



Federal Court of Australia

District Registry: New South Wales

Division: General

No: NSD462/2022

On Appeal from a single Judge of the Federal Court of Australia

TOYOTA MOTOR CORPORATION AUSTRALIA LIMITED (ACN 009 686 097)

Appellant

KENNETH JOHN WILLIAMS and another named in the schedule

Respondents

ORDER

JUDGES: JUSTICE MOSHINSKY, JUSTICE COLVIN and
JUSTICE STEWART

DATE OF ORDER: 12 May 2023

WHERE MADE: Melbourne

THE COURT ORDERS THAT:

1. Paragraphs 18 and 19 of the orders made by the primary judge on 16 May 2022 (**Initial Trial Orders**) be set aside.
2. The primary judge's answers to the questions posed in Schedule 2 to the Initial Trial Orders be amended in accordance with the Schedule to these orders.
3. Pursuant to s 33ZB(a) of the *Federal Court of Australia Act 1976* (Cth), all group members, other than those who have opted out, are affected by the judgment of the Full Court and bound by these orders and the orders made by the Full Court on 27 March 2023.
4. Each party bear its or their own costs of the appeal.
5. Continuously from the date of these orders until further Court order (including an order by the Court in its original jurisdiction in this matter):
 - a. the respondents are to cause copies of the Full Court's reasons for judgment delivered on 27 March 2023 (**Full Court Reasons**), the Full Court's orders made on 27 March 2023 and these orders, to be displayed on the website maintained by the respondents' solicitors in relation to this proceeding;



- b. the District Registrar of the New South Wales Registry of the Federal Court of Australia shall cause the Full Court Reasons, the Full Court's orders made on 27 March 2023 and these orders, to be posted on the class action page of the website of the Federal Court; and
- c. the appellant is to cause copies of the Full Court Reasons, the Full Court's orders made on 27 March 2023 and these orders, to be displayed on the appellant's website, together with a link to the Federal Court website referred to in paragraph 5(b) above.

Date that entry is stamped: 12 May 2023

Sia Lagos
Registrar



SCHEDULE

Schedule 2

Questions Common to Group Members

References below to paragraphs of the reasons for judgment delivered by Justice Lee on 7 April 2022 (**Reasons**) and the reasons for judgment delivered by the Justices Moshinsky, Colvin and Stewart on 27 March 2023 (**Full Court Reasons**) are included for convenience only and do not, and should not be understood to, limit the Reasons or the Full Court Reasons.

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

Characteristics of the Relevant Vehicles

1. Throughout the Relevant Period, was it the case that:
 - (a) the DPF System in the Relevant Vehicles was not designed to function effectively during all reasonably expected conditions of normal operation and use in the Australian market, including the High Speed Driving Pattern;
A: Yes: Reasons, [15(6)], [15(7)].
 - (b) in the event that the Relevant Vehicles were exposed to the High Speed Driving Pattern or the Earlier Countermeasures the DPF System was ineffective in preventing the formation of deposits on the DOC surface or coking within the DOC, which in turn prevented the DPF from regenerating effectively;
A: Yes: Reasons, [15(6)], [15(8)].
 - (c) if the Relevant Vehicles were exposed to the High Speed Driving Pattern and/or the Earlier Countermeasures:
 - 1.c.1 the DOC became blocked by deposits forming on the face of the DOC;
 - 1.c.2 regeneration events failed to remove sufficient particulate matter from the DPF to prevent the DPF from becoming or remaining 'full' or blocked;
 - 1.c.3 the DPF System failed to prevent the DPF from becoming 'full' or blocked;



- 1.c.4 the DOC and DPF did not function effectively;
- 1.c.5 the catalytic efficiency of the DOC was diminished;
- 1.c.6 the exhaust in the DPF did not reach a sufficiently high temperature to effect thermal oxidation;

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

(d) if a Relevant Vehicle was exposed to the High Speed Driving Pattern, the Relevant Vehicles would experience one or more of the following consequences by reason of the Core Defect:

- 1.4.1 damage to the DOC;
- 1.4.2 the flow of unoxidized fuel through the DPF and the emission of white smoke from the vehicle's exhaust during and immediately following regeneration;
- 1.4.3 the emission of excessive white smoke and foul-smelling exhaust from the vehicle's exhaust during regeneration;
- 1.4.4 partial or complete blockage of the DPF;
- 1.4.5 the emission of foul-smelling exhaust from the exhaust pipe when the engine was on during and immediately following Automatic Regeneration;
- 1.4.6 the need to have the Relevant Vehicle inspected, serviced and/or repaired by a service engineer for the purpose of cleaning, repairing or replacing the DPF, the DPF System (or components thereof);
- 1.4.7 the need to have the Relevant Vehicle inspected, serviced and/or repaired more regularly than would be required absent the Core Defect;
- 1.4.8 the need to programme the ECM more often than would be required absent the Core Defect; or
- 1.4.9 the display of DPF Notifications on an excessive number of occasions and/or for an excessive period of time;
- 1.4.10 blockage of the Additional Injector due to carbon deposits on its tip;
- 1.4.11 the Additional Injector causes deposits forming on the face of the DOC, causing white smoke; and



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

A: Yes: Reasons, [59].

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

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

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

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

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

A: Yes: Reasons, [212]; Full Court Reasons, [51].

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

A: Yes, the Relevant Vehicles were not of acceptable quality within the meaning of s 54(2) of the ACL: Reasons, [173]-[213]; Full Court Reasons, [65].

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

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

Vehicle Representations

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

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

6.a.1 not defective;

6.a.2 of good quality;

6.a.3 reliable;

6.a.4 durable;



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

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

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

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

A: Yes: Reasons, [217].

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

A: Yes: Reasons, [217].

