions for their full terms and effect.
32. As to paragraph 32, it admits that there were provisions of the relevant laws substantially to the effect alleged, and at trial it will refer to those provisions for their full terms and effect.
33. As to paragraph 33, it says as to:
- (a) sub-paragraph (a):
 - (i) admits that at all material times, under NSW laws, a motor vehicle's registration could be refused if, at the relevant time, the circumstances in sub-paragraphs (i) or (ii) existed;
 - (ii) admits that at all material times, under NSW laws, a motor vehicle's registration could be suspended or cancelled if, at the relevant time, the circumstances in sub-paragraphs (iii), (iv), (v) or (vi) existed;
 - (iii) otherwise denies sub-paragraph (a);
 - (b) sub-paragraph (b):
 - (i) admits that at all material times, under Victorian laws, a motor vehicle's registration could be refused if, at the relevant time, the circumstances in sub-paragraphs (i), (ii) or (iii) existed;
 - (ii) admits that at all material times, under Victorian laws, a motor vehicle's registration could be suspended or cancelled if, at the relevant time, the circumstances in sub-paragraphs (iv), (v) or (vi) existed;
 - (iii) otherwise denies sub-paragraph (b);

- (c) sub-paragraph (c):
 - (i) admits that at all material times, under Queensland laws, a motor vehicle's registration could be refused if, at the relevant time, the circumstances in sub-paragraph (i) existed;
 - (ii) admits that at all material times, under Queensland laws, a motor vehicle's registration could be suspended if, at the relevant time, the circumstances in sub-paragraph (ii) existed;
 - (iii) admits that at all material times, under Queensland laws, a motor vehicle's registration could be cancelled if, at the relevant time, the circumstances in sub-paragraphs (ii) or (iii) existed;
 - (iv) otherwise denies sub-paragraph (c);
- (d) sub-paragraph (d):
 - (i) admits that at all material times, under South Australian laws, a motor vehicle's registration could be refused if, at the relevant time, the circumstances in sub-paragraph (i) existed;
 - (ii) admits that at all material times, under South Australian laws, a motor vehicle's registration could be suspended if, at the relevant time, the circumstances in sub-paragraphs (ii) or (iii) existed;
 - (iii) it admits that at all material times, under South Australian laws, a motor vehicle's registration could be cancelled if, at the relevant time, the circumstances in sub-paragraphs (ii), (iii) or (iv) existed;
 - (iv) otherwise denies sub-paragraph (d);
- (e) sub-paragraph (e):
 - (i) it admits that at all material times, under Australian Capital Territory laws, a motor vehicle's registration could be refused if, at the relevant time, the circumstances in sub-paragraphs (i) or (ii) existed;
 - (ii) it admits that at all material times, under Australian Capital Territory laws, a motor vehicle's registration could be suspended or cancelled if, at the relevant time, the circumstances in sub-paragraphs (iii), (iv) or (v) existed;

- (iii) otherwise denies sub-paragraph (e);
- (f) sub-paragraph (f):
 - (i) it admits that at all material times, under Northern Territory laws, a motor vehicle's registration could be cancelled if, at the relevant time, the circumstances in sub-paragraphs (i), (ii) or (iii) existed;
 - (ii) otherwise denies sub-paragraph (f);
- (g) sub-paragraph (g):
 - (i) it admits that at all material times, under Tasmanian laws, a motor vehicle's registration could be refused if, at the relevant time, the circumstances in sub-paragraph (i) existed;
 - (ii) it admits that at all material times, under Tasmanian laws, a motor vehicle's registration could be suspended or cancelled if, at the relevant time, the circumstances in sub-paragraphs (ii), (iii), (iv) or (v) existed; and
 - (iii) otherwise denies sub-paragraph (g).

34. As to paragraph 34, it:

- (a) admits the allegations in respect of the laws of Victoria, South Australia, the Australian Capital Territory, and Tasmania; and
- (b) otherwise does not admit the allegations in paragraph 34.

