



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

No. S ECI 2022 00313 00313

Filed on: 19/12/2024 02:41 PM

BETWEEN

JAMES WILLIAM BUTTERWORTH ADAM PETER ROWE

Plaintiff

-and-

TOYOTA MOTOR CORPORATION AUSTRALIA LIMITED (ACN 009 686 097)

Defendant

AMENDED WRIT

(filed pursuant to the Orders of Watson J made 18 December 2024)

Date of Document:	<u>7 February 2022</u> <u>19 December 2024</u>	Solicitors Code:	102650
Filed on behalf of:	The Plaintiff	DX:	28001 Warrnambool
Prepared by:	Maddens Lawyers 219 Koroit Street Warrnambool Victoria, 3280	Telephone:	(03) 5560 2000
		Ref:	211778
		Email:	kae@maddenslawyers.com.au

TO THE DEFENDANT

TAKE NOTICE that this proceeding has been brought against you by the plaintiff for the claim set out in this writ.

IF YOU INTEND TO DEFEND the proceeding, or if you have a claim against the plaintiff which you wish to have taken into account at the trial, **YOU MUST GIVE NOTICE** of your intention by filing an appearance within the proper time for appearance stated below.

YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by—

- (a) filing a "Notice of Appearance" in the Prothonotary's office, 436 Lonsdale Street, Melbourne, or, where the writ has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and
- (b) on the day you file the Notice, serving a copy, sealed by the Court, at the plaintiff's address for service, which is set out at the end of this writ.

IF YOU FAIL to file an appearance within the proper time, the plaintiff may **OBTAIN JUDGMENT AGAINST YOU** on the claim without further notice.

***THE PROPER TIME TO FILE AN APPEARANCE** is as follows—

- (a) where you are served with the writ in Victoria, within 10 days after service;
- (b) where you are served with the writ out of Victoria and in another part of Australia, within 21 days after service;
- (c) where you are served with the writ in Papua New Guinea, within 28 days after service;
- (d) where you are served with the writ in New Zealand under Part 2 of the Trans-Tasman Proceedings Act 2010 of the Commonwealth, within 30 working days (within the meaning of that Act) after service or, if a shorter or longer period has been fixed by the Court under section 13(1)(b) of that Act, the period so fixed;
- (e) in any other case, within 42 days after service of the writ.

FILED

Prothonotary

THIS WRIT is to be served within one year from the date it is filed or within such further period as the Court orders.

- 1. Place of trial— Melbourne
- 2. Mode of trial— Judge
- 3. This writ was filed for the plaintiff by Maddens Lawyers as solicitors for the plaintiff.
- 4. The address of the plaintiff is 11 Greenup Close, Florey, ACT 2615. ~~269 Cobden South Ecklin Road, Elingamite North, Victoria, 3266~~
- 5. The address for service of the plaintiff is
C/- Maddens Lawyers
219 Koroit Street
Warrnambool
Victoria, 3280
- 6. The email address for service of the plaintiff is kae@maddenslawyers.com.au
- 7. The address of the defendant is 155 Bertie Street, Port Melbourne, Victoria 3207

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GROUP PROCEEDINGS LIST

No. S ECI 2022 00313

B E T W E E N

JAMES WILLIAM BUTTERWORTH ADAM PETER ROWE

Plaintiff

-and-

TOYOTA MOTOR CORPORATION AUSTRALIA LIMITED ACN 009 686 097

Defendant

THIRD ~~SECOND~~ FURTHER AMENDED STATEMENT OF CLAIM
(filed pursuant to the Orders of Watson J made 18 December 2024)

Date of Document: ~~8 March 2023~~ ~~20 November 2023~~ ~~18 June 2024~~ 19 December 2024

Filed on behalf of:	The Plaintiff	Solicitors Code:	102650
Prepared by:	Maddens Lawyers	DX:	28001 Warrnambool
	219 Koroit Street	Telephone:	(03) 5560 2000
	Warrnambool	Ref:	211778
	Victoria, 3280	Email:	<u>kae@maddenslawyers.com.au</u>

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A. PARTIES

A1. The Proceeding

1. This proceeding is commenced as a representative proceeding pursuant to Part 4A of the *Supreme Court Act 1986* (Vic) by the Plaintiff on his own behalf and on behalf of all the Group Members (as defined in paragraph 2 below).

A2. The Plaintiff and Group Members

2. The Plaintiff and the persons he represents (**the Group Members**) are persons who:
- (a) at any time in the period from 7 February 2016 to the date this third further amended statement of claim was filed (**Relevant Period**), acquired ~~an interest in~~ one or more of the Affected Vehicles (as defined in paragraphs 53 and 54 below); and
 - (b) either:
 - (i) acquired the Affected Vehicle:
 - (A) from an authorised Toyota dealer or other retailer selling Affected Vehicles, including used car dealers;
 - (B) other than by way of sale by auction; and
 - (C) other than for the purpose of re-supply; or
 - (ii) acquired the Affected Vehicle from a person who acquired the Affected Vehicle in the circumstances described in subparagraph 2(b)(i) above, other than for the purpose of re-supply;
 - (c) but not including:
 - (i) the Defendant (**Toyota Australia**), or any related entity of Toyota Australia (as defined by s.9 of the *Corporations Act* 2001 (Cth));
 - (ii) any authorised Toyota dealer; or
 - (iii) any Judge of the Supreme Court ~~of~~ of Victoria.

Particulars

- i. Acquired, wherever appearing in this statement of claim, means to acquire by way of purchase, exchange or taking on a lease or on hire-purchase.*

3. As at the date of the commencement of the proceedings there were seven or more Group Members.
4. On or about 9 February 2021 ~~15 May 2020~~, the Plaintiff acquired an Affected Vehicle, being a new 2021 Toyota Landcruiser 200 GXL wagon with a 4.5L turbo diesel engine used automatic ~~2014 Toyota Landcruiser Sahara wagon with a 4.5L 1VD-FTV diesel engine.~~

Particulars

- i. The Plaintiff purchased this vehicle from Bega Automotive Pty Ltd trading as 'Bega Valley Motors' ABN 66 906 392 708 S.A. Progress No 1 Pty Ltd ABN 86 602 258 695 trading as Peter Kittle Motor Company, an authorised Toyota Dealer, in Bega, New South Wales Mildura, Victoria.*

A3. The Defendant

5. At all material times, Toyota Australia:

- (a) is and was a corporation incorporated in Australia;
- (b) is and was a trading corporation within the meaning of section 4 of the *Trade Practices Act 1974* (Cth) (**TPA**);
- (c) is and was a trading corporation within the meaning of section 4 of the *Competition and Consumer Act 2010* (Cth) (**CCA**);
- (d) is and was a corporation within the meaning of section 5 of the *Motor Vehicle Standards Act 1989* (Cth) (the **Motor Vehicle Standards Act**);
- (e) is and was a constitutional corporation within the meaning of section 5 of the *Road Vehicle Standards Act 2018* (Cth) (the **Road Vehicle Standards Act**);
- (f) is and was a supplier within the meaning of section 4 of the TPA and sections 4 and 4C of the CCA and section 2 of the *Australian Consumer Law* (**ACL**) (being schedule 2 of the CCA), of the Affected Vehicles;
- (g) is and was the manufacturer of the Affected Vehicles supplied in Australia, within the meaning of section 7 of the ACL in that:
 - (i) Toyota Australia imported the Affected Vehicles into Australia;
 - (ii) Toyota Australia was not (but for the operation of section 7 of the ACL) the manufacturer of the Affected Vehicles; and
 - (iii) at the time of importation, the manufacturer of the Affected Vehicles did not have a place of business in Australia;
 - (iv) or, further and in the alternative, Toyota Australia held itself out to the Australian public as the manufacturer of the Affected Vehicles;
 - (v) or, further and in the alternative, Toyota Australia caused or permitted its brand or mark, Toyota, to be applied to the Affected Vehicles which it supplied in Australia;
- (h) distributed the Affected Vehicles throughout Australia;
- (i) further, or alternatively, advertised, marketed, and promoted the Affected Vehicles throughout Australia;
- (j) imported and supplied new vehicles within the meaning of the Motor Vehicle Standards Act, including Affected Vehicles;
- (k) on or after 1 July 2021, imported and supplied new vehicles within the meaning of the Road Vehicle Standards Act, including Affected Vehicles; and

- (l) on or after 1 July 2021, entered Affected Vehicles onto the Register of Approved Vehicles (**RAV**) under the Road Vehicle Standards Act.

B. COMPLIANCE REGIME FOR NEW CARS SOLD IN AUSTRALIA

B1. Motor Vehicle Standards Act and Road Vehicle Standards Act

6. At all material times, up to and including 30 June 2021, the Motor Vehicle Standards Act prohibited a person from supplying to the market a new vehicle that did not comply with the national standards and prohibited a person from supplying to the market a new vehicle that did not have fitted an identification plate of a type prescribed by the Motor Vehicle Standards Act, namely a plate certifying compliance with those national standards (**compliance plate**).

Particulars

- i. *Motor Vehicle Standards Act ss. 10, 10A and 14.*

7. At all material times, up to and including 30 June 2021, the Motor Vehicle Standards Act prohibited the importation of a road vehicle that did not comply with national standards and prohibited the importation of a road vehicle that did not have a compliance plate fitted.

Particulars

- i. *Motor Vehicle Standards Act s. 18.*

8. At all material times, up to and including 30 June 2021, the Motor Vehicle Standards Act:
- (a) required the importer of a road vehicle to do all things reasonable and necessary to ensure that, when the vehicle was supplied to market, it still complied with national standards and still had a compliance plate fitted;
- (b) prohibited the importer from modifying the vehicle in any way that made it not comply with national standards.

Particulars

- i. *Motor Vehicle Standards Act s. 17.*

9. On 1 July 2021, the Motor Vehicle Standards Act was repealed and replaced with the Road Vehicle Standards Act.

Particulars

- i. *Road Vehicle Standards (Consequential and Transitional Provisions) Act 2018 (Cth) (**Transitional Provisions Act**) s. 2 and 3 and Schedule 2.*

10. Notwithstanding the repeal of the Motor Vehicle Standards Act, the relevant provisions of the Motor Vehicle Standards Act, including the provisions referred to in paragraphs 6 to 8 above

remain in force, to the exclusion of the Road Vehicle Standards Act, during a transitional period from 1 July 2021 until 30 June 2023 in relation to:

- (a) Affected Vehicles which were approved to have a compliance plate fitted on or before 30 June 2021 in accordance with section 10A(1) or (2) of the Motor Vehicle Standards Act; or
- (b) Affected Vehicles which had a pending application for a compliance plate before the Minister on or before 30 June 2021, but which applications were decided by the Minister on or after 1 July 2021,

by operation of the Transitional Provisions Act.