9. Were the Vehicle Representations:

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

A: Yes: Reasons, [233]; Full Court Reasons, [65].

Future Vehicle Representations

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

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

10.a.1 not defective;

10.a.2 of good quality;

10.a.3 reliable;

10.a.4 durable;

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



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

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

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

A: Yes: *Reasons, [217].*

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

A: No: *Reasons, [243]; Full Court Reasons, [65].*

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

A: Yes: *Reasons, [217].*

14. Were the Future Vehicle Representations:

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

A: Yes: *Reasons, [223]-[225], [234], [243]; Full Court Reasons, [65].*

DPF System Representations

15. During the Relevant Period, did TMCA represent to the public at large that the Relevant Vehicles contained, or were part of model lines that contained, a DPF System that, in its design and manufacturing:

- (a) was not defective;
- (b) was of good quality;
- (c) was reliable;
- (d) was durable;
- (e) did not have a propensity to fail;



- (f) completed a regeneration cycle with sufficient regularity to prevent the DPF from becoming partially or completely blocked?

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

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

A: Yes: Reasons, [217].

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

A: Yes: Reasons, [217].

18. Were the DPF System Representations:

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

A: Yes: Reasons, [232].

Future DPF Representations

19. During the Relevant Period, did TMCA represent to the public at large that the Relevant Vehicles contained, or were part of model lines that contained, a DPF System that:

- (a) would not be defective;
- (b) would be of good quality;
- (c) would be reliable;
- (d) would be durable;
- (e) would not have a propensity to fail;
- (f) would complete a regeneration cycle with sufficient regularity to prevent the DPF from become partially or completely blocked?



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

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

A: Yes: Reasons, [217].

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

A: No: Reasons, [243].

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

A: Yes: Reasons, [217].

23. Were the Future DPF System Representations:

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

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

Omissions conduct

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

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

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



25. Was the Omissions Conduct:

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

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

Damages under ACL s 272(1)(a)

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

A: Yes, the failure to comply with the guarantee of acceptable quality resulted in a reduction in value of all Relevant Vehicles of 17.5%, meaning that their true value was 82.5% of their Average Retail Price: Reasons, [330]-[331], [391], [393]-[394], [446(1)]. 10% (before taking into account the availability of the 2020 Field Fix). The amount of the reduction in value (taking into account the availability of the 2020 Field Fix) is yet to be determined: Full Court Reasons, [312], [317]-[319].

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

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



to answer at this stage. It is preferable that this question be answered following the remitter.

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

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

A: ~~Yes, it is appropriate to make an award of Reduction in Value Damages to Group Members in respect of Entire Period Relevant Vehicles (other than 2020 Field Fix Relevant Vehicles and Post Relevant Period Replaced Vehicles) pursuant to s 33Z(1)(e) of the FCAA: Reasons, [446]-[447]. Yet to be determined: Full Court Reasons, [321].~~

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

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

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

(a) what is the appropriate form of the order awarding damages;

(b) what is the appropriate quantum of damages to be awarded?

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

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



~~82.5% of the Average Retail Price for that model line and build year of Relevant Vehicle;~~

- ~~(b) for each Relevant Vehicle, the lower of: (i) the Price Paid and (ii) the Average Retail Price for that that model line and build year of Relevant Vehicle is to be determined, with the lower of those two prices being the applicable comparator for the purposes of applying this formula; and~~
- ~~(c) for each Relevant Vehicle, the amount recoverable under s 272(1)(a) by the relevant Group Member in respect of the vehicle is the amount (if any) by which the applicable comparator price in respect of the vehicle (as determined in (b) above) exceeds the true value of the vehicle (as calculated in (a) above), reduced by an amount equal to any payment(s) made by the respondent to the Group Member in respect of that vehicle prior to the date of these orders for the reduction in value of the vehicle and/or for the difference between the price the Group Member paid to acquire the vehicle and the price at which they traded it in to the respondent or sold it, as part of a redress programme conducted by the respondent: *Reasons*, [405]-[408], [446]. Yet to be determined: Full Court Reasons, [321].~~

Damages under ACL s 272(1)(b)

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

A: Yes: Reasons, [465]-[474], [492]; Full Court Reasons, [136], [319].

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

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



~~Partial Period Relevant Vehicles except on an individualised basis: Reasons, [492]-[493]. Not appropriate to answer at this stage. It is preferable that this question be answered following the remitter.~~

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

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

~~A: Yes, it is appropriate to award GST Damages to Group Members who have not opted out in respect of Entire Period Relevant Vehicles (including 2020 Field Fix Relevant Vehicles and Post Relevant Period Replaced Vehicles falling within that description) pursuant to s 33Z(1)(e) of the FCAA: Reasons, [493]. Yet to be determined: Full Court Reasons, [321].~~

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

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

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

(a) what is the appropriate form of the order awarding damages;

(b) what is the appropriate quantum of damages to be awarded?

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

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



~~(b) the amount of GST Damages to which the Group Member is entitled in respect of the vehicle is equal to 10% of the amount in item (a) above: Reasons, [492]. Yet to be determined: Full Court Reasons, [321].~~

Pre-judgment interest

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

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

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

~~*A: Yes, it is appropriate to make an award of pre-judgment interest on any Reduction in Value Damages and/or GST Damages pursuant to s 33Z(1)(e) of the FCAA to the Group Members entitled to receive those Reduction in Value Damages and/or GST Damages: Reasons, [494]. Yet to be determined: Full Court Reasons, [321].*~~

Mitigation

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

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

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

A: No: Reasons, [508].



Schedule

No: NSD462/2022

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

Second Respondent DIRECT CLAIM SERVICES QLD PTY LTD (ACN 167 519 968)