C. DEVICES IN TOYOTA VEHICLES

35. As to paragraph 35, it:

- (a) refers to and repeats paragraphs 36 to 52E below;
- (b) [not used];
- (c) denies that:
 - (i) any relevant elements of design were not justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle;

- (ii) any relevant conditions were not substantially included in the Type 1 test procedure; and

Particulars

- A. The effectiveness of the emission control system depends on ensuring that it satisfies all applicable exhaust emissions standards while protecting the engine against damage or accident during the safe operation of the vehicle.
- B. The applicable emissions standards for the Affected Vehicles are referred to in paragraph 22 above. They require that a vehicle does not exceed specified average emissions limits in specified conditions (such as ambient temperature, air pressure, vehicle mileage, fuel specification and vehicle load) based on a specified driving cycle (involving specified patterns of idling, acceleration, steady driving and deceleration) over a specified time (19 minutes and 40 seconds). Relevant emissions for diesel engines (Compression Ignition) include: (1) Carbon Monoxide (CO), (2) Oxides of Nitrogen (NOx), (3) NOx + Hydrocarbons (THC), (4) Particulate Matter (PM) and (5) Particles (P).
- C. The emission control system comprises different components, including the EGR System referred to in section C2 below, the fuel injection system referred to in section C3 below and exhaust treatment systems such as diesel particulate filters. The different components of the emissions control system are interdependent and configured to operate dynamically in conjunction with each other to balance the complex competing demands of the applicable emissions standards and the need to ensure the engine is protected against damage or accident and the vehicle operates safely.
- D. The components and configuration of the emission control system varied across Affected Vehicles depending on, at least, vehicle model and engine type.
- E. Toyota Australia reserves its rights to provide further and better particulars once the plaintiff provides particulars and/or evidence in relation to the matters raised in Clayton Utz's letters seeking further and better particulars and, in particular, at [4] of the 1 December 2022 letter and at ~~[2(c)], [3(b)], [4(b)]~~ and [5(a)] of the 18 January 2023 letter, and following the filing of expert evidence.
- (d) otherwise denies the allegations in paragraph 35.

C1. Engine Control Unit

36. As to paragraph 36, it:

- (a) admits the allegations in paragraph 36; and
- (b) says further that the configuration of the ECU varied across Affected Vehicles depending on, at least, vehicle model and engine type.

37. As to paragraph 37, it:

- ~~(a) — says that coolant pumps and intake and exhaust manifolds are not controlled by the ECU;~~
- (a) ~~(b)~~ says that the ECU also controls the transmission in Affected Vehicles with automatic transmission; and
- (b) ~~(c)~~ otherwise admits the allegations in paragraph 37.

C2. EGR System

38. As to paragraph 38, it:

- (a) admits the allegations in paragraph 38; and
- (b) says further that the components and configuration of the EGR System varied across Affected Vehicles depending on, at least, vehicle model and engine type.

39. As to paragraph 39, it:

- (a) admits the allegations in paragraph 39; and
- (b) says further that the operation of the EGR System also affects the following emissions in addition to NO_x:
 - (i) carbon monoxide (CO);
 - (ii) total hydrocarbons (NO_x plus hydrocarbons);
 - (iii) particulate matter (PM); and
 - (iv) particles (P).

Particulars

Toyota Australia refers to and repeats paragraph C of the particulars under paragraph 35 above.

40. It admits the allegations in paragraph 40.
41. As to paragraph 41, it:
- (a) admits the allegations in paragraph 41;
 - (b) refers to and repeats sub-paragraph 38(b) above; and
 - (c) says that the EGR valve is one of the components of the EGR System which varied across Affected Vehicles depending on, at least, vehicle model and engine type.
42. As to paragraph 42, it:
- (a) admits that the ECU controls the position of the EGR valve;
 - (b) says that the ECU controls the EGR valve based on operating conditions including depending on the type of Affected Vehicle:
 - (i) engine speed (RPM);
 - (ii) accelerator pedal position;
 - (iii) water temperature;
 - (iv) atmospheric pressure;
 - (v) mass air flow;
 - (vi) intake air temperature; and
 - (vii) air/fuel ratio ~~(in some but not all Affected Vehicles);~~
 - (c) says that ~~the EGR valve~~ the expression "engine load" has no single or definite meaning and is therefore vague and embarrassing; and
 - ~~(i) is typically not at its maximum open position when the engine is idle;~~
 - ~~(i) may or may not be fully closed when the accelerator pedal position is at or above 42% of its maximum; and~~

~~(ii) does not progressively or linearly open or close as the accelerator pedal position changes because the position of the accelerator pedal does not operate alone to open or close the EGR valve; and~~

(d) otherwise denies the allegations in paragraph 42.

43. As to paragraph 43, it:

~~(a) says that the accelerator pedal position may occasionally be pressed at or above 42% of maximum during vehicle operation and use;~~

(a) ~~(b)~~ refers to and repeats paragraph 42(c) above and says that the “engine loads” referred to have not been identified or particularised; and

(b) ~~(c)~~ having regard to sub-paragraph (a), does not know and therefore does not admit otherwise denies the allegations in paragraph 43.