Particulars

- i. *Transitional Provisions Act: Schedule 3, Part 2, Item 2; Part 3, Sub-Item 4(1)-(3); Part 4, Item 13 and 14.*

11. On or after 1 July 2021 until 31 December 2021, a person who:

- (a) on or before 30 June 2021, received approval to have a compliance plate fitted on a vehicle; or
- (b) on or before 30 June 2021, made an application to the Minister for approval for a compliance plate and the Minister approved it after 1 July 2021,

could provide to the Minister, in the approved form:

- (c) written acknowledgement of the conditions applying to road vehicle type approvals, as set out in the *Road Vehicle Standards Rules 2019* (Cth) (**Road Vehicle Standards Rules**), and that breach of any of those conditions is an offence under the “new law” (including the Road Vehicle Standards Act) as defined in Schedule 3, Part 1, Item 1 of the Transitional Provisions Act; and
- (d) a signed declaration that the person satisfies the conditions applying to road vehicle type approvals, as set out in the Road Vehicle Standards Rules, in respect of the type of vehicle covered by an approval mention in sub-paragraphs (a) and (b) above; and
- (e) pays the applicable charges,

is be taken to have been granted a road vehicle type approval under the Road Vehicle Standards Rules in respect of the vehicle which had otherwise received a compliance plate, or was pending approval for a compliance plate, and could thereby enter the vehicle in respect of which they obtained the road vehicle type approval on the RAV.

Particulars

- i. *Transitional Provisions Act, Schedule 3, Part 3, Item 5(1).*

12. On or after 1 July 2021, a vehicle may be entered on the RAV if the vehicle satisfies the requirements of an entry pathway.

Particulars

- i. *Road Vehicle Standards Act s. 15.*

13. On or after 1 July 2021, a person contravenes s. 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.

14. On or after 1 July 2021, 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 (an online database of vehicles that meet the requirements of the applicable national standards and have been approved for provision to the Australian market).

Particulars

- i. *Road Vehicle Standards Act ss. 14, 15, 24.*

15. On or after 1 July 2021, a person contravenes s. 22 of the Road Vehicle Standards Act if the person imports a road vehicle into Australia but is not permitted to do so because, inter alia, at the time of importation, that road vehicle is of a type to which there is no road vehicle type approval in force.

Particulars

- i. *Road Vehicle Standards Act s. 22.*

16. On or after 1 July 2021, the Road Vehicle Standards Act prohibits a person from modifying a road vehicle on the RAV before the vehicle is provided to a consumer for the first time in Australia and the modifications (which are not otherwise allowed by the rules) cause the road vehicle to not satisfy the requirements of the entry pathway that applied at the time the vehicle was entered on the RAV.

Particulars

- i. *Road Vehicle Standards Act s. 26.*

17. On or after 1 July 2021, it is a condition of a road vehicle type approval that the holder of the approval, at all times, inter alia, ensures that the vehicles covered in this approval, at the time they are entered on the RAV, comply with the applicable national road standards as in force at that time.

Particulars

- i. *Road Vehicle Standards Rules r. 26.*

B2. National Standards – Australian Design Rule 79

18. At all material times, Australian Design Rule 79 was a national standard for the purposes of the Motor Vehicle Standards Act (**Australian Design Rules or ADR 79**).

Particulars

- i. *At all material times up to and including 10 December 2018, the making of national standards was provided for in section 7 of the Motor Vehicle Standards Act which empowered the Minister to determine vehicle standards for road vehicles or vehicle components.*
 - ii. *At all material times from 11 December 2018 to 30 June 2021, a national standard in force under section 7 of the Motor Vehicle Standards Act continued in force as if it were a national standard determined under section 12 of the Road Vehicle Standards Act, pursuant to Schedule 1 of the Transitional Provisions Act.*
 - iii. *At all material times from 1 July 2021, a national standard in force under section 7 of the Motor Vehicle Standards Act continued in force as if it were a national standard determined under section 12 of the Road Vehicle Standards Act, Schedule 3, Part 2, Item 2 of the Transitional Provisions Act.*
 - iv. *The applicable versions of ADR 79 are:*
 1. *Vehicle Standard (ADR 79/02 – Emission Control for Light Vehicles) 2005;*
 2. *Vehicle Standard (ADR 79/03 – Emission Control for Light Vehicles) 2011;*
and
 3. *Vehicle Standard (ADR 79/04 – Emission Control for Light Vehicles) 2011.*
19. At all material times, ADR 79 was a mandatory safety standard for the purposes of section 65C of the TPA and section 106 of the ACL.

Particulars

- i. *At all times during the currency of the TPA, pursuant to section 41 of the Motor Vehicle Standards Act, a national standard was taken to be a prescribed consumer product safety standard for the purposes of section 65C of the TPA.*
- ii. *From 1 January 2011 up to and including 30 June 2021, pursuant to section 41 of the Motor Vehicle Standards Act, a national standard is taken to be a safety standard for the purposes of section 106 (other than 106(7)) of the ACL.*
- iii. *After 1 July 2021, pursuant to section 77 of the Road Vehicle Standards Act, a national standard is taken to be a safety standard for the purposes of section 106 (other than 106(7)) of the ACL.*

20. At all material times, ADR 79 was applicable to the Affected Vehicles, being M or N category vehicles with a Gross Vehicle Mass less than or equal to 3.5 tonnes.

Particulars

- i. *Australian Design Rule 79/02, 79/03 and 79/04, rule 2.1.*

21. At all material times, ADR 79 applied to the Affected Vehicles as follows:

(a) ADR 79/02:

- (i) new model Toyota diesel vehicles manufactured on or after 1 July 2008; and
(ii) Toyota diesel vehicles produced on or after 1 July 2010;

(b) ADR 79/03: new model Toyota diesel vehicles manufactured between 1 November 2013 and 31 October 2016;

(c) ADR 79/04: new model Toyota diesel vehicles manufactured between 1 November 2016 to the end of the Relevant Period.

Particulars

- i. *Australian Design Rule 79/02, 79/03 and 79/04, rule 2.2.*

B3. Requirements of ADR 79

22. At all material times, the Australian Design Rules specified maximum permitted levels of exhaust emissions, including nitrogen oxides (**NO_x**), depending on the gross vehicle mass of the vehicle.

Particulars

- i. *ADR 79/02, Appendix A, rule 5.2.1, Type I; rule 5.3.1.4 including the table entitled 'Limit Values'.*
ii. *ADR 79/03 and 79/04, Appendix A, rule 5.2.1, Type I and Table 1.*

23. At all material times, pursuant to ADR 79, vehicle manufacturers or their authorised representative were required to apply to the Approval Authority for type approval with regard to exhaust emissions, crankcase emissions, evaporative emissions, durability of pollution control devices and on-board diagnostic system.

Particulars

- i. *ADR 79/02, 79/03 and 79/04, Appendix A, rule 3.1.*

24. At all material times, ADR 79 required that the components liable to affect the emission of pollutants be so designed, constructed and assembled as to enable the vehicle, in normal

use, despite the vibration to which they may be subjected, to comply with the provisions of ADR 79.

Particulars

- i. *ADR 79/02, 79/03 and 79/04, Appendix A, rule 5.1.1.*

25. At all material times, ADR 79 prohibited the use of a defeat device.

Particulars

- i. *ADR 79/02, 79/03 and 79/04, Appendix A, rule 5.1.2.1.*

26. At all material times, ADR 79 defined a defeat device to mean “any element of design which senses temperature, vehicle speed, engine rotational speed, transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use. Such an element may not be considered a defeat device if:

- (a) the need for the device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle; and or
- (b) the device does not function beyond the requirements of an engine starting; or
- (c) conditions are substantially included in the Type I or Type VI test procedures.”

Particulars

- i. *ADR 79/02, 79/03 and 79/04, Appendix A, rule 2.16.*
- ii. *The Type I and Type VI test procedures are the test procedures described in Annexure 4 and Annexure 8 of ADR 79/02;*
- iii. *The Type I and Type VI test procedures are the test procedures described in Annexure 4A and Annexure 8 of ADR 79/03 and 79/04.*

B4. Registration Requirements

27. At all material times, it was an offence under State and Territory laws for a person to use a motor vehicle on a road that did not comply with the applicable vehicle standards for the vehicle.

Particulars

- i. *Road Transport (Vehicle Registration) Regulation 2017 (NSW), Reg. 60(1) (formerly, Road Transport (Vehicle Registration) Regulation 2007 (NSW), Reg. 52(1));*

- ii. *Road Safety (Vehicles) Regulations 2021 (Vic), Reg 294(1) (formerly, Road Safety (Vehicles) Regulations 2009 (Vic), Reg 258(2));*
- iii. *Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 2021 (Qld), Reg. 7(1) and 8(1) (formerly Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 2010 (Qld), Reg. 5(1);*
- iv. *Road Traffic Act 1961 (SA), s 116(1), 117(1) and 118(1);*
- v. *Road Traffic (Vehicles) Regulations 2014 (WA), Reg 232 (formerly, Road Traffic (Vehicle Standards) Regulations 2002, Reg. 8);*
- vi. *Road Transport (Vehicle Registration) Regulation 2000 (ACT), Reg 109(2);*
- vii. *Motor Vehicles (Standards) Regulations 1987 (NT), Reg 35;*
- viii. *Vehicles and Traffic (Vehicle Standards) Regulations 2014 (Tas), Reg 4(1)(a); (formerly, Vehicles and Traffic (Vehicle Standards) Regulation 2001 (Tas), Reg 4(1)(a).*

28. At all material times, ADR 79 applied to the design and construction of motor vehicles and accordingly was an applicable vehicle standard for the purposes of State and Territory laws.

Particulars

- i. *Road Transport (Vehicle Registration) Regulation 2017 (NSW), Schedule 2, Clause 21 and 22 (formerly, Road Transport (Vehicle Registration) Regulation 2007 (NSW), Schedule 2, clause 11 and 12);*
- ii. *Road Safety (Vehicles) Regulation 2021 (Vic), Reg 21 and 22 (formerly Road Safety (Vehicles) Regulation 2009 (Vic), Schedule 2, clause 19 and 20;*
- iii. *Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 2021 (Qld), Schedule 1, clause 21 and 22 (formerly Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 2010 (Qld), Schedule 1, clause 7 and 8;*
- iv. *Road Traffic (Light Vehicle Standards) Rules 2018 (SA), Reg 21 and 22 (formerly, Road Traffic (Light Vehicle Standards) Rules 2013 (SA), Reg 19 and 20 and Road Traffic (Light Vehicle Standards) Rules 1999 (SA), Reg. 19 and 20);*

- v. *Road Traffic (Vehicles) Regulations 2014 (WA), Reg 236 and 238; (formerly, Road Traffic (Vehicle Standards) Rules 2002 (WA) Rule 13 and 14, respectively);*
- vi. *Road Transport (Vehicle Registration) Regulation 2000 (ACT), Schedule 1, clause 1.15 and 1.16;*
- vii. *Motor Vehicles (Standards) Regulations - Australian Vehicle Standards Rule (1989) (NT), Reg 19 and 20;*
- viii. *Vehicles and Traffic (Vehicle Standards) Regulation 2014 (Tas), Reg 19 and 20.*

29. At all material times, it was an offence under State and Territory laws for a person to use an unregistered motor vehicle on a road.

Particulars

- i. *Road Transport Act 2013 (NSW), s 68(1) (formerly, Road Transport (Vehicle Registration) Act 1997, s 18;*
- ii. *Road Safety Act 1986 (Vic), s 7(1);*
- iii. *Transport Operations (Road Use Management—Vehicle Registration) Regulation 2021(QLD) Reg. 10 (formerly Transport Operations (Road Use Management—Vehicle Registration) Regulation 2010 (QLD), Reg. 11;*
- iv. *Motor Vehicles Act 1959 (SA), s. 9;*
- v. *Road Traffic (Vehicles) Act 2012 (WA), s. 4; (formerly, Road Traffic Act 1974 WA, s 15);*
- vi. *Road Transport (Vehicle Registration) Act 1999 (ACT), s. 18(1);*
- vii. *Traffic Act 1987 (NT), s. 33(1);*
- viii. *Vehicle and Traffic Act 1999 (Tas), s. 27(1).*

30. At all material times, for a motor vehicle to be eligible for registration without conditions under State and Territory laws, it was required to comply with the applicable vehicle standards for the vehicle.