44. As to paragraph 44, it:

(a) refers to and repeats paragraphs 42(c) and 43(a) above;

(b) says that the Type I test does not specify engine loads as part of the test; and

(c) ~~(a)~~ otherwise denies the allegations in paragraph 44.; ~~and~~

~~(b) says that the EGR System operates at all times when the engine is operating.~~

45. As to paragraph 45, it:

(a) refers to and repeats sub-paragraphs ~~44(b)~~ 42(c) and 43(a) above;

(b) says that the effectiveness of the emissions control system depends on, among other things, the operation of the EGR System including the opening and closing of the EGR valve;

(c) says that the EGR System is configured to ensure that, working in conjunction with the other elements of the emission control system, the applicable exhaust emissions standards are satisfied while protecting the engine against damage or accident during the safe operation of the vehicle; and

(d) otherwise denies the allegations in paragraph 45.

46. As to paragraph 46, it:

- (a) denies the allegations in paragraph 46; and
- (b) refers to and repeats paragraphs 35 to 45 above.

C2C3. Injection Timing

47. As to paragraph 47, it:

- (a) admits the allegations in paragraph 47; and
- (b) says that the components and configuration of the fuel injection system varied across Affected Vehicles depending on, at least, vehicle model and engine type.

48. As to paragraph 48, it:

- (a) admits the allegations in this paragraph 48;
- (b) refers to and repeats paragraph 47(b) above;
- (c) says that the ECU controls the quantity and timing of fuel injection based on operating conditions that include the following, depending on the type of Affected Vehicle:
 - (i) common rail pressure (being fuel pressure at the component known as the common rail);
 - (ii) intake manifold absolute pressure (being the intake air pressure);
 - (iii) intake air temperature;
 - (iv) water temperature;
 - (v) engine speed (RPM);
 - (vi) accelerator pedal position; and
 - (vii) crank angle; and

- (d) says further that the control of the quantity and timing of fuel injection also affects the following emissions in addition to NO_x:
- (i) carbon monoxide (CO);
 - (ii) total hydrocarbons (NO_x plus hydrocarbons);
 - (iii) particulate matter (PM); and
 - (iv) particles (P).

49. As to paragraph 49, it:

- (a) admits the allegations in sub-paragraph 49(a);
- (b) ~~(a)~~ refers to and repeats sub-paragraphs 42(c) and 48(c) above; and
- (c) ~~(b)~~ otherwise denies the allegations in paragraph 49.

Particulars

Toyota Australia refers to and repeats paragraph C of the particulars under paragraph 35 above.

50. [Not used]. As to paragraph 50, it:

- ~~(a) refers to and repeats sub-paragraphs 48(c) and 48(d) above; and~~
- ~~(b) otherwise denies the allegations in paragraph 50.~~

51. As to paragraph 51, it:

- (a) refers to and repeats sub-paragraphs 42(c), 43(a), 48(c) and 48(d) above; and
- (b) otherwise denies the allegations in paragraph 51.

52. As to paragraph 52, it:

- (a) denies the allegations in paragraph 52; and
- (b) refers to and repeats paragraphs 35, 36, 37 and 47 to 51 above.

C4. Thermal Window

52A. As to paragraph 52A, it:

- (a) refers to and repeats sub-paragraph 42(b) above; and
- (b) otherwise admits the allegations in paragraph 52A.

52B. As to paragraph 52B, it:

- (a) says that the Type I test is conducted with ambient air temperatures between 20°C and 30°C; and
- (b) otherwise denies the allegations in paragraph 52B.

52C. As to paragraph 52C, it:

- (a) refers to and repeats sub-paragraph 52B(a) above; and
- (b) says intake air temperatures outside the Thermal Window may include conditions which may reasonably be expected to be encountered in normal vehicle operation and use;
- (c) otherwise denies the allegations in paragraph 52C.

52D. As to paragraph 52D, it:

- (a) refers to and repeats sub-paragraph 52A(a) and 52B(a) above; and
- (b) otherwise denies the allegations in paragraph 52D.

52E. As to paragraph 52E, it:

- (a) denies the allegations in paragraph 52E; and
- (b) refers to and repeats paragraphs 35 to 45 and 52A to 52D above.

D. AFFECTED TOYOTA VEHICLES IN AUSTRALIA**D1. Affected Toyota Vehicles**

53. As to paragraph 53, it

- (a) refers to and repeats paragraphs 46, 52 and 52E above and denies that any vehicles referred to in paragraph 53 contained a defeat device; and
- (b) otherwise admits the allegations in paragraph 53.

54. It does not plead to paragraph 54 as it does not contain any allegation.

D2. Effect of defeat device on Affected Vehicles

55. As to paragraph 55, it:

- (a) denies the allegations in paragraph 55 and refers to and repeats paragraphs 46, 52 and 52E above; and
- (b) refers to and repeats paragraph 22 above.

D3. Compliance Plates Fixed to, or entry onto the RAV of, Affected Vehicles

56. As to paragraph 56, it:

- (a) says that Toyota Australia sought and obtained approval from the Minister:
 - (i) on or before 30 June 2021, to fix identification plates to the Affected Vehicles in accordance with the *Motor Vehicle Standards Act*, or alternatively
 - (ii) on or after 1 July 2021:
 - A. to fix identification plates to the Affected Vehicles in accordance with the *Motor Vehicle Standards Act*; or alternatively,
 - B. to obtain a vehicle type approval to enable it to enter one or more of the Affected Vehicles onto the RAV in accordance with the *Road Vehicle Standards Act*, and
- (b) otherwise denies the allegations in paragraph 56 and refers to and repeats paragraph 21 above.

57. As to paragraph 57, it:

- (a) admits that in seeking approval from the Minister to fix identification plates to the Affected Vehicles it did not make any such disclosure;
- (b) denies that any such disclosure was required, including because:
 - (i) the Affected Vehicles were not fitted with defeat devices contrary to ADR 79 as pleaded in paragraph 55 of the 2FASOC;
 - (ii) the Affected Vehicles did not fail to comply with ADR 79 as pleaded in paragraph 55 of the 2FASOC; and
- (c) otherwise denies the allegations in paragraph 57.

58. As to paragraph 58, it:

- (a) says that, where applicable, Toyota Australia obtained approval for identification plates to be placed on vehicle types constituted by the Affected Vehicles;
- (b) says that, where applicable, after obtaining the approvals referred to in paragraph (a) above, it fitted the Affected Vehicles, with identification plates prior to their supply as new vehicles; and
- (c) otherwise denies the allegations in paragraph 58.

59. As to paragraph 59, it:

- (a) admits that in seeking road vehicle type approval from the Minister it did not make any such disclosure;
- (b) denies that any such disclosure was required, including because:
 - (i) the Affected Vehicles were not fitted with defeat devices contrary to ADR 79 as pleaded in paragraph 55 of the 2FASOC;
 - (ii) the Affected Vehicles did not fail to comply with ADR 79 as pleaded in paragraph 55 of the 2FASOC; and
- (c) otherwise denies the allegations in paragraph 59.

60. As to paragraph 60, it:

- (a) says that, where applicable, having obtained a road vehicle type approval from the Minister, Toyota Australia entered Affected Vehicles which obtained a road vehicle type approval on the RAV prior to their supply as new vehicles; and
- (b) otherwise denies the allegations in paragraph 60.

D4. Affected Vehicles Failed to Comply with Registration Requirements

61. It denies the allegations in paragraph 61 and refers to and repeats paragraph 21 above.

E. COMPLIANCE WITH SAFETY STANDARDS

62. It admits the allegations in paragraph 62.

63. It admits the allegations in paragraph 63.

64. As to paragraph 64, it:

- (a) refers to and repeats paragraph 19 above; and
- (b) otherwise admits paragraph 64.

65. It denies the allegations in paragraph 65.

66. It denies the allegations in paragraph 66.

F. COMPLIANCE WITH STATUTORY WARRANTIES AND GUARANTEES

67. It admits the allegations in paragraph 67.

68. As to paragraph 68, it:

- (a) admits the allegations in sub-paragraph (c); and
- (b) otherwise does not admit the allegations in paragraph 68.

F1. Action in respect of Guarantee as to Acceptable Quality

69. As to paragraph 69, it:

- (a) refers to and repeats the matters in paragraph 68 above; and

(b) otherwise admits the allegations in paragraph 69.

70. It denies the allegations in paragraph 70.

71. It denies the allegations in paragraph 71.

72. As to paragraph 72, it:

(a) admits that, for the purposes of section 271(1) of the ACL, and pursuant to section 2 of the ACL, the Plaintiff and Group Members who acquired Affected Vehicles by way of purchase are affected persons in relation to their Affected Vehicles in that each was a:

(i) consumer who acquired an Affected Vehicle; or

(ii) a person who acquired an Affected Vehicle from a consumer (other than for the purpose of re-supply); and

(b) otherwise does not admit the allegations in paragraph 72.