Particulars

- i. *Road Transport (Vehicle Registration) Regulation 2017 (NSW), Reg. 6(1) (formerly Road Transport (Vehicle Registration) Regulation 2007 (NSW), Reg. 6(1));*
- ii. *Road Safety (Vehicles) Regulation 2021 (Vic), Reg 24 (1) and 48(1) (formerly Road Safety (Vehicles) Regulation 2009 (Vic), Reg. 14(1) and 29(1);*
- iii. *Transport Operations (Road Use Management—Vehicle Registration) Regulation 2021 (QLD), Reg. 18 (formerly, Transport Operations (Road Use Management—Vehicle Registration) Regulation 2010 (QLD), Reg. 9;*
- iv. *Motor Vehicles Act 1959 (SA), s 24(1);*
- v. *Road Traffic (Vehicles) Regulations 2014 (WA), Reg. 34 (formerly, Road Traffic (Licensing) Regulations 1975, Reg 9(2));*
- vi. *Road Transport (Vehicle Registration) Regulation 2000 (ACT), Reg. 26(1);*
- vii. *Motor Vehicles Act 1949 (NT), s. 8(a);*
- viii. *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2021 (Tas), Reg. 77(1) (formerly, Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010 (Tas), Reg. 52(1).*

31. At all material times, an application for registration or renewal of registration could be refused under State and Territory laws if the vehicle did not comply with the applicable vehicle standards.

Particulars

- i. *Road Transport (Vehicle Registration) Regulation 2017 (NSW), Reg. 6(1), 12(1), and 36(6) (formerly, Road Transport (Vehicle Registration) Regulation 2007 (NSW), Reg 6(1), 12(1) and 30(7));*
- ii. *Road Safety (Vehicles) Regulation 2021 (Vic), Reg 24 (1), 48(1) and 84(4) (formerly Road Safety (Vehicles) Regulation 2009 (Vic), Reg 14(1), 29(1) and 69(4);*
- iii. *Transport Operations (Road Use Management—Vehicle Registration) Regulation 2021 (QLD), Reg. 21(1) and 34(2) (formerly, Transport Operations (Road Use Management—Vehicle Registration) Regulation 2010 (QLD), Reg. 17(1) and 43(11);*

- iv. *Motor Vehicles Act 1959 (SA), s 24(3);*
- v. *Road Traffic (Vehicles) Act 2012 (WA), s 5(3)(a)(i) (formerly, the Road Traffic Act 1974 (WA), s. 17(2));*
- vi. *Road Transport (Vehicle Registration) Regulation 2000 (ACT), Reg 26(1), 32(1)(a) and 68(9)(a);*
- vii. *Motor Vehicles Act 1949 (NT), s 8;*
- viii. *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2021 (Tas), Reg 76(1), 84(2) and 100(2) (formerly Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010 (Tas), Reg 57(1), 59(2) and 68(2).*

32. At all material times, a motor vehicle's registration could be suspended or cancelled under State and Territory laws if the vehicle did not comply with the applicable vehicle standards.

Particulars

- i. *Road Transport (Vehicle Registration) Regulation 2017 (NSW), Reg. 45(1) (formerly, Road Transport (Vehicle Registration) Regulation 2007 (NSW), Reg 41(1));*
- ii. *Road Safety (Vehicles) Regulation 2021 (Vic) Reg 129(b), 130(1) and 132 (formerly Road Safety (Vehicles) Regulation 2009 (Vic), Reg. 114(b), 115(1) and 117;*
- iii. *Transport Operations (Road Use Management—Vehicle Registration) Regulation 2021 (QLD), Reg 59(1) (formerly, Transport Operations (Road Use Management—Vehicle Registration) Regulation 2010 (QLD), Reg 58(1) and (2);*
- iv. *Motor Vehicles Act 1959 (SA), s 55A(1);*
- v. *Road Traffic (Vehicles) Act 2012 (WA), s 9(1) and (2) (formerly, the Road Traffic Act 1974 (WA), s. 23A);*
- vi. *Road Transport (Vehicle Registration) Regulation 2000 (ACT), Reg 84(1); Motor Vehicles Act (NT), s 102(2)(c); Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2021 (Tas), Reg 77(1) and 104(1) (formerly, Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010 (Tas), Reg 52(1)(a) and 72(1)(b).*

33. At all material times, a motor vehicle's registration could be refused or suspended or cancelled if, at the relevant time:
- (a) under NSW laws:
 - (i) the vehicle is not an eligible vehicle;
 - (ii) the relevant authority reasonably believes that information given in the application for registration is false or misleading;
 - (iii) a defect notice issued in relation to the vehicle has not been complied with and the date for compliance specified in the notice has expired;
 - (iv) the relevant authority reasonably believes that the ownership, possession, control or description of the registrable vehicle (or of any part of the registrable vehicle) as recorded on the Register is uncertain;
 - (v) the registration has been issued erroneously;
 - (vi) the vehicle does not comply with the applicable standards for the vehicle;
 - (b) under Victorian laws:
 - (i) the vehicle is not eligible for registration;
 - (ii) the relevant authority reasonably believes that information given in the application is false or misleading;
 - (iii) the relevant authority reasonably believes that the vehicle or part of the vehicle has, or may have, been illegally imported;
 - (iv) a vehicle defect notice relating to the vehicle has not been complied with and the date for compliance specified in the notice has expired;
 - (v) the relevant authority reasonably believes the ownership, possession, control or description of the vehicle as recorded on the register is uncertain;
 - (vi) the relevant authority reasonably believes the vehicle or part of the vehicle has, or may have, been illegally imported;
 - (c) under Queensland laws:
 - (i) the relevant authority reasonably believes information given in the application is false or misleading;
 - (ii) the approval was issued because of a document or representation that is false or misleading or obtained or made in another improper way;
 - (iii) a defect notice issued in relation to the vehicle has not been complied with and the date for compliance specified in the notice had expired;

- (d) under South Australian laws:
 - (i) the relevant authority reasonably believes that information disclosed in the application for registration or any evidence provided by the applicant is or may be inaccurate, incomplete or misleading;
 - (ii) the relevant authority reasonably believes that information recorded in the register of motor vehicles in relation to the vehicle is or may be inaccurate, incomplete or misleading;
 - (iii) the vehicle was registered in error;
 - (iv) the vehicle has been suspended and the reason for suspension still exists following a period of notice;
- (e) under Australian Capital Territory laws:
 - (i) the vehicle is not an eligible vehicle;
 - (ii) the relevant authority believes on reasonable grounds that information given in, or in relation to, the application for registration is false, misleading or incomplete in a material particular;
 - (iii) a defect notice issued in relation to the vehicle has not been complied with and the date for compliance specified in the notice has expired;
 - (iv) the ownership, possession, control or description of the vehicle as recorded in the register is uncertain;
 - (v) the vehicle has been registered in error;
- (f) under Northern Territory laws:
 - (i) the registration of a motor vehicle has been obtained by fraud or deception;
 - (ii) the motor vehicle has been registered in error;
 - (iii) a defect notice issued in relation to the vehicle has not been complied with and the date for compliance or to show reasonable cause has expired;
- (g) under Tasmanian laws:
 - (i) the relevant authority reasonably believes that information given in or in relation to the application for registration is false or misleading;
 - (ii) the vehicle has been registered in error;
 - (iii) the vehicle is no longer eligible for registration;
 - (iv) the responsibility for the vehicle or the description of the vehicle as recorded in the register of motor vehicles and trailers is uncertain;

- (v) a vehicle defect notice has been issued in respect of the vehicle, the time for compliance with the notice has passed, and the notice has not been complied with.

Particulars

- i. *Road Transport (Vehicle Registration) Regulation 2017 (NSW), Reg. 12(1) and 45(1) (formerly, Road Transport (Vehicle Registration) Regulation 2007 (NSW), reg 12(1) and 41(1));*
- ii. *Road Safety (Vehicles) Regulation 2021 (Vic), Reg 48, 84(4), 129 and 132 (formerly, Road Safety (Vehicles) Regulation 2009 (VIC), reg 29, 69(4), 114 and 117;*
- iii. *Transport Operations (Road Use Management) Act 1995 (QLD) s18(1) and Transport Operations (Road Use Management—Vehicle Registration) Regulation 2021 (QLD), Reg. 21(1) and Schedule 7, clause 1 (formerly, Transport Operations (Road Use Management—Vehicle Registration) Regulation 2010 (QLD), Reg. 17(1) and Schedule 7, clause 1;*
- iv. *Motor Vehicles Act 1959 (SA), s 24(3) and 55A(1);*
- v. *Road Transport (Vehicle Registration) Regulation 2000 (ACT), reg 32(1), 84(1);*
- vi. *Motor Vehicles Act 1949 (NT), s 102(2), 128A(14);*
- vii. *Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2021 (TAS), reg 82(3), 100(2) and 104(1) (formerly, Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010 (TAS), reg 57(2), 68(2) and 72(1).*

34. At all material times, State and Territory laws gave authorised officers and police officers the power to inspect a motor vehicle to determine if it complied with the applicable vehicle standards, and on discovering that it did not, the power to:

- (a) issue a warning or a defect notice;
- (b) impose conditions on the use of the vehicle; or
- (c) prohibit the use of the vehicle.

Particulars

- i. *Road Transport Act 2013 (NSW), s 76(4) (formerly, Road Transport (Vehicle Registration) Act 1997 s 26 (2)) and the Road Transport (Vehicle Registration)*

Regulation 2017 (NSW), Reg. 80 (formerly, Road Transport (Vehicle Registration) Regulation 2007 (NSW), Reg 70);

- ii. *Road Safety Act 1986 (VIC), s 13(2) and 14;*
- iii. *Transport Operations (Road User Management) Act 1995 (Qld) s 34(2), s 36(1) and Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 2021 (Qld), Reg 67 (formerly, Transport Operations (Road Use Management – Vehicle Standards and Safety) Regulation 2010 (Qld), Reg 8;*
- iv. *Road Traffic Act 1961 (SA), s 40Q(2) and 145;*
- v. *Road Traffic (Administration) Act 2008 (WA), s 52(2) and Road Traffic (Vehicles) Act 2012 (WA), s 71(1) (formerly Road Traffic (Vehicle Standards) Regulations 2002, Reg 61 and 62(1));*
- vi. *Road Transport (Vehicle Registration) Act 1999 (ACT), s 25;*
- vii. *Motor Vehicles Act 1949 (NT), ss 128 and 128A;*
- viii. *Vehicles and Traffic Act 1999 (Tas), s 49(1)(f) and Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2021 (Tas), Reg. 117(2) (formerly, Vehicle and Traffic (Driver Licensing and Vehicle Registration) Regulations 2010 (Tas), Reg. 85.*

C. DEVICES IN TOYOTA VEHICLES

35. During the Relevant Period, the Affected Vehicles possessed elements of design, as set out in paragraphs 36 to 52~~E~~ below, which sensed vehicle ~~the~~ parameters ~~of throttle position~~ for the purpose of activating, modulating, delaying or deactivating the operation of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use, and in respect of which none of the exceptions referred to in paragraph 26 above apply.

C1. Engine Control Unit

36. During the Relevant Period, each Affected Vehicle contained an engine control unit (**ECU**).
37. The ECU of each of the Affected Vehicles controls its engine and exhaust functions by sensing and interpreting relevant parameters (including temperature, pressure, engine rotational~~a~~ speed, and accelerator pedal ~~or throttle~~ position) and initiating, modulating or ceasing the operation of relevant vehicle devices (including exhaust gas recirculation, fuel injection timing ~~injectors, coolant pumps and air intake and exhaust manifolds~~) in response.

C2. EGR System

38. During the Relevant Period, each of the Affected Vehicles has included an exhaust gas recirculation system (**EGR System**).

39. The EGR System reduces the vehicle's NOx emissions by recirculating exhaust gases produced in the engine during the combustion process back into the combustion chamber.

Particulars

- i. *The recirculation of exhaust gases reduces the amount of oxygen in the combustion chamber, which reduces the temperature of combustion and the creation of nitrogen oxides.*

40. The EGR System is part of the vehicle's emissions control system.

41. The EGR System of each Affected Vehicle includes an EGR valve, which controls the rate volume of exhaust gas recirculated into the combustion chamber.

Particulars

- i. *When the EGR valve is closed, no exhaust gas is recirculated and correspondingly more air and therefore oxygen is taken into the engine's combustion chamber, which results in higher combustion temperature and the creation of more NOx.*
- ii. *The more the EGR valve is opened, the greater the rate volume of exhaust gas recirculated into the engine, which results in lower combustion temperature and the creation of less NOx.*

42. In each Affected Vehicle:

(a) the ECU controls the position of the EGR valve: such that:

~~(a) the EGR valve is at its maximum open position when the throttle is idle and is progressively closed as the throttle is engaged;~~

~~(b) the EGR valve is fully closed when the throttle position is at or above approximately 42% of its maximum.~~

(b) the ECU senses and interprets engine driving condition parameters for the purpose of controlling the position of the EGR valve, including:

- (i) engine speed;
- (ii) accelerator pedal position;
- (iii) coolant temperature;
- (iv) atmospheric pressure;
- (v) atmospheric temperature;
- (vi) mass air flow;

- (vii) intake air temperature; and
- (viii) air-fuel ratio.

Particulars

- i. Section E440 of the Overseas Type Approval Documents for each vehicle.
 - ii. Prior to discovery and inspection the Plaintiff is unable to say precisely how the ECU controls the EGR valve in response to engine driving conditions, but as alleged in paragraph 42(c) below, it does so such that the EGR valve closes as engine load increases.
 - iii. Further particulars will be provided after discovery, expert evidence and before trial.
- (c) the ECU controls the position of the EGR valve such that the EGR valve closes as engine load increases;

Particulars

- i. As to the Hilux (2.8L 1GD-FTV) and Landcruiser (4.5L 1VD-FTV), the Expert Report of Juston Smithers dated 6 May 2024, sections 8.2 to 8.4.
- ii. As to the other Affected Vehicles, it is to be inferred from sections E440 and E472 of the Overseas Type Approval Documents relevant to each vehicle.
- iii. Further particulars will be provided after discovery, expert evidence and before trial.

43. ~~Throttle positions at or above approximately 42% of maximum are~~ Conditions which may reasonably be expected to be encountered in normal vehicle operation and use of the Affected Vehicles include engine loads that exceed those encountered during the Type I test.

44. ~~When For engine loads that exceed those encountered during the Type I test, the ECU of each Affected Vehicle closes the EGR valve, reducing the EGR rate. is closed the operation of the EGR System is deactivated~~

Particulars

- i. As to the Hilux (2.8L 1GD-FTV) and Landcruiser (4.5L 1VD-FTV), the Expert Report of Juston Smithers dated 6 May 2024, sections 8.2 to 8.4.
- ii. As to the other Affected Vehicles, it is to be inferred from sections E440 and E472 of the Overseas Type Approval Documents relevant to each vehicle.
- iii. Further particulars will be provided after discovery, expert evidence and before trial.

45. The closing deactivation of the operation of the EGR valve System of each Affected Vehicle in response to engine loads that exceed those encountered in the Type I test reduces the effectiveness of the emissions control system.

Particulars

- i. When ~~As~~ the EGR valve ~~is~~ closeed, vehicle NOx emissions increase substantially exceed the NOx emissions when the EGR System is operating and.
- ii. In conditions which may reasonably be expected to be encountered in normal vehicle operation and use and which are not substantially included in the Type I test procedures, the EGR valve closes to an extent that the vehicle NOx emissions substantially exceed the maximum average NOx emissions prescribed in ADR-79 for the Type I test.
- iii. As to the Hilux (2.8L 1GD-FTV) and Landcruiser (4.5L 1VD-FTV), the Expert Report of Juston Smithers dated 6 May 2024, sections 7, 8.2 to 8.4.
- iv. As to the other Affected Vehicles, it is to be inferred from sections E440 and E472 of the Overseas Type Approval Documents relevant to each vehicle.
- v. Further particulars will be provided after discovery, expert evidence and before trial.

46. In the premises, the manner in which the ECU of Affected Vehicles controls the EGR valve and EGR rate relative to engine load is a defeat device.

C3.C2-Injection Timing

47. During the Relevant Period, the engine of each of the Affected Vehicles has included a fuel injection system.

48. In each of the Affected Vehicles, the timing of the injection of fuel into the combustion chamber:

- (a) is controlled by the ECU;
- (b) affects the vehicle's NOx emissions;
- (c) is part of the vehicle's emissions control system.

49. In each Affected Vehicle:

(a) the ECU controls the fuel injection timing: such that:

~~(a) when the throttle position is less than approximately 42%, the fuel injecting timing is between approximately 1 and 7 degrees crank angle after "top dead centre" (being the point at which the piston is at the top of the cylinder, positioned farthest from the crankshaft); and~~

~~(b) when the throttle position is at or greater than approximately 42%, then during the period that it remains so, the fuel injection timing is advanced to be between about 1.5 degrees and 8 degrees crank angle before "top dead centre".~~

- (b) the ECU senses and interprets engine driving condition parameters for the purpose of controlling the fuel injection timing, including:
- (i) common rail fuel pressure;
 - (ii) intake manifold absolute pressure;
 - (iii) intake air temperature;
 - (iv) water temperature;
 - (v) engine rotational speed;
 - (vi) accelerator pedal position; and
 - (vii) crank angle.

Particulars

- i. Sections E432 and E438 of the Overseas Type Approval Documents relevant to each vehicle.
- ii. Further particulars will be provided after discovery, expert evidence and before trial.

- (c) the ECU advances the fuel injection timing (where advancing refers to fuel being injected earlier in the combustion cycle) as engine load increases;

Particulars

- i. Section E438 of the Overseas Type Approval Documents for each vehicle.
- ii. As to the Landcruiser (3.3L F33A-FTV) the fuel injection timing is advanced as engine load increases from approximately 1,800 rpm engine speed.
- iii. Further particulars will be provided after discovery, expert evidence and before trial.

50. ~~[Not used] The effect of paragraph (a) is that the throttle position causes the fuel injection timing in the Affected Vehicles to be optimised to minimise nitrogen oxide emissions and meet statutory emissions limits.~~

51. ~~The effect of paragraph (b) is that the throttle position causes~~ The advancing of the fuel injection timing in the Affected Vehicles in response to engine loads that exceed those encountered during the Type I test reduces the effectiveness of the emissions control system. ~~advance relative to that referred to in paragraph (a), with the effect that engine performance is improved, but nitrogen oxide emissions increase.~~

Particulars

- i. When the fuel injection timing is advanced, vehicle NOx emissions increase.
- ii. In conditions which may reasonably be expected to be encountered in normal vehicle operation and use and which are not substantially included in the Type I

test procedures, the fuel injection timing is advanced to an extent that the vehicle NOx emissions substantially exceed the maximum average NOx emissions prescribed in ADR-79 for the Type I test.

- iii. As to the Hilux (2.8L 1GD-FTV) and Landcruiser (4.5L 1VD-FTV), the Expert Report of Juston Smithers dated 6 May 2024, sections 7, 8.2 to 8.4.
- iv. As to the other Affected Vehicles, it is to be inferred from section E438 of the Overseas Type Approval Documents relevant to each vehicle.
- v. Further particulars will be provided after discovery, expert evidence and before trial.

52. In the premises, the manner in which the ECU of Affected Vehicles controls the fuel injection timing relative to engine load is ~~was~~ a defeat device.

C4. Thermal Window

52A. During the Relevant Period, the ECU of each of the Affected Vehicles sensed intake air temperature to control the position of the EGR valve.

Particulars

- i. As to the Hilux (2.8L 1GD-FTV) and Landcruiser (4.5L 1VD-FTV), the Expert Report of Juston Smithers dated 6 May 2024, sections 9.2 to 9.4.
- ii. As to the other Affected Vehicles, it is to be inferred from sections E440 and E472 of the Overseas Type Approval Documents for each vehicle.
- iii. Further particulars will be provided after discovery, expert evidence and before trial.

52B. The Type I test is conducted with intake air temperatures between approximately 20°C and 30°C (Thermal Window).

Particulars

- i. The Type I test is conducted in ambient temperatures of 20°C to 30°C, ADR 79/02, Appendix A, Annex 4 rule 6.1.1; 79/03 and 79/04, Appendix A, Annex 4a rule 3.1.1.
- ii. In the controlled environment of Type I testing, there is no material difference between ambient temperatures and intake air temperatures.

52C. Conditions which may reasonably be expected to be encountered in normal vehicle operation and use include conditions in which intake air temperatures are outside the Thermal Window.

52D. In each Affected Vehicle:

- (a) for intake air temperatures outside the Thermal Window, the ECU closes the EGR valve thereby reducing the EGR rate; and

Particulars

- i. As to the Hilux (2.8L 1GD-FTV) for intake air temperatures below the Thermal Window, the ECU closes the EGR valve thereby reducing the EGR rate, as set out in the Expert Report of Juston Smithers dated 6 May 2024 section 9.2.
 - ii. As to the Landcruiser (4.5L 1VD-FTV), the Expert Report of Juston Smithers dated 6 May 2024 section 9.3.
 - iii. As to the other Affected Vehicles, it is to be inferred from the sections E440 and E472 of the Overseas Type Approval Documents relevant to each vehicle.
 - iv. Further particulars will be provided after discovery, expert evidence and before trial.
- (b) the closing of the EGR valve referred to in paragraph 52D(a) above reduces the effectiveness of the emissions control system by substantially increasing vehicle NOx emissions.

Particulars

- i. As the EGR valve closes, vehicle NOx emissions increase.
- ii. In conditions which may reasonably be expected to be encountered in normal vehicle operation and use and which are not substantially included in the Type I test procedures, the EGR valve closes to an extent that the vehicle NOx emissions substantially exceed the maximum average NOx emissions prescribed in ADR-79 for the Type I test.
- iii. As to the Hilux (2.8L 1GD-FTV) and Landcruiser (4.5L 1VD-FTV), the Confidential Expert Report of Juston Smithers dated 6 May 2024, sections 9.2 to 9.4.
- iv. As to the other Affected Vehicles, it is to be inferred from the sections E440 and E472 of the Overseas Type Approval Documents relevant each vehicle.
- v. Further particulars will be provided after discovery, expert evidence and before trial.