73. It denies the allegations in paragraph 73.

F2. Action in respect of non-compliance with Express Warranty

74. It denies the allegations in paragraph 74.

75. It denies the allegations in paragraph 75.

76. It denies the allegations in paragraph 76.

77. It denies the allegations in paragraph 77.

78. It denies the allegations in paragraph 78.

79. As to paragraph 79, it:

(a) admits that, for the purposes of section 271(5) of the ACL, and pursuant to section 2 of the ACL, the Plaintiff and Group Members who acquired Affected Vehicles by way of purchase are affected persons in relation to their Affected Vehicles in that each was a:

(i) consumer who acquired an Affected Vehicle; or

(ii) a person who acquired an Affected Vehicle from a consumer (other than for the purpose of re-supply); and

(b) otherwise does not admit the allegations in paragraph 79.

80. It denies the allegations in paragraph 80.

G. MISLEADING AND DECEPTIVE CONDUCT

G1. Alleged Toyota Compliance Representation

81. It denies the allegations in paragraph 81.

82. It denies the allegations in paragraph 82.

83. It denies the allegations in paragraph 83.

84. It denies the allegations in paragraph 84.

85. As to paragraph 85, it:

(a) admits the allegations in paragraph 85;

(b) says that it was not required to correct or qualify the Toyota Compliance Representation as alleged because:

(i) no representation was made in the terms alleged;

(ii) alternatively if it was made, it denies that it was misleading or deceptive, or likely to mislead or deceive, as alleged by the plaintiff.

G2. Allegations of misleading or deceptive omission

86. It denies the allegations in paragraph 86.

87. As to paragraph 87, it:

(a) denies that the Affected Vehicles were fitted with a defeat device and it refers to and repeats paragraphs 46, 52 and 52E above; and

(b) denies the allegations in paragraph 87.

88. It denies the allegations in paragraph 88.

89. It denies the allegations in paragraph 89.

H. COMMON QUESTIONS OF LAW OR FACT

90. It does not admit that the questions set out in paragraphs 1 to 9 in Section H are appropriate common questions for trial, and says that the form of any common questions will be addressed by the defendant following the close of pleadings and prior to trial.

I. LOSS OR DAMAGE SUFFERED BY THE PLAINTIFF AND GROUP MEMBERS AND RELIEF SOUGHT

91. It denies the allegations in paragraph 1 of Section I and without limiting that denial refers to and repeats paragraph 21 above and says further that:

- (a) at no time has an application for registration or renewal of registration of an Affected Vehicle been refused under State or Territory laws because the vehicle did not relevantly comply with applicable vehicle standards;
- (b) at no time has the registration of an Affected Vehicle been suspended or cancelled under State or Territory laws because the vehicle did not relevantly comply with applicable vehicle standards;
- (c) at all material times each Affected Vehicle has been used, without any relevant impediment, on public roads in Australia;
- (d) at no time has any authorised officer or police officer determined that an Affected Vehicle did not relevantly comply with applicable vehicle standards and thereby issued a warning or defect notice, imposed conditions on the use of the vehicle, or prohibited use of the vehicle;
- (e) at no time has the plaintiff or any Group Member relevantly been prevented from using their vehicle and exploiting the capacity of the vehicle to its full extent; and
- (f) at no time has the market or re-sale value of an Affected Vehicle been affected by the alleged contraventions (which are expressly denied).

92. It denies the allegations in paragraph 2 of Section I and refers to and repeats paragraph 91 above.

93. As to paragraph 3 of Section I, it:

- (a) denies the allegations in paragraph 3;
- (b) refers to and repeats paragraph 91 above; and
- (c) says further that if any Group Members have suffered loss and damage as alleged, then any monetary award must take into account any amount awarded to Group Members in the class action commenced by Kenneth John Williams against Toyota Australia in Federal Court proceeding NSD 1210/2019, in respect of which an appeal was allowed in NSD462/2022, and is presently the subject of appeals applications for special leave to the High Court in HCA S15537/2023 and HCA S15738/2023.

Plaintiff's claims

94. It denies that the plaintiff or any group member is entitled to the relief sought in paragraphs 4 to 10 of Section I.

Date: 9 August 2024 ~~23 June 2023~~

Christopher M Caleo

Paul Liondas

Xuelin Teo

Amendments to this pleading settled by Paul Liondas and Xuelin Teo.



Clayton Utz
Solicitors for the defendant