52E. In the premises, the manner in which the ECU of Affected Vehicles controls the EGR valve and EGR rate outside the Thermal Window is a defeat device.

D. AFFECTED TOYOTA VEHICLES IN AUSTRALIA

D1. Affected Toyota Vehicles

53. Toyota Australia imported the following types of diesel vehicles which contained a defeat device (as pleaded in paragraphs 46~~3~~ and 52 and 52E above):

- (a) from ~~at least 2010~~2007, Landcruiser vehicles fitted with a 4.5L 195kW to 200kW 1VD-FTV engine;
- (b) from 2013 , RAV-4 vehicles fitted with a 2.2L 2AD-FHV or 2AD-FTV engine;
- (c) from 2015, Hilux vehicles fitted with:

- (i) a 2.4L 2GD-FTV engine; and
- (ii) a 2.8L 1GD-FTV engine;
- (d) from 2015, [Fortuna Fortuner](#) vehicles fitted with a 2.8L 1GD-FTV engine;
- (e) from 2015, Landcruiser vehicles fitted with a 2.8L ~~1GD~~[1GD](#)-FTV engine;
- (f) from 2019, vehicles fitted with a 2.8L 1GD-FTV engine as follows:
 - (i) Hiace, [excepting models with a Gross Vehicle Mass exceeding 3,500 kilograms](#); and
 - (ii) Granvia;
- (g) from 2020, Landcruiser vehicles fitted with a 3.3L F33A-FTV engine.

54. The vehicles referred to in paragraph 53 above are referred to in this pleading as the **Affected Vehicles**.

D2. Effect of defeat device on Affected Vehicles

55. By reason of the matters pleaded in paragraphs 46, ~~and~~ 52 [and 52E above](#), the Affected Vehicles failed to comply with the requirements of ADR 79 in the following respects:

- (a) they contained a defeat device within the meaning of ADR 79, the installation of which was a contravention of ADR 79;
- (b) under normal vehicle operation and use, the Affected Vehicles emitted levels of nitrogen oxide that exceeded the emission limits in ADR 79; and
- (c) the engines of the Affected Vehicles are liable to increase the emission of pollutants, and therefore those engines themselves, were not designed, constructed and assembled so as to enable the vehicle, in normal use, to comply with the provisions of ADR 79.

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

56. Notwithstanding the matters pleaded in paragraphs 46, ~~and~~ 52 [and 52E above](#), in purported compliance with ADR 79, Toyota Australia sought and obtained approval from the Minister to:

- (a) on or before 30 June 2021, to fix compliance plates to the Affected Vehicles; or alternatively
- (b) on or after 1 July 2021:
 - (i) to fix compliance plates to the Affected Vehicles; or alternatively,
 - (ii) to obtain a road vehicle type authority to enable it to enter one or more of Affected Vehicles onto the RAV.

Particulars

In seeking and obtaining approval from the Minister, Toyota Australia relied on the following overseas regulatory type approval documents for each of the Affected Vehicles:

- a. *for Landcruiser vehicles fitted with a 4.5L 195kW to 200kW 1VD-FTV engine: TMA.001.030.0055, TMA.001.029.3452 and TMA.001.029.3969;*
- b. *for RAV-4 vehicles fitted with a 2.2L 2AD-FHV or 2AD-FTV engine: TMA.001.030.0820, TMA.001.030.0587 and TMA.001.030.0448;*
- c. *for Hilux vehicles fitted with a 2.4L 2GD-FTV engine: TMA.001.029.1752, TMA.001.029.1602, TMA.001.029.1114 and TMA.001.029.0868;*
- d. *for Hilux vehicles fitted with a 2.8L 1GD-FTV engine: TMA.001.029.0719, TMA.001.029.0001 and TMA.001.029.0508;*
- e. *for Fortuner vehicles fitted with a 2.8L 1GD-FTV engine: TMA.001.029.2440, TMA.001.029.2078 and TMA.001.029.1880;*
- f. *for Landcruiser vehicles fitted with a 2.8L 1GD-FTV engine: TMA.001.029.3023;*
- g. *for Hiace vehicles fitted with a 2.8L 1GD-FTV engine: TMA.001.029.2792;*
- h. *for Granvia vehicles fitted with a 2.8L 1GD-FTV engine: TMA.001.016.7183;*
- i. *for Landcruiser vehicles fitted with a 3.3L F33A-FTV engine: TMA.001.029.4272.*

(Overseas Type Approval Documents).

57. Toyota Australia, in seeking approval from the Minister to fix compliance plates to the Affected Vehicles did not disclose:
- (a) that the Affected Vehicles were fitted with defeat devices, contrary to ADR 79 as pleaded in paragraph 55 above;
 - (b) that the Affected Vehicles did not comply with ADR 79 as pleaded in paragraph 55 above.
58. Having obtained approval from the Minister to do so, Toyota Australia fitted the Affected Vehicles with compliance plates prior to their supply, distribution or sale.
59. Further and/or alternatively, Toyota Australia, in seeking a road vehicle type approval from the Minister did not disclose:
- (a) that the Affected Vehicles were fitted with defeat devices, contrary to ADR 79 as pleaded in paragraph 55 above;
 - (b) that the Affected Vehicles did not comply with ADR 79 as pleaded in paragraph 55 above.

60. Further/and or alternatively, 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, distribution or sale.

D4. Affected Vehicles Failed to Comply with Registration Requirements

61. By failing to comply with ADR 79, the Affected Vehicles failed to comply (and continue to fail to comply) with the requirements for registration under the relevant State and Territory regulations.

E. FAILURE TO COMPLY WITH SAFETY STANDARDS

62. Toyota Australia supplied each of the Affected Vehicles in trade or commerce.

63. At all material times, the Affected Vehicles were:

- (a) “goods” within the meaning of s. 4 of the TPA and s. 2 of the ACL, in that they were vehicles;
- (b) goods intended to be used, or of a kind likely to be used, by a consumer within the meaning of s. 65C(1) of the TPA;
- (c) “consumer goods” within the meaning of s. 2 of the ACL, in that they were goods that were intended to be used, and were of a kind likely to be used, for personal, domestic, or household use or consumption.

64. At all material times, the Affected Vehicles were consumer goods of a particular kind, namely road vehicles, for which there was a safety standard in force, namely ADR 79.

Particulars

- i. The plaintiff refers to and repeats paragraphs 19 and 20 above.

65. The Affected Vehicles did not comply with the safety standard.

Particulars

- i. The plaintiff refers to and repeats paragraph 55 above.

66. In the premises, Toyota Australia:

- (a) supplied goods in contravention of s. 65C of the TPA and s. 106(1) of the ACL; further or alternatively,
- (b) manufactured, possessed and had control over consumer goods in contravention of s. 106(3) of the ACL.

Particulars

- i. The plaintiff refers to and repeats paragraphs 5(g)-5(l) above.

F. FAILURE TO COMPLY WITH STATUTORY WARRANTIES AND GUARANTEES

67. The Plaintiff and Group Members were supplied with Affected Vehicles, in trade or commerce, by:

- (a) Toyota Australia; or
- (b) an authorised Toyota dealer; or;
- (c) other retailers selling Affected Vehicles, including used car dealers.

68. The Plaintiff and Group Members acquired the Affected Vehicles as consumers within the meaning of section 3 of the ACL in that:

- (a) on or before 30 June 2021, the amount paid to acquire the Affected Vehicles did not exceed \$40,000; or
- (b) on or after 1 July 2021, the amount paid to acquire the Affected Vehicles did not exceed \$100,000; or
- (c) the Affected Vehicles were of a kind ordinarily acquired for personal, domestic or household use or consumption; or
- (d) the Affected Vehicles were acquired for use principally in the transport of goods on public roads.

F1. Action in respect of Guarantee as to Acceptable Quality

69. On or after 1 January 2011, by reason of the matters pleaded in paragraphs 67 and 68 above, there was a statutory guarantee that the Affected Vehicles were of an acceptable quality pursuant to s. 54 of the ACL.

70. By reason of the matters pleaded in paragraphs 55 and/or 61, the Affected Vehicles were not of acceptable quality because they were not:

- (a) fit for the purposes for which goods such as the Affected Vehicles are commonly supplied;
- (b) acceptable in appearance and finish; or
- (c) free from defects;

as a reasonable consumer fully acquainted with the state and condition of the Affected Vehicles (including the matters pleaded in paragraphs 55 and/or 61) would regard as acceptable having regard to:

- (a) the nature of the Affected Vehicles;
- (b) the price of the Affected Vehicles;
- (c) the representations made about the Affected Vehicles by Toyota Australia in paragraphs 81 to 89 below.

71. By reason of each of the matters pleaded in paragraph 70 above, individually and cumulatively, the Affected Vehicles failed to comply with the guarantee as to acceptable quality imposed by s. 54 of the ACL.
72. For the purposes of s. 271(1) of the ACL, and pursuant to s. 2 of the ACL, the Plaintiff and Group Members are affected persons in relation to the Affected Vehicles, in that each was:
- (a) a consumer who acquired an Affected Vehicle;
 - (b) a person who acquired an Affected Vehicle from a consumer (other than for the purpose of re-supply); or
 - (c) a person who derived title to the goods through or under a consumer.
73. In the premises, and by reference to the matters pleaded in paragraph 5(g), the Plaintiff and Group Members are entitled under s. 271(1) of the ACL to recover damages from Toyota Australia in respect of the failure to comply with the guarantee imposed by s 54 of the ACL.

F1A. Action in respect of Guarantee as to Description

73A. The Affected Vehicles were supplied to the Plaintiff and Group Members by a description which included, relevantly, that the vehicle complied with the Motor Vehicle Standards Act including the requirements of the national standards (Description).

Particulars

- i. Section 10 of the Motor Vehicle Standards Act refers to the requirement for plates to be placed on road vehicles to indicate that the vehicles comply with the national standards.
- ii. At the time of supply, each of the Affected Vehicles was fixed with a compliance plate which expressly stated that the vehicle had been manufactured to comply with the Motor Vehicle Standards Act.
- iii. At the time of supply, the "Description of the Motor Vehicle" in the Plaintiff's Contract of Sale dated 9 February 2021 included the 'Compliance Date', being the date recorded on the vehicle's compliance plate, within the meaning of s 10 of the Motor Vehicle Standards Act.

73B. On or after 1 January 2011, by reason of the matters pleaded in paragraphs 67, 68 and 73A above and by operation of s. 56 of the ACL, there was a statutory guarantee that the Affected Vehicles correspond with the Description.

73C. By reason of the matters pleaded in paragraph 55 above, the Affected Vehicles did not correspond with the Description because they did not comply with the Motor Vehicle Standards Act in that:

- (a) they were fitted with a defeat device and therefore did not comply with ADR 79;
- (b) by reason of their non-compliance with ADR 79, the Affected Vehicles:

(i) did not comply with the “national standards” (within the meaning of s. 5(1) of the Motor Vehicle Standards Act); and

(ii) were “nonstandard” (within the meaning of s. 5(1) of the Motor Vehicle Standards Act);

(c) in the premises, the Affected Vehicles had been supplied to the market in contravention of s. 14(1)(a) of the Motor Vehicle Standards Act which prohibited their supply to the market.

73D. By reason of the matters pleaded in paragraph 73C above, the Affected Vehicles failed to comply with the guarantee as to description imposed by s. 56 of the ACL.

73E. For the purposes of s. 271(3) of the ACL, and pursuant to s. 2 of the ACL, the Plaintiff and Group Members are affected persons in relation to the Affected Vehicles, in that each was:

(a) a consumer who acquired an Affected Vehicle;

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

(c) a person who derived title to the goods through or under a consumer.

73F. In the premises, and by reference to the matters pleaded in paragraph 5(g), the Plaintiff and Group Members are entitled under s. 271(3) of the ACL to recover damages from Toyota Australia in respect of the failure to comply with the guarantee imposed by s. 56 of the ACL.

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

74. Toyota Australia asserted or represented that the Affected Vehicles complied with the applicable national standards for road vehicles in Australia (~~Affected Vehicles’ Express Compliance Warranty~~).

75. The ~~Affected Vehicles’~~ Express Compliance Warranty was ~~asserted or represented~~ given or made by Toyota Australia by the following conduct:

(a) on or before 30 June 2021, affixing a compliance place on an Affected Vehicle certifying compliance with Australian vehicle standards;

(b) on or after 1 July 2021, obtaining a road vehicle type approval and entering Affected Vehicles onto the RAV, further or alternatively

(c) the conduct referred to in paragraphs 5(f)-5(l) above.

76. The ~~Affected Vehicles’~~ Express Compliance Warranty was an assertion and/or representation by Toyota Australia that:

(a) related to the quality, state, condition, performance ~~and~~ or characteristics of the Affected Vehicles;

- (b) was given or made in connection with the supply of the Affected Vehicles, or in connection with the promotion by any means of the supply or use of the Affected Vehicles; and
- (c) the natural tendency of which was to induce persons to acquire the Affected Vehicles.

77. In the premises, and further by reason of the matters pleaded in paragraphs 5(g), 67, and 68 above, there was a statutory guarantee pursuant to s. 59 of the ACL that Toyota Australia would comply with the ~~Affected Vehicles'~~ Express Compliance Warranty given or made by it in relation to the Affected Vehicles.

78. By reason of the matters pleaded in paragraph 55, Toyota Australia failed to comply with the ~~Affected Vehicles'~~ Express Compliance Warranty.

79. For the purposes of s. 271(5) of the ACL, and pursuant to s. 2 of the ACL, the Plaintiff and Group Members are affected persons in relation to the Affected Vehicles in that each was:

- (a) a consumer who acquired an Affected Vehicle;
- (b) a person who acquired an Affected Vehicle from a consumer (other than for the purpose of re-supply); or
- (c) a person who derived title to the goods through or under a consumer.

80. In the premises, and by reference to the matters pleaded in paragraph 5(g), the Plaintiff and Group Members are entitled under s. 271(5) of the ACL to recover damages from Toyota Australia.

F3. Action in respect of Express Refund Warranty

80A. In a "Warranty and Service" booklet:

(a) given or made available to the Plaintiff and one or more Group Members from no later than 1 January 2019. Toyota Australia made the following express statements:

(i) "[o]ur goods come with guarantees that cannot be excluded under the Australian Consumer Law";

(ii) "[you] are entitled to a replacement or a refund for a major failure";

(iii) "[i]n some circumstances your rights under the Australian Consumer Law statutory consumer guarantees may be greater than your rights under the Toyota Warranty Advantage [in section 1-6] or other applicable Toyota warranty, in which case Toyota will always honour your rights under the Australian Consumer Law statutory consumer guarantees";

Particulars

i. “Warranty and Service” booklet given to the Plaintiff at about the time of his acquisition of the Affected Vehicle as alleged in paragraph 4 above. Important Notice, section 1-2.

ii. The “Warranty and Service” booklets from January 2019 for each make and model of the Affected Vehicles are available online at toyotamanuals.com.au.

iii. For example, Landcruiser Prado Warranty & Service Booklet (Jan 19-Oct 20)” Important Notice, section 1-2, available online at <https://toyotamanuals.com.au/docs/landcruiser-prado-warranty-service-booklet-jan-19-oct-20>.

(b) given or made available to one or more Group Members between about 7 February 2016 and January 2019, Toyota Australia made the following express statements:

(i) “[o]ur goods come with guarantees that cannot be excluded under the Australian Consumer Law”;

(ii) “[you] are entitled to a replacement or a refund for a major failure”;

(iii) “No Toyota Warranty and nothing in this Warranty and Service Book limits the consumer guarantees under the Australian Consumer Law in any way. In some circumstances your rights under those guarantees may be greater than your rights under the applicable Toyota Warranty, in which case Toyota will always honour your rights under the guarantees”;

Particulars

i. The “Warranty and Service” booklets from October 2015 to January 2019 for each make and model of the Affected Vehicles are available online at toyotamanuals.com.au.

ii. For example, “RAV4 Warranty and Service Booklet (Oct 15 – Jan 19)” Important Notice, section 1-2, available online at https://toyotamanuals.com.au/document/landing_page/rav4-warranty-service-booklet-oct-15-jan-19.

(together, the **Warranty Statements**).

80B. Toyota Australia also made the Warranty Statements online.

Particulars

i. “Important Notice”, page 3, at <https://www.toyota.com.au/-/media/toyota/main-site/page->

[data/warranty/files/toy_3000822_toyota_service_warranty_brochure_digi4p_p_twa-v2.pdf?rev=f65a717406834c93bd8b31138065365e](https://www.toyota.com.au/-/media/toyota/main-site/page-data/warranty/files/20240708_toyota-warranty-advantage-terms-conditions_2024.pdf?rev=f65a717406834c93bd8b31138065365e).

[ii. "Important Notice", page 3, at https://www.toyota.com.au/-/media/toyota/main-site/page-data/warranty/files/20240708_toyota-warranty-advantage-terms-conditions_2024.pdf?rev=5610f6171dee4efd8f16eb1e41089e18](https://www.toyota.com.au/-/media/toyota/main-site/page-data/warranty/files/20240708_toyota-warranty-advantage-terms-conditions_2024.pdf?rev=5610f6171dee4efd8f16eb1e41089e18).

[iii. See also particulars to paragraphs 80A\(a\) and 80A\(b\) above.](#)

80C. The statutory guarantee in s. 56 of the ACL is a:

(a) "statutory consumer guarantee"; and

(b) "consumer guarantee under the Australian Consumer Law";

within the meaning of the Warranty Statements.

80D. Where there is a "major failure" within the meaning of s. 260(1) of the ACL, the Plaintiff and the Group Members each have the right, at their election, to reject the Affected Vehicles and receive a refund from the supplier of the Affected Vehicles of:

(a) any money they paid for the Affected Vehicles; and

(b) an amount that is equal to the value of any other consideration provided by them for the Affected Vehicles.

(the **ACL Refund Right**).

Particulars

[i. Sections 259\(1\), s 259\(3\), 260\(1\), 263\(4\).](#)

80E. By each of the Warranty Statements, Toyota Australia undertook, asserted or represented in relation to each of the Affected Vehicles registered or delivered in Australia from about 7 February 2016, that Toyota Australia would honour the ACL Refund Right by Toyota Australia paying to the Plaintiff and each Group Member, upon rejection of the Affected Vehicles and at their election, any amount to which they were entitled under the ACL Refund Right (**Express Refund Warranty**).

80F. The Express Refund Warranty:

(a) related to the quality, state, condition, performance or characteristics of the Affected Vehicles;

(b) was given or made in connection with the supply of the Affected Vehicles, or in connection with the promotion by any means of the supply or use of the Affected Vehicles; and

(c) the natural tendency of which was to induce persons to acquire the Affected Vehicles.

80G. In the premises, and by reason of the matters pleaded in paragraphs 5(g), 67, and 68 above, there was a statutory guarantee pursuant to s. 59 of the ACL that Toyota Australia would comply with the Express Refund Warranty given or made by it in relation to the Affected Vehicles.

80H. The failure to comply with the guarantee in s. 56 of the ACL as pleaded in paragraphs 73A to 73F above was a “major failure” within the meaning of s. 260(1) of the ACL in that:

(a) the Affected Vehicles would not have been acquired by a reasonable consumer fully acquainted with the nature and extent of the failure; or

(b) the Affected Vehicles depart in one or more significant respects from the Description; or

Particulars

i. The Plaintiff relies on the matters pleaded in paragraph 73C above.

(c) the Affected Vehicles are substantially unfit for a purpose for which goods of the same kind are commonly supplied and they cannot, easily and within a reasonable time, be remedied to make them fit for such a purpose.

80I. By reason of the matters pleaded in paragraphs 80A to 80H above, Toyota Australia is obliged to comply with the Express Refund Warranty by paying to the Plaintiff and Group Members who were supplied with an Affected Vehicle from about 7 February 2016, upon rejection of the Affected Vehicles and at their election, the amount of any money they paid, and the value of any consideration they provided, for the Affected Vehicle.

G. MISLEADING AND DECEPTIVE CONDUCT

G1. Toyota Compliance Representation

81. By the conduct pleaded in paragraphs 5(f)-5(l), Toyota Australia dealt with the Affected Vehicles as vehicles that were for use as road vehicles in Australia, and further or alternatively:

(a) on or before 30 June 2021, affixed a compliance place certifying compliance with Australian vehicle standards; or

(b) on or after 1 July 2021, entered the Affected vehicles onto the RAV,

and thereby made a representation to all persons acquiring ~~or dealing with~~ the Affected Vehicles that the Affected Vehicles complied with the applicable legal requirements for road vehicles in Australia (the **Toyota Compliance Representation**).

82. The Plaintiff and Group Members purchased or otherwise acquired ~~interests in~~ the Affected Vehicles because of the Toyota Compliance Representation.

83. By reason of the matters referred to in paragraph 55 above, the Toyota Compliance Representation was false and misleading.
84. By reason of the conduct referred to in paragraphs 81 and 83, Toyota Australia engaged in conduct that was misleading or deceptive, or alternatively was likely to mislead or deceive, in contravention of section 18 of the ACL.
85. Toyota Australia failed to correct or qualify the Toyota Compliance Representation at any time during the Relevant Period.

G2. Misleading or Deceptive Omission by Toyota Australia

86. Further or in the alternative, by manufacturing and/or distributing the Affected Vehicles for supply to and sale in Australia, and applying for and obtaining approval to:
- (a) on or before 30 June 2021, affix a compliance place certifying compliance with Australian vehicle standards; or
 - (b) on or after 1 July 2021, a road vehicle type approval and entering Affected Vehicles onto the RAV,

Toyota Australia created a reasonable expectation on the part of persons acquiring ~~an interest in~~ the Affected Vehicles, that the Affected Vehicles complied with the applicable legal requirements for the Affected Vehicles in Australia (**Toyota Omission Conduct**).

87. Given that reasonable expectation on the part of persons referred to in the previous paragraph, Toyota Australia's failure to disclose that the Affected Vehicles were fitted with a defeat device was misleading or deceptive conduct or conduct that was likely to mislead or deceive in that if consumers had been aware that the Affected Vehicles contained the defeat device then consumers would not have acquired ~~an interest in~~ an Affected Vehicle.
88. By reason of the conduct referred to in paragraphs 86 and 87, Toyota Australia engaged in conduct that was misleading or deceptive, or alternatively was likely to mislead or deceive, in contravention of section 18 of the ACL.
89. The Toyota Omission Conduct continued during the whole of the Relevant Period.

H. COMMON QUESTIONS OF LAW OR FACT

The questions of law or fact common to the claims of the Plaintiff and Group Members are or include:

90.1—Did the following Toyota diesel vehicles contain a defeat device:

- (a) Hilux, Landcruiser, Fortuner, Granvia and HiAce vehicles fitted with a 2.8 litre 1GD-FTV engine;
- (b) Hilux vehicles fitted with a 2.4 litre 2GD-FTV engine;
- (c) Landcruiser vehicles fitted with a 3.3 litre F33A-FTV engine;

- (d) Landcruiser vehicles fitted with a 4.5 litre 1VD-FTV 195kW to 200kW engine; and
- (e) RAV-4 vehicles fitted with a 2.2 litre 2AD-FHV or 2AD-FTV engine.

91.2—Did the Affected Vehicles fail to comply with ADR 79 and, if so, in what respect?

92.3—Did Toyota Australia:

- (a) supply Affected Vehicles in contravention of section 65C of the TPA and/or section 106(1) of the ACL; and/or
- (b) manufacture, possess or have control of Affected Vehicles in contravention of section 106(3) of the ACL?

93.4—Were the Affected Vehicles of acceptable quality within the meaning of s 54 of the ACL and, if not, did Toyota Australia contravene section 54 of the ACL?

94 Did the Affected Vehicles correspond to the Description and, if not, did Toyota Australia contravene section 56 of the ACL?

95 Was the failure to comply with the statutory guarantee in section 56 of the ACL a “major failure” within the meaning of section 260(1) of the ACL?

96.5—Did Toyota Australia make the ~~Affected Vehicles~~ Express Compliance Warranty and, if so, did Toyota Australia contravene section 59 of the ACL?

97. Did Toyota Australia make the Express Refund Warranty?

98. Is Toyota Australia obliged to pay to the Plaintiff and each Group Member who acquired an Affected Vehicle from about 7 February 2016, upon rejection of the Affected Vehicles and at their election:

(a) any money they paid for the Affected Vehicles; and

(b) an amount that is equal to the value of any other consideration provided by them for the Affected Vehicles?

99.6—Did Toyota Australia make the Toyota Compliance Representation and, if so, was that representation misleading or deceptive in contravention of section 18 of the ACL?

100.7—Did Toyota Australia fail to disclose the existence of a defeat device in the Affected Vehicles and, if so, was that non-disclosure misleading or deceptive in contravention of section 18 of the ACL?

101.8—Have the Plaintiff and Group Members suffered loss or damage as a result of one or more of the alleged contraventions and, if so, what is the correct measure of such loss and damage?

102.9—Should any and, if so, what relief other than damages be granted in favour of the Plaintiff and Group Members?

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

~~103. [not used] 1.—The Plaintiff and Group Members acquired an interest in an Affected Vehicle that had no value at the time that the interest Affected Vehicle was acquired, as the vehicle was not lawfully able to be registered in Australia or used on a public road in Australia.~~

~~104. 2.—~~The Plaintiff and Group Members have suffered loss and damage as a result of:

(a) the failure of the Affected Vehicles to comply with the statutory guarantee as to acceptable quality pursuant to s. 54 of the ACL (as pleaded in paragraphs s 69 to 73 above); further or alternatively,

~~(aa) the failure of the Affected Vehicles to comply with the statutory guarantee as to description pursuant to s. 56 of the ACL (as pleaded in paragraph 73A to 73F above); further or alternatively.~~

(b) the failure of Toyota Australia to comply with the ~~Affected Vehicles~~ Express Compliance Warranty pursuant to s. 59 of the ACL (as pleaded in paragraphs s 74 to 80I above).

Particulars

i. The Plaintiff has suffered the following loss and damage (calculated in accordance with s. 272 of the ACL):

a. the reduction in the value of the Plaintiff's Affected Vehicle resulting from the failure of the Affected Vehicle to comply with ~~each either or both~~ of the guarantees referred to in paragraphs ~~0~~ 104(a), (aa) or (b) above, below whichever of the following prices is lower:

- A. the price paid or payable by the Plaintiff for the Plaintiff's Affected Vehicle; and
- B. the average retail price of the Plaintiff's Affected Vehicle at the time of supply.

ii. The Group Members have suffered the following loss and damage (calculated in accordance with s. 272 of the ACL):

a. the reduction in the value of each Group Member's Affected Vehicle resulting from the failure of the Affected Vehicle to comply with ~~each either or both~~ of the guarantees referred to in paragraphs ~~0~~ 104(a), (aa) or (b) above, below whichever of the following prices is lower:

- C. the price paid or payable by the Group Member for their Affected Vehicle; and

D. the average retail price of the Group Member's Affected Vehicle at the time of supply.

iii. Further particulars of the extent to which:

a. the failure of the Affected Vehicles to comply with the statutory guarantee as to acceptable quality; and

aa. the failure of Toyota Australia to comply with the statutory guarantee as to description; and

b. the failure of Toyota Australia to comply with the ~~Affected Vehicles~~ Express Compliance Warranty,

has caused the Plaintiff and Group Members to suffer loss and damage will be provided after the Plaintiff has served expert evidence.

105.3-The Plaintiff and Group Members have suffered the loss and damage because of Toyota Australia's contraventions of the ACL:

(c) pleaded in paragraphs 66 (safety standard);

(d) pleaded in paragraphs 84 (Toyota Compliance Representation);

(e) pleaded in paragraph 88 (Toyota Omission Conduct).

Particulars

i. The Plaintiff has suffered the following loss and damage:

a. in an amount equivalent to the entire consideration given by him to acquire ~~his interest in~~ an Affected Vehicle;

b. alternatively, the difference between:

A. the purchase price paid by the Plaintiff to acquire ~~his interest in~~ his Affected Vehicle, and the true value of his Affected Vehicle at the time of ~~acquiring~~ the interest acquisition; or

B. in the alternative, the purchase price paid by the Plaintiff to acquire his Affected Vehicle, and the market value of his Affected Vehicle as at the date of trial;

c. any expense or inconvenience suffered as a consequence of steps to rectify any non-compliance in the Affected Vehicle.

ii. The Group Members have suffered the following loss and damage:

a. in an amount equivalent to the entire consideration given by each of them to acquire ~~their interest in~~ an Affected Vehicle;

- b. alternatively, the difference between:
 - A. the purchase price paid by each of them to acquire ~~their interest in~~ an Affected Vehicle, and the true value of the Affected Vehicle at the time of ~~acquiring the interest~~ acquisition; or
 - B. in the alternative, the purchase price paid by each Group Member to acquire an Affected Vehicle, and the market value of their Affected Vehicle as at the date of trial;
 - c. any expense or inconvenience suffered as a consequence of steps to rectify any non-compliance in the Affected Vehicle.
- iii. Further particulars of the extent to which the Plaintiff and Group Members have suffered loss and damage will be provided after the Plaintiff has served expert evidence.

AND THE PLAINTIFF CLAIMS, IN HIS OWN RIGHT AND OWN BEHALF OF GROUP MEMBERS:

A. 4.—Declarations that Toyota Australia engaged in conduct in contravention of:

- (f) section 18 of the ACL; and/or
- (g) section 54 of the ACL; and/or
- (bb) section 56 of the ACL; and/or
- (h) section 59 of the ACL; and/or
- (i) section 106(1) and (3) of the ACL; and/or
- (j) section 65C of the TPA.

B. A declaration that Toyota Australia is obliged to pay to the Plaintiff, and Group Members who were supplied with an Affected Vehicle from about 7 February 2016, upon rejection of the Affected Vehicles and at their election:

- (a) any money they paid for the Affected Vehicles; and
- (b) an amount that is equal to the value of any other consideration provided by them for the Affected Vehicles.

C. 5.—Damages or compensation pursuant to sections 236 of the ACL.

D. 6.—Damages or compensation pursuant to sections 271 and 272 of the ACL.

E. 7.—Damages pursuant to section 82 of the TPA.

F. 8.—Interest.

G.9. Costs.

H.10. Such other orders as the Court sees fit.

~~8 March 2023~~ ~~20 November 2023~~ ~~18 June 2024~~ 19 December 2024

G D DALTON

N MONCRIEF
M-A COWDEN

J B WATERS

Maddens

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MADDENS LAWYERS

Solicitors for the Plaintiff

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

No.

BETWEEN

ADAM PETER ROWE

Plaintiff

~~-and-~~

TOYOTA MOTOR CORPORATION AUSTRALIA LIMITED (ACN 009 686 097)

Defendant

INDORSEMENT OF CLAIM

Date of Document:	7 February 2022	Solicitors Code:	102650
Filed on behalf of:	The Plaintiff	DX:	28001 Warrnambool
Prepared by:	Maddens Lawyers	Telephone:	(03) 5560 2000
	219 Koroit Street	Ref:	211778
	Warrnambool	Email:	
	Victoria, 3280	kae@maddenslawyers.com.au	

THE PARTIES

1. This proceeding is commenced as a group proceeding pursuant to Part 4A of the *Supreme Court Act 1986 (Vic)* by the Plaintiff on his own behalf and on behalf of all persons who **(Group Members)**:
 - a. at any time in the period from 7 February 2016 to 7 February 2022 (**Relevant Period**) acquired an interest in one or more of the following Toyota diesel vehicles containing a defeat device (as defined in paragraph 8 below):
 - i. Hilux, Landcruiser Prado, Fortuner, Granvia and HiAce vehicles fitted with a 2.8 litre 1GD-FTV engine;
 - ii. Hilux vehicles fitted with a 2.4 litre 2GD-FTV engine;
 - iii. Landcruiser vehicles fitted with a 3.3 litre F33A-FTV engine;
 - iv. Landcruiser vehicles fitted with a 4.5 litre 1VD-FTV 195kW to 200kW engine; and
 - v. RAV-4 vehicles fitted with a 2.2 litre 2AD-FHV or 2AD-FTV engine;**(affected vehicles)**
 - b. still had an interest in that vehicle as at 7 February 2022;

~~e. but not including:~~

- ~~i. the Defendant (**Toyota Australia**), or any related entity of Toyota Australia;~~
- ~~ii. any Toyota authorised dealer; or~~
- ~~iii. any Judge of the Supreme Court of Victoria.~~

~~2. There are more than seven Group Members.~~

~~3. Toyota Australia is, and throughout the Relevant Period, was:~~

- ~~a. a corporation incorporated in Australia;~~
- ~~b. a trading corporation within the meaning of section 4(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**);~~
- ~~c. the manufacturer of the affected vehicles supplied in Australia, within the meaning of section 7 of the *Australian Consumer Law* (**ACL**) (being Schedule 2 of the CCA), in that:
 - ~~i. Toyota Australia imported the affected vehicles into Australia;~~
 - ~~ii. Toyota Australia was not (but for the operation of section 7 of the ACL) the manufacturer of the affected vehicles; and~~
 - ~~iii. at the time of importation, the manufacturer of the affected vehicles did not have a place of business in Australia;~~~~
- ~~d. is and was a “supplier”, within the meaning of ss 4 and 4C of the CCA and s 2 of the ACL, of the affected vehicles;~~
- ~~e. distributed affected vehicles in Australia;~~
- ~~f. advertised and promoted the affected vehicles in Australia;~~
- ~~g. imported and supplied new vehicles within the meaning of the Motor Vehicle Standards Act, including the affected vehicles.~~

~~**NATURE OF CLAIMS MADE ON BEHALF OF GROUP MEMBERS**~~

- ~~4. Toyota Australia applied to the Administrator of Vehicle Standards (**Administrator**), a statutory office established pursuant to the *Motor Vehicles Standards Act 1989* (Cth), and obtained Identification Plate approvals (**compliance plates**), which permitted each of the affected vehicles to be imported into Australia and to be sold to and driven by consumers in Australia.~~
- ~~5. In determining whether to grant the approvals, the Administrator had to be satisfied that the relevant vehicle type complied with specified Australian Design Rules, including Australian Design Rule 79 (**ADR 79**), which concerned emission control for light vehicles.~~

6. ~~If the vehicle type did not comply with ADR 79, the Administrator would not grant compliance plate approval and vehicles of that type, including the affected vehicles, could not be imported into Australia or be sold to and driven by consumers in Australia.~~
7. ~~Throughout the Relevant Period, ADR 79 (among other things):~~
 - a. ~~was a national standard for the purposes of the *Motor Vehicles Standards Act 1989* (Cth);~~
 - b. ~~applied to the affected vehicles;~~
 - c. ~~specified maximum permitted levels of exhaust emissions, including nitrogen oxides, depending on the gross vehicle mass of the vehicle;~~
 - d. ~~required vehicle manufacturers to submit a description of the provisions taken to prevent tampering with and modification of the emission control computer;~~
 - e. ~~required that the components liable to affect the emission of pollutants be so designed, constructed and assembled as to enable the vehicle, in normal use, despite the vibration to which they may be subjected, to comply with the provisions of ADR 79; and~~
 - f. ~~prohibited the use of a defeat device in a new vehicle.~~
8. ~~During the Relevant Period, the affected vehicles possessed design elements which, under ordinary driving conditions, de-activated, modulated and/or delayed parts of the vehicle's emission control system, or reduced the effectiveness of the emission control system, with the result that the vehicle's performance was enhanced but the vehicle emitted higher levels of nitrogen oxide (**defeat device**).~~
9. ~~The affected vehicles failed to comply with the requirements of ADR 79 in (at least) the following respects:~~
 - a. ~~they possessed a defeat device which was prohibited under ADR 79;~~
 - b. ~~the engines in the affected vehicles were not designed, constructed and assembled as to enable the vehicle, in normal use, to comply with the provisions of ADR 79; and/or~~
 - c. ~~under ordinary driving conditions, the affected vehicles emitted levels of nitrogen oxide that exceeded the emission limits in ADR 79.~~
10. ~~In purported compliance with ADR 79, Toyota Australia sought and obtained approval from the Administrator to fix compliance plates to the affected vehicles.~~
11. ~~Having obtained approval from the Administrator to do so, Toyota Australia fitted the affected vehicles with compliance plates prior to their supply, distribution or sale in Australia.~~
12. ~~In seeking approval from the Administrator to fix compliance plates to the affected vehicles, Toyota Australia did not disclose:~~
 - a. ~~that the affected vehicles were fitted with defeat devices, contrary to ADR 79; or~~

~~b. that the affected vehicles did not comply with ADR 79.~~

~~Misleading or deceptive conduct~~

- ~~13. In seeking and obtaining approval from the Administrator to fix compliance plates to the affected vehicles, Toyota Australia represented to the Administrator that the affected vehicles were compliant with ADR 79 (**Administrator Compliance Representation**).~~
- ~~14. The Administrator relied upon the Administrator Compliance Representation in granting approval to each model of affected vehicle for the purposes of ADR 79.~~
- ~~15. Further and alternatively, throughout the Relevant Period, Toyota Australia represented to all persons acquiring an interest in an affected vehicle that the vehicle complied with the applicable legal requirements for road vehicles in Australia (**Consumer Compliance Representation**).~~
- ~~16. The Plaintiff and Group Members acquired interests in the affected vehicles because of the Compliance Representation.~~
- ~~17. By reason of the affected vehicle not complying with ADR 79:
 - ~~a. the Administrator Compliance Representation; and/or~~
 - ~~b. the Consumer Compliance Representation,~~was false or misleading and Toyota Australia engaged in conduct in trade or commerce that was misleading or deceptive, or was likely to mislead or deceive, in contravention of section 18 of the ACL.~~
- ~~18. Further or alternatively, Toyota Australia's failure to disclose that the affected vehicles contained a defeat device and/or did not comply with ADR 79 was conduct in trade or commerce that was misleading or deceptive, or was likely to mislead or deceive, in contravention of section 18 of the ACL.~~

~~False or misleading representation~~

- ~~19. Further or alternatively, by making the Administrator Compliance Representation and/or the Consumer Compliance Representation, Toyota Australia contravened section 29(1)(a) of the ACL by representing in trade or commerce in connection with the supply of goods that the affected vehicles were of a compliant standard and quality when they were not, in fact, of that standard and quality.~~

~~ACL guarantee and warranty~~

- ~~20. At all times throughout the Relevant Period, there was a statutory guarantee that the affected vehicles were of acceptable quality, as specified by section 54 of the ACL.~~

- ~~21. The affected vehicles failed to comply with the guarantee as to acceptable quality imposed by section 54 of the ACL because they possessed a defeat device rendering them non-compliant with ADR 79.~~
- ~~22. At all times throughout the Relevant Period, there was a statutory guarantee imposed by section 59 of the ACL that Toyota Australia would comply with any express warranty it gave or made in relation to the affected vehicles.~~
- ~~23. By reason of placing compliance plates on the affected vehicles, Toyota Australia gave or made an express warranty that the affected vehicles complied with the applicable national standards, including ADR 79.~~
- ~~24. Toyota Australia failed to comply with the express warranty it gave or made because the affected vehicles failed to comply with ADR 79, which was a national standard for the purposes of the Motor Vehicle Standards Act.~~
- ~~25. For the purposes of section 271(1) of the ACL, the Plaintiff and Group Members are affected persons in relation to the affected vehicles.~~
- ~~26. Accordingly, by reason of the failure to comply with the guarantee imposed by section 54 and/or section 59 of the ACL, the Plaintiff and Group Members are entitled under section 271 of the ACL to recover damages from Toyota Australia.~~

ACL safety standard

- ~~27. At all times throughout the Relevant Period, ADR 79 was a safety standard for the purpose of section 106 of the ACL.~~
- ~~28. At all times throughout the Relevant Period, each of the affected vehicles was a consumer good:
 - ~~a. within the meaning of section 2 of the ACL; and~~
 - ~~b. for which a safety standard, namely ADR 79, was in force.~~~~
- ~~29. By importing and supplying the affected vehicles, in trade or commerce, when they did not comply with ADR 79, Toyota Australia contravened section 106(1) and (3) of the ACL.~~

Loss or damage suffered by the Plaintiff and Group Members

- ~~30. By reason of the conduct set out above, the Plaintiff and Group Members have suffered loss and damage, comprising:
 - ~~a. the entire consideration given by them to acquire their interest in an affected vehicle given that, at the time that interest was acquired, the affected vehicle had no value as the vehicle was not lawfully able to be driven in Australia;~~~~

- ~~b. alternatively, the difference between the consideration given by them to acquire their interest in an affected vehicle and the true value of the vehicle at the time of acquiring the interest (including the true value if the existence of the defeat device within the vehicle had been known and disclosed); and/or~~
- ~~c. any expense or inconvenience suffered as a consequence of steps to rectify any non-compliance in the affected vehicle.~~

RELIEF CLAIMED

- ~~1. Declarations that Toyota Australia engaged in conduct in contravention of:
 - ~~a. section 18 of the ACL; and/or~~
 - ~~b. section 29(1)(a) of the ACL; and/or~~
 - ~~c. section 54 of the ACL; and/or~~
 - ~~d. section 59 of the ACL; and/or~~
 - ~~e. section 106(1) and (3) of the ACL.~~~~
- ~~2. An order pursuant to:
 - ~~a. section 243 of the ACL requiring Toyota Australia to refund the money or other consideration paid by the Plaintiff and Group Members to obtain their interests in the affected vehicles;~~
 - ~~b. section 236 of the ACL that Toyota Australia pay compensation to the Plaintiff and Group Members for damage caused by the conduct of Toyota Australia in contravention of section 18 of the ACL; and/or~~
 - ~~c. section 236 of the ACL that Toyota Australia pay compensation to the Plaintiff and Group Members for damage caused by the conduct of Toyota Australia in contravention of section 29(1)(a) of the ACL; and/or~~
 - ~~d. section 271(1) of the ACL that Toyota Australia pay compensation to the Plaintiff and Group Members for damage caused by the conduct of Toyota Australia in contravention of section 54 of the ACL; and/or~~
 - ~~e. section 271(5) of the ACL that Toyota Australia pay compensation to the Plaintiff and Group Members for damage caused by the conduct of Toyota Australia in contravention of section 59 of the ACL; and/or~~
 - ~~f. section 236 of the ACL that Toyota Australia pay compensation to the Plaintiff and Group Members for damage caused by the conduct of Toyota Australia in contravention of section 106(1) and/or (3) of the ACL.~~~~
- ~~3. Costs.~~

4. ~~Such other orders as the Court thinks fit.~~

COMMON QUESTIONS OF LAW OR FACT

The questions of law or fact common to the claims of the Plaintiff and Group Members are or include:

1. ~~Did the following Toyota diesel vehicles contain a defeat device:
 - a. ~~Hilux, Landcruiser Prado, Fortuner, Granvia and HiAce vehicles fitted with a 2.8 litre 4GD-FTV engine;~~
 - b. ~~Hilux vehicles fitted with a 2.4 litre 2GD-FTV engine;~~
 - c. ~~Landcruiser vehicles fitted with a 3.3 litre F33A-FTV engine;~~
 - d. ~~Landcruiser vehicles fitted with a 4.5 litre 1VD-FTV 195kW to 200kW engine; and~~
 - e. ~~RAV-4 vehicles fitted with a 2.2 litre 2AD-FHV or 2AD-FTV engine.~~~~
2. ~~Did the affected vehicles fail to comply with ADR 79 and, if so, in what respect?~~
3. ~~Did Toyota Australia make the Administrator Compliance Representation and, if so, was that representation misleading or deceptive in contravention of section 18 of the ACL?~~
4. ~~Did Toyota Australia make the Consumer Compliance Representation and, if so, was that representation misleading or deceptive in contravention of section 18 of the ACL?~~
5. ~~Did Toyota Australia fail to disclose the existence of a defeat device in the affected vehicles and, if so, was that non-disclosure misleading or deceptive in contravention of section 18 of the ACL?~~
6. ~~Did Toyota Australia make a false or misleading representation that the affected vehicles were of a particular standard and/or quality and, if so, did Toyota Australia contravene section 29(1)(a) of the ACL?~~
7. ~~Were the affected vehicles of acceptable quality within the meaning of s 54 of the ACL and, if not, did Toyota Australia contravene section 54 of the ACL?~~
8. ~~Did Toyota Australia expressly warrant that the affected vehicles complied with ADR 79 and, if so, did Toyota Australia contravene section 59 of the ACL?~~
9. ~~Did Toyota Australia supply and/or import the affected vehicles in contravention of section 106(1) and/or (3) of the ACL?~~
10. ~~Have the Plaintiff and Group Members suffered loss or damage as a result of one or more of the alleged contraventions and, if so, what is the correct measure of such loss and damage?~~
11. ~~Should any and, if so, what relief other than damages be granted in favour of the Plaintiff and Group Members?~~